# EXHIBIT B

# Inquiry into convictions of Kathleen Megan Folbigg

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# New South Wales Supreme Court

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|---|---|
| **CITATION :** | **R v Folbigg [2002] NSWSC 1127 revised - 30/05/2003** |
| **CURRENT JURISDICTION:** | Common Law Divsion |
| **FILE NUMBER(S) :** | **SC** 70046/02 |
| **HEARING DATE(S) :** | 22/11/02 |
| **JUDGMENT DATE :** | 29 November 2002 |
| **PARTIES :** | Regina<br>Kathleen Megan Folbigg |
| **JUDGMENT OF :** | Wood CJatCL at 1 |

| | |
|---|---|
| **COUNSEL :** | M A G Tedeschi, QC (Crown)<br>P Zahra SC (Senior Public Defender) |
| **SOLICITORS :** | S E O'Connor (Crown)<br>D J Humphreys (Legal Aid) |
| **CATCHWORDS :** | CRIMINAL LAW - accused charged with murder of four children, and one attempted murder - plea of not guilty - defence application to have trials heard individually and separately - Tendency and coincidence evidence. |

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|---|---|
| **LEGISLATION CITED :** | Crimes Act 1900<br>Evidence Act 1995 |
| **CASES CITED :** | DPP v P [1991] 2 AC 443<br>Gipp v The Queen (1998) 194 CLR 106<br>Hoch v The Queen (1988) 165 CLR 292<br>KRM v The Queen (2001) CLR 211<br>Perry v The Queen (1982) 150 CLR 580<br>Pfennig v The Queen (1995) 182 CLR 46<br>R v ACK NSWCCA 22 April 1996<br>R v AH (1997) 98 A Crim R 71<br>R v Bell [2002] NSWCCA 2<br>R v Benecke (1999) 106 A Crim R 282<br>R v Chamilos NSWCCA 24 October 1983<br>R v Colby [1999] NSWCCA 261<br>R v Clark [2000] EWCA 54<br>R v GK [2001] NSWCCA 413<br>R v Jackson [2001] NSWCCA 387<br>R v Joiner [2002] NSWCCA 354<br>R v Lisoff [1999] NSWCCA 364<br>R v Lock (1997) 91 A Crim R 356<br>R v Lockyer (1996) 89 A Crim R 457<br>R v Martin [2000] NSWCCA 332<br>R v Phillips [1999] NSWSC 115<br>R v Serratore (1999) 48 NSWLR 101<br>R v Singh-Bal (1997) 92 A Crim R 397<br>R v Straffen [1952] 2 QB 911<br>R v Verma (1987) 30 A Crim R 441<br>R v WRC [2002] NSWCCA 210<br>R v Zappala NSWCCA 4 November 1991<br>Shepherd v The Queen (1990) 170 CLR 573<br>Sutton v The Queen (1984) 153 CLR 528<br>Thompson v The Queen (1989) 169 CLR 1<br>Wilson v The Queen (1970) 123 CLR 334 |
| **DECISION :** | Application for separate trials refused. Tendency and coincidence evidence admissible on a limited basis. |



**IN THE SUPREME COURT**

**OF NEW SOUTH WALES**
**COMMON LAW DIVISION**

**WOOD CJ at CL**

**Friday 29 November 2002**

**70046/02 Regina v Kathleen Megan Folbigg**

**JUDGMENT**

1 **HIS HONOUR**: The accused has been arraigned, pursuant to an indictment charging her with the murder of four of her infant children, Caleb, Patrick, Sarah and Laura, and with an additional offence of maliciously inflicting grievous bodily harm to Patrick, with intent to do him grievous bodily harm, some 4 months before his death.

2 A notice of motion has been filed by the applicant, seeking that the counts relating to the murders of Caleb, Sarah and Laura each be heard individually and separately from the counts relating to Patrick. She does not object to the counts relating to that child being heard together.

**BACKGROUND**

3 The Crown opposes the application, and seeks to rely on the evidence relating to the deaths of each child, and the apparent life-threatening event ("ALTE") concerning Patrick, which preceded his death, as being admissible in relation to each count. In this regard it has served tendency and coincidence notices. It has also made it clear that it relies on this evidence, in conjunction with extracts from the diaries of the accused, and evidence from her husband, as being relevant to her relationship with, and attitude towards, the deceased children during their lifetimes.

4 The substantial issue in the trial, obviously, is whether the accused was responsible for the death of each child, and for the ALTE involving Patrick which preceded his death, it being the Crown case that she deliberately asphyxiated each of them, thereby occasioning their deaths, as well as the grievous bodily harm, which Patrick had earlier suffered.

5 As the medical reports, to which I will later refer, make clear, there are, in cases such as the present, two broad possibilities to be considered, namely, whether all 4 deaths, and the ALTE were:

> (a) The result of natural causes, either being different causes, or the same cause repeated in each instance, the latter of which might require a consideration of the possibility of a congenital anomaly of internal metabolism, which went undiagnosed during the life time of

the children, and was also missed post mortem; or were,

(b) Associated with some form of induced or imposed airway obstruction leading to cerebral hypoxemia, as the Crown contends.

6 The matter is complicated, to the extent that in relation to 2 deaths, the cause of death was originally ascribed, following autopsy, to Sudden Infant Death Syndrome (SIDS), and that in relation to the earlier deaths, the post mortem examinations were not as exhaustive as might have been the case had homicide been suspected.

7 As I understand the expression SIDS, it is traditionally reserved for a death where no pathology, or possible cause for the death, of an infant has been found, following appropriate post mortem examination. As such, the death is regarded as occurring due to natural causes. Where however, pathology is found which may provide a possible, although not definitive reason for death, then the practice of pathologists is to give the cause of death as "*not ascertained".* As I understand the reports of experts who have been qualified by the Crown and by the Defence, none of them would now specify SIDS as the cause of death for any of the children.

**The Deaths and ALTE**

8 It is convenient briefly to summarise, in a chronological way, certain facts in relation to the deaths, and to Patrick's ALTE, which seem not to be in issue, at least upon the material available at this stage of the proceedings.

**Caleb Gibson**

(i) He was born 1 February 1989;

(ii) He was born healthy, but he had some difficulty breathing and feeding simultaneously, and he had been diagnosed with transient tachnypnoea prior to his discharge from hospital;

(iii) He died on 20 February 1989, aged 19 days;

(iv) He was fed by the accused at 1 am, on 20 February 1989;

(v) He was found by the accused in his bassinette at 2.50 am, cyanosed and not breathing – the accused was screaming, and this awoke the father, who was asleep;

(vi) Caleb was found to be pale, and warm to the touch when seen by ambulance officers;

(vii) Post mortem and other medical reports showed:

· Laryngeal or inspiratory stridor (floppy or lazy larynx)
· No inherent metabolic problems or external signs of injury
· Haemosiderin within the lungs which on the medical evidence was not necessarily specific for asphyxia, although it was consistent with it
· mottling on the pleural surfaces and congestion in places showing incomplete aeration.

(viii) Dr Cummings' autopsy opinion was that death was due to SIDS.

**Patrick Alan**

(i) He was born on 3 June 1990;
(ii) He was discharged home in good health and appeared to sleep and feed well;
(iii) A sleep study at the Mater Hospital, on 14/15 June 1990, was normal;
(iv) On 18 October 1990, while aged 4 months, at 3.30 am, the accused's screams woke the father who was asleep – Patrick, then aged 4 months, appeared pale and limp, his breathing was faint and laboured, but he responded to oxygen given by ambulance officers;
(v) While in hospital on the following evening he developed a generalised seizure. A CT scan demonstrated hypodense areas in the temporal and occipital lobes and a possible diagnosis of viral encephalitis was mentioned;
(vi) He was later diagnosed to be suffering from a major form of epilepsy, a neurological deficit caused by near asphyxiation, and was also found to have cortical blindness;
(vii) The accused threatened to leave her husband and Patrick following this event;
(viii) The initial hospitalisation was followed by further admissions in relation to seizures, a bout of gastroenteritis, and an oculogyric crisis (that is, an involuntary tonic spasm of extraocular muscles);
(ix) Patrick died on 13 February 2001, aged 8 months, that is, within 4 months of the ALTE;
(x) At 10 am the accused rang her husband at work and said, " *it's happened again";*
(xi) Patrick was found in his cot by ambulance officers, with peripheral cyanosis, and without vital signs, although he was still warm to the touch;
(xii) A death certificate was issued showing the cause of death to be asphyxia due to airway obstruction and epileptic fits;
(xiii) Post mortem examination showed:

· Old infarcts and gliosis in the parieto-occipital areas (both cerebral hemispheres) which Dr Bishop and Professor Berry both thought to be secondary to the earlier cardio respiratory arrest;
· Hepatic congestion, congested postero-basal dependant segments in both lungs, and enlarged thymus;
· No congenital metabolic problems.

**Sarah Kathleen**

(i) She was born on 14 October 1992, and was generally a well child, who was said to have been a very loud snorer, who had suffered some apnoea while asleep;
(ii) A sleep apnoea blanket was used to monitor her sleeping and to provide an alarm if breathing stopped;
(iii) She died on 30 August 1993, aged 10 ½ months;

(iv) On 28 August 1993, the accused had moved her to the main bedroom, and had discontinued the use of the sleep apnoea blanket;
(v) On the night of 29 August 1993, the accused was angry when Sarah would not settle and at one stage she dumped the child in her husband's lap – eventually Sarah was put to bed by her father in the main bedroom at 10 to 10.30 pm;
(vi) At about 1.10 am the father noticed that Sarah and the accused were not in the room;
(vii) At 1.30 am the father was awoken by the accused's screams – Sarah was in her cot, cyanosed, with mucus and vomit in her mouth; she was asystolic, and still warm to the touch;
(viii) Professor Hilton's opinion, following a post mortem examination, was that the cause of death was SIDS;
(ix) Sarah had been treated with antibiotics for a cold;
(x) The post mortem examination showed:

· Pulmonary congestion and oedema;
· Some internal petechiae on the pleura, epicardium and thymus;
· No morbid anatomical cause;
· Some bacteria (staphylococcus aureus) in the airways;
· Uvula unusually congested or possibly haemorrhagic lying anterior to epiglottis.

**Laura Elizabeth**

(i) She was born on 7 August 1997;
(ii) Laura's sleep and breathing patterns were monitored – A corometrics device being used to monitor her vital statistics, and other data, including room temperature and ventilation;
(iii) The monitoring was reduced in August 1998, when Laura was aged 12 months;
(iv) In August 1998, the accused threatened to leave home, and gave a letter to her husband advising that the only thing keeping them together was Laura;
(v) On 1 March 1999, the accused became angry at about 7 am when Laura was crying, and her husband was about to go to work. This led to an argument;
(vi) Laura died on 1 March 1999, aged 19 months;
(vii) At 10.30 am on 1 March 1999, the accused took Laura to her husband's place of work, and then home at about 11.00 am;
(viii) At 12.05 pm the accused phoned 000 and reported that Laura was not breathing;
(ix) Ambulance staff found that Laura was not breathing, in a state of bradycardia, before becoming asystole; cyanosis was evident, and she was warm to the touch. She was taken to hospital but pronounced dead at 12.45 pm;
(x) Laura had a recent upper respitory tract infection;
(xi) The post mortem examination by Dr Cala showed:

· Clear fluid around the nostrils
· Some inflammatory changes in the heart consistent with myocarditis, of probably viral origin;
· Petechial haemorrhages on the anterior aspect of the suprasternal thymus gland;
· Focal haemorrhagic and collapsed lungs;
· No congenital metabolic abnormality.

(xii) Dr Cala could not determine the cause of death, but excluded SIDS.

**The Diaries**

9 The Crown seeks to rely upon various diary entries made by the accused, particularly those which were made following the death of Sarah. They related principally to the period when the accused was contemplating having a fourth child, and also to the period following the birth of that child (Laura).

10 The Crown submits that they are potentially of significant probative value, in so far as they would appear, on their face, to demonstrate an admission by the accused of her responsibility for the deaths of Caleb & Patrick and, most particularly that of Sarah, occurring at times when she was tired and in a black mood, or stressed.

11 An earlier entry of 3 June 1990 is also said to have significance, being an entry made on the date that Patrick was born, that is, 15 months after Caleb's death, in so far as the accused wrote:

> " *I had mixed feelings this day. Whether or not I was going to cope as a mother or whether I was going to get* ***stressed out like I did last time*** *. I often regret Caleb & Patrick, only because your life changes so much, and maybe I'm not a Person that likes change. But we will see?"*

12 After the death of Sarah, the accused and her husband separated for 4 months between January and April 1995, at which point they were reconciled.

13 During the period when the accused was contemplating a fifth pregnancy, and later awaiting the birth of Laura, the following entries seem to have particular probative value:

> " ***18th June 96 – Tues – 10.21am.***
> *I'm ready this time. And I know Ill have help & support this time* ***When I think I'm going to loose control like last times Ill just hand baby over to someone else.*** *Not feel so totally alone. getting back into my exercise after will help my state of mind & sleeping wherever possible as well. I have learnt my lesson this time.*
> ...
> ***8-9-96 – Sunday – avo.***
> *Feel now is a time for us to have another baby. Have finally*

*realised is the right time for me. I have Craig & he wants a child. That I can give him. And I have enough friends now,* ***not to loose it like before*** *.*

…

***30-10-96 – Wednesday 5am***

***I worry*** *that my next child will,* ***suffer my physicological mood swings like the others did*** *. I pray I'm prepared & ready mind wise for this next one. Maybe nature has decided I never will be & it will nevr happen.*

…

*4-12-96 – Thurs – 4.30am*

*I'm ready this time. But have already decided if I get any feelings of jealousy or anger to much I will leave Craig & baby,* ***rather than answer being as before*** *. Silly but will be the only way I will cope. I think support, & not being afraid to ask for it will be a major plus. Also – I have & will change my attitude & try earnestly* ***not to let anything stress me to the max*** *. I will do things to pamper myself regularly & just deal with things. If I have a clingy baby, then so be it. A cat napper so be it. That will be when I will ask help & sleep whenever I can. To keep myself in a decent mood. I know now that* ***battling wills & sleep depravaision were the causes last time*** *. Fish I've got help – they are relaxing to watch its quite funny.*

…

***1-1-97 9.30 pm Wednesday***

*Another year gone & what a year to come. I have a baby on the way, which means major personal sacrifice for both of us. But I feel confident about it all going well this time.* ***I am going to call for help this time*** *& not attempt to do everything myself any more – I know that that was the main Reason for all my stress before &* ***stress made me do terrible things*** *.*

…

***4.2.97 – Tues morn, 3.30am***

*Still can't sleep. Seem to be thinking of Patrick & Sarah & Caleb. Makes me seriously wonder wether I'm stupid or doing the right thing by having this baby.* ***My guilt of how responsible I feel for them all, haunts me*** *, my fear of it happening again, haunts me. My fear of Craig & I surviving if it did, haunts me as well.*

*I wonder wether having this one, wasn't just a determination on my behalf to get it right & not be defeated by me total inadequate feelings about myself.*

*What sort of mother am I, have I been – a terrible one, that's what it boils down too – that's how I feel & that is what I think I'm trying to conquer with this baby. To prove that there is*

*nothing rong with me, if other women can do it, so can I. Is that a wrong reason to have a baby. Yes I think so, but its too late to realise now. I'm sure with the support I'm going to ask for I'll get through.* ***What scares me most will be when I'm alone with baby.*** *How do I overcome that? Defeat that?*

...

***17-2-97 – Monday 9.50am***

*[Craig] he should be for me, forever, just because a baby is entering our life makes no difference really, one day it will leave.* ***The others did*** *, but* ***this ones not going in the same fashion*** *. This time I'm prepared &* ***know what signals to watch out for in myself. Changes in mood etc.*** *Help I will get if need be*

***16-5-97 – Fri morn 2am***

*[Mel] I think that she will be a great help in Preventing me from stressing out as much as I've done in the past. Night time & early mornings such as these will be the worst for me, that's when wishing someone else was awake with me will happen.*

*Purely because of what happened before. Craig says he will stress & worry, but he still seems to sleep okay every night & did with Sarah. I really needed him to wake that morning & take over from me. This time I've already decided* ***If I ever feel that way again Im going to wake him up*** *.*

...

***6.7.97 – Fri Nite. 9.30pm***

*[Life with Craig] Maybe then he will see when, stress of it all is getting to be too much &* ***save me from ever feeling like I did before, during my dark moods*** *.*

*Hopefully preparing myself will mean the end of my dark moods, or at least the ability to see it coming & say to him or someone hey, help I'm getting overwhelmed here, help me out.* ***That will be the key to this babies survival.*** *It surely will. But, enough dwelling, things are different this time, It will all work out for sure."*

14 Following the birth of Laura, the accused made further entries, which the Crown suggests are of significant probative value in relation to her involvement in the deaths of the other children. The first of these was written within weeks of the birth of this child:

***"25.8.97 – Monday nite 8.30pm***

*Scary feelings, I've realised I actually love her & have bonded with her, wish to protect her etc. Maternal instinct, is what they call it. I now know* ***I never had it with the others*** *. Monitor is a good idea. Nothing can happen without the monitor knowing &* ***since I'm not game enough to not***

***plug it in, because theyd want to know why I hadn't,*** *Everything will be fine this time."*

15 It was followed by other entries which appear to repeat the theme of the earlier entries concerning the earlier deaths, but which the Crown relies on as showing an increase in her irritability, resentment of the child, in so far as she was required to give up her gymnasium attendances, and anger directed towards the child herself. Of particular relevance are the following entries:

" ***20.9.97 – Sat morn 3.15am***
*Sleep, who needs it. Yes I'm getting a little irritable now...* ***Am getting very stressed*** *, because I can't depend on Craig for any real help or support... [Craig] How dare he complain to me about lack of sleep – what the fuck would he know. Think he'll have to sleep in other room. Just so He's not disturbed – selfish prick. Well now I know where I stand.*
...
***25.10.97 10pm – Sat nite***
*Just watched video of Sarah, little upsetting, but she did some funny things...I think I am more patient with Laura. I take the time to figure out what is rong now* ***instead of just snapping my cog*** *...Looking at the video, Sarah was boyish looking. Laura has definite feminine features, they are chalk & cheese. And truthfully just as well. Wouldn't of handled another one like Sarah.* ***She saved her life by being different.***
...
***3.11.97 – Monday avo – 6pm***
*Why is it when I'm so tired I'm feeling sick – shitty I can't sleep very depressed with myself at the moment. Feeling deprived of my freedom... Someone's awake got to go, Lost it with her earlier. Left her crying in our bedroom & had to walk out –* ***that feeling was happening*** *. And I think it was because I had to clear my head & prioritise. As I've done in here now. I love her I really do* ***I don't want anything to happen*** *.*
...
***8th Nov- 97 – Monday nite 10pm***
*Had a bad day today. Lost it with Laura a couple of times. She cried most of the day. Why do I do that. I must learn to read her better. She's pretty straight forward. She either wants to sleep or doesn't. Got to stop placing so much importance on myself.*
*Much try to release my stress somehow.* ***I'm starting to take it out on her*** *. Bad move.* ***Bad things & thoughts happen when that happen*** *.* ***It will never happen again*** *.*
...

***9.11.97 – Sunday nite 8.45pm***
*Craig was pretty drunk Friday nite; In his drunken stupor he admitted that he's not really happy. There's a problem with his security level with me & he has a morbid fear about Laura – he well I know theres nothing wrong with her.* ***Nothing out of ordinary any way*** *.*
***Because it was me not them.***
*Think I handle her fits of crying better than I did with Sarah – I've learnt to .ace getting to me, to walk away & breath in for a while myself. It helps me cope & figure out how to help her.* ***With Sarah all I wanted was her to shut up. And one day she did*** *.*
…
***31.12.97 11pm***
*Getting Laura to be next year ought to be fun. She'll realise a Party is going on. And that will be it.* ***Wonder if the battle of the wills will start with her & I then*** *. We'll actually get to see. She's a fairly good natured baby –* ***Thank goodness, it has saved her from the fate of her siblings. I think she was warned.***

…
***20.1.97 (Sic) [should be 1998] – Tuesday 8am***
*The gym was a pivotal part of me, And now because I can't go without taking Laura its put a damper on everything. I've had my one & only escape taken away from me.*
…
***28.1.98 – Wednesday 5.30pm***
*Very depressed with myself, angry & upset.*
***I've done it. I lost it with her*** *. I yelled at her so angrily that it scared her, she hasn't stopped crying. Got so bad I nearly (poss) purposely dropped her on the floor & left her. I restrained enough to put her on the floor & walk away. Went to my room & left her to cry.*
*Was gone probably only 5 mins but it seemed like a lifetime. I feel like the worst mother on this earth.* ***Scared that she'll leave me now. Like Sarah did. I knew I was short tempered & cruel sometimes to her & she left. With a bit of help.***
*I don't want that to ever happen again. I actually seem to have a bond with Laura.* ***It can't happen again*** *. I'm ashamed of myself. I can't tell Craig about it because he'll worry about leaving her with me.* ***Only seems to happen if I'm too tired*** *her moaning, bored, wingy sound, drives me up the wall. I truly can't wait until she's old enough to tell me what she wants.*
…

***Friday Nite 6/3/98 – 10pm***
*Laura not well, really got on my nerves today,* ***snapped & got really angry, but not nearly as bad as I used to get.*** *"*

16 The emphasis in the passages extracted from these diaries, has been added, to indicate matters which would appear to be capable of giving rise to admissions in relation to the earlier deaths, and to a build up of stress before the death of Laura. They are said to derive further potential support from the evidence of Craig Folbigg, whose statement speaks of the accused's tendency to become stressed, and to lose her temper and control with her children. The diary entires, it is submitted, support the inference that it was this circumstance which led to their demise, that the accused was aware that she had been personally responsible for their deaths, and that, during the last pregnancy, and after the birth of Laura, she was concerned that these moods would re-emerge, and endanger Laura.

**The expert evidence**

17 It is next convenient to refer, in a summary way, to the expert evidence, which the Crown and the accused seek to tender in the trial, so far as that is disclosed, at this stage, in the reports which have been tendered. The parties are prepared to allow the application to be determined, at this stage, upon the face of the reports, having regard to the number of witnesses who are to be called, and to the fact that some of them are drawn from overseas. As a consequence, their opinions are yet to be tested in cross examination. I do not, however, see that as an obstacle to a determination of the application by way of a preliminary hearing.

18 In one critical respect they are unanimous, namely that it is extremely unusual, if not totally unprecedented, to have 4 deaths, and one ALTE, of infant siblings occurring in the same family, in succession, over a period of 8 years. As they all appear to recognise, the fact of sequential deaths, and of an ALTE, of this kind, within the one family, must inevitably give rise to a real concern, in the absence of some inherited abnormality (none being suggested to be present in this case) that they involved acts of deliberate homicide.

19 The Crown has foreshadowed an intention to call, in respect of this part of its case, a number of expert witnesses, as well as the pathologists who carried out the individual post mortem examinations and the various medical practitioners who attended the infants. The experts include Professor Berry, Dr Cala, Dr Ophoven, Professor Herdson, Professor Ouvrier, and Dr Beal, whose reports have been served.

20 The defence proposes calling 2 witnesses, Professors Byard and Busutill, whose reports have been served and to refer to the evidence which Professor Berry gave in another trial, having a similarity to the present.

21 The substance of the opinions which emerge from the reports may next be noted, individually in relation to each child, and then generally.

**Caleb**

22 Dr Ophoven, a paediatric forensic pathologist said, in her report:

> " *It is my opinion to a reasonable degree of medical certainty* [an expression which she equated to proof beyond reasonable doubt] *that Caleb Folbigg did not die of the condition known as Sudden Infant Death Syndrome. It is also my opinion that Caleb's death is most consistent with death by suffocation* ."

23 Professor Peter Berry, a Professor of Paediatric Pathology, noted:

> " *Faced with a similar case [as Caleb Folbigg's death] today, I would not give the cause of death as SIDS because of the finding of haemosiderin in the lungs.* "

24 Professor Peter Herdson, a Professor of Pathology, said:

> " *In my opinion, [in relation to Caleb Folbigg's death], the findings taken in isolation leave the cause of death undetermined, but apparently consistent with Sudden Infant Death Syndrome* ."

25 Professor Busuttil, a Professor of Forensic Medicine and consultant Pathologist, said in relation to Caleb's death:

> " *5.9 IN SUMMARY*
>
> v *This death should not have been attributed to SIDS.*
>
> v *There was a congenital clinically-diagnosed but not pathologically confirmed condition which could have led to upper airways obstruction.*
> v *The presence of some HAEMOSIDERIN in the lungs of this child raises the possibility of imposed airways obstruction.*
> v *Imposed airways obstruction cannot be completely excluded.*
> v *No other metabolic congenital anomaly was found in this child".*

**Patrick**

26 Dr Ophoven said:

> " *Patrick's sudden, profound and irreversible brain damage is consistent with and diagnosed as a hypoxic episode. Hypoxia in this case is synonymous with asphyxia and unfortunately heralds the fatal event in retrospect. No natural disease or process has been identified to explain this event, nor was there a recurrence of an acute life threatening event observed by anyone except his mother. In my opinion, the cause of Patrick's cardio-respiratory arrest is the same process that killed him... In my opinion the cause of death should be listed as...suffocation."*

27 Professor Berry said:

> " *Patrick's initial collapse was never explained. Such 'near-*

*miss' events resulting in brain damage are a cause for concern because the window of opportunity to find a child in extremis and affect the resuscitation is very short, probably a matter of only a few minutes. This raises the question that the person who finds the baby may have been present when the collapse occurred and may have been in its cause. Such 'acute life threatening events' are not part of the usual natural history of SIDS... Taking this case in isolation I would have given the cause of death as 'not ascertained', ascribing it to brain damage following an unexplained collapse, also noting that the child's mother found him both on that occasion and when he subsequently died."*

28 Professor Herdson observed:

" *In my opinion, [in relation to Patrick Folbigg's death], the history of a life threatening episode with subsequent abnormalities would be most unusual for a death to be due to so-called Sudden Infant Death Syndrome and the cause of death in this case is more accurately undetermined."*

29 Professor Busuttil's opinion, in summary, was as follows:

"

v *This death should not have been attributed to SIDS.*
v *It should not have been attributed to asphyxia in the absence of typical asphyxial signs at autopsy.*
v *There was a brain condition, which could have given rise to serious life-threatening convulsions, and death could have occurred in the course of these convulsions.*
v *The diffuse generalised focal brain damage present could have been the result of a viral infection of the brain, which has healed and it would be almost impossible to specifically identify this cause weeks later – an (sic) encephalitis. This disseminated brain damage could also have resulted from depletion of the oxygen supply to the brain, and therefore imposed upper airways obstruction lasting for a period of minutes.*
v *It is unlikely that this brain damage resulted from a shaking injury.*
v *No congenital metabolic problem was conclusively shows (sic) to be present in this child*."

30 Professor Ouvrier, a paediatric neurologist, provided a report in which he stated:

*"The clinical history and findings at admission (18 October) coupled with the early onset of seizures which became intractable would be in keeping with encephalopathy due most likely, in my opinion, to an asphyxial episode... The subsequent evolution of the case with episodic tonic upgaze, seizures and decrease in visual attention would have been consistent with brain damage suffered during the event leading to the (October) admission.*
*The most plausible explanation of the series of events is that*

*there was an acute asphyxial event on the morning of 18/10/1990. Such an event could have been a 'near miss' SIDS (ALTE) or could have been due to deliberate suffocation of the infant."*

Further,

*"The pathological findings at autopsy would have been consistent with damage due to a serious hypoxic event suffered at the age of 4 months but I cannot exclude the possibility that the findings could have possibly been caused by shaking or trauma since this may sometimes cause apnoea... The final event appears to have been a further asphyxial episode without clear explanation."*

**Sarah**

31 Dr Ophoven said:

" *Although the classic classification of SIDS includes children under 1 year of age, this is not the age range accepted by most forensic pathologists and a sudden unexpected infant death, greater than 6 months from the SIDS condition would be considered atypical and by essentially 1 year of age would be excluded. It is my opinion that Sarah's death is most consistent with death by suffocation."*

32 Professor Berry observed:

" *Taken in isolation, the death of Sarah may be ascribed to the 'Sudden death syndrome'. The post-mortem findings were consistent with that diagnosis. However, at 10 months of age she was older than most SIDS, the majority having occurred by 6 months of age. That alone is reason for closely scrutinizing the circumstances. I would probably give the cause of death in isolation as SIDS, with misgivings."*

33 Professor Herdson noted:

*"[In relation to Sarah Folbigg's death], I concur with... Associate Professor John MN Hilton...where the findings taken in isolation could be diagnosed as Sudden Infant Death Syndrome, and assessment of the subsequent analysis provided by Professor Peter Jeremy Berry... and Dr Janice Jean Ophoven."*

34 Professor Byard was unsure of the significance of the congested uvula, and said:

" *Given the above points, with no abnormal findings present at autopsy, I would have to label the cause of death as 'undetermined', with an autopsy finding of narrowing of the*

*upper airway".*

35 Professor Busuttil's opinion, in summary, was:

"

v *No anatomical or other cause of death was found.*
v *This death approximates most of the four death being reviewed, a typical death from SIDS.*
v The presence of the congested uvula may have produced some upper airway obstruction.

**Laura**

36 Dr Ophoven said:

" *It is my opinion to a reasonable degree of medical certainty* [that is, beyond reasonable doubt] *that Laura Folbigg did not die of the condition known as Sudden Infant Death Syndrome. In my opinion, she does not fall within the age range associated with SIDS and would not be considered for the diagnosis of SIDS for that reason in and of itself. It is my opinion that Laura's death is most consistent with death by suffocation."*

37 Professor Berry said:

" *[In respect of Laura Folbigg], it is recognised that an inflammatory infiltrate in the heart muscle is also quite commonly found in those who die of other causes, for example in road traffic accidents. It has been described as an incidental finding in suffocation. An inflammatory infiltrate in the heart must therefore be quite common in the general population and probably accompanies some common childhood illnesses. The finding of an inflammatory infiltrate in the heart [as was found in Laura's heart] does not necessarily mean it was responsible for death."*

He also stated:

" *Nevertheless, taken* ***in isolation*** *I would have ascribed this death to myocarditis recognising that although the infiltrate was quite extensive, I could not see actual damage to the heart and muscle."*

38 Dr Alan Cala, a Forensic Pathologist, who conducted the post-mortem examination of Laura Folbigg made the following statement:

" *Non-accidental asphyxia in the form of deliberate smothering must be considered as a possible cause of death for Laura Folbigg, and as possible cause of death for the other Folbigg children as well. I remain very suspicious that all four Folbigg children may have died as a result of a deliberate smothering. The medical evidence, however, does*

*not allow me to take this any higher than a suspicion of deliberate smothering."*

The inflammatory infiltrate in the heart, consistent with myocarditis, he said, " *may represent an incidental finding* ".

39 Professor Herdson added:

" *I concur with...Dr Allan D Cala... where the cause of [Laura Folbigg's] death was undetermined... and I further agree with Dr Cala that his finding of myocarditis is consistent with Laura's recent illness and is probably incidental."*

40 Professor Busuttil said, in summary:

"

v *This death should not have been classified as SIDS.*
v *There is a myocarditits which although may be completely incidental could also have caused serious heart problems and even death acutely and unexpectedly.*
v *This condition could not have been induced by imposed airways obstructions of this child either recently prior to death or previously."*

41 Professor Byard stated:

" *Given the finding of extensive myocardial inflammation with no abnormalities present I would have attributed the death to myocarditis. An identical conclusion would be drawn by most pathologists according to Professor Berry.* "

42 It can be seen from the foregoing, that these opinions depended on an assessment of the post mortem findings and pathology considered *individually* in each case. I next turn to the overall assessment of the expert witnesses.

43 Dr Ophoven observed:

" *It is well recognized that the SIDS [Sudden Infant Death Syndrome] process is not a hereditary problem and the statistical probability that 4 children in one sibship could die from SIDS would be infinitesimally small."*

44 Professor Berry's view was as follows:

" *The sudden and unexpected death of three children in the same family without evidence of a natural cause is extraordinary. I am unable to rule out that Caleb, Patrick, Sarah and possibly Laura Folbigg were suffocated by the person who found them lifeless, and I believe that it is probable that this was the case."*

45 Dr Cala concurred with the following statement from the American Academy of Pediatrics [*Pediatrics*, Vol. 94 Number 1, July 1994, pp 124 to 126]:

*"There is a small subset of infants who die unexpectedly, whose deaths are attributed to SIDS, but who may have been*

*smothered or poisoned. Autopsy cannot distinguish death by SIDS from death by suffocation. A study of infants suffocated by their parents indicates that certain features should raise the possibility of suffocation. These include previous episodes of apnoea (cessation of breathing) in the presence of the same person, previous unexplained medical disorders such as seizures, age at death older than 6 months and previous unexpected or unexplained deaths of one or more siblings or the previous death of infants under the care of the same, unrelated person."*

46 He also said:

*" If homicidal acts have been committed, it is most likely these acts have been in the form of deliberate smothering, whether deliberately or accidentally inflicted may leave no trace. There are no specific post-mortem findings for smothering."*

47 Professor Herdson, when taking all 4 deaths into account, said:

*" I am unaware that there have ever been three or more thoroughly investigated infant deaths in one family from Sudden Infant Death Syndrome.*
*Based on all the material that I have reviewed relating to these four infant deaths, in my opinion all four infants probably died from intentional suffocation.*

*· In drawing this conclusion, apart from my comments above, I would draw attention to the wide age range of the children at the time of the initial observed events or deaths, twenty days for Caleb to approximately nineteen months for Laura.*
*· The fact that two infants, Patrick on 18.10.90 and Laura on 1.3.99, were found moribund rather than dead is not the pattern associated with Sudden Infant Death Syndrome"*

48 Dr Susan Beal, a paediatrician, made the following statement:

*" Based on the records I have examined in regards to the family Folbigg, I have no hesitation in saying I believe that all four siblings were murdered... As far as I am aware there has never been three or more deaths from SIDS in the one family anywhere in the world, although some families, later proved to have murdered their infants had infants who were originally classified as SIDS."*

49 Professor Busutill observed:

*" 9.3 As far as one can ascertain, there was **no** congenital metabolic abnormality demonstrated in any or all of these children that could have caused them to die suddenly and unexpectedly.*
*9.4 These deaths are **not** all due to SIDS, and with exception*

*of the third death other conditions, which could [be] life-threatening, were present and should have been taken into consideration by the pathologist and by the Coroner in coming to an eventual cause of death.*
*9.5 It certainly **cannot** be said, indeed beyond reasonable doubt, that these deaths were irrefutably due to imposed or induced airways obstruction, as by suffocation.*
*9.6 In three of these deaths such a possibility should have carefully considered on pathological grounds in the differential diagnosis as one possibility among many; it certainly is **not** the only possible explanation for these deaths because of the presence of other physical disease which could have caused sudden unexpected death."*

50 Professor Byard, a specialist Forensic Pathologist and Consultant Paedeiatric Forensic Pathologist observed:

" *The autopsy findings, [in relation to each child] cannot be taken in isolation and with the occurrence of 4 deaths within the same family and police concerns I would list the causes of death as follows:*

*1. Caleb: Undetermined, with laryngomalacia;*
*2. Patrick: Undetermined, cannot exclude epilepsy;*
*3. Sarah: Undetermined, with narrowing of the upper airway* ;
*4. Laura: Undetermined, cannot exclude Myocarditis.*

*In my view the critical issue in the pathology of these cases is the presence of underlying conditions which are known to cause sudden death in young children and babies. I am certainly concerned that there may have been inflicted suffocation but could not state unequivocally that this had occurred, and could not agree that their autopsies have failed to 'identify any known natural disease or disease processes that could explain the sudden deaths', as has been stated by Dr Ophoven.*
*Although these cases are discussed in several of the expert reports as SIDS deaths they cannot, by definition, be regarded as such, either on their own or together. Thus, comments on the significance of the presence or absence of SIDS risk factors and use of statistics derived from SIDS deaths are not applicable.*
*The unusual background of this family with many issues of concern does not negate the fact that potentially significant organic illness was present in these children. Upper airway narrowing, epilepsy and myocarditis may have been coincidental to their deaths, but alternatively may have been causative or contributory; unfortunately this issue cannot be*

*clarified from the autopsy records. Given the information that I have been provided with I simply cannot see how the significance of these conditions can be down-played as potential causes of death, no matter how worrying the circumstances are."*

**The issues**

51 As stated by the Crown, the central issues in the case are:

> (i) can the Crown positively exclude death by natural causes (including SIDS, cardiomyopathy and epilepsy) leaving death by deliberate suffocation as the only reasonable inference;
>
> OR
>
> (ii) can the Crown prove the possibility that each child's death was due to asphyxia, and then, with the other evidence, prove beyond reasonable doubt that such event was deliberately induced by the accused?

52 Clearly the application for severance of the counts is inextricably linked to the question whether the matters asserted to be coincidence and tendency/relationship evidence should be admitted at the trial: *R v Verma* (1987) 30 A Crim R 441; *Hoch v The Queen* (1988) 165 CLR 292; *R v Bell* [2002] NSWCCA 2; and *R v Jackson* [2001] NSWCCA 387. If it is not admissible, then I would accept that severance should be ordered, although admittedly that could give rise to a difficulty with the diaries, since they are not confined to any one child, and are relied upon by the Crown as showing that the accused was responsible for the death of each of her children.

**DIRECT EVIDENCE**

53 The Crown submits that the evidence concerning the deaths of each child, and concerning the ALTE involving Patrick, is admissible in relation to each count, not just as coincidence evidence, but also as *direc*t evidence to prove that the medical cause for those events was an act of deliberate suffocation carried out by the accused. Its case is dependant, not only upon the evidence relating to each death and the ALTE, but also, upon the circumstantial evidence concerning the accused's irritability and anger in relation to the children, the diary entries, the fact that it was she who was with the children alone at the time of their deaths, and the fact that, in the case of Patrick and Laura, they were still alive, although in extreme difficulties, when her screams alerted her husband. In that regard, it points also to the medical evidence as to the very short time frame which can exist between the onset of an ALTE and the finding of a child while moribund, being a matter of only minutes.

54 The Crown accepts that the medical evidence, in relation to each death or ALTE, if considered individually, and without reference to the other evidence, or to the context of the accused's relationship with, and attitude

to the children, could not by itself exclude a reasonable possibility, or hypothesis, that such death was due to a cause other than deliberate suffocation.

55 However, it submits, for similar reasons to those which found favour in *R v Clark* [2000] EWCA Crim 54, that the similarity of the circumstances of the deaths and of the ALTE would make it an affront to common sense to conclude that it was simply an unfortunate coincidence for history to repeat itself four or five times, or to ignore the entire history involving all of the deaths and the ALTE.

56 Upon that basis, it was submitted that it was entirely proper and consistent with legal principle, that the medical experts and jury be permitted to consider the entire history of each of the cases together, and that it would be contrary to commonsense to confine them to a consideration of any one case, in isolation from the others.

57 It offered, by way of an analogy, in order to demonstrate the cogency of such a proposition, the following scenario:

> " *(i.) a person is admitted to a hospital suffering from a mysterious respiratory disease of unexplained origin. The treating doctor is unable to determine the source or nature of the disease, and when the patient subsequently dies, in the absence of further information, the doctor ascribes the death to pneumonia.*
> *(ii.) Shortly after the first patient's admission, three other people are admitted to other hospitals suffering from a similar unknown respiratory disease. They also die. A medical expert witness then reviews all four cases and discovers that they all had similar symptoms, and had all visited the same shopping centre within 24 hours prior to the onset of their disease.*
> *(iii.) A subsequent examination of the air-conditioning system at the shopping centre reveals the presence of the micro organism that causes Legionnaires Disease.*
> *(iv.) On a further review of all four deaths, and considering medical literature and research from around the world, the medical expert witness forms the view that in all probability the four deaths were from Legionnaires Disease."*

58 In this analogy it would obviously be quite artificial to require the medical expert witness to diagnose the cause of the disease for the first deceased person, in the absence of what happened to the subsequent three victims, that is, without knowledge of the additional fact (iii.). It was upon that basis that it was submitted that the evidence concerning the deaths of all four children was admissible as *direct* evidence to establish the cause of death of each one of them.

59 So far as such evidence would provide additional diagnostic material enabling the formulation of a conclusion as to the cause of death, or of

Patrick's ALTE, then it would have a relevance under s 56 of the *Evidence Act*, being evidence that could rationally affect the assessment of the probability of the existence of the central fact in issue in relation to each count (s 55 *Evidence Act*), that is, the cause of death or ALTE of the subject child.

60 There is some force in this proposition, but it seems to me to be subsumed more relevantly in the argument for the tender of the evidence in accordance with the coincidence rule. Moreover, the suggested analogy does have an additional feature in the presence of an established possible cause in the known exposure of each victim to the bacterium which causes Legionnaire's disease.

**COINCIDENCE EVIDENCE**

61 The coincidence notice served by the Crown is in the following terms:

> " *Notice is given that the Prosecution presently intends to adduce 'coincidence' evidence pursuant to the coincidence rule in sub-section 98(1) of the Evidence Act 1995, ie. Evidence that 2 or more related events occurred to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind.*
> *1. The 'person' referred to in the proceeding (sic) paragraph is Kathleen Megan FOLBIGG.*
> *2. The substance of evidence of the occurrence of the related events is contained within the following documents which previously have been served upon you. The Crown alleges that the coincidence evidence establishes:*
>
> > *(i) that each of the accused's children died/had an ALTE (Apparent Life Threatening Event) in a similar way*
> > *(ii) that each of the accused's children died/had an ALTE from the same cause*
> > *(iii) that the accused killed/caused an ALTE to each of the four children by asphyxiating them with the intent to kill or do GRIEVOUS BODILY HARM to them.*
> > *(iv) that the accused's four children did not die from Sudden Infant Death Syndrome or any other illness, disease or syndrome."*

62 The material relied upon by the Crown as coincidence evidence is that which relates to similarities in the circumstances concerning the death or ALTE of each child, as identified in a chart prepared by it, namely that:

> (i) each child was under 2 years of age at the time of death or ALTE (and it may be noted, additionally, that three such deaths and one ALTE occurred in the first year of life);

(ii) each death occurred at a time which is unusual for a SIDS event;

(iii) each death occurred in the child's own cot or bed;

(iv) each death or ALTE occurred during a sleep period;

(v) each child was last seen alive by the accused;

(vi) each child was found not breathing by the accused, and in relation to those who died in the night, she claimed to have observed from a distance, and in the dark, that they had stopped breathing;

(vii) only the accused was awake or present at the time when each child was found dead or not breathing;

(viii) there was, in each case, a short interval between the time when the child was last claimed to have been seen alive by the accused, and the time when he or she was found lifeless or not breathing properly;

(ix) in relation to the children who died in their cots or had an ALTE in the night, the accused had got up to go to the toilet, and in some cases had returned to bed, before getting up again and sounding the alarm;

(x) the accused had failed to pick up or attempt to resuscitate any of the children after the discovery of his or her death or cessation of breathing (subject to her claim to have done so in relation to Laura);

(xi) when each child was found he or she was warm to the touch;

(xii) there were no signs of any injury found on any child;

(xiii) no major illness preceded the death or the ALTE in any of the cases;

(xiv) each of Caleb, Sarah and Laura gave every appearance of being normal and healthy before his or her death, as had Patrick before his ALTE;

(xv) the sleep studies for each child were normal (save for Caleb, who by reason of being the first born was not the subject of any such study);

(xvi) the tests for any inherited and/or biochemical disorder or metabolic abnormality were negative in each case;

(xvii) the death or ALTE in each case, arose from an hypoxic event;

(xviii) the sleep monitors, which had been provided following the earlier deaths and ALTE, were not in use at the time of death in the case of Sarah and Laura; and

(xix) the accused had shown acute irritation in relation to each child, or appeared to have been in a condition of stress, before the death or ALTE.

63 The Crown submits that the relevant similarity of these events is so substantial and remarkable, that when taken in conjunction with the remaining evidence, including the expert medical evidence, the only reasonable hypothesis left open is that each death or ALTE was caused by deliberate asphyxiation. It relies, in this regard, on the diary entires and the evidence of Mr Folbigg, including his denial of any culpability, that it was the accused who had deliberately asphyxiated each child.

64 Before turning to the principles relating to coincidence evidence, four preliminary observations may be made.

65 First, the Crown does not invite an *assumption* of the guilt of the accused, in relation to any one of the deaths or of the ALTE, in order to make the evidence admissible. Had it sought to do so, then that would have involved an error of the kind exposed in *Perry v The Queen* (1982) 150 CLR 580 at 589/590 per Gibbs CJ and in *Sutton v The Queen* (1984) 152 CLR 528.

66 Secondly, it does not suggest that this is a case of the kind considered in *R v Straffen* [1952] 2 QB 911, or of the kind mentioned by Lee AJ in *R v Zappala* NSWCCA 4 November 1991 or similar to that seen in *Thompson v The Queen* (1989) 169 CLR 1, where there is evidence of an accused having committed a crime in a unique or unusual manner, which was then replicated in the offences giving rise to the further charges, or where the Crown relies on other proven homicidal acts on his or her part to strengthen its case.

67 Thirdly, the present case is one where the evidence goes not to the identity of the person who has committed a proven criminal offence, of the kind considered in *Sutton* and *Zappala*, but rather, it is one where the evidence goes to the question whether *any crime* has been committed at all, that is, whether the deaths and the ALTE were due to an unlawful act.

68 It is not, however, a case where, in relation to the assessment of the probative value of the relevant evidence, any question of concoction arises for consideration, of the kind examined in *R v Colby* [1999] NSWCCA 261 and in *R v ACK* NSWCCA 22 April 1996; and see also the reasoning in *R v Lock* (1997) 91 A Crim R 356, a case involving tendency evidence, but which would appear equally relevant to a case of coincidence evidence, so far as it is necessary to assess the probative force of the evidence.

69 In substance, it is a case where the similar factual circumstances of each death, taken in conjunction, in particular, with the presence of hypoxia, and the absence of any genetic abnormality, or clear medical reason for the occurrence of an ALTE or sudden death, in an otherwise healthy child, and in conjunction with the remaining circumstantial evidence, are said to establish that each child died of induced asphyxia.

70 The coincidence rule is now enshrined in s 98 of the *Evidence Act*, which provides, relevantly (notice having been given), as follows:

> " ***98*** *(1) Evidence that 2 or more related events occurred is not admissible to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind if:*
>
> *(a) …*
>
> *(b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.*
>
> *(2) For the purposes of subsection (1), 2 or more events are taken to be related events if and only if:*
> *(a) they are substantially and relevantly similar, and*
> *(b) the circumstances in which they occurred are substantially similar."*

71 If this test is passed, then before the evidence can be led it must also pass through the hurdle of s 101(2) as well as that contained respectively in s135 and s137 of the Act. S 101(2) requires that its probative value (to a fact in issue) "*substantially outweighs any prejudicial effect it may have on the defendant.*"

72 Under s 135, the Court has a general discretion to refuse to admit the evidence:

> *"if its probative value is substantially outweighed by the danger that the evidence might:*
> *(a) be unfairly prejudicial to a party, or*
> *(b) be misleading or confusing, or*
> *(c) cause or result in undue waste of time;"*

and, under s 137, it is bound to refuse to admit the evidence if " *its probative value is outweighed by the danger of unfair prejudice to the defendant".*

73 The *"probative value*" of evidence is defined in the Dictionary to the Act as "*…the extent to which the evidence could* ***rationally*** *affect the assessment of the* ***probability*** *of the existence of a fact in issue"* – here the probability that the death of each child, and of Patrick's ALTE, was due to asphyxiation. The inclusion of the word "*rationally*", in the definition, is of importance, having regard to the need for consideration to be given, both to the force of the evidence, and to the question of unfairness associated with

any risk of it being used in a way that is not logically connected with the relevant issue, or of it being given undue weight in the resolution of that issue: *R v Lockyer* (1996) 89 A Crim R 457 at 460, and *R v Colby* [1999] NSWCCA 261.

74 In *R v Lockyer*, Hunt CJ at CL (at 459) held that the expression "*significant*" when used in conjunction with the expression "*probative value"* meant "*something more than mere relevance but something less than a 'substantial' degree of relevance"*. I would respectfully adopt the observation of Ireland AJ in *R v Martin* [2000] NSWCCA 332 (at para 67) that its use, in s 98 and also in s 97 (tendency evidence) mandates that the evidence be of importance, or of consequence.

75 At common law, evidence falling within the umbrella of coincidence evidence, there referred to as similar fact evidence, was admissible if it possessed "*a particular probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused in the offence charged"* per Mason CJ, Wilson and Gaudron JJ in *Hoch v The Queen* (1988) 165 CLR 292 at 294. Their Honours went on to say, at 294-5:

> " *Assuming similar fact evidence to be relevant to some issue in the trial, the criterion of its admissibility is the strength of its probative force: see Perry v The Queen; Sutton v The Queen; Reg v Boardman. That strength lies in the fact that the evidence reveals 'striking similarities', 'unusual features', 'underlying unity', 'system' or 'pattern' such that it raises, as a matter of common sense and experience, the objective improbability of some event having occurred other than as alleged by the prosecution."* (Citations supplied).

76 In *Pfennig v The Queen* (1995) 182 CLR 461, a case concerned principally with propensity evidence, but equally applicable to coincidence evidence, Mason CJ, Deane and Dawson JJ, after referring to *Hoch*, went on to say, in relation to the passage last cited, (at 482):

> " *This passage should not be understood as asserting that 'striking similarities' or the other characteristics mentioned in relation to propensity or similar fact evidence are essential prerequisites of its admissibility in every case.*
> *An important distinction is to be drawn between cases such as the present case in which the 'similar facts' are not in dispute and cases in which such facts are in dispute. Thus, their Honours said [in Hoch]:*
>
> > *'Where the happening of the matters said to constitute similar facts is not in dispute and there is evidence to connect the accused person with one or more of the happenings, evidence of those similar facts may render it objectively improbable that a person other than the accused committed the act in question, that the relevant act was unintended, or that it occurred innocently or fortuitously. The similar*

*fact evidence is then admissible as evidence relevant to that issue.'"*

77 This has a relevance for the present case in that, so far as I can see, the matters said to constitute similar facts are not themselves in dispute to any extent, if at all, as distinct from the conclusions to be drawn from them.

78 Additionally their Honours said, in relation to the question of the potential prejudicial effect of the evidence of this kind (at 482):

> " *the prejudicial effect that the law is concerned to guard against is the possibility that the jury will treat the similar facts as establishing an inference of guilt where neither logic nor experience would necessitate the conclusion that it clearly points to the guilt of the accused."*

79 In carrying out the weighing of the probative force of the evidence, against its prejudicial effect, they observed that (at 483):

> " *the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is consistent with the innocence of the accused. Here 'rational' must be taken to mean 'reasonable' and the trial judge must ask himself or herself the question in the context of the prosecution case; that is to say, he or she must regard the evidence as a step in the proof of that case. Only if there is no such view can one safely conclude that the probative force of the evidence outweighs its prejudicial effect."*

80 In *R v WRC* [2002] NSWCCA 210, Hodgson JA said, in relation to this passage, again in a case involving tendency evidence, but of equal relevance for coincidence evidence:

> " *27. Plainly, that passage does not mean that the judge must look at the propensity evidence in isolation, and not admit it unless there is no reasonable view of the evidence so considered that is consistent with the innocence of the accused of the offence with which the accused stands charged. That approach would be quite inconsistent with the correct approach for considering circumstantial evidence, as explained in Shepherd v The Queen (1990) 170 CLR 573; and the quoted passage proceeds by reference to the character of propensity evidence as circumstantial evidence.*
> *28. On the other hand, nor can it mean that the judge must look at all the evidence in the case, including the propensity evidence, and admit the propensity evidence if and only if there is no reasonable view of all the evidence that is consistent with the innocence of the accused: that approach would disregard altogether the need for some special probative value of propensity evidence.*
> *29. In my opinion, what it must mean is that, if it first be assumed that all the other evidence in the case left the jury*

*with a reasonable doubt about the guilt of the accused, the propensity evidence must be such that, when it is considered along with the other evidence, there will then be no reasonable view that is consistent with the innocence of the accused. That is, the propensity evidence must be such that, when it is added to the other evidence, it would eliminate any reasonable doubt which might be left by the other evidence."*

81 To those observations his Honour adhered in *R v Joiner* [2002] NSWCCA 354 at para 37. Reference may also be made to *Pfennig*, *Lock* and *R v AH* (1997) 98 A Crim R 71 at 78, in support of the proposition that the evidence must be excluded unless, *when taken in conjunction with the remaining evidence*, the only rational explanation is the inculpation of the accused for the offence in question.

82 It is next convenient to apply these principles to the evidence which the Crown expects to lead. As I currently understand that evidence, it will be the expert opinion of each of Drs Ophoven and Beal, and of Professors Berry and Herdson, that each child died of intentional suffocation. Drs Ophoven and Beal reach that conclusion without qualification, while Professors Berry and Herdson express that view as a probability.

83 The other experts, including Dr Cala, and Professors Byard and Busutill fall somewhat short of this, although they accept that deliberate smothering or induced asphyxia, cannot be excluded in any one of the 4 deaths or in Patrick's ALTE. What all experts do appear to exclude, in the light of what is now known, however, as a cause of any of the deaths or of Patrick's ALTE, is SIDS, or any underlying congenital metabolic abnormality. Moreover, while some other possible medical conditions have been identified, none of the experts are prepared to ascribe, as the cause of death or of the ALTE, any natural disease process, to the *exclusion* of other possible causes, including smothering.

84 The defence submitted that the Crown faced a logical difficulty in that it has to rely upon a concatenation of events, in order to prove the cause of death in each case, being unable to show positively by reference to the evidence concerning *any one* death, that it was due to induced asphyxia. If it could do so then, as I understand the defence position, it would accept that the argument for calling the evidence, in relation to all counts, would be that much stronger, since it would then be capable of excluding mere coincidence or accidental death.

85 The answer to that submission, in my view, lies in the approach taken in *R v Clark,* and in *R v WRC,* elsewhere mentioned in these reasons, bearing in mind, in particular, that this aspect of the Crown case, although very important for proof of the accused's guilt, is but one circumstance in a circumstantial case.

86 The associated defence submission to the effect that coincidence evidence is only admissible if it is sufficient *in itself* to prove beyond

reasonable doubt that the accused is guilty is, in my view, misconceived. For the reasons stated in *WRC* (at para 29) and in *Joiner* (at para 37) cited earlier, it overstates the requirement for admissibility, since it is necessary that the coincidence evidence be considered in the light of all the remaining evidence.

87 Mr Zahra SC also submitted that there was a danger in relation to the medical evidence, if it be the case that the experts had formed their ultimate opinion by reference to a mantra expressed in the terms of one death equals SIDS, two deaths equals unascertained cause and three deaths equals homicide, unless otherwise explained.

88 Clearly, any such reasoning, or any reasoning based only upon an exercise of statistical probability, would be potentially misleading and capable of weakening the probative force of their evidence. However, that would not, in my view, prevent the experts from giving evidence to the effect that SIDS is a relatively infrequent event, and that multiple SIDS deaths and/or multiple unexplained deaths or ALTE's involving infants within any one family are even more infrequent.

89 Subject to appropriate qualification as to what is included, and what is not included in the medical literature upon this topic, I would see no objection to reference being made to it concerning the occurrence of SIDS. Similarly I would see no objection to the experts expressing an opinion, subject to the same qualification, as to the improbable occurrence of multiple deaths of infants or of ALTE's, within the same family, of unexplained causes, that is, absent some common genetic disorder.

90 I would not however regard it as appropriate for the likelihood of any such occurrence to be expressed in the terms of statistical odds, since that could give rise to a risk of those odds being misused in a way similar to the Prosecutor's fallacy which has been exposed, in relation to DNA evidence.

91 It was accepted by Mr Zahra SC that the ultimate issue rule of the common law, having been repealed by s 80 of the *Evidence Act*, does not preclude the medical experts from offering their opinions as to the causes of each death. Clearly that is so in relation to an opinion offered for example that it was due to an hypoxic event, or was one which was consistent with asphyxia. However, what they cannot do is to take the next step, which is properly one of fact for the jury, and not one dependent upon the medical or scientific expertise which each clearly has, to offer the view that it was the accused who induced that event, or that the death amounted to homicide. The final step is one which relies upon circumstantial proof from the factors previously identified.

92 This may require some modification of the opinion as to the ultimate issue offered in particular by Dr Beal and Professor Ophoven. It would not, however, limit their evidence as to any or all of the deaths as being consistent with, and as possibly or even probably due to induced asphyxia.

93 Considerable reliance was placed by the defence upon the decision of

Bell J in *R v Phillips* [1999] NSWSC 1175. That was a case in which the accused was charged with the murder of one of her children, and in which the Crown sought to tender evidence concerning the deaths of two other children who had been born to her, and of a number of ALTE's relating to all three children. It was a case where four matters were said to demonstrate that there was a substantial and relevant similarity between the deaths and ALTEs, namely, that each child was a natural child of the accused; in each case it was she who had located the child, at a time when the child was either not breathing or experiencing breathing difficulties; in each case it had been she who had arranged to take the child to hospital; and in each case the de facto partner of the accused had been "unavailable" in the context of a background of domestic friction. The second and fourth of these matters was not conceded, and Bell J expressed strong reservations as to whether either could be established on the available evidence.

94 The present case is, in my view, distinguishable, since there are here many more matters relied upon as showing a substantial and relevant similarity. Moreover, it is a case where, unlike *Phillips*, there is independent evidence in the form of the diaries, and Mr Folbigg's evidence, and it is one where, some of the experts expressed their opinions as to the cause of death in far more positive terms than those expressed by the witnesses in *Phillips*.

95 In this regard Bell J observed (at para 64):

> *"I did not understand any of the witnesses who gave evidence in the proceedings before me to be of a view other than that the family history of ALTE, and the deaths of the 3 children was highly suspicious".*

96 Later her Honour observed that the difficulty which stood in the way of a finding that no rational explanation existed for the deaths and ALTE's, other than that the accused had deliberately induced each incident, was the fact that "*none of the expert witnesses was prepared to go so far."*

97 The present case differs in this respect. The critical circumstance in this case, and where it seems to me to differ from *Phillips*, is that it is sufficient for the Crown to point, in each case, to the evidence of each expert which would exclude SIDS as a cause; which would identify the improbability of the various incidental medical conditions which were observed post mortem as the cause of death or of the ALTE's, and which would then identify asphyxia, as a possible or probable cause of death. It appears to me to be enough, in a circumstantial case, for the Crown to establish that asphyxia was a possible cause of death, and that the findings on post mortem examination are, in the opinion of the experts following their independent review, *consistent* with that having been the causative mechanism.

98 Moreover, so far as it is submitted that Professor Herdson and Dr Ophoven based their opinions upon no more than an assessment of the probability of four deaths within the one family occurring by a mechanism other than the deliberate act of a parent, or by reference to a statistical

probability exercise of the kind that met with disfavour in *R v Clark*, then this seems to me to involve an unjustified attack on the detailed analysis which they brought to each case.

99 I am similarly unconvinced that their opinions are based on any misapprehension of the facts of each matter, or that the process of reasoning foreshadowed by the Crown depends upon the simple proposition that if all four deaths were not SIDS deaths, then they must have amounted to murder. Clearly, any such line of reasoning would be erroneous, because the Crown would still need to exclude, as a reasonable hypothesis, in respect of each count, that the event was not due to some medical condition, or cause other than the deliberate act of the accused.

100 I do not understand the Crown to approach the case on the simple basis suggested, or to suggest that the circumstances giving rise to each death should be considered other than carefully in isolation as well as collectively, and in the light of the remaining circumstantial evidence.

101 Upon my assessment of the evidence which the Crown intends to call, the present case has a close similarity to that of *R v Clark* [2000] EWCA Crim 54, where the Court upheld the decision of the trial judge, in not severing an indictment charging a mother with the murder of two of her infant children, and in allowing the evidence in relation to each child to be received as part of the Crown case concerning the two counts.

102 It was a case where six principal similarities were relied upon, namely that the two babies had been about the same age at the time of death; they were each found unconscious by the appellant in the same room; they were found at about the same time, shortly after being fed; the appellant had been alone with them when they were discovered lifeless; in each case their father was either away, or about to go away; and in each case there was evidence (although this was, admittedly, contentious) of previous abuse or of deliberate injury.

103 The central issue for each count was whether the Crown could exclude death by natural causes. Similarly to the present case, the effect of the medical evidence as a whole was that neither baby had been the subject of a SIDS death, and there was a consensus, as the lowest common denominator, that each death was unexplained, but was consistent with an unnatural death.

104 Again, similarly to the present case, the medical evidence was not regarded as standing alone so far as there were matters of potential significance in relation to the credibility of the evidence of the parents. The Court concluded, after an analysis of the evidence (at 89):

> " *The Prosecution's case against the appellant depended on a large number of pieces of circumstantial evidence, including not only the medical evidence concerning each baby but also evidence going to the credibility of the appellant and her husband. In that context the various similarities referred to by the judge could properly be relied*

*on as supporting the Prosecution case and as tending to prove the appellant's guilt on each of the counts. They made an explanation based on coincidence very much less plausible, if not an affront to commonsense. In any event it would have been an affront to commonsense to require the jury to consider only one of these deaths in isolation from the other. The overall circumstances of the two deaths were plainly relevant to the assessment of guilt in respect of each of them".*

105 In the course of its reasons, the Court rejected the proposition that even if the evidence on one count was admissible upon the other, it could only become admissible once the jury had concluded that the first death was unnatural upon the evidence relating to that count alone – holding (at para 90) that the decision of the House of Lords in *DPP v P* [1991] 2 AC 447 did not lay down such a high hurdle. Their Lordships went on to say (at 90):

> " *such evidence can have sufficient probative force to make it just to admit it even though, taken by itself, it would not be sufficient to prove guilt. Proof of guilt depends on the combination of the evidence admitted on grounds of similarity and the other evidence in the case."*

106 When considered in the context of the remaining circumstantial evidence, and particularly the diary extracts, which I have highlighted, it is my view that the requirements of ss 98 and 101(2), as noted above, have been met in the present case.

107 What is critical, it seems to me, is that the medical evidence is part of a circumstantial case, in which the jury might properly take into account the following:

(a) The infrequent incidence of SIDS;

(b) The rarity of repeat incidents of SIDS and of unexplained infant deaths or ALTE's within one family;

(c) The absence of any metabolic abnormality in any of the children, let alone a common abnormality;

(d) The fact that each was a healthy child and that such physical or medical conditions, as were observed post mortem, were unlikely causes of death;

(e) The absence of any sleeping abnormality in the three children who were tested and/or monitored;

(f) The fact that monitoring was provided but then ceased in relation to Sarah and Laura – a matter of some importance in view of the

diary entry of 25 August 1997;

(g) The fact that two of the children were found by the accused within the very brief window between a child being found moribund and dead;

(h) The fact that all children were found by the accused while they were still warm, even though in four of the five relevant instances this occurred at night;

(i) The unexplained absence of Sarah and the accused at about 1 am, shortly before she was found dead;

(j) The unusual behaviour of the accused in getting up from bed, leaving the room, returning, and then getting up again only to discover, in the case of some of the children, that they were moribund or lifeless;

(k) The fact that she claimed to have observed, in the dark and from some distance away, that some of them were not breathing;

(l) The stress and anger which the accused had expressed toward the children;

(m) The fact that the accused would not nurse or endeavour to resuscitate the children when they were found; and

(n) The diary entries including, in particular, the sections which I have emphasised in the extracts set out earlier in these reasons, so far as they may reveal an absence of love for, or a bond with, the children, an acceptance by the accused of her hand in their deaths, her black moods and stress, her fears as to the way she behaved when stressed, and any resentment which she may have held in relation to the curtailment of her outside activities by reason of the need to care for Laura.

108 In the light of the circumstances mentioned, this is not a case dependant entirely upon the medical evidence. Were it otherwise, then there could well have been a very real difficulty for the Crown in excluding natural causes, whether it be SIDS or the presence or the progression, of some physical defect or disease process, as a rational cause of death or of Patrick’s ALTE.

109 In summary, the facts which have been identified by the Crown in relation to each of the deaths appear to me to be substantially and relevantly similar when considered in the absence of any common metabolic abnormality, or outward sign of injury, or otherwise life threatening disease or medical condition. When further considered in the light of what appears, prima facie, to be significant admissions by the accused, in the diaries

concerning the deaths of some of the children, as well as the evidence concerning her moods and irritation, proximate to their deaths, then I am left with the view that the test in *WRC, Joiner,* and *Pfennig* is satisfied. The evidence would, in combination, be such, if accepted, that no reasonable view would remain open that would be consistent with the innocence of the accused.

110 So long as the evidence of the experts is pressed upon the basis previously mentioned, then I am satisfied that their opinions concerning each death and ALTE is properly admissible. Taken in conjunction with the circumstantial evidence, the coincidence of the occurrences is such that it would be an affront to common sense to restrict the admission of the evidence in the way requested, or to sever the counts. In particular, it would require the jury to consider each case in a vacuum, isolated from what, on a prima facie basis, would appear to be facts of significant probative force as to the cause of the relevant death.

111 In coming to this conclusion I have given very careful consideration to the obvious prejudice attaching to the number of deaths and to the risk of an inference being drawn from that fact alone, that there was more than coincidence here involved. Nevertheless, when considered in the context of the remaining circumstantial evidence, the repetition of the events has its own significant probative value.

112 It is true, as Mr Zahra has submitted, that some of the so-called similarities are nothing other than the incidents attaching to any primary carer, and that as such they are not necessarily incriminatory. To some extent, but only to a limited extent, is that true. In particular the time at which the alarm was raised at night, being closely proximate to the occurrence of the ALTE, or death, and the way in which the accused claimed that she had discovered the problem, do not seem to fit into the expected pattern of conduct for a primary care giver. Moreover, they can properly be understood in the context of the opportunity presented by the fact that the accused had been up and about, and by the fact that her husband was a very deep sleeper, who was not easily roused. These are matters which are fit for the jury to assess, and they do not reduce the significance of the similarities.

113 In relation to s 101(2), I am accordingly satisfied that the evidence directly relevant to each death and ALTE has considerable probative force in relation to all counts, when considered in combination with the other matters. That is attributable, not only to the considerable qualifications of the experts, whose views are to be tendered, but also to the context in which the deaths occurred, including the thought processes disclosed by the accused in her diaries, and the husband’s evidence.

114 I am also satisfied that suitable directions can be framed so as to ensure that the jury does not use the evidence in some illogical way, or give to it a weight which it does not deserve.

115 So far as the defence submission depends upon an assessment of the

likely weight of the evidence to be called by the Crown, that in my view is a matter to be reserved for the jury, and is not a matter which should be determinative of the current application. Were it the case that the opinions offered by the experts were tenuous, or illogical, or plainly dubious on their face, then I accept that this would be a matter of relevance for the weighing exercise.

116 However, in circumstances where opinions are offered, by experts of the kind who are to be called, and who appear to be extremely well qualified in the fields of infant mortality, neurology, and forensic pathology, then any attempt by me to form a conclusion at this stage of the proceedings as to the weight which should be given to them would be inappropriate.

117 Rather, they should be accepted, on a prima facie basis, for the purposes of this application, as representing an assessment and/or opinion offered by a suitably qualified expert, which may then be explored at trial, and weighed, in due course, by a jury.

118 This is not to ignore the caution in *Pfennig* (at para 60) that the "*probative value of disputed similar facts is less than the probative value those facts would have if they were not disputed".* In this case it is not the underlying similar facts which are in dispute. Rather, the dispute goes to the cause of death in each case, the resolution of which turns upon a consideration of the similar facts and all of the remaining evidence.

119 Mr Zahra SC raised a question as to where the starting point of the jury might be, and in particular asked whether there might not be a risk of them being overwhelmed by the considerable body of evidence, and the apparent coincidence of the deaths, to the point of losing sight of the central issue in *each* case, as to the cause of death.

120 There is some force in that submission. However, that risk can, in my view, properly be overcome by focused closing addresses and by the way in which the summing up is framed. It may well be, as counsel have identified, that the case in relation to Sarah is the strongest, both by reason of the absence of any apparent medical cause for her demise, and the diary entries relating to her death, particularly the comment (28 January 1998) that it occurred "*with a bit of help*". It will however be a matter for the Crown whether it elects to advance a particular death as the one where its case of murder is the strongest, and to rely upon the coincidence rule, in conjunction with the evidence particular to the other deaths or ALTE, to invite the jury to exclude, in relation to these other events, all rational causes other than deliberately induced asphyxia.

121 Moreover, it should be assumed that the jury will be instructed, in explicit terms that before it can convict the accused upon any count, it must be satisfied, by reference to the *whole* of the evidence, that the relevant death or ALTE was caused by asphyxia, and that it was the accused whose act brought about that event. Each fact I would regard as an essential intermediate fact to be proved by the Crown beyond reasonable doubt.

122 For these reasons I am satisfied that the evidence is admissible as coincidence evidence and that, subject next to a consideration of s 135 and s 137 of the *Evidence Act*, the Crown should be allowed to call the evidence concerning each death, or ALTE, generally, that is, as evidence admissible in respect of each and every count.

123 The s 137 requirement to exclude evidence adduced by the Crown, where its probative value is outweighed by the danger of unfair prejudice to the defendant, comes into operation where there is a *real* risk of unfairness arising to the accused by reason of the admission of the evidence: *R v Lisoff* [1999] NSWCCA 364.

124 Consideration of the possibility of unfairness, for the purposes of this section is not materially different from that required in relation to s 101(2), that is, whether there is a risk of the jury misusing the evidence (for example on a basis logically unconnected with the fact in issue) or attaching to it a probative weight which is disproportionate to its real evidentiary value: *R v Benecke* (1999) 106 A Crim R 282.

125 It is not enough that the prejudice to the accused arises solely from the fact that the evidence may strengthen or even establish the prosecution case: *R v Singh-Bal* (1997) 92 A Crim R 397. The key to exclusion under this section is that of unfairness: *R v GK* [2001] NSWCCA 413. For the same reasons as those considered in relation to s 101(2), I am satisfied that the probative value of the evidence is not outweighed by any danger of unfair prejudice to the accused.

126 Section 135, unlike s 137, does involve a discretionary exclusion of evidence, in the presence of one or other of the circumstances identified. For the reasons already mentioned, I am not persuaded that the evidence would be *unfairly* prejudicial.

127 While the evidence of the experts concerning each death, is likely to be complex, and while there clearly will be differences of opinion between them, even significant differences, it can be safely assumed that their views will be carefully and exhaustively explored, and that such differences as persist will be presented to the jury, by the end of the trial, in a way which is understandable. I see no risk, in those circumstances, of this body of evidence being either misleading or confusing.

128 Additionally, since the cause of death is the central issue in each case, it could not be said that the evidence would cause or result in an undue waste of time, as might occur, for example, where it related to some peripheral issue.

129 For these reasons I am also satisfied that neither s 135 or s 137 require that the evidence concerning each death and ALTE be excluded from being available for consideration in relation to each count.

## RELATIONSHIP/TENDENCY EVIDENCE

130 The evidence in question relates to the attitude and conduct of the accused towards each child, as disclosed in the diaries, her husband's evidence, and her ERISP. In substance, it is the Crown submission that she had a tendency or propensity to become stressed and to lose her temper and control with each of the children, and then to asphyxiate them. As such it is relied upon as supporting a motive or reason why the accused would kill or harm her children, in a way which would normally be quite unexpected, and, in that way, to establish that this was a case which involved felonious conduct by the accused.

131 The Crown accepts, that before the evidence can be used as tendency evidence to establish the last step, the jury would need to be satisfied beyond reasonable doubt, in relation to *any one* of the children, that the accused had caused his or her ALTE or death. Once so satisfied, then it submits, the jury can use *that* conclusion and the remaining circumstantial evidence or tendency evidence to assist in deciding whether or not she was responsible for the other deaths or ALTE. In this sense it has a separate significance from that which might apply to its use as circumstantial evidence in support of the coincidence argument.

132 Before the evidence can be used upon this basis, the Crown must satisfy the requirements of s 97(1) of the *Evidence Act* which relevantly provides:

> " ***97*** *(1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind if:*
> *(a) ...*
> *(b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value."*

133 Similar considerations to those relevant for the coincidence rule apply to the tendency rule, in relation to the meaning of the expression "significant probative value": *R v Lockyer* (1996) 89 A Crim R 457 and *R v Lock* (1997) 91 A Crim R 356; as well as in relation to the s101(2) weighing exercise, and to the possibility of exclusion under ss 135 or 137 of the *Evidence Act*.

134 It is doubtful whether reliance upon the evidence identified in the tendency notice would of itself materially advance the Crown case if, as I have held, it is also admissible in conjunction with the medical evidence, in relation to each count as coincidence evidence. However, subject to proof of the matter which the Crown accepts that it would need to establish, by reference to the entirety of the evidence, then I am similarly satisfied that the evidence identified in the notice would qualify as tendency evidence. For the same reasons as those applicable to admissibility under the

coincidence rule, this evidence, when taken in conjunction with the remaining evidence, appears to me to have the necessary probative value, and to be such as to substantially outweigh any prejudicial value it has to the accused.

135 In that regard, I accept that evidence concerning the accused's stress, or anger, or attitude towards the children, has a significant potential probative force in so far as it would provide a reason for the wholly exceptional experience of a mother killing her own children. If the remaining evidence were considered in a vacuum, that is, without reference to these matters, then the jury would be left in a most artificial position, without the assistance which it would need to decide whether the deaths were deliberately caused, or whether they were accidental or resulted, as a matter of mere coincidence, from natural causes, or from the progression of some disease or physical condition.

136 Relationship evidence has an area of overlap with tendency evidence, depending upon the use to which it is put. It may be relevant and properly admissible as a matter going to motive, or so far as it may assist in a choice between accident and misadventure (*Wilson v The Queen* (1970) 123 CLR 334), or as providing a proper context for the consideration by the jury of the particular offence, as in *R v Serratore* (1999) 48 NSWLR 101.

137 It may also have a particular relevance in relation to sexual assault offences of the kind considered in *R v Chamilos* NSWCCA 24 October 1985, *Gipp v The Queen* (1998) 194 CLR 106 and *KRM v The Queen* (2001) 206 CLR 22`1.

138 Whether the evidence is relied upon, in conjunction with the remaining evidence, as relationship evidence, or as tendency evidence, does not appear to involve any practical difference of significance, in this case.

139 For the evidence to be admissible as relationship evidence, I would be minded, in the circumstances of this case, and having regard to sections 135 and 137, to impose a similar test for admissibility as that set by s 101(2).

140 Being satisfied that those tests have been met, I will allow the evidence of the accused's conduct and attitude, with and toward each child, to be admitted into evidence as tendency evidence, in relation to all counts.

141 By reason of these conclusions, I am satisfied that the application of the accused to sever the indictment should be dismissed. I so order.

142 In conclusion, as I have observed, it is sufficient for this application that the expert evidence be limited in the way outlined, that is, to show that induced asphyxia was a possible and consistent cause of each death and ALTE. I would need to be persuaded that the Crown could take the next step, at least having regard to the reports as they presently stand, that it was in fact *the* cause of death, to the exclusion of any other cause as a rational possibility. That is the ultimate issue for the jury which seems to me to depend upon more than the medical evidence.

143 If the Crown wishes to assert that the medical evidence should be permitted to be used in this more positive way, then it will be necessary to hear further argument on this question. I draw attention, in this regard, to the helpful observations of Heydon JA in *Makita (Australia) Pty Limited* (2001) 52 NSWLR 705, concerning the manner in which the expert evidence should be presented, and assessed, by the trier of fact, in a case such as the present. I also draw attention to the decision in *R v Puckeridge* [2000] NSWCCA 193, concerning the way in which causation will need to be left to the jury.

144 I also observe, although neither Counsel have made reference to it, that the case is one where, in relation to the deaths of each of Caleb, Patrick and Sarah, the provisions of s 22A of the *Crimes Act* (infanticide), may have a potential relevance. If applicable, then any wilful act of the accused concerning those children could potentially be dealt with and punished as if it were one of manslaughter rather than murder. Moreover, the occurrence of an act of infanticide, in relation to any one or more of the earlier deaths, might have considerable potential relevance in relation to questions of diminished responsibility (in relation to Caleb, Patrick and Sarah) or of substantial impairment by abnormality of mind (in relation to Laura), which would similarly reduce any relevant offence to one of manslaughter.

145 While I have expressly not taken this circumstance into account in deciding the present application, the similarity of occurrences could have very great probative relevance in relation to any issue or issues arising in this regard, such that any such question would almost certainly require joinder of the counts and tender of the evidence generally.

146 Having regard to the matters discussed in these reasons, and the need to ensure a fair trial, I make an order that these reasons not be published until further order.

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Last Modified: 11/28/2007

# New South Wales
# Court of Criminal Appeal

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| **CITATION :** | **R. v. Folbigg [2003] NSWCCA 17 revised - 30/05/2003** |
| **HEARING DATE(S) :** | 6 February 2003 |
| **JUDGMENT DATE :** | 13 February 2003 |
| | |
| **JUDGMENT OF :** | Hodgson JA at 1; Sully J at 36; Buddin J at 37 |
| **DECISION :** | 1. Application dismissed. 2. The fact of the application and the result may be published, but ordered that the reasons not be published until further order. |

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| **CATCHWORDS :** | CRIMINAL LAW - EVIDENCE - Accused charged with murder of four children - Plea of not guilty - Defence application for separate trials - Coincidence evidence |
| **LEGISLATION CITED :** | Evidence Act ss.97, 98, 101, 135, 137 |

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|---|---|
| **CASES CITED :** | Makin v. Attorney-General for NSW [1894] AC 57<br>Perry v. The Queen (1982) 150 CLR 580<br>Pfennig v. the Queen (1995) 182 CLR 461<br>R v. Geering (1849) 18 LJMC 215<br>R v. Grills (1954) 73 WN(NSW) 303<br>R v. Joiner [2002] NSWCCA 354<br>R v. Le [2000] NSWCCA 49<br>R v. Leask [1999] NSWCCA 33<br>R v. OGD (222) 50 NSWLR 443<br>R v. Phillips [1999] NSWSC 1175<br>R v. Smith (1915) 11 Cr.App.Rep 229<br>R v. WRC [2000] NSWCCA 210<br>Shepherd v. The Queen (1990) 170 CLR 573<br>Sutton v. The Queen (1983-4) 152 CLR 528<br>Thompson v. The Queen (1989) 169 CLR 1<br>W v. The Queen [2001] FCA 1648 |
| **PARTIES :** | Regina<br>Kathleen Megan Folbigg - applicant |
| **FILE NUMBER(S) :** | **CCA** 60496/02 |
| **COUNSEL :** | Mr. M. Sexton SC with Dr. J. Quilter for Crown<br>Mr. P. Zahra SC with Mr. A. Cook for applicant |
| **SOLICITORS :** | S.E. O'Connor for Crown<br>D.J. Humphries for applicant |

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|---|---|
| **LOWER COURT JURISDICTION :** | Supreme Court |
| **LOWER COURT FILE NUMBER(S) :** | SC 70046/02 |
| **LOWER COURT JUDICIAL OFFICER :** | Wood CJ at CL |

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**IN THE COURT OF CRIMINAL APPEAL**
**CCA 60496/02**

**SC 70046/02**

**HODGSON JA**

**SULLY J**
**BUDDIN J**

**Thursday 13 February 2003**

**REGINA v. Kathleen Megan FOLBIGG**

**Judgment**

1 **HODGSON JA:** The applicant Kathleen Megan Folbigg has been charged with the murder of four of her infant children, namely Caleb, Patrick, Sarah and Laura, and with maliciously inflicting grievous bodily harm to Patrick with intent to do him grievous bodily harm, some four months before his death.

2 The applicant applied for an order that the counts relating to the alleged murders of Caleb, Sarah and Laura be heard individually and separately from the counts relating to Patrick. That application was dismissed by Wood CJ at CL on 29 November 2002.

3 The applicant seeks leave to appeal from that decision.

## PRIMARY JUDGE'S DECISION

4 Before the primary judge, the Crown opposed the application, on the basis that evidence relating to the deaths of each child, and an apparent life-threatening event (referred to by the primary judge as an ALTE) concerning Patrick, was admissible in relation to each count as tendency evidence under s.97 of the Evidence Act and co-incidence evidence under s.98 of the Act. Appropriate notices complying with s.99 of the Act had been served. The primary judge accepted that contention of the Crown, and it was for that reason that he rejected the application. The applicant contends that the primary judge was in error, and that, in relation to any one charge concerning one child, evidence relating to the deaths or ALTE of other children would not be admissible as tendency or co-incidence evidence.

5 In his judgment, the primary judge noted that the substantial issue in relation to each count was whether the applicant was responsible for the death or ALTE in question, the Crown case being that the applicant asphyxiated each child; and that the medical evidence showed that there were two possibilities to be considered in each case, namely whether the death or ALTE was the result of natural causes or the result of induced or imposed airway obstruction. He noted that in relation to two deaths, the cause of death was originally ascribed, following autopsy, to sudden infant death syndrome (SIDS), an expression used where no pathology or possible cause for the death of an infant has been found, following appropriate post mortem examination. In such cases, the death is regarded as due to natural causes.

6 The primary judge noted that where pathology is found which may provide a possible, although not definitive, reason for death, the practice of pathologists is to give the cause of death as "not ascertained".

7 In his judgment, the primary judge summarised the facts in relation to the deaths and ALTE which seemed, and indeed still seem, not to be in dispute:

*Caleb Gibson*

*(i) He was born 1 February 1989;*

*(ii) He was born healthy, but he had some difficulty breathing and feeding simultaneously, and he had been diagnosed with transient tachnypnoea prior to his discharge from hospital;*

*(iii) He died on 20 February 1989, aged 19 days;*

*(iv) He was fed by the accused at 1 am, on 20 February 1989;*

*(v) He was found by the accused in his bassinette at 2.50 am, cyanosed and not breathing – the accused was screaming, and this awoke the father, who was asleep;*

*(vi) Caleb was found to be pale, and warm to the touch when seen by ambulance officers;*

*(vii) Post mortem and other medical reports showed:*

§ *Laryngeal or inspiratory stridor (floppy or lazy larynx)*
§ *No inherent metabolic problems or external signs of injury*
§ *Haemosiderin within the lungs which on the medical evidence was not necessarily specific for asphyxia, although it was consistent with it*
§ *mottling on the pleural surfaces and congestion in places showing incomplete aeration.*

*(viii) Dr Cummings' autopsy opinion was that death was due to SIDS.*

*Patrick Alan*

*(i) He was born on 3 June 1990;*

*(ii) He was discharged home in good health and appeared to sleep and feed well;*

*(iii) A sleep study at the Mater Hospital, on 14/15 June 1990, was normal;*

*(iv) On 18 October 1990, while aged 4 months, at 3.30 am, the accused's screams woke the father who was asleep – Patrick, then aged 4 months, appeared pale and limp, his breathing was faint and laboured, but he responded to oxygen given by ambulance officers;*

*(v) While in hospital on the following evening he developed a generalised seizure. A CT scan demonstrated hypodense areas in the temporal and occipital lobes and a possible diagnosis of viral encephalitis was mentioned;*

*(vi) He was later diagnosed to be suffering from a major form of epilepsy, a neurological deficit caused by near asphyxiation, and was also found to have cortical blindness;*

*(vii) The accused threatened to leave her husband and Patrick following this event;*

*(viii) The initial hospitalisation was followed by further admissions in relation to seizures, a bout of gastroenteritis,*

*and an oculogyric crisis (that is, an involuntary tonic spasm of extraocular muscles);*
*(ix) Patrick died on 13 February 2001, aged 8 months, that is, within 4 months of the ALTE;*
*(x) At 10 am the accused rang her husband at work and said, "it's happened again";*
*(xi) Patrick was found in his cot by ambulance officers, with peripheral cyanosis, and without vital signs, although he was still warm to the touch;*
*(xii) A death certificate was issued showing the cause of death to be asphyxia due to airway obstruction and epileptic fits;*
*(xiii) Post mortem examination showed:*

§ *Old infarcts and gliosis in the parieto-occipital areas (both cerebral hemispheres) which Dr Bishop and Professor Berry both thought to be secondary to the earlier cardio respiratory arrest;*
§ *Hepatic congestion, congested postero-basal dependant segments in both lungs, and enlarged thymus;*
§ *No congenital metabolic problems.*

*Sarah Kathleen*
*(i) She was born on 14 October 1992, and was generally a well child, who was said to have been a very loud snorer, who had suffered some apnoea while asleep;*
*(ii) A sleep apnoea blanket was used to monitor her sleeping and to provide an alarm if breathing stopped;*
*(iii) She died on 30 August 1993, aged 10 ½ months;*
*(iv) On 28 August 1993, the accused had moved her to the main bedroom, and had discontinued the use of the sleep apnoea blanket;*
*(v) On the night of 29 August 1993, the accused was angry when Sarah would not settle and at one stage she dumped the child in her husband's lap – eventually Sarah was put to bed by her father in the main bedroom at 10 to 10.30 pm;*
*(vi) At about 1.10 am the father noticed that Sarah and the accused were not in the room;*
*(vii) At 1.30 am the father was awoken by the accused's screams – Sarah was in her cot, cyanosed, with mucus and vomit in her mouth; she was asystolic, and still warm to the touch;*
*(viii) Professor Hilton's opinion, following a post mortem examination, was that the cause of death was SIDS;*
*(ix) Sarah had been treated with antibiotics for a cold;*
*(x) The post mortem examination showed:*

§ *Pulmonary congestion and oedema;*
§ *Some internal petechiae on the pleura, epicardium and thymus;*
§ *No morbid anatomical cause;*

§ *Some bacteria (staphylococcus aureus) in the airways;*
§ *Uvula unusually congested or possibly haemorrhagic lying anterior to epiglottis.*

> *Laura Elizabeth*
> *(i) She was born on 7 August 1997;*
> *(ii) Laura's sleep and breathing patterns were monitored – A corometrics device being used to monitor her vital statistics, and other data, including room temperature and ventilation;*
> *(iii) The monitoring was reduced in August 1998, when Laura was aged 12 months;*
> *(iv) In August 1998, the accused threatened to leave home, and gave a letter to her husband advising that the only thing keeping them together was Laura;*
> *(v) On 1 March 1999, the accused became angry at about 7 am when Laura was crying, and her husband was about to go to work. This led to an argument;*
> *(vi) Laura died on 1 March 1999, aged 19 months;*
> *(vii) At 10.30 am on 1 March 1999, the accused took Laura to her husband's place of work, and then home at about 11.00 am;*
> *(viii) At 12.05 pm the accused phoned 000 and reported that Laura was not breathing;*
> *(ix) Ambulance staff found that Laura was not breathing, in a state of bradycardia, before becoming asystole; cyanosis was evident, and she was warm to the touch. She was taken to hospital but pronounced dead at 12.45 pm;*
> *(x) Laura had a recent upper respitory tract infection;*
> *(xi) The post mortem examination by Dr Cala showed:*

§ *Clear fluid around the nostrils*
§ *Some inflammatory changes in the heart consistent with myocarditis, of probably viral origin;*
§ *Petechial haemorrhages on the anterior aspect of the suprasternal thymus gland;*
§ *Focal haemorrhagic and collapsed lungs;*
§ *No congenital metabolic abnormality.*

> *(xii) Dr Cala could not determine the cause of death, but excluded SIDS.*

8 The primary judge then recorded a number of diary entries made by the applicant upon which the Crown sought to rely, particularly some made following the death of Sarah. The relevant passages of the primary judge's judgment are in pars.[11] to [16], as follows:

> *11 An earlier entry of 3 June 1990 is also said to have significance, being an entry made on the date that Patrick was born, that is, 15 months after Caleb's death, in so far as the accused wrote:*

> “I had mixed feelings this day. Whether or not I was going to cope as a mother or whether I was going to get **stressed out like <u>I did last time</u>** . I often regret Caleb & Patrick, only because your life changes so much, and maybe I’m not a Person that likes change. But we will see?”

*12 After the death of Sarah, the accused and her husband separated for 4 months between January and April 1995, at which point they were reconciled.*

*13 During the period when the accused was contemplating a fifth pregnancy, and later awaiting the birth of Laura, the following entries seem to have particular probative value:*

> **“18th June 96 – Tues – 10.21am.**
> I’m ready this time. And I know Ill have help & support this time When I think I’m going to loose control like last times Ill just hand baby over to someone else. Not feel so totally alone. getting back into my exercise after will help my state of mind & sleeping wherever possible as well. I have learnt my lesson this time.
>
> …
>
> **8-9-96 – Sunday – avo.**
> Feel now is a time for us to have another baby. Have finally realised is the right time for me. I have Craig & he wants a child. That I can give him. And I have enough friends now, not to loose it like before.
>
> …
>
> **30-10-96 – Wednesday 5am**
> I worry that my next child will, suffer my physicological mood swings like the others did. I pray I’m prepared & ready mind wise for this next one. Maybe nature has decided I never will be & it will nevr (sic) happen.
>
> …
>
> **4-12-96 – Thurs – 4.30am**
> I’m ready this time. But have already decided if I get any feelings of jealousy or anger to much I will leave Craig & baby, rather than answer being as before. Silly but will be the only way I will cope. I think

support, & not being afraid to ask for it will be a major plus. Also – I have & will change my attitude & try earnestly not to let anything stress me to the max. I will do things to pamper myself regularly & just deal with things. If I have a clingy baby, then so be it. A cat napper so be it. That will be when I will ask help & sleep whenever I can. To keep myself in a decent mood. I know now that battling wills & sleep depravaision were the causes last time. Fish I've got help – they are relaxing to watch its quite funny.

…

**1-1-97 9.30 pm Wednesday**
Another year gone & what a year to come. I have a baby on the way, which means major personal sacrifice for both of us. But I feel confident about it all going well this time. **I am going to call for help this time** & not attempt to do everything myself any more – I know that that was the main Reason for all my stress before & **stress made me do terrible things** .

…

**4.2.97 – Tues morn, 3.30am**
Still can't sleep. Seem to be thinking of Patrick & Sarah & Caleb. Makes me seriously wonder wether I'm stupid or doing the right thing by having this baby. **My guilt of how responsible I feel for them all, haunts me** , my fear of it happening again, haunts me. My fear of Craig & I surviving if it did, haunts me as well.
I wonder wether having this one, wasn't just a determination on my behalf to get it right & not be defeated by me total inadequate feelings about myself.
What sort of mother am I, have I been – a terrible one, that's what it boils down too – that's how I feel & that is what I think I'm trying to conquer with this baby. To prove that there is nothing rong (sic) with me, if other women can do it, so can I.
Is that a wrong reason to have a baby. Yes I think so, but its too late to realise now. I'm sure with the support I'm going to ask for I'll get through. **What scares me most will be when I'm alone with baby.** How do I overcome that? Defeat that?

…

***17-2-97 – Monday 9.50am***
*[Craig] he should be for me, forever, just because a baby is entering our life makes no difference really, one day it will leave.* ***The others did*** *, but* ***this ones not going in the same fashion*** *. This time I'm prepared &* ***know what signals to watch out for in myself. Changes in mood etc.*** *Help I will get if need be*

***16-5-97 – Fri morn 2am***
*[Mel] I think that she will be a great help in Preventing me from stressing out as much as I've done in the past. Night time & early mornings such as these will be the worst for me, that's when wishing someone else was awake with me will happen.*
Purely because of what happened before. Craig says he will stress & worry, but he still seems to sleep okay every night & did with Sarah. I really needed him to wake that morning & take over from me. This time I've already decided **If I ever feel that way again Im going to wake him up** .

…

**6.7.97 – Fri Nite. 9.30pm**
[Life with Craig] Maybe then he will see when, stress of it all is getting to be too much & **save me from ever feeling like I did before, during my dark moods** .
Hopefully preparing myself will mean the end of my dark moods, or at least the ability to see it coming & say to him or someone hey, help I'm getting overwhelmed here, help me out. **That will be the key to this babies survival.** It surely will. But, enough dwelling, things are different this time, It will all work out for sure."

*14 Following the birth of Laura, the accused made further entries, which the Crown suggests are of significant probative value in relation to her involvement in the deaths of the other children. The first of these was written within weeks of the birth of this child:*

**"25.8.97 – Monday nite 8.30pm**
Scary feelings, I've realised I actually love her & have

bonded with her, wish to protect her etc. Maternal instinct, is what they call it. I now know **I never had it with the others** . Monitor is a good idea. Nothing can happen without the monitor knowing **& since I'm not game enough to not plug it in, because theyd want to know why I hadn't,** Everything will be fine this time."

*15 It was followed by other entries which appear to repeat the theme of the earlier entries concerning the earlier deaths, but which the Crown relies on as showing an increase in her irritability, resentment of the child, in so far as she was required to give up her gymnasium attendances, and anger directed towards the child herself. Of particular relevance are the following entries:*

**"20.9.97 – Sat morn 3.15am**
Sleep, who needs it. Yes I'm getting a little irritable now… **Am getting very stressed,** because I can't depend on Craig for any real help or support… [Craig] How dare he complain to me about lack of sleep – what the fuck would he know. Think he'll have to sleep in other room. Just so He's not disturbed – selfish prick. Well now I know where I stand.

…

**25.10.97 10pm – Sat nite**
Just watched video of Sarah, little upsetting, but she did some funny things…I think I am more patient with Laura. I take the time to figure out what is rong now instead of just snapping my cog…Looking at the video, Sarah was boyish looking. Laura has definite feminine features, they are chalk & cheese. And truthfully just as well. Wouldn't of handled another one like Sarah. She saved her life by being different.

…

**3.11.97 – Monday avo – 6pm**
*Why is it when I'm so tired I'm feeling sick – shitty I can't sleep very depressed with myself at the moment. Feeling deprived of my freedom… Someone's awake got to go, Lost it with her earlier. Left her crying in our bedroom & had to walk out –* ***that feeling was happening*** *. And I think it was because I had to clear my head & prioritise. As I've done in here now. I love her I really do* ***I don't want***

***anything to happen*** *.*

…

**8th Nov- 97 – Monday nite 10pm**
Had a bad day today. Lost it with Laura a couple of times. She cried most of the day. Why do I do that. I must learn to read her better. She's pretty straight forward. She either wants to sleep or doesn't. Got to stop placing so much importance on myself.

Much try to release my stress somehow. **I'm starting to take it out on her** . Bad move. **Bad things & thoughts happen when that happen** . **It will never happen again** .

…

**9.11.97 – Sunday nite 8.45pm**
Craig was pretty drunk Friday nite; In his drunken stupor he admitted that he's not really happy. There's a problem with his security level with me & he has a morbid fear about Laura – he well I know theres nothing wrong with her. **Nothing out of ordinary any way** .
**Because it was me not them.**
Think I handle her fits of crying better than I did with Sarah – I've learnt to .ace (sic) getting to me, to walk away & breath in for a while myself. It helps me cope & figure out how to help her. **With Sarah all I wanted was her to shut up. And one day she did** .

…

***31.12.97 11pm***
*Getting Laura to be next year ought to be fun. She'll realise a Party is going on. And that will be it.*
***Wonder if the battle of the wills will start with her & I then*** *. We'll actually get to see. She's a fairly good natured baby –* ***Thank goodness, it has saved her from the fate of her siblings. I think she was warned.***

…

**20.1.97 (Sic) [should be 1998] – Tuesday 8am**

The gym was a pivotal part of me, And now because I can't go without taking Laura its put a damper on everything. I've had my one & only escape taken away from me.

...

**28.1.98 – Wednesday 5.30pm**
Very depressed with myself, angry & upset.
**I've done it. I lost it with her** . I yelled at her so angrily that it scared her, she hasn't stopped crying. Got so bad I nearly (poss) purposely dropped her on the floor & left her. I restrained enough to put her on the floor & walk away. Went to my room & left her to cry.
Was gone probably only 5 mins but it seemed like a lifetime.
I feel like the worst mother on this earth. **Scared that she'll leave me now. Like Sarah did. I knew I was short tempered & cruel sometimes to her & she left. With a bit of help.**
I don't want that to ever happen again. I actually seem to have a bond with Laura. **It can't happen again** . I'm ashamed of myself. I can't tell Craig about it because he'll worry about leaving her with me.
**Only seems to happen if I'm too tired** her moaning, bored, wingy sound, drives me up the wall. I truly can't wait until she's old enough to tell me what she wants.

...

**Friday Nite 6/3/98 – 10pm**
Laura not well, really got on my nerves today,
**snapped & got really angry, but not nearly as bad as I used to get.** "

*16 The emphasis in the passages extracted from these diaries, has been added, to indicate matters which would appear to be capable of giving rise to admissions in relation to the earlier deaths, and to a build up of stress before the death of Laura. They are said to derive further potential support from the evidence of Craig Folbigg, whose statement speaks of the accused's tendency to become stressed, and to lose her temper and control with her children. The diary entires, it is submitted, support the inference that it was this circumstance which led to their demise, that the accused*

*was aware that she had been personally responsible for their deaths, and that, during the last pregnancy, and after the birth of Laura, she was concerned that these moods would re-emerge, and endanger Laura.*

9 The primary judge then summarised reports by medical experts which the Crown proposed to rely on (Professor Berry, Dr. Carla, Dr. Ophoven, Professor Herdson, Professor Ouvrier, and Dr. Beal), and which the applicant proposed to rely on (Professors Byard and Busutill), as follows:

***Caleb***

*22 Dr Ophoven, a paediatric forensic pathologist said, in her report:*

> " *It is my opinion to a reasonable degree of medical certainty* [an expression which she equated to proof beyond reasonable doubt] *that Caleb Folbigg did not die of the condition known as Sudden Infant Death Syndrome. It is also my opinion that Caleb's death is most consistent with death by suffocation* ."

*23 Professor Peter Berry, a Professor of Paediatric Pathology, noted:*

> "Faced with a similar case [as Caleb Folbigg's death] today, I would not give the cause of death as SIDS because of the finding of haemosiderin in the lungs."

*24 Professor Peter Herdson, a Professor of Pathology, said:*

> " *In my opinion, [in relation to Caleb Folbigg's death], the findings taken in isolation leave the cause of death undetermined, but apparently consistent with Sudden Infant Death Syndrome* ."

*25 Professor Busuttil, a Professor of Forensic Medicine and consultant Pathologist, said in relation to Caleb's death:*

> "5.9 IN SUMMARY

· This death should not have been attributed to SIDS.
· There was a congenital clinically-diagnosed but not pathologically confirmed condition which could have led to upper airways obstruction.
· The presence of some HAEMOSIDERIN in the lungs of this child raises the possibility of imposed airways obstruction.
· Imposed airways obstruction cannot be completely excluded.
· No other metabolic congenital anomaly was found in this child".

***Patrick***

*26 Dr Ophoven said:*

> "Patrick's sudden, profound and irreversible brain damage is consistent with and diagnosed as a hypoxic episode. Hypoxia in this case is synonymous with asphyxia and unfortunately heralds the fatal

event in retrospect. No natural disease or process has been identified to explain this event, nor was there a recurrence of an acute life threatening event observed by anyone except his mother. In my opinion, the cause of Patrick's cardio-respiratory arrest is the same process that killed him… In my opinion the cause of death should be listed as… suffocation."

*27 Professor Berry said:*

"Patrick's initial collapse was never explained. Such 'near-miss' events resulting in brain damage are a cause for concern because the window of opportunity to find a child in extremis and affect the resuscitation is very short, probably a matter of only a few minutes. This raises the question that the person who finds the baby may have been present when the collapse occurred and may have been in its cause. Such 'acute life threatening events' are not part of the usual natural history of SIDS… Taking this case in isolation I would have given the cause of death as 'not ascertained', ascribing it to brain damage following an unexplained collapse, also noting that the child's mother found him both on that occasion and when he subsequently died."

*28 Professor Herdson observed:*

"In my opinion, [in relation to Patrick Folbigg's death], the history of a life threatening episode with subsequent abnormalities would be most unusual for a death to be due to so-called Sudden Infant Death Syndrome and the cause of death in this case is more accurately undetermined."

*29 Professor Busuttil's opinion, in summary, was as follows:*

· This death should not have been attributed to SIDS.
· It should not have been attributed to asphyxia in the absence of typical asphyxial signs at autopsy.
· There was a brain condition, which could have given rise to serious life-threatening convulsions, and death could have occurred in the course of these convulsions.
· The diffuse generalised focal brain damage present could have been the result of a viral infection of the brain, which has healed and it would be almost impossible to specifically identify this cause weeks later – an (sic) encephalitis. This disseminated brain damage could also have resulted from depletion of the oxygen supply to the brain, and therefore imposed upper airways obstruction lasting for a period of minutes.

· It is unlikely that this brain damage resulted from a shaking injury.
· No congenital metabolic problem was conclusively shows (sic) to be present in this child.”

*30 Professor Ouvrier, a paediatric neurologist, provided a report in which he stated:*

> “The clinical history and findings at admission (18 October) coupled with the early onset of seizures which became intractable would be in keeping with encephalopathy due most likely, in my opinion, to an asphyxial episode… The subsequent evolution of the case with episodic tonic upgaze, seizures and decrease in visual attention would have been consistent with brain damage suffered during the event leading to the (October) admission.
>
> The most plausible explanation of the series of events is that there was an acute asphyxial event on the morning of 18/10/1990. Such an event could have been a ‘near miss’ SIDS (ALTE) or could have been due to deliberate suffocation of the infant.”

*Further,*

> “The pathological findings at autopsy would have been consistent with damage due to a serious hypoxic event suffered at the age of 4 months but I cannot exclude the possibility that the findings could have possibly been caused by shaking or trauma since this may sometimes cause apnoea… The final event appears to have been a further asphyxial episode without clear explanation.”

***Sarah***

*31 Dr Ophoven said:*

> “Although the classic classification of SIDS includes children under 1 year of age, this is not the age range accepted by most forensic pathologists and a sudden unexpected infant death, greater than 6 months from the SIDS condition would be considered atypical and by essentially 1 year of age would be excluded. It is my opinion that Sarah’s death is most consistent with death by suffocation.”

*32 Professor Berry observed:*

> “Taken in isolation, the death of Sarah may be ascribed to the ‘Sudden death syndrome’. The post-mortem findings were consistent with that diagnosis. However, at 10 months of age she was older than

most SIDS, the majority having occurred by 6 months of age. That alone is reason for closely scrutinizing the circumstances. I would probably give the cause of death in isolation as SIDS, with misgivings."

*33 Professor Herdson noted:*

"[In relation to Sarah Folbigg's death], I concur with… Associate Professor John MN Hilton…where the findings taken in isolation could be diagnosed as Sudden Infant Death Syndrome, and assessment of the subsequent analysis provided by Professor Peter Jeremy Berry… and Dr Janice Jean Ophoven."

*34 Professor Byard was unsure of the significance of the congested uvula, and said:*

"Given the above points, with no abnormal findings present at autopsy, I would have to label the cause of death as 'undetermined', with an autopsy finding of narrowing of the upper airway".

*35 Professor Busuttil's opinion, in summary, was:*

· No anatomical or other cause of death was found.
· This death approximates most of the four death being reviewed, a typical death from SIDS.
· *The presence of the congested uvula may have produced some upper airway obstruction.*

***Laura***

*36 Dr Ophoven said:*

"It is my opinion to a reasonable degree of medical certainty [that is, beyond reasonable doubt] that Laura Folbigg did not die of the condition known as Sudden Infant Death Syndrome. In my opinion, she does not fall within the age range associated with SIDS and would not be considered for the diagnosis of SIDS for that reason in and of itself. It is my opinion that Laura's death is most consistent with death by suffocation."

*37 Professor Berry said:*

"[In respect of Laura Folbigg], it is recognised that an inflammatory infiltrate in the heart muscle is also quite commonly found in those who die of other causes, for example in road traffic accidents. It has been described as an incidental finding in suffocation. An inflammatory infiltrate in the heart must therefore be quite common in the general population and

probably accompanies some common childhood illnesses. The finding of an inflammatory infiltrate in the heart [as was found in Laura's heart] does not necessarily mean it was responsible for death."

*He also stated:*

"Nevertheless, taken **in isolation** I would have ascribed this death to myocarditis recognising that although the infiltrate was quite extensive, I could not see actual damage to the heart and muscle."

*38 Dr Alan Cala, a Forensic Pathologist, who conducted the post-mortem examination of Laura Folbigg made the following statement:*

"Non-accidental asphyxia in the form of deliberate smothering must be considered as a possible cause of death for Laura Folbigg, and as possible cause of death for the other Folbigg children as well. I remain very suspicious that all four Folbigg children may have died as a result of a deliberate smothering. The medical evidence, however, does not allow me to take this any higher than a suspicion of deliberate smothering."

The inflammatory infiltrate in the heart, consistent with myocarditis, he said, "may represent an incidental finding".

*39 Professor Herdson added:*

*" I concur with…Dr Allan D Cala… where the cause of [Laura Folbigg's] death was undetermined… and I further agree with Dr Cala that his finding of myocarditis is consistent with Laura's recent illness and is probably incidental."*

*40 Professor Busuttil said, in summary:*

· *This death should not have been classified as SIDS.*
· *There is a myocarditits which although may be completely incidental could also have caused serious heart problems and even death acutely and unexpectedly.*
· *This condition could not have been induced by imposed airways obstructions of this child either recently prior to death or previously."*

*41 Professor Byard stated:*

"Given the finding of extensive myocardial inflammation with no abnormalities present I would have attributed the death to myocarditis. An identical

conclusion would be drawn by most pathologists according to Professor Berry."

*42 It can be seen from the foregoing, that these opinions depended on an assessment of the post mortem findings and pathology considered* individually *in each case. I next turn to the overall assessment of the expert witnesses.*

*43 Dr Ophoven observed:*

"It is well recognized that the SIDS [Sudden Infant Death Syndrome] process is not a hereditary problem and the statistical probability that 4 children in one sibship could die from SIDS would be infinitesimally small."

*44 Professor Berry's view was as follows:*

"The sudden and unexpected death of three children in the same family without evidence of a natural cause is extraordinary. I am unable to rule out that Caleb, Patrick, Sarah and possibly Laura Folbigg were suffocated by the person who found them lifeless, and I believe that it is probable that this was the case."

*45 Dr Cala concurred with the following statement from the American Academy of Pediatrics [* Pediatrics *, Vol. 94 Number 1, July 1994, pp 124 to 126]:*

"There is a small subset of infants who die unexpectedly, whose deaths are attributed to SIDS, but who may have been smothered or poisoned. Autopsy cannot distinguish death by SIDS from death by suffocation. A study of infants suffocated by their parents indicates that certain features should raise the possibility of suffocation. These include previous episodes of apnoea (cessation of breathing) in the presence of the same person, previous unexplained medical disorders such as seizures, age at death older than 6 months and previous unexpected or unexplained deaths of one or more siblings or the previous death of infants under the care of the same, unrelated person."

*46 He also said:*

"If homicidal acts have been committed, it is most likely these acts have been in the form of deliberate smothering, whether deliberately or accidentally inflicted may leave no trace. There are no specific post-mortem findings for smothering."

*47 Professor Herdson, when taking all 4 deaths into account, said:*

> "I am unaware that there have ever been three or more thoroughly investigated infant deaths in one family from Sudden Infant Death Syndrome.
>
> Based on all the material that I have reviewed relating to these four infant deaths, in my opinion all four infants probably died from intentional suffocation.

· In drawing this conclusion, apart from my comments above, I would draw attention to the wide age range of the children at the time of the initial observed events or deaths, twenty days for Caleb to approximately nineteen months for Laura.
· The fact that two infants, Patrick on 18.10.90 and Laura on 1.3.99, were found moribund rather than dead is not the pattern associated with Sudden Infant Death Syndrome"

*48 Dr Susan Beal, a paediatrician, made the following statement:*

> "Based on the records I have examined in regards to the family Folbigg, I have no hesitation in saying I believe that all four siblings were murdered… As far as I am aware there has never been three or more deaths from SIDS in the one family anywhere in the world, although some families, later proved to have murdered their infants had infants who were originally classified as SIDS."

*49 Professor Busutill observed:*

> "9.3 As far as one can ascertain, there was **no** congenital metabolic abnormality demonstrated in any or all of these children that could have caused them to die suddenly and unexpectedly.
>
> 9.4 These deaths are **not** all due to SIDS, and with exception of the third death other conditions, which could [be] life-threatening, were present and should have been taken into consideration by the pathologist and by the Coroner in coming to an eventual cause of death.
>
> 9.5 It certainly **cannot** be said, indeed beyond reasonable doubt, that these deaths were irrefutably due to imposed or induced airways obstruction, as by suffocation.

9.6 In three of these deaths such a possibility should have carefully considered on pathological grounds in the differential diagnosis as one possibility among many; it certainly is **not** the only possible explanation for these deaths because of the presence of other physical disease which could have caused sudden unexpected death."

*50 Professor Byard, a specialist Forensic Pathologist and Consultant Paedeiatric Forensic Pathologist observed:*

"The autopsy findings, [in relation to each child] cannot be taken in isolation and with the occurrence of 4 deaths within the same family and police concerns I would list the causes of death as follows:

1. Caleb: Undetermined, with laryngomalacia;
2. Patrick: Undetermined, cannot exclude epilepsy;
3. Sarah: Undetermined, with narrowing of the upper airway;
4. Laura: Undetermined, cannot exclude Myocarditis.

In my view the critical issue in the pathology of these cases is the presence of underlying conditions which are known to cause sudden death in young children and babies. I am certainly concerned that there may have been inflicted suffocation but could not state unequivocally that this had occurred, and could not agree that their autopsies have failed to 'identify any known natural disease or disease processes that could explain the sudden deaths', as has been stated by Dr Ophoven.

Although these cases are discussed in several of the expert reports as SIDS deaths they cannot, by definition, be regarded as such, either on their own or together. Thus, comments on the significance of the presence or absence of SIDS risk factors and use of statistics derived from SIDS deaths are not applicable.

The unusual background of this family with many issues of concern does not negate the fact that potentially significant organic illness was present in these children. Upper airway narrowing, epilepsy and myocarditis may have been coincidental to their deaths, but alternatively may have been causative or

contributory; unfortunately this issue cannot be clarified from the autopsy records. Given the information that I have been provided with I simply cannot see how the significance of these conditions can be down-played as potential causes of death, no matter how worrying the circumstances are."

10 The primary judge set out the co-incidence notice as served by the Crown, as follows:

> *"Notice is given that the Prosecution presently intends to adduce 'coincidence' evidence pursuant to the coincidence rule in sub-section 98(1) of the Evidence Act 1995, ie. Evidence that 2 or more related events occurred to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind.*
>
> *1. The 'person' referred to in the proceeding (sic) paragraph is Kathleen Megan FOLBIGG.*
>
> *2. The substance of evidence of the occurrence of the related events is contained within the following documents which previously have been served upon you. The Crown alleges that the coincidence evidence establishes:*
>
> > *(i) that each of the accused's children died/had an ALTE (Apparent Life Threatening Event) in a similar way*
> > *(ii) that each of the accused's children died/had an ALTE from the same cause*
> > *(iii) that the accused killed/caused an ALTE to each of the four children by asphyxiating them with the intent to kill or do GRIEVOUS BODILY HARM to them.*
> > *(iv) that the accused's four children did not die from Sudden Infant Death Syndrome or any other illness, disease or syndrome."*

11 He continued:

> *62 The material relied upon by the Crown as coincidence evidence is that which relates to similarities in the circumstances concerning the death or ALTE of each child, as identified in a chart prepared by it, namely that:*
>
> *(i) each child was under 2 years of age at the time of death or ALTE (and it may be noted, additionally, that three such deaths and one ALTE occurred in the first year of life);*
>
> *(ii) each death occurred at a time which is unusual for a SIDS event;*

*(iii) each death occurred in the child's own cot or bed;*

*(iv) each death or ALTE occurred during a sleep period;*

*(v) each child was last seen alive by the accused;*

*(vi) each child was found not breathing by the accused, and in relation to those who died in the night, she claimed to have observed from a distance, and in the dark, that they had stopped breathing;*

*(vii) only the accused was awake or present at the time when each child was found dead or not breathing;*

*(viii) there was, in each case, a short interval between the time when the child was last claimed to have been seen alive by the accused, and the time when he or she was found lifeless or not breathing properly;*

*(ix) in relation to the children who died in their cots or had an ALTE in the night, the accused had got up to go to the toilet, and in some cases had returned to bed, before getting up again and sounding the alarm;*

*(x) the accused had failed to pick up or attempt to resuscitate any of the children after the discovery of his or her death or cessation of breathing (subject to her claim to have done so in relation to Laura);*

*(xi) when each child was found he or she was warm to the touch;*

*(xii) there were no signs of any injury found on any child;*

*(xiii) no major illness preceded the death or the ALTE in any of the cases;*

*(xiv) each of Caleb, Sarah and Laura gave every appearance of being normal and healthy before his or her death, as had Patrick before his ALTE;*
*(xv) the sleep studies for each child were normal (save for Caleb, who by reason of being the first born was not the subject of any such study);*

*(xvi) the tests for any inherited and/or biochemical disorder or metabolic abnormality were negative in each case;*

*(xvii) the death or ALTE in each case, arose from an hypoxic event;*

*(xviii) the sleep monitors, which had been provided following the earlier deaths and ALTE, were not in use at the time of death in the case of Sarah and Laura; and*

*(xix) the accused had shown acute irritation in relation to each child, or appeared to have been in a condition of stress, before the death or ALTE.*

12 The primary judge referred to relevant statutory provisions, as follows:

*70 The coincidence rule is now enshrined in s 98 of the* Evidence Act *, which provides, relevantly (notice having been given), as follows:*

> " **98** (1) Evidence that 2 or more related events occurred is not admissible to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind if:
> (a) ...
> (b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.
> (2) For the purposes of subsection (1), 2 or more events are taken to be related events if and only if:
> (a) they are substantially and relevantly similar, and
> (b) the circumstances in which they occurred are substantially similar."

*71 If this test is passed, then before the evidence can be led it must also pass through the hurdle of s 101(2) as well as that contained respectively in s135 and s137 of the Act. S 101(2) requires that its probative value (to a fact in issue) "substantially outweighs any prejudicial effect it may have on the defendant."*

*72 Under s 135, the Court has a general discretion to refuse to admit the evidence:*

> "if its probative value is substantially outweighed by the danger that the evidence might:
> (a) be unfairly prejudicial to a party, or
> (b) be misleading or confusing, or
> (c) cause or result in undue waste of time;"

*and, under s 137, it is bound to refuse to admit the evidence*

*if "its probative value is outweighed by the danger of unfair prejudice to the defendant".*

*73 The* "probative value *" of evidence is defined in the Dictionary to the Act as "* …the extent to which the evidence could **rationally** affect the assessment of the **probability** of the existence of a fact in issue" *– here the probability that the death of each child, and of Patrick's ALTE, was due to asphyxiation. The inclusion of the word "* rationally *", in the definition, is of importance, having regard to the need for consideration to be given, both to the force of the evidence, and to the question of unfairness associated with any risk of it being used in a way that is not logically connected with the relevant issue, or of it being given undue weight in the resolution of that issue:* R v Lockyer *(1996) 89 A Crim R 457 at 460, and* R v Colby *[1999] NSWCCA 261.*

13 At par.[81] of the judgment, the primary judge accepted the proposition that co-incidence evidence must be excluded unless, taken in conjunction with the other evidence, its only rational explanation was the inculpation of the accused in the offence in question, having referred inter alia to Pfennig v. The Queen (1995) 182 CLR 461, R v. WRC [2002] NSWCCA 210 and R v. Joiner [2002] NSWCCA 354.

14 The primary judge's main conclusions are set out at pars.[106] to [109] of the judgment, as follows:

*106 When considered in the context of the remaining circumstantial evidence, and particularly the diary extracts, which I have highlighted, it is my view that the requirements of ss 98 and 101(2), as noted above, have been met in the present case.*

*107 What is critical, it seems to me, is that the medical evidence is part of a circumstantial case, in which the jury might properly take into account the following:*

*(a) The infrequent incidence of SIDS;*

*(b) The rarity of repeat incidents of SIDS and of unexplained infant deaths or ALTE's within one family;*

*(c) The absence of any metabolic abnormality in any of the children, let alone a common abnormality;*

*(d) The fact that each was a healthy child and that such physical or medical conditions, as were observed post mortem, were unlikely causes of death;*

*(e) The absence of any sleeping abnormality in the three*

*children who were tested and/or monitored;*

*(f) The fact that monitoring was provided but then ceased in relation to Sarah and Laura – a matter of some importance in view of the diary entry of 25 August 1997;*

*(g) The fact that two of the children were found by the accused within the very brief window between a child being found moribund and dead;*

*(h) The fact that all children were found by the accused while they were still warm, even though in four of the five relevant instances this occurred at night;*

*(i) The unexplained absence of Sarah and the accused at about 1 am, shortly before she was found dead;*

*(j) The unusual behaviour of the accused in getting up from bed, leaving the room, returning, and then getting up again only to discover, in the case of some of the children, that they were moribund or lifeless;*

*(k) The fact that she claimed to have observed, in the dark and from some distance away, that some of them were not breathing;*

*(l) The stress and anger which the accused had expressed toward the children;*

*(m) The fact that the accused would not nurse or endeavour to resuscitate the children when they were found; and*

*(n) The diary entries including, in particular, the sections which I have emphasised in the extracts set out earlier in these reasons, so far as they may reveal an absence of love for, or a bond with, the children, an acceptance by the accused of her hand in their deaths, her black moods and stress, her fears as to the way she behaved when stressed, and any resentment which she may have held in relation to the curtailment of her outside activities by reason of the need to care for Laura.*

*108 In the light of the circumstances mentioned, this is not a case dependant entirely upon the medical evidence. Were it otherwise, then there could well have been a very real difficulty for the Crown in excluding natural causes, whether it be SIDS or the presence or the progression, of some*

> *physical defect or disease process, as a rational cause of death or of Patrick's ALTE.*
>
> *109 In summary, the facts which have been identified by the Crown in relation to each of the deaths appear to me to be substantially and relevantly similar when considered in the absence of any common metabolic abnormality, or outward sign of injury, or otherwise life threatening disease or medical condition. When further considered in the light of what appears, prima facie, to be significant admissions by the accused, in the diaries concerning the deaths of some of the children, as well as the evidence concerning her moods and irritation, proximate to their deaths, then I am left with the view that the test in* WRC, Joiner, *and* Pfennig *is satisfied. The evidence would, in combination, be such, if accepted, that no reasonable view would remain open that would be consistent with the innocence of the accused.*

15 The primary judge then considered whether the evidence on each count was admissible in relation to other counts as tendency and/or relationship evidence. He noted that its use as tendency evidence, though not as co-incidence evidence, would pre-suppose that a decision was first made that the applicant was responsible for one of the deaths of ALTE, and then that that decision would be relied on as supporting a decision that she was responsible for other deaths. The primary judge concluded that evidence of the applicant's conduct and attitude with and towards each child would be admitted into evidence as tendency evidence in relation to each count.

**SUBMISSIONS OF APPLICANT**

16 No written grounds of appeal have been provided, but Mr. Zahra SC on behalf of the applicant has made extensive written and oral submissions. They indicate that the essential ground of the appeal is that the primary judge was in error in ruling that on each count evidence in relation to other counts would be admissible as coincidence or tendency evidence.

17 In the written submissions, Mr. Zahra submitted that the test of admissibility required that the evidence allow for no reasonable view of it consistent with innocence: see Pfennig. He pointed out that this was not a case where the Crown sought to rely on other proven homicidal acts to prove its case, as in Thompson v. The Queen (1989) 169 CLR 1. Rather, the Crown was seeking to prove asphyxiation in relation to each one of four deaths, by using evidence in relation to the other three, when in no case did the evidence in relation to just one of the deaths prove asphyxiation; and accordingly, the evidence lacked the probative force required by Pfennig: cf. R. v. Phillips [1999] NSWSC 1175.

18 Mr. Zahra submitted that the Crown wished to invite the jury to conclude that, whereas one event might be explicable in terms of a misadventure, the repetition of events made such an explanation implausible. This made

the impermissible assumption that each event is of itself relevant in that it was a non-accidental death: see Sutton v. The Queen (1983-4) 152 CLR 528, Perry v. The Queen (1982) 150 CLR 580.

19 Mr. Zahra submitted that the primary judge erred in not identifying any sequence in assessing the admissibility of the similar fact evidence, and failing to identify any starting point for the process: he was wrong to say that this was a matter to be dealt with by Crown addresses, and then by the jury, when it had to be dealt with by the judge in determining the question of admissibility. The primary judge did not, as required by ss.98 and 101 of the Evidence Act, in relation to each count, first assess the probative force of the evidence, and then consider whether this evidence bore no reasonable explanation other than the guilt of the applicant on the offence charged.

20 In oral submissions before us, Mr. Zahra submitted that the primary judge made a further error in relying on medical evidence which would not be admissible at the trial because it was based not on medical expertise but on the medical experts' views on matters of probability and statistics: the view of some of the medical experts that the occurrence of four such deaths by natural causes was so improbable that they must have been caused by some unlawful act was a matter outside medical expertise and a matter which would be excluded as going to the ultimate question to be decided by the jury. In the case of some of the medical evidence relied on by the primary judge, the views of the experts as to the cause of death was tainted by that kind of reasoning: indeed, Mr. Zahra submitted, Dr. Ophoven and Dr. Beal did not rely on any other reasoning. Mr. Zahra submitted that, at least if one eliminated this unsatisfactory reasoning, the medical evidence in this case could do no more than raise suspicion; and in that respect, this case was indistinguishable from R v. Phillips. Mr. Zahra referred us to reports of a recent Court of Appeal decision in the matter of Clark, a previous decision in which had been reported as R v. Clark (2000) EWCA 54. In that recent decision, the English Court of Appeal overturned a conviction based on similar fact evidence of this kind, and the Court was invited to withhold judgment in this matter until the report became available, which was expected to be in about two weeks from the hearing of this application.

21 Mr. Zahra also submitted that the failure of the Crown and of the primary judge to identify any sequence in dealing with the similar fact evidence pointed up the real difficulty that would occur in leaving the questions to the jury: this difficulty and the confusion that was likely to be occasioned in leaving the matters to the jury could be considered part of the prejudicial effect of the evidence which had to be taken into account under s.101.

**SUBMISSIONS OF CROWN**

22 Mr. Sexton SC submitted that s.101(2) of the Evidence Act posed the question of whether the probative value of the evidence substantially outweighed any prejudicial effect on the defendant, requiring a comparison of probative value and prejudicial effect rather than a rigid requirement that

there be no rational view consistent with the evidence other than the guilt of the accused: see Pfennig at 516-7, 531-2 per McHugh J, R v. Leask [1999] NSWCCA 33 at [49]-[53], R v. Le [2000] NSWCCA 49 at [112]-[118], W v. The Queen [2001] FCA 1648 at [52]-[61], [101]-[105]. Further, Pfennig was decided on the common law, not on s.101(2); and the statutory test should be applied, not the High Court's view of the common law: see Leask at [53], R v. OGD (2000) 50 NSWLR 443 at [55].

23 Mr. Sexton submitted that, even if the Pfennig test had to be satisfied, the primary judge was correct in finding that it was satisfied in this case. The applicant's submissions were incorrect in suggesting that the medical evidence had to be looked at in isolation, and in suggesting that it was necessary for the evidence in relation to any one event of death or ALTE to prove involvement of the applicant before it could be admissible in relation to other such events: see Makin v. Attorney-General for New South Wales [1894] AC 57, R v. Smith (1915) 11 Cr App Rep 229, R v. Geering (1849) 18 LJMC 215, R v. Grills (1954) 73 WN(NSW) 303.

**WHAT IS THE CORRECT TEST?**

24 In WRC at [25]-[29], I said the following:

> *25 In my opinion, Pfennig is highly relevant to the effect of ss.97, 98 and 101 of the Evidence Act, in that the principles there stated concerning circumstances in which the probative force of similar fact evidence substantially outweighs its prejudicial effect are directly applicable to questions raised for decision by ss.101 and 137 of the Evidence Act: R v. AH (1997) 42 NSWLR 702. OGD does not suggest the contrary.*
>
> *26 The essence of the approach to similar fact evidence, such as propensity evidence, established by Pfennig appears in the following passage from the judgment of Mason CJ, Deane J and Dawson J at 482-3:*
>
> > Because propensity evidence is a special class of circumstantial evidence, its probative force is to be gauged in the light of its character as such. But because it has a prejudicial capacity of a high order, the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is consistent with the innocence of the accused. (Hoch (1988) 165 CLR at 296 (where Mason CJ, Wilson and Gaudron JJ expressed agreement with the remarks of Dawson J in Sutton (1984) 152 CLR at 564). See also Harriman (1989) 167 CLR at 602). Here "rational" must be taken to mean "reasonable" (See Peacock v. The King (1911) 13 CLR 619 at 634; Plomp v. The Queen (1963) 110 CLR 234) and the trial judge

must ask himself or herself the question in the context of the prosecution case; that is to say, he or she must regard the evidence as a step in the proof of that case. Only if there is no such view can one safely conclude that the probative force of the evidence outweighs its prejudicial effect. And, unless the tension between probative force and prejudicial effect is governed by such a principle, striking the balance will continue to resemble the exercise of a discretion rather than the application of a principle.

*27 Plainly, that passage does not mean that the judge must look at the propensity evidence in isolation, and not admit it unless there is no reasonable view of the evidence so considered that is consistent with the innocence of the accused of the offence with which the accused stands charged. That approach would be quite inconsistent with the correct approach for considering circumstantial evidence, as explained in Shepherd v. The Queen (1990) 170 CLR 573; and the quoted passage proceeds by reference to the character of propensity evidence as circumstantial evidence.*

*28 On the other hand, nor can it mean that the judge must look at all the evidence in the case, including the propensity evidence, and admit the propensity evidence if and only if there is no reasonable view of all the evidence that is consistent with the innocence of the accused: that approach would disregard altogether the need for some special probative value of the propensity evidence.*

*29 In my opinion, what it must mean is that, if it first be assumed that all the other evidence in the case left the jury with a reasonable doubt about the guilt of the accused, the propensity evidence must be such that, when it is considered along with the other evidence, there will then be no reasonable view that is consistent with the innocence of the accused. That is, the propensity evidence must be such that, when it is added to the other evidence, it would eliminate any reasonable doubt which might be left by the other evidence.*

25 In Joiner at [37], I adhered to what I said in WRC.

26 I note the criticism by McHugh J of the majority view in Pfennig, set out at 516 of that case:

*If evidence revealing criminal propensity is not admissible unless the evidence is consistent only with the guilt of the accused, the requirement that the probative value 'outweigh' or 'transcend' the prejudicial effect is superfluous. The evidence either meets the no rational explanation test or it*

*does not. There is nothing to be weighed - at all events by the trial judge. The law has already done the weighing. This means that, even in cases where the risk of prejudice is very small, the prosecution cannot use the evidence unless it satisfies the stringent no rational explanation test. It cannot use the evidence even though in a practical sense its probative value outweighs its prejudicial effect.*

27 I note also that Pfennig was decided on the basis of the common law, not s.101(2); and I accept that this Court must apply the statute, and not the common law as expounded by the High Court. However, the majority of the High Court in Pfennig plainly said that only if there was no rational view of the evidence consistent with the innocence of the accused could the Court safely conclude that the probative value of the evidence outweighed its prejudicial effect; and in my opinion that statement is applicable to the test stated by s.101(2). Accordingly, unless and until the High Court of Australia says differently, I think this Court must apply the Pfennig test.

28 I set out in WRC in the passages quoted how I understand the Pfennig test to operate. I would add that the test certainly does not require the judge to reach the view that the jury acting reasonably must convict: the judge must form his or her own view as to whether there is no rational view of the evidence, as it then appears to the judge, which is consistent with innocence, and the judge does not need to speculate as to how precisely that evidence may be affected by the way it is presented at the trial or by cross-examination, or how other minds might view it. Furthermore if, as the trial progresses, there are grounds for contending that the evidence as presented turns out to be substantially different from how it appeared at the time of the determination of admissibility or the joinder of counts, there may be a ground to apply for those questions to be re-considered.

**DID THE PRIMARY JUDGE ERR IN APPLYING THAT TEST?**

29 The primary judge purported to apply the Pfennig test, so the next question is whether he erred in his application of the test. Dealing first with the submission concerning the medical evidence, in my opinion the primary judge was careful to base his decision only on so much of the medical evidence as was not in any way affected by statistical considerations in such a way as to be liable to be rendered inadmissible. In my opinion, this appears from pars.[82]-[83], and [97] and [142] of the judgment as follows:

*82 It is next convenient to apply these principles to the evidence which the Crown expects to lead. As I currently understand that evidence, it will be the expert opinion of each of Drs Ophoven and Beal, and of Professors Berry and Herdson, that each child died of intentional suffocation. Drs Ophoven and Beal reach that conclusion without qualification, while Professors Berry and Herdson express that view as a probability.*

> *83 The other experts, including Dr Cala, and Professors Byard and Busutill fall somewhat short of this, although they accept that deliberate smothering or induced asphyxia, cannot be excluded in any one of the 4 deaths or in Patrick's ALTE. What all experts do appear to exclude, in the light of what is now known, however, as a cause of any of the deaths or of Patrick's ALTE, is SIDS, or any underlying congenital metabolic abnormality. Moreover, while some other possible medical conditions have been identified, none of the experts are prepared to ascribe, as the cause of death or of the ALTE, any natural disease process, to the* exclusion *of other possible causes, including smothering.*
>
> *...*
>
> *97 The present case differs in this respect. The critical circumstance in this case, and where it seems to me to differ from* Phillips *, is that it is sufficient for the Crown to point, in each case, to the evidence of each expert which would exclude SIDS as a cause; which would identify the improbability of the various incidental medical conditions which were observed post mortem as the cause of death or of the ALTE's, and which would then identify asphyxia, as a possible or probable cause of death. It appears to me to be enough, in a circumstantial case, for the Crown to establish that asphyxia was a possible cause of death, and that the findings on post mortem examination are, in the opinion of the experts following their independent review,* consistent *with that having been the causative mechanism.*
>
> *...*
>
> *142 In conclusion, as I have observed, it is sufficient for this application that the expert evidence be limited in the way outlined, that is, to show that induced asphyxia was a possible and consistent cause of each death and ALTE. I would need to be persuaded that the Crown could take the next step, at least having regard to the reports as they presently stand, that it was in fact* the *cause of death, to the exclusion of any other cause as a rational possibility. That is the ultimate issue for the jury which seems to me to depend upon more than the medical evidence.*

In my opinion, what the primary judge is saying in those paragraphs is that there is little, if any, dispute in the medical evidence, in so far as it indicated that in each case medical considerations alone left a possibility that the cause was asphyxiation, this being a reasonable

possibility and not a possibility which was merely remote or fanciful; and that there was no other cause which could be considered as something more than a reasonable possibility. The primary judge having approached the matter in that way, I think it is appropriate for this Court to do likewise, and consider whether, treating the medical evidence in that way, it considers the primary judge erred in holding that the s.101 test was satisfied.

30 In my opinion, the other principal submission of the applicant is based on a misconception of the principles concerning circumstantial evidence. As shown by Shepherd v. The Queen (1990) 170 CLR 573, it is of the essence of circumstantial evidence that the totality may prove a case beyond reasonable doubt whereas each piece of evidence considered on its own may prove nothing and may even be considered irrelevant in the absence of other evidence. In this case, if it be the case that it is only the occurrence of four deaths in similar circumstances that could prove that the applicant was responsible for any one of them, and that the evidence relating to any one of them without the evidence relating to the others would prove nothing, then this would not of itself mean that the Pfennig test could not be satisfied.

31 In my opinion, it is necessary in relation to each count for the Court to consider the evidence relating to that count in the absence of evidence relating to the other counts, and consider whether any deficiency of proof of the appellant's responsibility for the death or ALTE in question would be overcome by the evidence relating to the other counts, so that the latter evidence would leave no rational view consistent with innocence in relation to the particular count being considered.

32 The primary judge did not explicitly undertake that course, but in my opinion that is the substance and effect of what he did. Furthermore, my own view is that, on following that course in relation to each count, there would be a deficiency of proof of guilty in relation to each count without evidence concerning the other children, but that the additional evidence concerning the other children would leave no rational view consistent with innocence in relation to the particular count being considered. I say so essentially for the reasons given by the primary judge, especially the extreme improbability of four such deaths and one ALTE occurring to children in the immediate care of their mother, with asphyxiation being a substantial possibility and no other cause of death being anything more than a substantial possibility, without the mother having contributed to any of those deaths, particularly in the light of the diary entries referred to by the primary judge. The contribution to the death may have been an unlawful act amounting to manslaughter rather than murder, but that would be sufficient in my view to satisfy the Pfennig test, when manslaughter is an alternative verdict available on a charge of murder.

33 As to whether there would be prejudice arising from confusion from the way the matter was left to the jury, it seems to me that the following course could be taken. The jury could be asked to consider first whether there is

any reasonable possibility that all deaths and the ALTE occurred by natural causes without any contribution from the applicant. If they do consider there is such reasonable possibility, that would be the end of the matter and a verdict of not guilty should be returned on all counts. If they consider there is no reasonable possibility that all incidents occurred by natural causes without a contribution from the mother, it would be pointed out that that conclusion does not mean that there was a contribution from the mother in each and every individual case, and it is necessary then to turn to consider the evidence in each individual case. The judge would then explain to the jury what evidence could be considered in relation to each count. There is a possibility of confusion, and I accept that this is prejudice within s.101, as well as ss.137 and 135. However, I think that the probative value of the evidence is such that it does substantially outweigh any prejudicial effect, so that the s.101 test is passed. In my opinion also, the evidence would not be excluded under s.137 or s.135.

34 In my opinion, in relation to each count, the evidence concerning the other counts and other children is admissible as coincidence evidence. That view is sufficient to justify refusing separate trials. It is not necessary to consider whether the evidence is admissible as tendency evidence.

**CONCLUSION**

35 For those reasons, in my opinion the application should be dismissed. The fact of the application and the result may be published, but I would order that the reasons not be published until further order.

36 **SULLY J:** I agree with Hodgson JA.

37 **BUDDIN J:** I agree with Hodgson JA.

Last Modified: 06/02/2003

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IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No S59 of 2003

B e t w e e n -

KATHLEEN MEGAN FOLBIGG

Applicant

and

THE QUEEN

Respondent

Summons

McHUGH J

(In Chambers)

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON WEDNESDAY, 19 FEBRUARY 2003, AT 2.15 PM

**MR P.R. ZAHRA, SC:** If your Honour pleases, I appear for the applicant with my learned friend, **MR A.P. COOK**. (instructed by Legal Aid Commission of New South Wales)

**MR M.G. SEXTON, SC**, Solicitor-General for the State of New South Wales: If your Honour pleases, I appear with my learned friend, **MS J.A. QUILTER**, for the respondent. (instructed by the S.E. O'Connor, Solicitor for Public Prosecutions (New South Wales))

**HIS HONOUR:** Yes, Mr Zahra.

**MR ZAHRA:** Thank you, your Honour.

**HIS HONOUR:** Mr Zahra, as you are probably aware, my practice is that on these stay applications you do not get any longer than you would on a special leave application. I have read your submissions. I have read the affidavit. I have read all the papers. So you have 20 minutes to put what you want to put. Thank you.

**MR ZAHRA:** Thank you, your Honour. Your Honour, I accept that it is incumbent that we argue and bring this matter within the description of "exceptional circumstances", that there is, in fact, a threshold issue which involves the question of the preservation of the rights of the parties and, on the other hand, the question of the balance of the convenience of the Court. In that regard, the Court has indicated in the past that one needs to avoid situations in which the administration of justice in the criminal courts is impeded unduly. Your Honour has an affidavit of Laurel Kay Baglee setting out the background to the trial.

**HIS HONOUR:** Yes, I have read that.

**MR ZAHRA:** That is, in fact, accurate. Can it be, however, said that what is not explicit in that history is that there has been no delay in the proceedings up to this point. This was a matter where there were no committal proceedings. The matter was listed for arraignment. The trial date was set on the first arraignment date and the first available trial date was, in fact, given.

**HIS HONOUR:** Now, I take it that the applicant has been arraigned in the indictment and asked to plead.

**MR ZAHRA:** Yes, your Honour.

**HIS HONOUR:** I think it would be preferable not to mention the particular facts of the case if you can avoid it.

**MR ZAHRA:** Yes, your Honour, I understand that. Your Honour, it is important to note in relation to the background of the proceedings so far that there has been no delay. The matter has proceeded expeditiously. The application for separate trials was made before the trial judge – in fact, flagged at the outset. An agenda was set for disclosure and the application under 5F proceeded at the first available date subsequent to the trial judge's rulings.

**HIS HONOUR:** Have the trials commenced at all?

**MR ZAHRA:** No. No, this is not a case of fragmentation in the sense that the trial has not yet commenced. So there has not been any delay. The trial judge, in fact, after he delivered the judgment raised the appropriateness of ventilating the issue pursuant to section 5F which, in fact, we did and we obtained the first available date. The Court of Criminal Appeal reserved and handed down the decision the following week. So this is not a matter where there has been fragmentation. There has not been undue delay. The matter has proceeded expeditiously at the present time and what, in fact, is sought here is the opportunity to ventilate what we submit is an appropriate special leave point and a special leave point that involves significant issues.

Can I indicate to your Honour the substantial basis on which we say that if this Court does not intervene that the rights of the parties will not be reserved. This matter is expected to achieve quite some publicity. There has already been substantial publicity, but the nature of the trial, the reporting of this matter is likely to be daily in both the print and television media. She, in fact, is presently on bail. She will be entering and exiting the court. One would expect that images will be portrayed of her in the media. Her name will become commonplace in the community. This is not a case that if the Court subsequently finds error, that the Court could go to remedies that were suggested in *Murphy*, where the matter might be delayed so that the memories of prospective jurors might be somewhat faded.

**HIS HONOUR:** Well, that might be to your client's advantage. It may be that the Court would take the view that a fair trial would not be possible.

**MR ZAHRA:** Yes. I was about to submit, your Honour, that that is no doubt another consideration because "the parties" also means the Crown and that may not be in the community's interest where the proceedings are stayed. It may not be in the community's interest that the matters do not proceed to trial.

**HIS HONOUR:** But is this not something of a red herring because if your argument is correct, is there a case in respect of any of the individual cases? It does not seem a real possibility on your argument.

**MR ZAHRA:** Well, up until the present time, we have not been told by the Crown that they do not intend to proceed with individual counts. So we proceed on the basis that we expect that the trials will proceed individually. So even if the trials were to proceed individually, the prospect is that the accused's name will be very prominent in the community. It will be attended by much publicity.

The other danger is no doubt the danger your Honour has implicitly referred to a moment ago, and that is that once her name is typed into the Internet the reporting, in fact, of the case will be revealed. There is no mechanism by which the Court can exclude the major media outlets from removing the reporting of the matter. Even if that were so in this country, the matter is likely to achieve international publicity, particularly in the United Kingdom. There was a case very much the same as this, the matter of Sally Clark, which continues to be reported in the media, especially in recent times. So the danger of prejudice because the information about the number of counts will be very much in the public domain. That would include, obviously, even if the trials were to proceed separately, just the physical image of the accused which will become familiar, let alone the prospect of the name also becoming somewhat common knowledge.

Can I take your Honour to the questions of the special leave point. As the submissions make clear, that the special leave point will involve a consideration of the appropriate test, particularly under section 101, the question of whether the common law statement in *Pfennig* - - -

**HIS HONOUR:** Yes, but you have succeeded on that point. It seems to me that your big difficulty in this, on a special leave application, is that the case concerns an application of principle given your success before Justice Wood in the Court of Criminal Appeal. So it is a question that both courts applied *Pfennig*, a proposition, I have to say, I would regard as rather doubtful, and you succeeded on that point. Thereafter it seems to be nothing else but an application of the principle.

**MR ZAHRA:** I understand what your Honour has said in the matter of *Pfennig*, but underlying *Pfennig* is the rationale that the prejudice in propensity cases, the fact that capacity of prejudice of a high order, that, in fact, is the rationale of *Pfennig*. No doubt that they have established a rule, but underlying that is, in fact, a recognition of the capacity of prejudice of a high order. In fact, that is the terminology which I have taken from *Pfennig*. Now, this case raises the issue as to how the question of prejudice to be assessed, particularly in a circumstantial case. So putting aside - - -

**HIS HONOUR:** You have to look at the statute. I mean, I believe I know as much about the law of evidence as most people, but it is an invitation to

error to start looking at this Act in terms of the common law rules of evidence. You have to give effect to the statute.

**MR ZAHRA:** Yes. Your Honour, there have been a number of significant decisions in this State concerning that particular question. The uniform evidence law obviously operates federally. It has been adopted in Tasmania and the ACT and I can take your Honour to a decision in the ACT where this particular issue also was addressed.

**HIS HONOUR:** Yes, there is a strong judgment of Justice Madgwick. Is that the judgment you are referring to?

**MR ZAHRA:** Yes, in *W*. So it is a matter that is of general importance.

**HIS HONOUR:** If I remember rightly, he thought that my dissenting judgment was - - -

**MR ZAHRA:** Yes.

**HIS HONOUR:** But leave that aside, I do not know that *Pfennig* has much to do with the case.

**MR ZAHRA:** Your Honour, might I say this - - -

**HIS HONOUR:** You have succeeded on this point.

**MR ZAHRA:** Yes, but might I say this: the underlying rationale of *Pfennig* is the recognition that propensity evidence has this capacity of a high order and the question then is how that particular rationale is applied. This case raises very clearly a number of issues about the assessment of the prejudice. Now, it raises an issue of the assessment of prejudice in a circumstantial case.

**HIS HONOUR:** But what is the prejudice? This case does not seem to me to have anything to do with propensity. It is a *Makin* or *Smith, "Brides in the Bath" Case*. It is probability reasoning. Propensity is only established by the verdict.

**MR ZAHRA:** Yes. Your Honour, I accept that. In fact, our primary argument has been that this case is very much the same as *Perry*, that at the end of the day there is a question raised as to whether in the ultimate process of the resolution of this matter one has to assume the guilt in one of the matters.

**HIS HONOUR:** It is more like *Plomp*, is it not? Are you familiar with *Plomp*?

**MR ZAHRA:** Yes, your Honour.

**HIS HONOUR:** Yes. It is more like *Plomp*. You had little more than motive and the fact that the wife disappeared in the surf in *Plomp*.

**MR ZAHRA:** Yes. Your Honour, the issue as to whether the Crown can identify a particular starting point and whether the Crown can identify a way that this case is ultimately to be placed before the jury we say is indicative of real prejudice. This issue has been squarely raised before the trial judge from the outset and raised also in the New South Wales Court of Criminal Appeal.

**HIS HONOUR:** Yes, but is a question of what you mean by "prejudice". In probability cases prejudice is pretty low down on the scale. It is in the pure propensity cases that prejudice usually raises its head, for the reason I mentioned in *Pfennig*, namely it is the verdict that establishes the propensity. The dangers of these cases, as Justice Murphy pointed out – I think it was in *Perry* or one of those cases – is that juries may think that it just could not be coincidences, whereas coincidences happen, perhaps more frequently than laypeople tend to think. But that is the only possible prejudice, it seems to me, that you could point to.

**MR ZAHRA:** Your Honour, the prejudice here is that ultimately that no appropriate directions can be given to the jury as to how they are going to apply the coincidence evidence in the present case.

**HIS HONOUR:** That would mean the evidence is just inadmissible, full stop.

**MR ZAHRA:** Well, the Court of Criminal Appeal did not go on to address that issue. In fact, as we say in our written submissions, the ultimate test, in fact, is quite difficult to understand. Can I hand to your Honour – there were some errors in the transcript which we have had corrected – can I hand to your Honour - - -

**HIS HONOUR:** Just concentrate on your big points, Mr Zahra. Do not worry about transcript trivialities.

**MR ZAHRA:** Well, yes, but, your Honour, when Mr Justice Hodgson referred to the direction that was ultimately contained in the judgment, his Honour Mr Justice Sully had indicated that, meaning no disrespect to the presiding judge, that his concerns as a trial judge that:

> by the time one got half way through that direction, the jury would be totally lost and the first thing that would happen after the jury

went out is that you get a note asking for some clarification. I think the way his Honour puts it, with respect, points out the difficulty.

This is at page 23 at around line 25 and following. This was, in fact, after his Honour articulated - - -

**HIS HONOUR:** Are you talking about the judgment or - - -

**MR ZAHRA:** Of the oral argument.

**HIS HONOUR:** My strong advice to you is not to pay too much attention to what judges say during oral argument.

**MR ZAHRA:** Yes, but this indicates what we say is that one does need to address ultimately how this matter is going to be put to the jury and that there is some assistance in the judgment, but the Court of Criminal Appeal had quite some difficulty. In fact, in the corrected transcript my friend was clearly asked by his Honour Mr Justice Sully to the effect of, "Can you give the jury a simple resume of the facts and indicate how the relevant principles of law are related to them?" And my friend indicated, "If only I could frame that direction in the way your Honour puts it". So my friend was unable to - - -

**HIS HONOUR:** The proposition might be in better hands when Mr Justice Wood directs the jury.

**MR ZAHRA:** Yes, but at this stage – your Honour, the argument was mounted also before his Honour and his Honour did not address the argument in his judgment, indicating that that was a matter to be left for the closing addresses. So where we presently are is that, in fact, we are going to face a trial where we do not know how the Crown is ultimately going to put the case. We do not know whether they are starting with any particular case or not.

**HIS HONOUR:** She can make an application after the Crown opens, at the conclusion of the Crown's opening address, but ultimately the jury will be directed concerning what the logisticians call positive and negative resemblances in each particular case. The more positive resemblances between each incident, the stronger is the inference that can be drawn from them.

**MR ZAHRA:** The difficulty is what the jury are to be told in relation to applying the evidence of coincidence in this case, from one case to the other. That, in fact, is the ultimate indicator of prejudice.

**HIS HONOUR:** But, Mr Zahra, the message needs to go out to the criminal Bar, as I hope it has gone out to the civil Bar, that we do not sit here to give advisory opinions. Ultimately our task is to determine matters within the meaning of the Constitution, to exercise judicial power, which means to determine the rights of the parties, and evidence questions pre-trial are very unsatisfactory vehicles.

**MR ZAHRA:** I accept that. This application is not seeking an advisory ruling. This application is raising the ultimate concern that the test may not have been appropriately applied. Bear in mind we are at a position where no one can, in fact, articulate how the case is ultimately to be put to the jury and how, in fact, the coincidence evidence is to be applied.

**HIS HONOUR:** Well, that only makes your special leave application all the more difficult, because you are asking for the Court to act on a hypothetical basis. You only have to have a couple of pieces of evidence and the whole complexion of the case changes.

**MR ZAHRA:** Your Honour, this is not a case where there will be additional witnesses or that the case will rise or fall on questions of credibility of witnesses. The evidence has been provided. It is not going to dramatically change during the course of the trial. Whatever evidence is there should be able to be articulated.

**HIS HONOUR:** How do you know? How do you know? Were these witnesses cross-examined before Justice Wood?

**MR ZAHRA:** Your Honour, the evidence falls into the following categories. Firstly, there are some civilian witnesses which really take the matter nowhere. There is no evidence of poor relationship with the child apart from some very small incidents. The medical evidence – we have been provided with extensive reports. We do not expect the nature of that evidence to change. There is a record of interview. There are some diaries. So, your Honour, the nature of the evidence is not going to change dramatically during the course of the trial. So at the present time we can make quite a good judgment on the fact that this is going to be the evidence during the course of the trial. We can make an appropriate analysis. We can conclude on that basis, despite this matter being raised before the trial judge and before the Court of Criminal Appeal, that ultimately the matter was not addressed, despite the request made by Mr Justice Sully during the course of oral argument.

The process has not yet been identified and we say the very fact that that process cannot be identified indicates error. We are not seeking an advisory opinion, but we say that that in itself indicates error because how

can the exercise under 101(2) be carried out when one cannot identify what the Crown case will be, how the Crown case will be presented to the jury.

**HIS HONOUR:** That will be a question for the trial judge to make up his or her mind. I assume it will be Justice Wood. Is Justice Wood going to hear the case?

**MR ZAHRA:** That is our understanding. But, your Honour, despite this matter being raised before Justice Wood, that has not been addressed. It is an issue that has been squarely raised and we say that that manifests the error.

**HIS HONOUR:** But it is hardly a special leave point in a criminal trial. I mean, error is not a ground for special leave.

**MR ZAHRA:** I accept that, but in this particular case there are special leave points, particularly with the question of general importance, particularly in the interpretation of the test under section 101. The relevance of the test when applied to circumstantial evidence, these were matters that were clearly raised by Mr Justice Hodgson. It also raises the issue of the application of *Perry* in a case involving coincidence evidence. So there are substantial issues to be heard on the special leave application. In fact, what we are obviously seeking is the opportunity to put those arguments in a special leave application. So it goes beyond just trying to determine whether *Pfennig* applies to the statutory provisions, but it also raises issues of the appropriate test where the case is substantially circumstantial evidence.

**HIS HONOUR:** But the appropriate test is set out in the statute.

**MR ZAHRA:** Your Honour, the difficulty of the application of the test to circumstantial evidence is evident in the course of argument in this matter. His Honour referred to his own judgments in *WRC* and *Joiner*, but I can take your Honour to some of the oral argument where his Honour had indicated that maybe what he had said in *WRC* and *Joiner* may not necessarily be what is the appropriate test in a case where it is substantially one of circumstantial evidence. I could take your Honour to that area, if your Honour wishes. But it is more than raising this issue of the interpretation of 101(2) and whether the *Pfennig* test, which is obviously pre the *Evidence Act*, applies, but also issues relating to the application of the test in a wholly circumstantial case and how it applies in a case which is very much what we say and what we have, in fact, argued the same, in fact, as *Perry*.

**HIS HONOUR:** Mr Zahra, the Court would be in a far better position to evaluate that after all the evidence is in in the case, including, if your client

gives evidence, her evidence. The thing you have to remember about this is that one of the reasons the Court does not intervene at an interlocutory stage in criminal proceedings is because the issues you want to raise now may never arise because your client is acquitted.

**MR ZAHRA:** Your Honour, they will arise during the course of this trial and it follows - - -

**HIS HONOUR:** Well, of they course they will.

**MR ZAHRA:** - - - that the jury would need to be directed.

**HIS HONOUR:** We can only hear 50 or 60 cases a year, including constitutional cases. We cannot be taking on cases at an interlocutory stage when the issue that you seek to ventilate may never prove decisive. If it does, you have a remedy.

**MR ZAHRA:** The difficulty is that it would be difficult to preserve the rights of the accused to a fair trial because of the publicity. The information will be so much in the public domain that one could not hear the matters separately without the prospect of jurors knowing about the accused and knowing about the detailed history of the evidence in this trial. That, in fact, is the ultimate problem.

**HIS HONOUR:** Yes. Well, I think your 20 minutes are up, thank you, Mr Zahra. Yes, I do not want to hear you, Mr Solicitor.

The applicant in this summons has been charged with four offences contained in one indictment. On 29 November 2002, Mr Justice Wood, the Chief Justice at Common Law in New South Wales, dismissed her application to have a trial of each offence heard separately. The application for separate trials was based on the proposition that the evidence in respect of each alleged offence was not admissible in respect of each other offence. His Honour, as I said, rejected that argument and dismissed the application.

On 6 February 2003, the Court of Criminal Appeal heard an appeal against the decision of Justice Wood. On 13 February this year, it dismissed the appeal but, at the request of the applicant, ordered that her trial which was, I understand, to begin on 10 February be stayed until 24 February 2003 to enable her to apply for special leave to this Court.

The applicant has subsequently filed a special leave application. I have read the application and the concise statement of the special leave application and other documents relied on in support of it. In this summons, the applicant seeks an order that her trial be stayed until further

order of this Court and, in particular, be stayed until the hearing of the special leave application.

On the special leave application, the applicant will argue that the Crown case suffers from the flaw identified in *Perry v The Queen* (1982) 150 CLR 580. That is to say, that evidence showing propensity is not admissible if its relevance is dependent on assuming the guilt of the accused in respect of the offence charged. The applicant submits, in effect, that in the absence of direct proof that the applicant committed the offences the Crown will ask the jury to draw an inference based on the unlikelihood of four offences being committed by the applicant otherwise than by design and the chain of reasoning assumes her guilt on each offence.

The applicant contends that the case raises significant legal issues concerning the interaction of sections 97, 98 and 101 of the *Evidence Act* 1995 (NSW). She argues that some confusion concerning the application of *Pfennig v The Queen* (1995) 182 CLR 461 and its continued operation exists within the New South Wales Court of Criminal Appeal. She refers to decisions such as *R v OGD (No 2)* (2000) 50 NSWLR 433 and *Colby* [1999] NSWCCA 261 as showing that this is so.

The applicant submits that the balance of convenience favours the granting of the stay. She submits that granting a stay will not prejudice the Crown. She points out that the case is set down for eight to 12 weeks and involves a large number of witnesses. She points out that, if the trial was to go ahead with all four charges, the resulting publicity would be so great that she would be prevented from being restored to her former position and could not obtain a fair trial in respect of the individual charges if this Court should later find that the charges should have been tried separately.

The applicant identifies a number of alleged errors in the Court of Criminal Appeal decision. The principal ones are first stating that, in a circumstantial case like this, while each piece of evidence may be inconclusive, the prosecution may still succeed if the whole combination of circumstances is capable of proving intent. The applicant submits that, while this approach might be appropriate in a straightforward circumstantial evidence case, it is implicit from the decision of this Court in *Perry* to which I referred that it is impermissible in cases involving propensity evidence. I might interpolate to say that I am far from convinced that this is a case of propensity evidence. Rather, it seems to me more like a probability case in which the accused's propensity is established by the verdict rather than by proof of prior acts revealing a propensity.

The second of the principal errors identified is that the Court of Criminal Appeal seems to suggest that propensity evidence may be admissible when there is otherwise some deficiency of proof of an

applicant's responsibility for the offences. The applicant contends that this tends to invite the tender of propensity evidence in cases where the prosecution's proof is weak. She says that the distinction is illogical and unfounded in authority.

Finally, the applicant submits that the case involves questions concerning what constitutes prejudice for the purposes of section 101 of the *Evidence Act* and that both the trial judge and the Court of Criminal Appeal failed adequately to deal with this issue.

On numerous occasions in recent years, this Court has said that it is only in exceptional circumstances that it will stay criminal proceedings, particularly before special leave to appeal has been granted. In *Grassby v The Queen* (1989) 63 ALJR 348 Chief Justice Mason noted that an applicant for a stay of proceedings pending application for special leave to appeal:

> has the considerable burden of showing, first, that it is an appropriate case for the grant of special leave, in particular that it is proper for this Court to intervene at what is an interlocutory stage of the criminal process . . . and secondly, that the decisions of the Court of Criminal Appeal are incorrect.

In *Beljajev v The Director of Public Prosecutions* (1991) 173 CLR 28 at 31 Justice Brennan noted:

> It is imperative that the jurisdiction to grant a stay be recognized as extraordinary and that applications seeking to invoke that jurisdiction are not made simply in order to secure the intervention of this Court in the preservation of a status quo . . . This must be so, particularly in the case of interlocutory applications in a criminal jurisdiction.

His Honour went on to say that:

> The jurisdiction of this Court is not fitted to the supervision of interlocutory processes of a criminal trial.

As I have said, the applicant seeks to stay her trial based on the arguments to which I have referred. In reality her position is based on a claim that the trial judge and the Court of Criminal Appeal misapplied the law in relation to tendency evidence under the *Evidence Act* in the light of decisions such as *Perry* and *Pfennig v The Queen*.

In his submissions this afternoon, Mr Zahra recognised that this Court will only intervene to stay a criminal trial in exceptional circumstances, but he contended that the circumstances of this case are

exceptional. As I have already said, his point is that, if separate trials should have been ordered and this Court subsequently finds that is so, a retrial will be required with considerable time and expense. Furthermore, he says the plaintiff's trials in the future in respect of the separate offences would be prejudiced by reason of the wide publicity that will be given to the evidence in the present case. However, the applicant's argument, in my view, is insufficient to overcome this Court's reluctance to allow special leave to appeal from an interlocutory decision and, in particular, to intervene in the criminal processes of the State before verdict.

In *Goldsmith v The Queen* (1993) 67 ALJR 513, Acting Chief Justice Brennan, delivering the judgment of Justice Gaudron and myself, said:

> An application for special leave to appeal will not readily be granted to canvass a question arising at an interlocutory stage of a criminal proceeding, nor will special leave be readily granted to consider a question of law when the intermediate court decided the question not on appeal but on an application for judicial review when the question relates to the procedure to be followed in the course of an exercise of jurisdiction by the primary tribunal.

Similarly, in *Yates v Wilson* (1989) 168 CLR 338 and at 64 ALJR 140 Chief Justice Mason, delivering the judgment of himself and Justices Toohey and Gaudron, said that:

> The undesirability of fragmenting the criminal process is so powerful a consideration that it requires no elaboration by us. It is a factor which should . . . inhibit this Court from granting special leave to appeal.

I might point out that nearly 20 years ago in *Lamb v Moss* (1983) 49 ALR 533 the Full Court of the Federal Court, consisting of Chief Justice Bowen, Justice Sheppard and Justice Fitzgerald, noted that there was "a considerable body of authoritative judicial opinion that exceptional circumstances will generally be required before a superior court will consider interfering in committal proceedings, particularly at an interlocutory stage."

In this case, it appears to me that the Court of Criminal Appeal carefully considered the relevant authorities. That court accepted the applicant's contention that the *Pfennig* test applied to section 101 of the *Evidence Act*, a proposition that I think is highly debatable. However, the court still found that the trial judge had not erred in holding that the evidence of each alleged offence was admissible in respect of each other offence. The Court of Criminal Appeal found that the trial judge based his

decision on admissibility on expert evidence and not on mere statistical considerations. Indeed, the court said that, even if it was only the occurrence of all four offences in similar circumstances that could prove that the applicant was responsible for any one of them, the *Pfennig* test might still be satisfied.

Be that as it may, given that the applicant succeeded in persuading the trial judge and the Court of Criminal Appeal that *Pfennig* applies, the application for special leave does not seem to me, with great respect, to raise any major questions of principle. Rather, it seems to be concerned with the application of established principles in particular circumstances and with the application of a statutory test to the particular facts of the case. This is an insufficient basis on which to grant the stay sought by the applicant and particularly in the light of the Court's general approach to interfering in interlocutory proceedings, particularly in interlocutory criminal proceedings.

I do not think the prospects of special leave being granted are high. At all events, they are not sufficiently high to warrant staying the trial. Of course, a wrongful application of principle may result in a miscarriage of justice and may attract the grant of special leave to appeal by this Court. But, in determining whether the case gives rise to a miscarriage of justice, the Court is always in a better position to evaluate whether a miscarriage has occurred after examining all the evidence than it is when determining a preliminary motion on facts which are assumed will be the subject of proof at the trial.

In all the circumstances, I do not think this is such an exceptional case that warrants the Court granting a stay of the proceedings. I dismiss the summons.

Is there anything further?

**MR ZAHRA:** No, your Honour.

**HIS HONOUR:** Yes, very well. Adjourn the Court.

**AT 2.59 PM THE MATTER WAS CONCLUDED**

# New South Wales Supreme Court

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| **CITATION :** | **R v FOLBIGG [2003] NSWSC 895** |
| **HEARING DATE(S) :** | 01/04/03, 02/04/03, 03/04/03, 07/04/03, 08/04/03, 09/04/03, 10/04/03, 11/04/03, 14/04/03, 15/04/03, 16/04/03, 17/04/03, 23/04/03, 24/04/03, 28/04/03, 29/04/03, 30/04/03, 01/05/03, 05/05/03, 06/05/03, 07/05/03, 08/05/03, 12/05/03, 13/05/03, 14/05/03, 15/05/03, 19/05/03, 20/05/03, 21/05/03, 29/08/03 |
| **JUDGMENT DATE :** | 24 October 2003 |
| | |
| **JUDGMENT OF :** | Barr J at 1 |
| **DECISION :** | The following sentences are imposed. For the manslaughter of Caleb Gibson Folbigg imprisonment for ten years; for the malicious infliction of grievous bodily harm with intent on Patrick Allen Folbigg imprisonment for fourteen years; for the murder of Patrick Allen Folbigg imprisonment for eighteen years; for the murder of Sarah Kathleen Folbigg imprisonment for twenty years; for the murder of Laura Elizabeth Folbigg imprisonment for twenty-two years ; last sentence to expire on 21 April 2043; non-parole period to expire on 21 April 2033. |

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|---|---|
| **CATCHWORDS :** | Criminal law - sentencing - manslaughter - malicious infliction of grievous bodily harm with intent - murder |
| **PARTIES :** | REGINA<br>Kathleen Megan FOLBIGG |

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|---|---|
| **FILE NUMBER(S) :** | **SC** 70046/02 |
| **COUNSEL :** | Crown: M. Tedeschi QC and J. Culver<br>Offender: P. Zahra SC and A. Cook |
| **SOLICITORS :** | Crown: S.E. O'Connor<br>Offender: D. J. Humphreys |

**IN THE SUPREME COURT**
**OF NEW SOUTH WALES**
**COMMON LAW DIVISION**

**GRAHAM BARR J**

**Friday, 24 October 2003**

**70046/02 REGINA v Kathleen Megan FOLBIGG**

**SENTENCE**

1 **HIS HONOUR**: The offender, Kathleen Megan Folbigg, has been found guilty by the jury of the following offences -

1. The manslaughter on 20 February 1989 of Caleb Gibson Folbigg;

2. The intentional infliction of grievous bodily harm on 18 October 1990 upon Patrick Allen Folbigg;

3. The murder on 13 February 1991 of Patrick Allen Folbigg;

4. The murder on 30 August 1993 of Sarah Kathleen Folbigg; and

5. The murder on 1 March 1999 of Laura Elizabeth Folbigg.

2 The offender was born on 14 June 1967. She met Craig Gibson Folbigg in 1985 and they began living together in 1986. They purchased a house in Mayfield, a suburb of Newcastle, in May 1987 and lived there. They married in September of the same year. Their first child, Caleb, was born on 1

February 1989. He was a healthy, full-term baby. He used to breathe noisily and used to stop breathing in order to feed. Accordingly he was referred to a paediatrician, Dr Springthorpe, who diagnosed laryngomalacia or floppy larynx. Dr Springthorpe thought that the condition was mild and that Caleb would grow out of it.

3 Mr Folbigg was in full-time employment and left to the offender the responsibility of caring for the child day by day. He was a very heavy sleeper who was difficult to wake. So far as the evidence shows, he never attended to Caleb or any of the couple's other children at night. The responsibility for attending to the needs of the children while the family slept was the offender's.

4 On 20 February 1989 the offender put Caleb to sleep in his bassinet in a room adjoining the bedroom used by her and her husband. During the night she arose and went to attend to Caleb. As she did so she smothered him. Only the offender was present and she has not explained why she did the act that killed Caleb. As I shall explain, the reason emerges from other evidence. Just before 3:00am she woke Mr Folbigg, screaming and saying that there was something wrong with the child. Caleb was lying on his back, dead, still wrapped in the rug in which he had been put to bed.

5 Nothing about the circumstances of Caleb's death gave rise to any suspicion that it was other than natural and a diagnosis of SIDS death was made. Such a diagnosis is made when a child of appropriate age, usually between two and six months, dies suddenly and unexpectedly and there is no reason to suspect an unnatural cause of death.

6 To those around her, particularly Mr Folbigg, the offender appeared not to be badly affected by the death. She soon resumed her former work and social habits.

7 It was believed at the time that there was a link between SIDS and the socio-economic status of families experiencing SIDS deaths. Accordingly, a local SIDS organisation recommended to the offender and Mr Folbigg that they renovate their home. They did so.

8 Their second child, Patrick, was born on 3 June 1990. He was a healthy and happy baby. A sleep study was conducted on him when he was about ten days old. The results were normal. To all appearances the offender was happy. Mr Folbigg did not return to work for several months but remained at home to help her.

9 Just after he returned to work an incident described as an acute or apparent life threatening event (ALTE) took place. Patrick was four and a half months old. On the evening of 17 October 1990 the offender put Patrick to bed in a cot in his bedroom. Mr Folbigg looked at him before he went to bed. He was lying on his back, covered with a sheet and blanket. During the night, while she was attending to Patrick, the offender cut off his air supply

by the use of a hand or some soft material. As before, she screamed and woke Mr Folbigg. He ascertained that the child was breathing and started to perform cardio-pulmonary resuscitation on him. An ambulance was called.

10 The ambulance officers took Patrick straight to hospital. They noted that he was in respiratory distress and gave him oxygen. He eventually regained consciousness but began to suffer fits. Many diagnostic tests were performed on him but the cause of the ALTE was never formally determined. A paediatric neurologist, Dr Wilkinson, diagnosed epilepsy and cortical blindness. The evidence and the verdicts show that those conditions resulted solely from the offender's attack.

11 Apart from his major neurological problems Patrick continued healthy and developed normally. The responsibility for his care fell primarily upon the offender. Mr Folbigg noticed that she would often become angry with him and the child. When she did so she made growling sounds.

12 The offender had for some time been keeping a diary in which she recorded thoughts and anxieties she was having about the children. Mr Folbigg found an entry written about her inability to look after Patrick, her belief that Mr Folbigg and Patrick would be better off without her and her intention to leave the family. She wrote that Mr Folbigg and his family could look after the child better. Mr Folbigg mentioned the matter to his sister, Mrs Newitt, and she was anxious to help. They persuaded the offender to stay.

13 On the morning of 13 February 1991, while Mr Folbigg was at work, the offender smothered Patrick. Immediately afterwards she summoned an ambulance and telephoned Mr Folbigg, Mrs Newitt and Dr Wilkinson.

14 Mrs Newitt arrived first at the Folbigg house. The offender was present, crying. Patrick was lying on his back in his cot, warm but dead. Mrs Newitt went to pick him up but the offender stopped her.

15 At the hospital a physician determined that Patrick had suffered a cardiac arrest but could find no cause. A post-mortem examination was conducted but the cause of death was undetermined.

16 The offender would not talk about what had happened other than to say that she had checked on the child and found him in that state. As before, she seemed not to have been badly affected by the death. She resumed working and going out socially.

17 She and Mr Folbigg moved to a house in Thornton in the Hunter Valley. For reasons which I shall explain, it was she who pressed him to have another child. He agreed on condition that SIDS specialists were involved in its care. Sarah was born on 14 October 1992. She was a happy, healthy baby. A sleep study conducted at about three weeks showed some small apnoeas, which were considered normal. Even so, a sleep apnoea monitoring blanket was used. The offender was still anxious and doubted

her ability to look after her child and the frequent false alarms to which the apparatus was prone did nothing to allay her anxieties and doubts. She wanted to abandon the use of the monitor. Of course, only she knew that Sarah was in no particular danger of spontaneous death.

18 Her fears and anxieties continued. She frequently lost her temper with Sarah, growling as before.

19 Use of the sleep apnoea blanket ceased two or three days before 29 August 1993. Sarah was unwell and unco-operative. The offender experienced difficulty putting her to bed. She growled at her and hugged her tightly to her chest, then threw her at Mr Folbigg, telling him to deal with her. He calmed her and put her to sleep in her bed at the end of his and the offender's bed. She was on her back, covered with a sheet and blanket. The family slept.

20 During the night the offender rose and took Sarah out of the room to attend to her. Then she smothered her. In the absence of any account of what happened I infer that the offender acted in a rage. She put Sarah back into her bed, woke Mr Folbigg, screaming and pretending that she had found Sarah in that condition.

21 At the post mortem examination small abrasions were noticed near Sarah's mouth. The lungs showed petechial haemorrhage, minor congestion and oedema. These signs were all consistent with death by asphyxiation by the application of mild force. Death was attributed to unknown natural causes.

22 Initially the offender appeared affected by the death. She became despondent and aimless. She refused to discuss matters except to repeat her story of having found Sarah dead. The relationship between her and Mr Folbigg deteriorated and there were several separations.

23 By early 1996 the couple were together again and living in Singleton. Their relationship had improved and they had made new friends. The offender pressed Mr Folbigg to have a fourth child. Laura was born on 7 August 1997. She was healthy.

24 Laura was tested for many genetic, biochemical and metabolic disorders. The results were all normal. A number of sleep and apnoea tests were conducted and there was at first an indication of mild central apnoea. It was not dangerous, however, and improved as Laura got older. As with Sarah, a sleep monitor was provided. Also as before, there were many false alarms and the offender found it impossible to conceal her impatience at the need to manage the superfluous machine. All her fears and anxieties continued unabated.

25 The relationship between the offender and Mr Folbigg deteriorated again. They spoke and wrote to one another about separating and about what would happen to Laura in that event. Increasingly, the offender spent her

time at the gymnasium during the day and with friends at night.

26 On 27 February 1999 Laura was not well and behaved in a way that the offender found irritating. She spun round, screamed at her and knocked her over. On the following day Mr Folbigg noticed that Laura was avoiding her mother. On the next morning, 1 March, Laura was subdued and clinging to Mr Folbigg. She was upset that he was about to leave for work. The offender lost patience with her and growled at her. She pinned Laura's hands to her high chair in an attempt to force-feed her. Mr Folbigg and the offender argued. He left for work. Not long afterwards the offender telephoned Mr Folbigg at work and they agreed that they had to discuss the problems that were besetting them once again. Later in the morning, having attended her gymnasium class, the offender took Laura to Mr Folbigg's place of work. She took Laura home at about 11:30am. Something happened shortly afterwards to raise her ire once again and she suffocated Laura. She summoned an ambulance. When the officers arrived they found her performing cardio-pulmonary massage on the child, who was unconscious, not breathing, bradycardic, warm and centrally cyanosed. The officers were unsuccessful in their attempts to resuscitate her.

27 On the post-mortem examination the presence of mild myocarditis, an inflammatory condition of the heart, was detected. The pathologist considered that myocarditis was not the cause of death, however, and declined to determine a cause.

28 The offender displayed signs of grief and some friends thought them genuine. However, others had doubts. At the funeral her foster sister, Mrs Bown, heard her remark that that was such a weight off her shoulders, then saw her return to her normal self.

29 Later on Mr Folbigg came across more diaries written by the offender, recording at greater length over a long period of time her thoughts and feelings about many things, including her perceptions of her capacity to care for the children. For the most part those diary entries were received into evidence.

30 A substantial number of medical expert witnesses gave evidence at the trial. It is unnecessary to treat their evidence in any detail. In expressing any opinion about the cause of death of any child or of the event that rendered Patrick blind and epileptic each such witness was permitted to consider only the facts directly bearing upon the event concerned. None was permitted to give an opinion based partly upon the events the subject of the other charges. None was permitted to take into account things written by the offender in her diaries.

31 No such witness was prepared to say that the signs pointed only to smothering but the medical evidence generally was that the result of each event was consistent with having been caused by acute asphyxiation. The jury accepted that evidence. They had to be satisfied in respect of each of the five events that there was no reasonable possibility that it had

happened naturally.

32 The arguments in favour of natural explanations for the deaths and Patrick's ALTE were unimpressive in the light of the whole of the evidence. They were these: for Caleb, SIDS properly so-called; for Patrick's ALTE and death, encephalitis or spontaneously occurring epilepsy rather than epilepsy caused by asphyxiation; for Sarah, unexplained natural causes; for Laura, myocarditis.

33 The evidence showed that natural but unexplained death was rare in the community and that there was no demonstrated genetic link to explain multiple deaths in a single family.

34 The advantage the jury had over the medical expert witnesses was that in addition to the matters the witnesses were permitted to take into account the jury could take into account the fact of the other deaths and Patrick's ALTE, with the presence at the relevant time of the offender and the improbability that all five events occurred naturally and spontaneously, and any meaning the jury gave to the offender's diary entries.

35 It is necessary to try to understand why the offender lost her temper and assaulted her children. In addition to the facts that I have related, the relevant evidence comprises the records of the Government department that had the responsibility to oversee the offender during her youth, other evidence about her early years, the diaries she kept during the latter part of the period of offending and the opinion of psychiatrists on that material.

36 The offender's first name was Kathleen Donovan and she lived with her parents until January 1969, when she was 18 months old. Her mother's sister was Mrs Platt, and she and her husband knew her well because they had looked after her for extended periods of time. In fact her mother seems to have spent little time caring for her. Mr and Mrs Platt wanted to have the offender permanently in their family and at one time her mother agreed and even signed a form of consent. The Minister approved Mr and Mrs Platt as adopting parents but her mother withdrew her consent.

37 On 8 January 1969 her father murdered her mother. He was by all accounts a violent man who made his living from crime. He was arrested and on the following day the offender was taken before a court and made a ward of the State. She was placed into the care of Mr and Mrs Platt.

38 Officers of the Department of Child Welfare visited Mr and Mrs Platt from time to time to record the progress of the offender. They were entirely satisfied with the care afforded by the Platts, and things went well until a departmental report made on 21 May 1970, when the offender was one month short of her third birthday. On 18 May 1970 Mrs Platt had said on the occasion of a home visit that she was having trouble teaching the offender the basic requirements of hygiene and acceptable behaviour. The offender was described as having severe temper tantrums and being extremely aggressive, particularly towards other children who visited the home. She

seemed to have a preoccupation with her sexual organs and had been seen on a couple of occasions trying to insert various objects into her vagina. She would on occasions scream and cry incessantly and cause much embarrassment inside and outside the home.

39 The offender was referred to the Yagoona Child Health Clinic, where Dr Spencer saw her for assessment. In her report of 12 June 1970 Dr Spencer reported that Mrs Platt was then describing her as virtually uncontrollable and a disruptive influence on the marriage. She indulged in excessive sex play and masturbation. Dr Spencer commented-

> *The social history is well known to you and it seems that* (the offender) *was misused by her father during infancy.*

40 In a departmental report of 23 June 1970 Mrs Platt is said to have complained that the offender's behaviour was deteriorating. She was still very brutal to other children and destructive in the home. She was continuing to masturbate herself and although steps had been taken to change her sexual behaviour little was being achieved. When corrected in any way she continued to scream and cry in retaliation.

41 On 18 July 1970, when the offender was three years old, she was withdrawn from the care of Mr and Mrs Platt and sent to Bidura Children's Home.

42 On 4 August 1970 a psychologist assessed her intelligence as within the borderline retarded range. However, the psychologist qualified the measurement by remarking on her remoteness and lack of responsiveness, restlessness and inattentiveness. Subsequent experience shows that the assessment was unreliable.

43 During the same month a further report described her as unresponsive and withdrawn and rarely smiling or talking when shown individual attention. However, there were signs that she was becoming more approachable and more interested in objects and events around her.

44 During the following month she was described as much less withdrawn, chattering to other children and staff and showing a greater interest in her environment. She was still aggressive with other children when she did not get her own way, however, and readily pushed and pulled at them to achieve her objects. There were no reports of continued masturbation.

45 The offender was placed into the foster care of Mr and Mrs Marlborough in September 1970. She settled down reasonably well and though there were periods of moodiness she seemed a likable, friendly girl on the surface and showed considerable affection for both foster parents. Mr and Mrs Marlborough liked her and found her intelligent. They enquired whether they could adopt her.

46 From then until 1985, when the offender ran away, she and Mr and Mrs Marlborough got on reasonably well together. There were periods of difficulty. The offender did not always find things easy in high school. In 1982 she was admonished and discharged on two stealing charges but she

must have appeared for the most part to have overcome the very difficult start she had had.

47 In 1984 she was told that her father had murdered her mother. That was something that she had to be told. The news had a profound effect upon her. She got in touch with Mr and Mrs Platt, who gave her some baby photographs and a photograph of her mother, but she did not pursue her relationship with them. Her relationship with Mr and Mrs Marlborough became worse and the final break came after a disagreement about a boyfriend. She was seventeen when she left home. She took up her relationship with Mr Folbigg in the following year.

48 Evidence was adduced on sentence from three psychiatrists. Dr Giuffrida saw the offender five times, initially as a Visiting Medical Officer in the Corrections Health Service. Dr Westmore saw her three times. Both were fully informed about her history and saw documents recording the events of her early years. They each took extensive histories from her. They understood the substance of the Crown case which had led to the convictions and saw the offender's diaries.

49 Dr Skinner did not see the offender. Although she saw an extensive range of documents, including the departmental records of the offender's early history and the diaries, her report was prepared before trial and was confined to the questions whether there was available any psychiatric defence or any evidence to support verdicts of guilty of infanticide. For those reasons her report is of limited assistance.

50 Dr Giuffrida regards as compelling the evidence that the offender was seriously disturbed at eighteen months of age. He thinks that she was probably neglected and brought up in an emotionally and physically abusive relationship. He thinks it highly likely that her father abused her mother and that the offender was exposed to that violence. He thinks that she was possibly sexually abused.

51 I accept that by the age of eighteen months the offender was a seriously disturbed and regressed little girl. I accept the opinion of Dr Giuffrida that she was by then severely traumatised.

52 It is well established that children who are neglected and suffer serious physical and sexual trauma may suffer a profound disturbance of personality development. The evidence for such a disturbance in the offender is strong, as her diaries reveal.

53 There is no evidence to show when the offender began keeping a diary. The earliest surviving entries were made in Mr Folbigg's diaries. There is this one on Patrick's birthday, 3 June 1990-

> *This was the day that Patrick Allan David Folbigg was born. I had mixed feelings this day. wether or not I was going to cope as a mother or wether I was going to get stressed out like I did last time . I often regret Caleb & Patrick, only*

*because your life changes so much, and maybe I'm not a Person that likes change. But we will see?*

54 Even though the entry was made in Mr Folbigg's diary, I am sure that it was intended only for the offender to read. Other entries over the years are intensely private, revealing ideas she never communicated to anybody, including her husband. I do not doubt that the offender kept a diary continuously throughout her married life, but those entries written between 1990 and 1996 have not survived. Those that have show her constant concerns about isolation, her fear of being unable to bond with her children, her fear of being left alone with them, her fear of the danger of losing her temper with them, her feelings of unworthiness and depression, her desire not to let it happen again and, later on, anxious concerns about having lost her temper with Laura in spite of her desire not to do so.

55 These are some of the entries-

**18 June 1996** *…I'm ready this time. And I know Ill have help & support this time. When I think Im going to loose control like last times Ill just hand baby over to someone else. Not feel so totally alone, getting back into my exercise after will help my state of mind & sleeping wherever possible as well. I have learnt my lesson this time.*

**22 June 1996** *…I watched a movie today about schizophenia, wonder if I have a mild curse of that. I change moods really quickly. In my most dangerous mood I'm not nice to be around & always want to be anywhere, but where I am.*

**24 June 1996** *…Haven't lost that maternal instinct. Emma seemed at peace with my presence. Maybe I shouldn't be as worried as I was feeling. I had a thought that my own baby wouldn't bond with me. Craig will have to do all the work??? Still. Craig's reaction was a typical hand it to the woman – she knows what to do, truley hope that changes with* (indecipherable) *Ill need all the support I can get if possible.*

**16 July 1996** *Sometimes I feel life is a film scene, just practiced and rehearsed, each actor, perfect & surreal, times I don't fit in the play, have never fit, but keep attempting to anyway for fear of being isolated & alone. Times – I feel alone anyway no matter who Im with.*

**21 July 1996** *Moved furniture and put cot back up today. Mixed emotions, sadness, nervousness, exciting. Looked at books I've got – never opened. I do hope & pray that the next child we have will get to have them read & read them also.*

…

*Depressed a little now. Probably because it will be another couple of months before Im pregnant. Pretty sure Im not now, had or having what I think is a period – God I hope so or else these tablets will cause brain damage. Probably would be just*

*desserts for me considering. But not fair for Craig at all. I would feel like a failure & wouldn't cope at all. Can't be dwelling on what ifs. I truley deserve anything life throws at me so my philosophy is whatever happens, happens & it's the way it shall be. I'm going to try my hardest, this time. If anything does happen Ill just leave & try to let Craig go in peace & start again – no I wouldn't I'm not that brave – Really I depend on people & other peoples help too much.*

**25 July 1996** *Having bad thoughts about him leaving me in the same way though. Strange he's either died or left me for someone else.*

*... thought of a baby & being left alone is a little frightening. Hope it never happens.*

**6 August 1996** *Is it a sign don't bother, with having a child. Would be just desserts for me if it is – exactly what I deserve for my indiscretions of life. We'll see.*

*...My egos a little busted with my problems that I seem to be having.*

**9 August 1996** *Been feeling weird lately – Depressed, indisive, etc. not my usual self. Can't seem to put a finger on whats rong.*

*...*

*...Feeling lonely! I know that's silly because I have friends I can see but I suppose its because I want friends, that will come to see me & want to be with me, I usually feel that I'm intruding or pushing my way onto people. Okay enough self analysing. Its my ego & weight problem thats giving me a bashing. Rang to go back to J/C they havent bothered to return my call. Feeling left out, taken for granted, unattractive and self centered. There I've purged myself. Now to change all this, is up to me – as usual.*

**26 August 1996** *Didnt end up going to work today. Was deeply depressed & thoughtful.*

**8 September 1996** *...Feel now is a time for us to have another baby. Have finally realised it is the right time for me. I have Craig & he wants a child. That I can give him. And I have enough friends now not to loose it like before.*

**11 September 1996** *...Feeling inferior doesn't help. Feeling inadequate because Im not pregnant yet. Feel as though its my fault. Think its deserved. After everything thats happened. I suppose I deserve to never have kids again. I am just so depressed. don't know what to do. Feel like taking rest of the week off. But know my pay will be grossly affected if I do.*

**14 October 1996** *...Children thing still isn't happening. Thinking of forgetting the idea. Nature, fate & the man upstairs have decided I don't get a 4th chance. And rightly so*

*I suppose. I would like to make all my mistakes & terrible thinking be converted and mean something though. Plus Im ready to continue my family time now. Obviously I am my father's daughter. But I think losing my temper stage & being frustrated with everything has passed. I now just let things happen & go with the flow. An attitude I should of had with all my children if given the chance I'll have it with the next one.*

**30 October 1996** *So many things troubling me lately. Not sure where to start. Craig & I are fine as in our relationship, becoming pregnant or rather not in my case is starting to weigh me down. Think I must be suffering a stress reaction. I know as each month goes by depressions are getting worse.*
*...Work is truley depressing me most days.*
*...I think that the business with my mother is finally wearing me down. I just cant understand a hate so strong.*
*...Things I remember are not good about my ubringing but, one fact remains I had a safe home, food & clothing. I a person who had a choice of that or state orphanages all her life cant expect much more.*

**13 November 1996** *...Not sure why Im so depressed lately. Seem to me suffering mood swings. I also have no energy lately either.*
*...Why is family so important to me? I now have the start of my very own, but it doesn't seem good enough. I know Craig doesn't understand. He has the knowledge of stability & love from siblings & parents even if he chooses to ignore them. Me – I have no one but him. It seems to affect me so, why should it matter. It shouldn't.*

**4 December 1996** *...I'm ready this time. But have already decided if I get any feelings of jealousy or anger to much I will leave Craig & baby, rather than answer being as before. Silly but will be the only way I will cope. I think support & not being afraid to ask for it will be a major plus. Also - I have & will change my attitude & try earnestly not to let anything stress me to the max. I will do things to pamper myself & just deal with things. If I have a clingy baby, then so be it. A catnapper so be it. That will be when I will ask help & sleep whenever I can. To keep myself in a decent mood. I know now that battling wills & sleep depravaision were the causes last time.*

**1 January 1997** *...But I feel confident about it all going well. This time. I am going to call for help this time & not attempt to do everything myself any more – I know that that was the main Reason for all my stress before & stress made me do terrible things.*

**14 January 1997** *Not happy with myself lately. Finally starting to physically show that I'm pregnant. Doesnt do*

*much for the self estem. Don't get me wrong. I couldn't be happier its just Craigs roving eye will always be of concern to me. I suppose this is a concept known by all women. We are vunerable emotionally at this stage. So everything is exaggerated 10 fold.*
*...I think its stress related. I must learn to calm down & be rational & worry about things as they happen not if they do.*
*...Im sure this is training for when baby arrives. Thats okay. Im pretty sure this time Ill handle it better. Hope so.*

**4 February 1997** *Still can't sleep. Seem to be thinking of Patrick & Sarah & Caleb. Makes me generally wonder wether I am stupid or doing the right thing by having this baby. My guilt of how responsible I feel for them all, haunts me, my fear of it happening again haunts me. My fear of Craig & I surviving if it did, haunts me as well. I wonder wether having this one, wasn't just a determination on my behalf to get it right & not be defeated by me total inadequate feelings about myself. What sort of mother am I, have I been – a terrible one, that's what it boils down too – thats how I feel & that is what I think Im trying to conquer with this baby. To prove that there is nothing rong with me, if other women can do it so can I.*
*Is that a wrong reason to have a baby. Yes I think so but its too late to realise now. Im sure with the support Im going to ask for I'll get through. What scares me most will be when Im alone with baby. How do I overcome that? Defeat that?*
**17 February 1997** *Found out hes jealous already of bub. He says he only has 6 mnts left to be with me & for me. Hopefully Ive explained thats not true he should be for me, forever, just because a baby is entering our life makes no difference really. One day it will leave. The others did, but this ones not going in the same fashion. This time Im prepared & know what signals to watch out for in myself. Changes in mood etc. Help I will get if need be.*
*I also know that my lethargy & tiredness & continued rejection of him had a bad effect.*
**24 February 1997** *...Very emotional now, upset- feeling useless, not myself, no confidence at all, with any decision. ...What do I do, I want to keep earning money for Craig, but theyve decided it's not with them. Ive let everyone down. ...To upset to keep writing. Crying all the time.*
**13 March 1997** *...Told Craig about my concerns of being alone in Sydney. But he wasn't impressed. Its something I'll just have to get over & deal with myself.*
*Today I got the impression he just didnt want to be or have me around.*

**5 April 1997** *… Don't hear from any of my family now, sometimes I feel as abandoned again, with no real family roots.*
*… I don't have that security and now now that I never really did. I'm a true loner. Without the roots & family I provide myself Ide be totally alone.*
**28 April 1997** *…I think this baby deserves everything I can give her. Concidering I really gave nothing to the others. I think even my feelings towards this one are already deeper. Shame, but thats the way it is. I think its because Im 30 now and time to settle & bring up a child. Obviously I wasnt ready before at all.*
**16 May 1997** *…Night time & early mornings such as these will be the worst for me, thats when wishing someone else was available with me will happen. Purely because of what happened before. Craig says he will stress & worry but he still seems to sleep okay every night & did with Sarah. I really needed him to wake that morning & take over from me. This time Ive already decided if ever feel that way again I'm going to wake him up. Im glad I don't have to stay down in Sydney by myself. That prospect was really nerve racking. I would have felt so vunerable & exposed. Relying on total strangers all the time.*
**18 May 1997** *Not feeling good about anything. Tired, achey, exhausted, can't breath properly, sick of everyone, everything, life in general.*
**30 May 1997** *…Got myself in quite an emotional state last night.*
*…Felt, feeling very alone, unattractive & now uncomfortable with the many thoughts that are running through my mind about the stability of our relationship. This is not the time to be upset & stressing over everything. He pulls away from me if I touch him in any other way than comforting. Feel as though I've lost him, that his feelings for me aren't the same any more. Never felt so alone in all my life.*
**6 June 1997** *…From now on though I'm sure his attention & focus will change from me to his child. & so it should. I couldn't see that before. I was very selfish when it came to Craig's attention. Hopefully this time we have both learned how to share it but still manage to keep a little something aside for just each other. we will see…maybe then he will see when stress of it all is getting to be too much & save me from ever feeling like like I did before, during my dark moods. Hopefully preparing myself will mean the end of my dark moods, or at least the ability to see it coming & say to him or someone hay, help I'm getting overwhelmed here, help me out. That will be the key to this babies survival. It*

*surley will.*

**11 June 1997** *If it wasn't for my baby coming soon, I'de sit & wonder again what I was put on this earth for, what contribution have I made to anyones life. Only person I think I've made a difference too is Craig. And at times like this, I can't do anything for him so I fail there as well. 30 years, first 5 I don't really remember, rest I don't choose to remember last 10-11 have been filled with Trauma, Tradgedy, happiness, mixed emotions of all desires. Maybe from now on I'll be able to settle a little. But no. Imediate future brings turmoil, happiness, sad memors, happy ones, depression, great pride & it goes on...Life sux. You can never figure it out is anyone meant too.*

*Don't think I'll suffer alzimers disease, my brain has too much happening, unstored & unrecalled memories just waiting. Heaven help the day they surface & I recall. That will be the day to lock me up & throw away the key. Something I'm sure will happen one day.*

**14 June 1997** *I have no family of my own to acknowledge me, except Lea & more & more she's proving that I really really don't matter to her.*

*...Depresses me that everyone else has a fair idea, where & what time they were born. I don't, have never been told.*

**26 June 1997** *...This time I'm positive with support from friends etc & Craig this time everything will work out fine & the sight and visions of the future I've been having will come true this time...most of my life has been turmoil, sadness, anger etc. I think now I might of actually realised it was mostly of my own making, & stupidity that made it that way. Now I understand truley that your life & how it turns out is in your control, no one elses.*

**2 July 1997** ... *Was very upset yesterday evening, crying & being totally emotional. Couldn't think of anything else to do but cry...Was just so and still am, Scared is the word. I know that it won't be long now. 4 weeks? sounds a fair amount of time but he/she could decide to come earlier than that. If it's got any sense it will, my poor bod isn't handling it all well at all anymore.*

*...I already know that he won't take any time off. My not working has hit him hard, all he sees is 15 grand less in his hand/bank a year now. He's already starting to worry about it. Like I stressed that he would. I'll have to accept, he won't be as much support to me as I thought he might. Change is a coming. A big one. Well just have to take day by day hour by hour & cope. Hopefully everything will prove to be different this time. It has to be. I have to be.*

**18 July 1997** *Curious as to what happened or who is*

*responsible for her having such a low opinion of herself. I think Steve partly, he calls her stupid, etc. Jokin or not, all comments like that hurt. Its what made me believe I was nothing or a nobody. Craig even was partly responsible for making me feel that way. He doesn't do it as often anymore. I've learnt to pull him up on it.*

**12 August 1997** *...Craig is home with me, will be so different when the time comes for him to be gone all day. That will be my test but I hope by then I'll be able to walk okay & get back to my exercise. It will make me feel better I'm sure.*

**25 August 1997** *Scary feelings, I've realised I actually love her & have bonded with her, wish to protect her etc. Maternal instinct is what they call it. I now know I never had it with the others. Monitor is a good idea. Nothing can happen without the monitor knowing & since I'm not game enough to not plug it in because theyde want to know why I hadn't. Everything will be fine this time.*

**20 September 1997** *I can't even trust or depend on him to look after her properly. He refuses to bother to learn anything about her. He doesn't pay attention when feeding her, hasn't changed a nappy, doesn't do washing or ironing. only washes up once in a while. His life continues as normal. Work, come home & I look after him. He doesn't even cook tea every now and then unless I ask him too. And then it is begrudgingly. What do I do. The only break I get is when I go to aerobics – 3 1/2 hrs a week. But these are times is not enough. I know, my feelings are normal I'm just venting. But at the moment, I* (indecipherable) *wish I hadn't made the decision to have her, but then all I have to do is look at her & all that melts away. Well, I just pissed Craig off he's up and out of bed now. Complaining he can't sleep, I have to keep disturbing him because he snores and grinds teeth too badly.*

**3 November 1997** *...Lost it with her earlier. Left her crying in our bedroom and had to walk out - that feeling was happening. And I think it was because I had to clear my head and prioritise. As I've done in here now. I love her I really do I don't want anything to happen.*

**8 November 1997** *...Had a bad day today, lost it with Laura a couple of times. She cried most of the day. Why do I do that. I must learn to read her better. She's pretty straight forward. She either wants to sleep or doesn't. Got to stop placing so much importance on myself...much try to release my stress somehow. I'm starting to take it out on her. Bad move. Bad things & thoughts happen when that happen. It will never happen again.*

**9 November 1997** *...Think I handle her fits of crying better*

*than I did with Sarah. I've learnt to, (?) ace getting to me, to walk away & breathe in for a while myself. It helps me cope & figure out how to help her. With Sarah all I wanted was her to shut up. And one day she did.*

**28 November 1997** *Of course that shouldn't be stopping me from walking and eating properly & less But I just don't seem to have the heart anymore. I think I knew that its all cyclolgical & connected to feelings of neglect, rejection, lonliness which brings on a depression which I disguise by eating chocolate & junk food & feeling sorry for myself most of the time. I need to get back to basics find me & the reasons for losing this weight.*

**11 December 1997** *…depression seems to get me more now too. Must control it, not it me.*

**28 December 1997** *Feeling depressed, unhappy with myself, know why, need will power & I'll succeed. Ward getting engaged. Goal to work towards? Something wrong with Craig and I? Haven't figured it out yet. Laura keeping us together I think. Think if I hadn't of had her, not sure we'de of survived as a couple.*

**31 December 1997** *Funny but if it wasn't for Laura, I'de feel as though I've wasted another year of my life. Everyone seems to be enjoying themselves. Pool is getting a real workout.*

**12 January 1998** *Not doing well, need to get some will power! Eating rong-not exercising. Too inactive. But how do I overcome; inherent laziness. Would be happy to be a sloth. Tired 90% of the time too makes life a little tougher. Must try to stope lounging around all the time. Get machines should use them.*

**28 January 1998** *Very depressed with myself, angry & upset – I've done it. I lost it with her. I yelled at her so angrily that it scared her, she hasn't stopped crying. Got so bad I nearly purposly dropped her on the floor & left her. I restrained enough to put her on the floor & walk away. Went to my room & left her to cry. Was gone probably only 5 mins but it seemed like a lifetime. I feel like the worst mother on this earth. Scared that she'll leave me now. Like Sarah did. I knew I was short tempered & cruel sometimes to her & she left. With a bit of help. I don't want that to ever happen again. I actually seem to have a bond with Laura. It can't happen again. Im ashamed of myself. I can't tell Craig about it because he'll worry about leaving her with me. Only seems to happen if Im too tired her moaning, bored, wingy sound, drives me up the wall. I truly can't wait until she's old enough to tell me what she wants.*

**7 February 1998** *Long days. Tiring & have been extremely*

> *short tempered. Cryed today. Told Craig lack of sleep & constant worry about Laura has got too me felt better after. Craig has tried to be helpful today. Doing chores that I have always wanted to do but never found time. What I wanted though was for him to just take her off my hands for a while. Or me go for a drive away, And be by myself. But she's not well, had her shots & feeling crappy. She's just a baby & doesn't understand. Hopefully she'll be back to normal soon.*
> **13 March 1998** *Feeling very dissatisfied tonight. With myself, my life, Craig. What can I do…I need him to take some of the stress of looking after her off me, He seems to be failing lately.*

56 In spite of the early turmoil in her life the offender made progress in the Marlborough family and at school. There were intermittent social problems and some minor offending, but no pattern of violence and nothing suggesting what psychiatrists call conduct disorder. Such a disorder might lead in adulthood to a diagnosis of antisocial personality disorder. There is no history of any pattern of violence on the part of the offender towards others or towards the children she eventually killed. I accept the opinions of Dr Giuffrida and Dr Westmore that antisocial personality disorder is not an appropriate diagnosis.

57 Almost all mothers who kill their children do so because they suffer from some kind of psychotic illness. The evidence is unanimous that the offender is not psychotic. The evidence of Dr Giuffrida and Dr Westmore about the diary entries enables one to gain some understanding of the offender's state of mind when she made them. The evidence about her early life enables some understanding of why that was her adult state of mind and suggests a reason why she killed her children.

58 I find Dr Giuffrida's detailed review of the underlying facts and of his interviews with the offender valuable because his opinion, based upon the facts and the interviews, suggests explanations for events that at first seem to defy explanation.

59 All five interviews took place after the conclusion of the trial. Although there was then no question about the offender's responsibility for killing the children she dealt with Dr Giuffrida throughout as though she was not responsible. Dr Giuffrida noted in these words her matter-of-fact recounting of events-

> *I asked Mrs Folbigg about her emotional reaction to Caleb's death which she described as heartbreaking and shocking. I noted that tears came to her eyes naturally at this point and her emotional response to this seemed genuine.*
> …
> *Her affect was particularly remarkable in that whilst she related comfortably and would often smile appropriately,*

*there was always a somewhat blunted, distant even remote quality to her ability to relate. There were parts of the interview where she was able to engage somewhat warmly and more responsively, although this was always fleeting.*

...

*Although she showed tears and sadness briefly on two occasions in relation to discussing the deaths of two of her children, there was a remarkable inertness of emotional response in these discussions. Equally I was unable to elicit any symptoms suggestive of the reliving, either in the forms of dreams or flashback type experiences of the trauma of the deaths of any of her children. I thought this was highly significant given her otherwise graphic descriptions of the actual events of their deaths. One might have expected in a woman who had suffered the trauma of the deaths of four children to have been tormented, indeed tortured by reliving type experiences associated with feelings of intense grief, anxiety and depression. All of these symptoms and the associated affective response was either absent, blunted or attenuated.*

60 I received much the same impression when I looked at and listened to the long video-taped record of the interview the offender had with Detective Senior Constable Ryan. Although she showed some emotional reaction almost at the end of the interview when she was asked whether she had killed her children, her attitude throughout was much as Dr Giuffrida described during his interviews. I thought the offender expansive, voluble, chatty, almost detached for the most part. Her appearance was quite out of keeping with the gravity of the occasion. When asked about the meaning of the entry of 14 October 1996 she gave these unconvincing answers to these questions-

Q. *Why wouldn't you get a fourth chance?*

A. *We were having trouble with me falling pregnant. Whether it be the stress and us trying so hard, I don't know, but it took quite a while. Something that sort of never happened with Sarah and never happened before.*

Q. *But why do you think that fate and the man upstairs have decided that you don't get a fourth chance?*

A. *I don't know. Maybe I just thought three was s'posed to be our limit. Maybe I thought fate had, you know, that that was it.*

Q. *Why do you say, And rightly so I s'pose?*

A. *Again, along the lines back then, I was still thinking to myself that not trying enough or my version of being responsible had something to do with that. Yeah, I can't really say much more.*

Q. *What's your version of being responsible?*

A. *Just the thoughts of was I diligent enough? Was I*

*watching? Was I listening? Was I, should I have walked in two minutes earlier, or should I've been somewhere else or done something else or spoken to someone else or got help from someone else? The list just goes on, it's just a never ending sort of thing.*

Q. *What were your mistakes and terrible thinking?*

A. *Just the frustrations that I might have felt with Pat, and the occasional battles of will that I would have had with Sarah. To me that, looking back at that time I thought that was a terrible way of thinking. I kept telling myself that that shouldn't have happened. Yeah, so that's sort of what I meant by that, it wasn't...*

Q . *Did you ever feel as though that you hated the children?*

A. *Never, nuh. I don't, I know I've come across my versions of what I think atrocious parents are, watchin' them in plazas beltin' their kids till they're red, and hearin' about other parents that have done this to their kids or humiliating and embarrassing them in public and all the rest of it. To me, that's just not socially acceptable sort of behaviour, and I always wonder whether they actually really want their kids or do they hate their kids to turn around and do that sort of thing? But no, I've never, never hated my children. How can you hate a child? They're so, they're just there, they're beings and they're yet to be developed and older. What they turn out like as adults is up to the people that they're with.*

Q. *What do you mean by, Obviously I'm my father's daughter?*

A. *...my natural father is just a total big loser to turn around and to do what he did, stuffin' up his own life, stuffin' up my life, stuffin' up anybody they come in contact with. To me, that's just a loser in general. So I was thinkin' along the lines of am I a loser? Is it just not meant for me to, I was very sort of down on myself in certain areas but not in others back then, so.*

Q. *Tell me about your dad.*

A. *He, which I found more information out just recently which doesn't help his case any in my eyes, as far as I'm concerned. He killed my mother by stabbin' her 20 odd times. This is supposed to have been over who had me when and where and why. And my natural family was responsible for hidin' me all over the place 'cause he turned out to be not a very nice sort of man. I just found out recently that he was actually one of Lenny McPherson's major hit men sort of thing, he was his right hand lieutenant man, used to go and do debt collectin' and all that sort of thing. So yeah, and I just regard anyone who could go for a life like, and be the sort of person that he was.*

Q. *O.K Just getting back to this, obviously I'm my father's daughter. What was your version of …*
*A. I was thinking maybe I was a loser of some kind that sort of was destined to have some sort of tragic life of some kind, but it is a passing thought. I sort of didn't, I tried not to let it dwell or anything, and. But that was more of a recrimination of him rather than me in general.*

61 Dr Giuffrida found the diary entries revealing. He thought that they were the writings of a greatly tormented and exceedingly disturbed woman. He noted the prevailing theme of intensely depressed mood, expressions of worthlessness and low self-esteem and repeated references to feelings of rejection and abandonment by her husband, family and friends.

62 As the evidence shows, those feelings were irreversible and resulted from the effects upon her of the experiences she had undergone as a little child.

63 Dr Giuffrida noted the ambivalent feelings of the offender towards pregnancy and motherhood. She approached childbirth with feelings of intense anxiety and the daunting prospect of trying to bond to her baby, fearing that she would be challenged beyond her capacity to care for the child and overwhelmed by the task. He drew attention to the diary entry of 25 July 1996 and the frightening thought of having a baby and being left alone. The entry of 9 August 1996 contained a reference, in a portion which I have not extracted, to some minor illnesses the offender had suffered followed by the observation-

*If I was superstitious I'de take it as a sign - Not to get pregnant & that my body rejecting the idea because it's just not ready?*

64 Dr Giuffrida is of the view that the diary entries well demonstrate that the offender suffered intense feelings of shame and guilt over the death of the children. He thinks that the second part of the diary note of 11 June 1997 that I have extracted above is a good indication of the degree of torment that she was suffering. However, he observes, she did everything she could to suppress and contain her feelings of guilt, shame and remorse.

65 Dr Giuffrida thinks that the entry of 25 August 1997 poignantly describes the offender's inability to bond with her first three children. A remarkable thing about the entry is that in it the offender records her realisation that she loves Laura and says that she has bonded with her and wishes to protect her. Sadly, the bond was not strong enough to protect her child from her.

66 I accept the opinion of Dr Giuffrida that the overall theme of the diaries is of a woman always coping at the margins of her capacity to bond, relate to, provide for and care for her children, a woman easily roused to panic and readily defeated by any perception on her part that she might fail to provide for her children.

67 I set out part of Dr Giuffrida's long diagnosis-

*Whilst I do not think Mrs Folbigg suffered from a psychotic level of depression, that is to say the state accompanied by the development of psychotic phenomena such as delusional ideas, hallucinations or a serious form of thought disorder, it is nonetheless clear to me that her state of depression was serious enough and persistent enough to have strongly contributed to a state of mind that led to her killing her children.*

*I said earlier that Mrs Folbigg is a woman of probably at least average, if not above intelligence, although not having achieved her potential educationally. There is therefore no evidence of developmental disability.*

*I said at the outset that women who cause the death of their children very frequently suffer from the most serious kind of personality disorder. The most common type of severe personality disorder encountered is of women who show marked features of the borderline personality disorder or dependent personality disorder or more commonly a combination of borderline and dependent personality disorder. Less commonly one finds women with serious antisocial personality disorder, many with the core features of psychopathic personality disorder. I should say in Mrs Folbigg's case that there was remarkably little to implicate any of these serious personality disorders. She certainly shows none of the usual features of borderline personality disorder nor in particular of psychopathy. In relation to the latter, there is a very significant absence of antisocial conduct or behaviour in adulthood, although there is some evidence of conduct problems in childhood in the form of two episodes of stealing. There is no criminal history or antisocial behaviour in adulthood. In fact in many respects Mrs Folbigg has been remarkably conventional in terms of her lifestyle and interests and if anything had very ordinary and conservative aspirations. Despite her difficulties in her marriage, she persisted with it and continued to contribute to the family welfare in the sense of always working when she could. There is therefore very significantly a remarkable absence in terms of the historical features or the core criteria for psychopathy.*

*I have commented in my mental state examination and numerous others have commented on Mrs Folbigg's emotional detachment and indeed the blunted or attenuated capacity to grieve the death of her children.*

*I spent a good deal of time taking a very detailed history of her relationship with her children and her response to each of their deaths. That response was characterised by an*

*almost total absence of normal grief and bereavement. For a woman to lose a young child and then to lose four children suddenly is an intensely traumatic experience and it is almost invariably the case that the mourning and grieving process is both profound and long lasting. Such women often develop grossly pathological symptoms particularly of severe depression.*

*Although it is clear that after the death of each of her children, Mrs Folbigg became depressed in the sense of becoming emotionally blunted and withdrawn, there was in each case an extraordinary absence of any of the normal mourning or bereavement signs. Given that each of the children died suddenly and assuming they died by her own hand and I presume by smothering, this would for any woman be an intensely traumatic experience and would almost invariably result in symptoms of a post traumatic stress disorder, that is a state accompanied particularly by acute anxiety, depression, usually gross cognitive impairment and most of all intense reliving phenomena in the form of flashback type experiences of the time of death of the child or of terrifying nightmares* (or) *the death which would be usually sufficiently intense to wake the woman from sleep, usually accompanied by symptoms of an acute panic attack with palpitations, sweating, tremor, hyperventilation and so on. As far as I could determine, Mrs Folbigg did not appear to experience any of the normal symptoms of grief or mourning, nor did she reveal any of the symptoms that I would expect of post traumatic stress disorder in these circumstances.*

*I must say that this is a very significant phenomenon and I should attempt to explain this as far as I can.*

*The clearest phenomenon is the lack of the capacity for bonding or attachment of Mrs Folbigg to any of her children. Her attachment to each of the children such as it was, appears to have been of a practical and mechanical kind, devoid of any sense of loving or passion. I might say that also seems to be equally true of her relationship with her husband and with her foster mother.*

*The question arises in my mind as to how to account for this apparently inherent incapacity. I think the clues to this can be identified in Mrs Folbigg's earliest life experiences. It is clear that in her first 18 months of life that she is highly likely to have been brought up in a highly dysfunctional and probably emotionally, physically and possibly a sexual abusive relationship. It is highly likely that her father Thomas Britton, who had a history of assault and malicious wounding and who ultimately killed his wife, was abusive to his wife in*

*the childs first 18 months of life. It seems likely that Mrs Folbigg would have been exposed to such violence.*
*It also seems to be clear that Mrs Folbigg's mother was unable to care for her child and gave the child to her sister and her brother-in-law to look after for periods of time. My best guess in all of these circumstances is that Mrs Folbigg herself as a child was probably neglected and probably traumatised. There is some indication from the reports from the Department of Community Services at the time that she may have been subject to sexual abuse.*
*The evidence that Kathleen Folbigg was seriously disturbed when she came to live with her aunt and uncle when she was 18 months old is compelling. It would seem abundantly clear from all of the reports available from the Department of Community Services that the child was severely regressed. It is significant that she is described as being of low intelligence and having trouble being taught the most basic requirements of hygiene, acceptable manners and behaviour. Given that we now know that Mrs Folbigg is of at least average, if not above average intelligence, the description of her level of cognitive development at that stage is, I believe, highly significant. When she was tested by a psychologist on 4 August 1970, she was described as being remote, speaking little, not responding to conversation and otherwise restless, inattentive and non cooperative. She is described as a very disturbed little girl with various behavioural difficulties, aggressive to other children and not responding to the usual social and emotional demands placed on her. This level of regression and cognitive impairment in a child of 18 months to 3 years would strongly suggest to me that the child had been severely traumatised in her first 18 months of life.*
*What is of even greater significance to me is a 3 year old child who is said to have a preoccupation with her genitals and repeatedly tries to insert various objects into her vagina. This is evidence of a very disturbed child and I would take the fact she was inserting various objects into her vagina as prima facie evidence that she has been seriously sexually abused in her first 18 months of life. The behavioural disturbances were also characterised by "severe temper tantrums" with screaming and crying incessantly for reasons which do not appear to be clear at the time. I would take all of these behavioural changes together as evidence that the child was severely traumatised at the time.*
*There is abundant evidence in the literature of early childhood development that children who are neglected and who suffer serious sexual and physical trauma and neglect, suffer a profound disturbance of personality development.*

*Given the likely trauma suffered by this child at the time, it is very highly likely that she herself failed to experience any true bonding or attachment to her own mother. The fact that her mother gave her up to her aunt for periods of time before then retrieving her would reinforce that view. I note that after she was cared for by her aunt and uncle that her behaviour appeared to deteriorate further and that she was aggressive to other children and apparently destructive in the home. She continued to masturbate herself and as far as I could determine from the reports probably continued to have a preoccupation with her genitals.*
*The history available from the Department of Community Services file is that Kathleen Folbigg remained an exceedingly difficult child and it was only with the long passage of time that her behaviour became more tractable.*
*I believe that what happened to Kathleen Folbigg in her first three years of life was that she suffered a profound and probably irreversible impairment of her capacity to develop any meaningful emotional bonding or attachment and that this impairment contributed in some part at least to her total inability to relate, care for and protect her own children.*

68 Dr Westmore interviewed and assessed the offender twice before trial, in September 2002 and January 2003 and once after trial in June 2003. On the last occasion she told him that she was maintaining her innocence. She denied feelings of anger towards the children and confirmed feelings of inadequacy in the marriage. Dr Westmore, too, observed that she spoke spontaneously and expansively but with a relatively flat tone and restricted affect.

69 Dr Westmore reviewed all the documents seen by Dr Giuffrida. He observed that the majority of women who kill children suffer from psychotic illnesses and that the offender is not psychotic. He thinks that the childhood history of the offender is likely to have influenced her personality development and that she probably experienced significant disturbances in mood state from time to time. She was probably mostly depressed, but at times the depression was likely to have expressed itself as anger and aggression. He thought her over-controlled in view of the serious circumstances in which he was assessing her, rarely showing emotional distress or any emotional response despite the traumatic nature of the charges and the result of the trial. He is of the opinion that individuals who are over-controlled may be prone to episodes of extreme angry outbursts and thinks it possible that the offender has personality characteristics of that type. He observes that the diaries may have been an outlet for her to express internal feelings of anger, frustration and perhaps homicidal impulses and thoughts.

70 Dr Westmore continues-

*Her own concerns about not being a good or adequate mother, combined with her personality difficulties and vulnerability and her problems dealing with emotions such as anger and depression and frustration, are all likely in combination to have led her to feel she could not cope with the children and subsequently her acting towards them in a way which caused their deaths.*
*What is less clear is why she kept having children. Perhaps she wanted to have further opportunities to try and be a good mother, to prove to herself and perhaps others that she was capable of dealing with the demands of a child but reinforcing her own sense of failure each time she was unsuccessful.*

71 Dr Westmore was the only psychiatrist to give oral evidence. He repeated his view that the offender was not psychotic. He drew attention to the problems encountered by the offender during her years of adoption, particularly as a teenager, and concluded that they were fairly typical of any teenager. He thought that the absence of behaviour properly described as conduct disorder led to the conclusion that the offender did not develop antisocial personality disorder. However, the verdicts of the jury and the diary entries, supported by evidence of the event that must have occurred during the first three years of the offender's life, led to a diagnosis of severe personality disorder of an unspecified kind.

72 He was asked to explain the relevance of the effects upon the offender of the abuse she must have suffered during her early life. He observed that she made in her diary a positive association between present feelings and the rejection and isolation she felt when younger. He thought that the effect of the first three years was to make her vulnerable to depression. He thought that the diary entries showed fairly consistent, persistent depression of a woman able to function at a superficial level but maintaining profoundly disturbed internal feelings. It was possible, he said, that the anger which manifested itself when the offender killed the children stemmed from her depression. One might also say that the anger and the depression were separate emotions. He said that it was difficult to understand the mechanism by which depression had operated because the offender's continued denials denied access to knowledge of her thought processes. However, it was possible to say from the diary entries that there was a relationship between the depression and the feelings of anger which led to the commission of each offence.

73 Dr Westmore observed that there had been occasions when the offender was obviously frustrated with a child and depressed and angry but was able to put the child on the floor and walk out of the room (and I observe that there was another occasion on which the offender thrust Laura into the arms of Mr Folbigg and demanded that he attend to her), suggesting that

when the children died something else profoundly wrong was happening. His opinion is that on the balance of probabilities her capacity to control her behaviour at such times was most likely impaired.

74 Dr Westmore was cross-examined about that opinion. He was reminded of the diary entry about an imaginary conversation with the dead children in which Laura was said to have improved her chances of survival by being well-behaved, to the entries showing an increase in the degree of tension between the offender and Laura as she got older, and to the differences in the personalities of Sarah and Laura, the former more wilful and the latter less so, at least during her first year of life. Dr Westmore was asked to explain how it was that the offender only suffocated her children when there was nobody there to see what she was doing. He was unable to explain, he said, because he had no access to her thought processes.

75 He was asked whether it appeared that the primary problem of the offender was a conflict between her will and the developing will of each successive child, whether in all probability she killed each child when she was unable to deal with the fact that that child had a will of its own. He thought that that might be part of the answer but was not likely to be the only cause. He thought that the offender had a vulnerability which led her to become depressed and have trouble dealing with emotion, such as anger and frustration. He thought that a lot of the anger she experienced was generated from Mr Folbigg, occurring in the relationship of their marriage, and was displaced onto the children. He suspected that while the children may have made her angry at times the real source of her anger was problems in her marriage. There were these questions and answers-

> *Q. Doesn't she describe in both diaries the fact that her problem with Sarah was that Sarah was exercising an independent will contrary to her mother?*
> *A. I think there were parts of that, yes.*
> *Q. How do you explain that in the context of her displacing rage from Craig?*
> *A. Yes well it's – it need not necessarily be simply displaced aggression and anger from Craig but I think that was part of it. Obviously the psychopathology – the psychological processes that led her to do this are multi-determined and multi-factorial and very complex and to link it-to try and link it simply with anger or simply with depression is really a superficial way of trying to deal with it and understand it but it doesn't – it doesn't do that I don't think.*
> *Q. Would you agree with this, Dr Westmore, that from a review of the diaries that it would appear that her primary problem was one of her will and her children's emerging will conflicting with each other?*
> *A. That wasn't my impression from the diaries. My – the overwhelming feeling I got from the diaries was the feelings of depression, followed closely by anger and frustration, followed by her sense of isolation and loneliness.*

76 The court is to impose a sentence of imprisonment for life on a person who is convicted of murder if it is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence. So far as the sentencing court is concerned a person sentenced to imprisonment for life will never be released. Punishment of that kind is reserved for cases which can properly be characterised as falling within the worst category of cases.

77 The assessment of the culpability of an offender has to be based on the circumstances in which the offence was committed. The assessing court puts aside matters like remorse, the prospects of rehabilitation and other subjective features. The assessment is one of the blameworthiness of the offender. In that assessment the court may consider the upbringing of the offender insofar as it may have contributed to the commission of the offence. In effect there is a two-stage process. The court must first determine whether on the objective facts the level of culpability is so extreme that it warrants the maximum penalty. If it is, the court must determine whether the subjective evidence displaces the prima facie need for the maximum penalty to be imposed.

78 In deciding whether a case falls within the worst category of cases it must be possible to point to particular features which are of very great heinousness and to postulate the absence of facts mitigating the seriousness of the crime as distinct from subjective features mitigating the penalty to be imposed.

79 The maximum penalty is not reserved for those cases where the offender is likely to remain a continuing danger to society for the rest of his or her life or where there is no chance of rehabilitation. The maximum penalty may be appropriate where the level of culpability is so extreme that the community interest in retribution and punishment can only be met by such punishment.

80 There are several features of the offender’s conduct which make it liable to be viewed more seriously and as attracting a higher penalty. They are that five attacks took place on the four children. The first, on Caleb, resulted in a verdict of guilty of manslaughter. The second attack resulted in most serious consequences for Patrick, leaving him blind and susceptible to epileptic attacks. The attack was carried out with the intention to cause him really serious injury. The remaining attacks were murderous. I shall defer for the moment the question whether the offender intended at the time to kill or, as with Patrick’s ALTE, merely to do really serious injury.

81 The attacks took place over a period of ten years.

82 The victims of the attacks were all little children dependent upon the offender for their nurture and survival. The offences constituted a serious breach of the trust the children placed in the offender.

83 The Crown submitted that the actions of the offender in continuing to

have more children while knowing what she was capable of doing to them constituted a further breach of trust in that she was prepared to put her own desire to have children ahead of the safety and welfare of those children. I do not accept that submission. I think that when she decided to conceive each successive child the offender believed that she would be able to overcome the danger she represented to that child by succeeding at last in forming an attachment to the child and, where necessary, relying on the support of others.

84 The verdict of the jury on the first count shows that the offender may not be dealt with as having intended to kill Caleb or do him really serious injury. Post mortem records show the presence in his lungs of a substance called haemosiderin. When free blood is present in the lungs, as it will be after the deprivation of oxygen by suffocation, haemosiderin will be formed. However, there are other possible explanations for the presence of the substance and it would be unsafe to deal with the offender as though she had attacked Caleb on an earlier occasion as well.

85 The Crown submitted that the offender ought to be found to have suffocated Caleb while contemplating the possibility that he might die. The contemplation of the probability of death would, of course, have led to a verdict of guilty of murder. The Crown pointed to evidence of one of its experts to the effect that it would take a suffocating child a few minutes to lose consciousness. I do not think that the evidence justifies such a conclusion.

86 It was submitted on behalf of the offender that the preferable conclusion was that she intended merely temporarily to quieten the child. I do not accept that submission. Although the offender was then a young and inexperienced mother as likely as any other to make a mistake, the conclusion contended for is quite out of keeping with the explanation given by the expert evidence called by the offender. In my opinion the attack on Caleb, like those on the other children, resulted from the uncontrollable anger of the offender which came about in the ways the expert witnesses have explained.

87 It is proper in my view to regard the manslaughter of Caleb as having resulted from an act of smothering which was unlawful and objectively dangerous and criminally negligent, carried out in the heat of uncontrollable anger by a young and inexperienced woman of prior good character.

88 In order to find the offender guilty of the second charge the jury had to be satisfied beyond reasonable doubt that when she suffocated Patrick she intended to do him really serious bodily injury. She did not have to intend any particular kind of injury. She was quite unlikely to have intended to render Patrick blind and epileptic, not being medically trained and not understanding the mechanism by which denial of oxygen to the brain might produce such results. Even so, she is responsible for the injuries that did result and they were of the most serious kind. The blindness was irreversible. In the circumstances there is no evidence to suggest whether

and how the epilepsy might have responded to treatment, but it was potentially long-lasting if not permanent.

89 I am satisfied beyond reasonable doubt that when she attacked Patrick for the second time on 13 February 1991 the offender intended to kill him. She had already suffocated him once and knew from her attack on Caleb what the consequence would be if she deprived him of air for long enough. I am satisfied that in her anger, however short-lived, she decided to rid herself of the child whose presence she could no longer tolerate.

90 In my opinion there is no room for doubt that when she killed Sarah and Laura she intended to do so.

91 The stresses on the offender of looking after a young child were greater than those which would operate on an ordinary person because she was psychologically damaged and barely coping. Her condition, which I think she did not fully understand, left her unable to ask for any systematic help or remove the danger she recognised by walking away from her child. She could confide in nobody. She told only her diary. Even when her diary was discovered and her feelings realised she was persuaded to stay with Patrick. I think that the condition that gave rise to her fears and anxieties prevented her from refusing the well-intentioned offer.

92 The attacks were not premeditated but took place when she was pushed beyond her capacity to manage. Her behaviour after each attack contained elements of falsity and truth. She falsely pretended the unexpected discovery of an accident and falsely maintained her innocence. That, I think, was because she could not bring herself to admit her failure to anyone but herself. However, her attempts to get help, including what I think was a genuine attempt to perform cardio-pulmonary resuscitation on Laura, were genuine and made out of an immediate regret of what she had done. Her anger cooled as fast as it had arisen.

93 However, even with these mitigating features one would not hesitate, without the evidence of the events of the offender’s childhood and their eventual effect on her behaviour as an adult, to say that, taken together, her offences fell into the worst category of cases, calling for the imposition of the maximum penalty. As the Crown said in its written submissions, the real issue that arises is whether the offender’s dysfunctional childhood provides any significant mitigation of her criminality.

94 I think that it does. I think that notwithstanding the stable family environments afforded by the Platt and Marlborough families and by Mr Folbigg the effects on the offender of the traumatic events of her childhood operated unabated. She was throughout these events depressed and suffering from a severe personality disorder. I accept the evidence of Dr Westmore that her capacity to control her behaviour was severely impaired.

95 I accept that throughout her marriage the offender was affected by the abuse perpetrated upon her during her first eighteen months of life. The effects included an inability to form a normal, loving and forbearing

relationship with her children. Although she realised that shortcoming she lacked the resources to remedy it. She was unable to confide in Mr Folbigg. He never knew that she was at the end of her tether. The result was that he continued to leave everything to her and her fear of the consequences became settled. Her depression went unrelieved and on occasions turned itself into anger. The offender was not by inclination a cruel mother. She did not systematically abuse her children. She generally looked after them well, fed and clothed them and had them appropriately attended to by medical practitioners. Her condition and her anxiety about it left her unable to shrug off the irritations of unwell, wilful and disobedient children. She was not fully equipped to cope.

96 On occasions she appeared cool, detached, self-interested and unaffected by the fate of the children. In truth, she suffered remorse which she could not express.

97 Dr Giuffrida and Dr Westmore agree that the offender's condition is for the most part untreatable. Her chronic depression may respond to medication. Her feelings of vulnerability and failure may respond to psychotherapy, though there may be doubt whether it will be possible to offer her the fortnightly services that Dr Westmore considers necessary for that purpose. She will always be a danger if given the responsibility of caring for a child. That must never happen. She is not a dangerous person generally, however, and her dangerousness towards children does not disentitle her to eventual release upon parole on conditions which will enable risks to be managed.

98 Because of the intractability of her condition, the offender's prospects of rehabilitation are negligible. She is remorseful but unlikely ever to acknowledge her offences to anyone other then herself. If she does she may very well commit suicide. Such an end will always be a risk in any event.

99 Gaol is a dangerous environment for any serving prisoner. It will be particularly dangerous for the offender. In order to protect her from the danger of murder by other inmates the authorities will have to keep her closely confined for the whole of her time in custody. The number of people with whom she will have contact will be limited. So far she has been locked up for twenty-two hours in every twenty-four and the indications are that some such regime will obtain indefinitely. For these reasons she will serve her sentences the harder and is entitled to consideration.

100 The need for the sentences to reflect the outrage of the community calls for the imposition of an effective sentence which incorporates an unusually long non-parole period. So does the need generally to deter persons from committing crimes like these, which are so difficult to detect. I propose to impose a series of sentences which, partially accumulated, will produce an effective head sentence of forty years' imprisonment and a non-parole period of thirty years'. I have considered whether the offender's circumstances justify a period on parole which exceeds one quarter of the head sentence but I have concluded that they do not. In any event, a non-

parole period of less than thirty years would be insufficient to reflect the objective seriousness of the offences.

101 This scheme of producing an overall sentence to reflect the totality of criminality has made it necessary to decline to fix a non-parole period on any of the first four counts and to increase the parole period on the fifth count.

102 Kathleen Megan Folbigg, for the manslaughter of Caleb Gibson Folbigg I sentence you to imprisonment for ten years. The sentence will be taken to have commenced on 22 April 2003 and will expire on 21 April 2013. I decline to fix a non-parole period.

103 For the intentional infliction of grievous bodily harm upon Patrick Allen Folbigg I sentence you to imprisonment for fourteen years. The sentence will commence on 22 April 2005 and will expire on 21 April 2019. I decline to fix a non-parole period.

104 For the murder of Patrick Allen Folbigg I sentence you to imprisonment for eighteen years. The sentence will commence on 22 April 2006 and will expire on 21 April 2024. I decline to fix a non-parole period.

105 For the murder of Sarah Kathleen Folbigg I sentence you to imprisonment for twenty years. The sentence will commence on 22 April 2013 and will expire on 21 April 2033. I decline to fix a non-parole period.

106 For the murder of Laura Elizabeth Folbigg I sentence you to imprisonment for twenty-two years. The sentence will commence on 22 April 2021 and will expire on 21 April 2043. I fix a non-parole period of twelve years, which will expire on 21 April 2033.

107 You will be eligible for release on parole on 21 April 2033.

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Last Modified: 10/28/2003

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| **Reported Decision :** | 152 A Crim R 35 |

New South Wales
Court of Criminal Appeal

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| **CITATION:** | **Regina v Folbigg [2005] NSWCCA 23** |
| **HEARING DATE(S):** | 26 November 2004 |
| **JUDGMENT DATE:** | 17 February 2005 |
| **JUDGMENT OF:** | Sully J at 1; Dunford J at 192; Hidden J at 193 |
| **DECISION:** | Extension of time granted to permit of hearing of present appeal and application; Appeal against convictions dismissed; Leave granted to appeal against sentence; sentences passed at first instance on Counts 4 and 5 quashed and appellant re-sentenced on those counts as follows; On Count 4 to imprisonment for 20 years to commence on 22 April 2008 and to expire on 21 April 2028; no non-parole period set because of the overall structure of the appellant's re-sentencing; On Count 5 to imprisonment for 22 years to commence on 22 April 2011 and to expire on 21 April 2033 with a non-parole period of 17 years to expire on 21 April 2028. |

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| **LEGISLATION CITED:** | Evidence Act 1995 (NSW)<br>Criminal Appeal Act 1912 (NSW) |
| **CASES CITED:** | GK (2001) 53 NSWLR 317<br>Makin v Attorney General of New South Wales [1894] A C 57 at 65<br>Reg v Boardman [1975] A C 421 at 456E<br>Harris v Director of Public Prosecutions [1952] A C 694<br>Reg v Cannings [2004] 1 WLR 2067<br>M v The Queen (1994) 181 CLR 487 at 493<br>Jones v The Queen (1997) 191 CLR 439<br>MFA v The Queen (2002) 213 CLR 606<br>R v Ellis (2003) 58 NSWLR 700<br>Director of Public Prosecutions v P [1991] 2 A C 447<br>Pearce v The Queen (1989) 194 CLR 610<br>Veen (No. 2) (1988) 164 CLR 465<br>Wong v The Queen (2001) 207 CLR 584 |
| **PARTIES:** | Regina<br>Kathleen Megan FOLBIGG |
| **FILE NUMBER(S):** | **CCA** 2004/1814 |
| **COUNSEL:** | M. Sexton SC/J. Girdham/A. Mitchelmore - Crown<br>D. Jackson QC/P. Zahra SC - Appellant |
| **SOLICITORS:** | S. Kavanagh - Crown<br>S. O'Connor - Appellant |

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| **LOWER COURT JURISDICTION:** | Supreme Court |
| **LOWER COURT FILE NUMBER(S):** | 70046/02 |
| **LOWER COURT JUDICIAL OFFICER:** | Barr J |

**IN THE COURT OF CRIMINAL APPEAL**

**2004/1814**

**SULLY J**
**DUNFORD J**
**HIDDEN J**

**17 February 2005**

RE5GINA v Kathleen Megan FOLBIGG

**Judgment**

**SULLY J:**

**Introduction**

1 Between 1 April 2003 and 21 May 2003 the appellant, Mrs. Folbigg, stood trial in the Supreme Court, and before Barr J and a jury, upon an indictment containing five counts.

2 **Count 1** charged the appellant with having murdered, on 20 February 1989, Caleb Gibson Folbigg.

3 **Count 2** charged the appellant with having maliciously inflicted, on 18 October 1990, grievous bodily harm upon Patrick Allen Folbigg with intent to do grievous bodily harm.

4 **Count 3** charged the appellant with having murdered, on 13 February 1991, Patrick Allen Folbigg.

5 **Count 4** charged the appellant with having murdered, on 30 August 1993, Sarah Kathleen Folbigg.

6 **Count 5** charged the appellant with having murdered, on 1 March 1999, Laura Elizabeth Folbigg.

7 On 21 May 2003 the jury found the appellant guilty as charged in each of Counts 2, 3, 4 and 5. Upon Count 1 the jury found the appellant not guilty of murder but guilty of manslaughter. On 24 October 2003 Barr J sentenced the appellant to various terms of imprisonment. The sentences were partially cumulated so as to produce an overall result of imprisonment for 40 years with a non-parole period of 30 years.

8 The appellant now appeals against all five of her convictions and she applies for leave to appeal against each of the five sentences passed upon her. The Notice of Appeal which has been copied in the Appeal Book shows a filing date of 8 July 2004. This suggests that the appellant requires an

extension of time in which to appeal against her convictions and to seek leave to appeal against the sentences passed upon her. I shall propose in due course, and for more abundant caution, an order formally granting any necessary extension of time.

9 Four grounds of appeal against the convictions were notified and argued. It will be convenient to deal with them in the order in which they were argued.

### The Crown Case at Trial

10 The appellant was married in September 1987 to Craig Folbigg. They had four children: Caleb, Patrick, Sarah and Laura. Each child died in infancy; died suddenly and unexpectedly; and died before the birth of the next child. In the case of each death the mechanism of death was the cessation of breathing; the post-mortem examination failed to establish exactly what had caused the cessation of breathing.

11 The appellant was the primary carer for each child. Her husband, following the unexplained death of Caleb and the subsequent birth of Patrick, left his then employment and spent a period of three months actively assisting the appellant in Patrick's day-to-day care. Apart from that one interlude, Mr. Folbigg was at all material times in full-time employment, and the appellant was the parent responsible for the day-to-day care of the children. It was particularly significant to the Crown case that Mr. Folbigg was a very heavy sleeper, and that it was the appellant who attended to the needs of the children during the late night and early morning hours.

12 ***Caleb*** was born on 1 February 1989. He was a healthy and full-term baby; but it was early noticed that he tended to breath noisily and to stop breathing in order to feed. A specialist paediatrician diagnosed laryngomalacia, a condition that is described in more colloquial language as a "floppy larynx". The diagnosis was that the condition was mild and that the baby would grow out of it.

13 On 20 February 1989 the appellant put Caleb to bed in a bassinette in a room adjacent to the bedroom used by her and Mr. Folbigg; and they both of them went to bed. It appeared from a record kept by the appellant of the pattern of Caleb's sleeping and feeding that Caleb had had an unsettled night, being awake from mid-night until 2.00 a.m.

14 At some time shortly before 3.00 a.m. Mr. Folbigg was awoken by what he described as *"screamed words"*. He ran into the adjoining room and found the appellant standing at the end of the bassinette. She was screaming: *"My baby, there's something wrong with my baby"*.

15 Caleb was lying on his back in the bassinette. He was wrapped in a rug. Mr. Folbigg picked the baby up and noted that he was warm to the touch but did not appear to be breathing. He told the appellant to call an ambulance, and himself attempted to perform CPR on the baby. Ambulance officers arrived at 2.55 a.m. but Caleb was then already dead.

16 There was nothing known at the time that was indicative of Caleb's death having been other than natural. In due course a diagnosis of sudden infant death syndrome, (SIDS), was made; such a diagnosis being normal when a baby aged, usually, somewhere between 2 months and 6 months, dies suddenly and unexpectedly and there is no reason to suspect that the death resulted from unnatural causes.

17 It was the Crown case that the appellant had smothered Caleb.

18 ***Patrick*** was born on 3 June 1990. He, too, appeared to be a healthy baby. He slept normally in a cot in a bedroom off the dining room. As previously noted, Mr. Folbigg took 3 months off work in order to help in caring for the new baby.

19 Three days after Mr. Folbigg had resumed full-time employment he was awoken by the sound of the appellant screaming. He ran into the bedroom and found the appellant standing at the end of the cot. Mr. Folbigg at once lifted Patrick out of the cot and performed CPR, noting that Patrick was warm to the touch. Ambulance officers attended at 4.41 a.m. and took Patrick to hospital. They noted that Patrick was in respiratory distress and gave him oxygen.

20 Patrick was aged at this time 4-1/2 months. In hospital he appeared to improve; but 2 days after the initial incident he had a sudden epileptiform seizure.

21 The appellant gave Patrick's treating doctor a history of having gone into Patrick's room at about 3.00 a.m. in order to see why he was coughing. He seemed to be alright and she went back to bed. At about 4.30 a.m. she heard Patrick gasping. When she attended him she found that he was blue around the lips, listless and floppy but making minimal respiratory efforts and giving off a high-pitched cry.

22 A battery of diagnostic tests was performed on Patrick, but the cause of the apparent life-threatening event, (ALTE), was never formally determined. A paediatric neurologist diagnosed epilepsy and cortical blindness.

23 In the aftermath of this the appellant showed signs of an inability to cope with the situation. She displayed frequently anger and frustration. She began to leave Patrick with Mr. Folbigg's sister, Mrs. Carol Newitt, and one of their neighbours, so that they could baby-sit and she herself could just get away from things for a time. At one stage during this period Mr. Folbigg found a diary which the appellant had been keeping, and in which she had written that she was not coping, and that Patrick and his father would both be better off if she left them, which she was intending to do if she could. This discovery led to an increase in Mrs. Newitt's involvement in Patrick's day-to-day care.

24 At about 10.00 a.m. on 13 February 1991 Mr. Folbigg received at work a telephone call from the appellant. She screamed: *"It's happened again"*. Mr. Folbigg at once went home. He arrived home at the same time as an ambulance which the appellant had called. Mrs. Newitt was already there,

having been called by the appellant. Mrs. Newitt had found upon her arrival that Patrick was lying on his back in his cot; but the appellant, who was crying, would not allow her to lift Patrick out of the cot.

25 Mr. Folbigg found Patrick still lying on his back in his cot. He picked Patrick up and performed CPR, noting that Patrick's lips were blue. Patrick and his parents were transported by the ambulance officers to hospital where Patrick shortly thereafter died.

26 A hospital physician determined that Patrick had suffered a cardiac arrest, but could assign no cause for it. A subsequent post-mortem examination could detect no cause of death.

27 The Crown case was, once again, that the appellant had smothered her baby.

28 The appellant appeared to recover relatively quickly from Patrick's death, just as she had done after Caleb's death. She and Mr. Folbigg relocated to the Hunter Valley; and the appellant began to press Mr. Folbigg to have another child. He eventually agreed to do so, but only on condition that SIDS specialists should be actively involved in any new baby's care.

29 ***Sarah*** was born on 14 October 1992. She slept in a bed in her parents' bedroom. She manifested during her first three weeks of life some sleep apnoea, but not to any abnormal degree; and the SIDS consultants provided a sleep apnoea monitoring blanket. The monitor frequently returned false alarms. The appellant wanted to abandon the use of the blanket; and it was part of the Crown case that this showed an understanding on the appellant's part that the baby was at no risk of spontaneous death. The use of the blanket was in fact discontinued two or three days before Sarah's death.

30 The appellant was frequently bad tempered with Sarah, and markedly so on the night before her death when Sarah was unwell and difficult to settle down for the night. The appellant showed marked signs of frustration, and it was left to Mr. Folbigg to calm the baby and to put her to bed in her cot at the end of the matrimonial bed.

31 According to Mr. Folbigg, he awoke briefly at about 1.10 a.m. on the morning of Sarah's death. There was a light coming from around the bedroom door, but neither mother nor baby was in the bedroom. Mr. Folbigg went back to sleep from which he was aroused by the screaming of the appellant. He saw the appellant standing at the bedroom door. Sarah was lying on her bed. She was floppy and warm but not breathing. Mr. Folbigg, and subsequently ambulance officers, performed CPR, but unsuccessfully.

32 A subsequent post-mortem examination noted small abrasions near Sarah's mouth. Her lungs showed petechial haemorrhage, minor congestion and oedema, all of them phenomena consistent with death by asphyxiation caused by the application of mild force. A displaced uvula was noted and eliminated as a cause of death. The formal finding was one of death due to unknown natural causes.

33 The Crown case was that the appellant had taken Sarah out of the bedroom in order to attend to her in some way; but had in fact smothered the baby, and had placed her dead body back in the bed, pretending to have found her in that condition. A note in the appellant's hand-writing was subsequently discovered on a calendar. The note read: *"Sarah left us at 1.00 a.m."*.

34 In the wake of Sarah's death the appellant seemed to become despondent and aimless. She would not depart from her version of having found Sarah already dead. Her relationship with Mr. Folbigg deteriorated to the point of a number of separations and reconciliations; but by early 1996 the appellant and her husband were once again living together. The appellant pressed, once again, for another child.

35 ***Laura*** was born on 7 August 1997. Extensive testing showed mild apnoea, but no genetic, biochemical or metabolic disorders. Arrangements were made for the installation of a special type of sleep monitor which stored information that was subsequently down-loaded by telephone to a Sister Margaret Tanner of Westmead Children's Hospital.

36 This monitor regularly returned false alarms. Mr. Folbigg, suspicious that the appellant was not using the monitor, confronted her on that topic, and was assured by the appellant that she was watchful of Laura, and that the machine was driving her mad.

37 Mr. Folbigg continued to be suspicious about the appellant's correct using of the monitor; and over time their relationship again deteriorated. The appellant came increasingly to spend her days at a gymnasium and her nights with friends.

38 On the day two days prior to the day of Laura's death, and again on the morning of the latter day, there were disturbing instances of anger and frustration on the appellant's part, boiling over into physical violence towards Laura.

39 On 1 March, the day of Laura's death, the appellant took Laura to Mr. Folbigg's place of work after her morning gym class. The appellant and Laura left for home at about 11.30 a.m. At about 12.14 p.m. an ambulance arrived at the home in answer to a call. The ambulance officers found the appellant crying and performing CPR on Laura who was lying on the breakfast bar. Laura was warm to the touch, but she was not breathing, and she had no pulse. The ambulance officers tried unsuccessfully to resuscitate her.

40 A subsequent post-mortem was conducted. It detected, but eliminated as a cause of death, a mild inflammatory condition of the heart. The formal finding was one of undetermined cause(s).

41 Laura's death left her father distraught, and he and the appellant separated. While Mr. Folbigg was tidying up the home in connection with that separation he discovered some diaries of the appellant. He read them; and what he read so disconcerted him that he contacted the police. Police

investigations subsequently located a further diary in the appellant's possession. The police investigations culminated in the charging of the appellant.

42 In the case of Laura, as in the case of her siblings, the Crown case was that the appellant had smothered the child.

43 The Crown case at trial accepted that the evidence available to the Crown in each individual case was insufficient to establish in connection with that individual case guilt beyond reasonable doubt. The Crown contended that to deal separately with each case would be unjustly artificial, and that all matters charged against the appellant should be tried on one indictment and at one trial. There were unsuccessful interlocutory attempts by the appellant to bar a joint trial. The propriety of a joint trial is the focus of *Ground 1* of the convictions appeal grounds.

44 The Crown case at trial depended heavily upon the contents of the appellant's diaries. It was the Crown case that this diary material contained virtual admissions of guilt of the deaths of Caleb, of Patrick and of Sarah; and admissions by the appellant that she appreciated that she was at risk of causing, similarly, the death of Laura. Whether this is a reasonable reading of the material is an important aspect of *Ground 2* of the convictions appeal grounds.

45 The Crown led at trial evidence from a number of witnesses who were presented as qualified to give professional expert opinion evidence to the effect that they knew of no previous recorded case in which three or more babies in one family had died suddenly and for reasons not explicable by proper professional diagnosis. The admissibility of this evidence is the focus of *Ground 3* of the conviction appeals grounds.

46 The Crown case at trial relied in part upon coincidence and tendency evidence. The correctness of the learned trial Judge's directions to the jury on those topics is the focus of *Ground 4* of the convictions appeal grounds.

**The Appellant's Case at Trial**

47 The appellant did not give evidence at her trial. Her case rested in part upon the cross-examination of Crown witnesses; and in part upon evidence called in her case from five witnesses, three of whom were lay witnesses, and the other two of whom were medical experts. The general cast of the appellant's case at trial is summarised helpfully, and as follows, in part A of the written Crown submissions:

> "The appellant did not kill her children or harm Patrick. She specifically denied this in her ERISP interview. She did not think Craig was responsible for their deaths. The Crown case had to be analysed extremely carefully to see if the Crown's assertions that she lost her temper with the children in fact matched the evidence. There were natural explanations for the events, such as Sudden Infant Death Syndrome and, in the case of Laura's death, myocarditis. The appellant in fact

was a caring mother, who, for example, always kept her children clean and tidy and was attentive to their appointments with doctors. Many of her diary entries in fact showed that she was concerned as a parent and enjoyed being a parent, something that was noticed by Craig and other witnesses at various times and passed on to the police during their investigations. There was no direct statement of responsibility for a death and it is understandable how a mother would blame herself in the appellant's situation, even though she was not responsible. There was no 'failure to thrive' by the children, apart from Patrick's difficulties with epilepsy and blindness, and they were well-nourished and cared for. The appellant appeared to be utterly distraught when the ambulance officers, the former police officer Mr. Saunders and others came to the house after the deaths of the children." [Footnotes omitted]

48 It will be necessary, when dealing later herein with Ground 2 of the conviction appeals grounds, to consider in more detail the evidence in both the Crown and the defence cases.

**The Convictions Appeal : Ground 3**

49 The Ground is:

"The trials of the appellant miscarried as a result of evidence being led from prosecution experts to the effect that they were unaware of any previous case in medical history where three or more infants in one family died suddenly as a result of disease processes."

50 The ground refers to *"prosecution experts"*; but in fact expert opinion evidence relevant to the ground was given by four witnesses, three of whom: Professor Herdson, Professor Berry and Dr. Beal, were called in the Crown case; and one of whom: Professor Bayard, was called in the defence case.

51 It will be necessary to consider presently the way in which the trial Judge ruled upon objections taken by Senior Counsel for the appellant at trial to the admission of this body of evidence in the Crown case. (It is convenient to note here, and not to repeat constantly hereafter, that the appellant was represented at trial by Mr. Zahra SC, the Senior Public Defender, who is particularly experienced in the conduct on behalf of accused persons of major criminal trials. Mr. Zahra appeared as second leading counsel for the appellant before this Court.)

52 Before doing that it is necessary to say something about some of the evidence which the Crown sought to lead at trial from Dr. Allan Cala, a very experienced forensic pathologist, who performed the post-mortem examination of the child, Laura.

53 The Crown sought to lead from Dr. Cala evidence to the following effect:

*[1] That Dr. Cala was not aware from his own experience or from reading medical literature that any child has ever died from a floppy larynx, a condition from which Caleb suffered.*

*[2] That no cause of Caleb's death had been found.*

*[3] That in the light of the evidence of Dr. Wikinson, Patrick's ALTE was consistent with his having suffered from a catastrophic asphyxiation event deriving from unknown causes; and that no cause of Patrick's death could be found.*

*[4] That it was inappropriate for Professor Hilton to call Sarah's death a SIDS death.*

*[5] That no cause could be assigned for Laura's death.*

*[6] That he could not think of any single natural cause that would account for all four deaths.*

*[7] That there was in his view an unnatural cause which could account for all the deaths, namely smothering.*

*[8] (Possibly) that each of the four children died from an unexpected catastrophic asphyxiation event of unknown origin.*

54 Objection was taken to the leading of evidence directed to the fourth and seventh of the foregoing items. In a reserved judgment published on 16 April 2003 his Honour disallowed evidence directed to those two propositions. In doing so, his Honour made a number of observations which seem to me to be pertinent to Ground 3. His Honour said:

> "(Dr. Cala) used to be employed as a pathologist in the New South Wales Institute of Forensic Medicine in Sydney, and in that capacity carried out an autopsy on the body of the child Laura, and provided a report for the Coroner. In his report he stated his inability to determine the cause of Laura's death. Such a conclusion is to be distinguished from one that a death is a SIDS death. The acronym SIDS is made up from the initial letters of the words Sudden Infant Death Syndrome. Having heard a number of expert witnesses give evidence about its meaning, I have the impression that it means no more than this, that the epithet is assigned to the death of a child of appropriate age who is believed to have died of a natural cause or natural causes, which cause or causes cannot be identified.
>
> According to Dr. Cala, the difference between the two conclusions is that a death should not be described as a SIDS death if unnatural causes, which for present purposes means

deliberate or accidental trauma, cannot be excluded.

55 On the day following the publication of this judgment, his Honour had to deal with objections to the proposed evidence of Professors Herdson and Berry and Dr. Beal. His Honour heard a deal of argument from the Crown Prosecutor and from Mr. Zahra SC, and reserved until 24 April his ruling on the objections.

56 On 24 April 2003 the Crown Prosecutor told his Honour this:

> "We have been in communication with Dr. Beal, Dr. Berry and Dr. Herdson since the matter was last raised with your Honour. We have prepared a document that sets out in question and answer form the sort of questions that we would intend asking them in much more admissible form than their reports. Certainly there are parts of their reports which are admissible, as your Honour has provisionally indicated, but there are other parts which we would seek to lead in a form which is closer to the form that was used with Dr. Cala. I have a copy to hand up to your Honour of those and my friend received that some days ago, I think, Tuesday. I don't know at this stage that we need the judgment from your Honour, unless my friend has some area that he wishes to raise."

57 Some brief discussion ensued; and his Honour indicated that he would give at once his ruling on the evidence of Professor Herdson and Professor Berry. There followed immediately this interchange:

> "HIS HONOUR: ..... Before I do, I take it, Mr. Zahra, if Dr. Beal's evidence is dealt with in the way that Dr. Cala's was, you would not be raising any objection.
> ZAHRA: Yes. I wouldn't cavil with your Honour's previous judgment on that."

58 His Honour then gave judgment. It is a brief judgment and it is convenient to reproduce it in full:

> "1. HIS HONOUR: Objection is taken to the tender of evidence from Dr. Berry to this effect:
>
> > Sudden death of four infants in the same family who were previously well (in the case of Patrick before his initial collapse) due to natural disease is unprecedented in my experience, and I know of no substantial examples in the literature. Nevertheless, it is important to explore this possibility.
> > ....
> > The sudden and unexpected death of three children in the same family without evidence of a natural cause is extraordinary. I am unable to rule out that Caleb, Patrick, Sarah and possibly Laura Folbigg were suffocated by the person who found them lifeless, and I believe that it is probable that this was the case.

2. Objection has also been taken to passages from Professor Herdson's report, but the only one now in dispute is this:

> I am unaware that there had ever been three or more thoroughly investigated infant deaths in one family from sudden infant death syndrome.

3. As I understand it, the defence does not object to the qualifications of Dr. Berry and Professor Herdson as highly experienced medical practitioners in the field of infant death and its causes.

4. What is submitted, as I understand it, is that what those witnesses would be doing, if permitted to express those opinions, would be reasoning by way of an opinion which they were not entitled to have. The evidence would therefore be non expert opinion, as that term is defined in section 79 **Evidence Act** .

5. For the most part I disagree with that submission. It seems to me that both witnesses can give evidence based upon their experience, both on their own account and from their knowledge from communication with other experts in their field of the incidence of unexplained infant deaths. It seems to me to be permissible for Dr. Berry to give evidence that the sudden death of four infants in the same family who were previously well due to natural disease is unprecedented, and he can make that statement of opinion from his own experience. He can also say that he knows of no substantiated examples from the literature.

6. So long as he deals with the cases individually and does not rely on the kind of coincidence reasoning against which I ruled in considering Dr. Cala's evidence, it seems to me also that Dr. Berry is entitled to say that he is unable to rule out that Caleb, Patrick, Sarah and possibly Laura were suffocated.

7. It would not be permissible, however, for him to continue to say that he could not rule out that they were suffocated by the person who found them lifeless, because although in one sense unexceptionable, that is a piece of loaded evidence and liable to be misunderstood by the jury. He should not, in any case, say that he thinks that it is probable that that was the case.

8. Conformably with my decision about Dr. Berry's challenged evidence, I think it permissible for Professor Herdson to say that he is unaware that there have ever been three or more thoroughly investigated infant deaths in one family from sudden infant death syndrome."

59 When one looks carefully at the wording of Ground 3, it is unclear whether the nub of the ground is a proposition that the foregoing preliminary rulings of Barr J were incorrect; or is, rather, a proposition that

the rulings were correct, but were overtaken in fact by the actual evidence as led before the jury; or is a combination of those two propositions. Given that ambiguity, it is necessary to cover both of the putative individual propositions. That entails a need to examine the evidence that the Crown witnesses gave before the jury.

60 The first of the three to be called was **Professor Herdson**, who had very impressive credentials as a pathologist, and as a consultant forensic pathologist.

61 Professor Herdson expressed opinions based upon *"a large dossier of material containing medical records for the four children, including their post-mortem reports .....(and) ..... a number of pathological slides that were taken during or shortly after the post-mortem examinations, ..... (and) ..... a certain amount of research in the literature"*.

62 The Crown Prosecutor led Professor Herdson's evidence-in-chief by taking him to the individual case of each in turn of the four children. As to each child, Professor Herdson agreed with a proposition, put to him by the Crown Prosecutor, that the child had died *"from a sudden catastrophic asphyxiating event of unknown causes"*. In the case of Patrick, Professor Herdson expressed the additional opinion that the ALTE had arisen from that type of event.

63 Professor Herdson said, as to each child, that the post-mortem findings were consistent with death by smothering. He thought that other observed phenomena: e.g. Caleb's "floppy" larynx, Laura's myocarditis, and Sarah's displaced uvula, were not of significance as possible causes of death. Asked whether he could *"think of any disease, illness or condition that could have accounted for the deaths of all these children"*, Professor Herdson said, simply, that he could not.

64 Professor Herdson accepted a proposition, put to him by way of summary by the Crown Prosecutor, that *".....death from SIDS is a diagnosis of death from some unknown natural cause, whereas death from undetermined causes implies a death from some unknown natural or unnatural cause"*. He thought that Sarah's case, looked at in isolation, came closest to satisfying the generally accepted diagnostic criteria for SIDS; but that, generally speaking, he could not *"distinguish between SIDS and suffocation"*.

65 In re-examination, Professor Herdson gave, over objection, this additional evidence:

> "Q. Are you aware, from your own experience, from contact with your colleagues and from the medical literature, whether there have ever been three or more, thoroughly investigated, infant deaths from sudden infant death syndrome in the one family?
> A. I am not aware of such a finding."

66 Evidence was then taken from **Professor Berry**, a highly qualified and

experienced paediatric pathologist. He, too, had examined the relevant medical records, post-mortem reports and microscopic slides.

67 It suffices for the moment to say that Professor Berry's evidence, although obviously different in particular expression, accorded in substance with the evidence of Professor Herdson, taking each of the cases of the four children individually and in isolation from the other cases. Professor Berry gave in the concluding passages of his examination-in-chief the following evidence:

> "Q. Professor, are you aware of any substantiated case where there have been three or more SIDS deaths in the one family?
> A. There are some reports many years ago which now no longer stand scrutiny, but I am unaware of any families with – I think you said – three or more deaths from SIDS in what I might call the contemporary literature and up-to-date literature, nor have I encountered any in my practice or research.
> Q. Putting aside the congenital or familial or genetic tests that were conducted on these children, are you aware of any case in which there have been three or more children who have died unexpectedly and suddenly from some other illness other than SIDS.
> I think that question is a bit unclear.
> A. I think I understand it. I'm personally not aware of any kindreds where there have been sudden deaths of previously fit children due to another medical condition that has affected three or more children. That's not to say they don't exist, but I'm personally unaware of any in the literature.
> Q. Does that mean that you have not had any yourself, you are unaware of any of your colleagues having come across any and reported them to you, and you are not aware of any in the medical literature?
> A. That's correct. My experience, knowledge of disease, is that fatal diseases are not 100 per cent instantly fatal in every case. So, some of the genetic conditions, for example, that were excluded, have very clear presentations. They don't, in fact, present with sudden death of a previously well child.
> I could elaborate if you wish me to, but I will leave it there if you don't.
> Q. I would ask you to elaborate, doctor.
> OBJECTION
> ZAHRA: As I understood what Professor Barry was saying, I think his first answer was that there was no research that he was aware of. I'm unsure as to whether the question relates merely to his own experience or whether he has excluded – in other words, that he has excluded all other research; in

other words, whether he has researched the literature to exclude multiple natural causes.
HIS HONOUR: That is a matter that can be investigated. I will permit the question.
CROWN PROSECUTOR: Q. You offered to elaborate on your last comment, and I would ask you to elaborate.
A. I wonder if you can help me if there has been discussion of emCAD in this Court, or not?
Q. No, we have not.
HIS HONOUR: Yes, there has been.
A. Just, as an example of a genetic condition that might run in a family that causes sudden death, there is something called emCAD. We do not need to go into it. It has been excluded, as I understand it, in this case. But those children do not present, generally speaking, as SIDS; they nearly always have a prodromal, an illness preceding their death, which is very characteristic. Two times out of three I can diagnose emCAD before I start the post-mortem from the history alone. So, what I am trying to say is that most illnesses have a period of illness before the child dies. The death is not instantaneous.
Q. Is that what you meant when you said “prodromal”?
A. Yes, a period of illness beforehand, so children do not just drop dead, as it were, of diseases and produce kindreds with multiple SIDS-like deaths. So, in this case, one of my anxieties is that there don’t appear to be significant illnesses before these children’s collapses.”

68 Later, and in re-examination, Professor Berry added this evidence:

“Q. What sort of a search have you made of the literature prior to coming to Australia to give evidence in this case?
A. This is a database called Mediline, which essentially contains references to all the medical articles that have been written since the 1960s, and you can select articles by putting in particular words, and so one might put in “sudden infant death” as one search criterion, and then you would put “multiple”, to pull up any paper that is indexed under “multiple infant deaths”, and some papers do come up, as you will – Dr. Susan Beal, for example, has written on this subject, and I am sure you will hear from her. A paper by Professor John Emery. There are other papers on this subject. But diseases that really cause sudden death, without preceding symptoms and without leaving traces from which you can make a diagnosis at post-mortem, three different ones in the same family, I am unaware of that.
Q. And the Mediline database that you have spoken about, is that one which is used by medical practitioners around the world?

A. Yes. It is the standard database.
Q. And it is universally recognised as the best medical database in the world?
A. I think that's true. There are other medical databases, and one can look in others, but it is the absolute standard one that everybody uses, yes."

69 Before **Dr. Beal** was called, there was extensive discussion in the absence of the jury about precisely what evidence, if any, she should be permitted to give. Before his Honour was a document containing what were described as *"model questions"*. The so-called model questions had been asked of Dr. Beal in an out-of-Court setting, and her answers, also recorded in the document, indicated what the Crown expected that she would say if examined in-chief in the terms of the model questions.

70 The discussion in the absence of the jury extends over some 24 pages of trial transcript. It is, with respect to those concerned, not always easy to fathom from what has been recorded in the transcript what points and objections were being agitated at any particular point. It is impossible to compress the 24 pages of material into a crisp paragraph or two. Perhaps the fairest way of proceeding is to note the opening submissions of Mr. Zahra SC. They are, as recorded:

"Your Honour, this witness will go further than any other expert and that would include Professor Berry and Professor Herdson. If I can just put it simply at this stage. We have a witness who will go further and who has not read the post-mortem reports. This is the essential foundation of the bases upon which this evidence is given. So we know that confidently because that is what the witness said in the voir dire. So it is a logical exercise to then ask one's self well, what is it that she relies upon to say these things? When we go through the detail of the statements and we go through the evidence on the voir dire, it becomes apparent that in fact it is either on a statistical basis or either on a premise that if the child was not prone and had no heart lesions, then it would be homicide or, reliance on the mantra. In other words, taking into account the history of the others.
Your Honour, the danger is that my friend will lead from this evidence extensively her background and experience. Her qualifications, your Honour, are immense and are likely to persuade the jury about her opinion.
It is not to say that her field of study and her researches and her papers have not had a significant effect on the understanding of SIDS in the past and it is not to say that the basis of her research is in fact not meritorious. However, your Honour it is largely based on an examination of patterns, to use her expression "patterns" in relation to a number of cases that she has specifically looked at.

> This has been an objection that we have obviously made more than once in relation to the use of statistical evidence as a foundation for opinion."

71 As the interchanges between Barr J and Mr. Zahra SC proceeded, his Honour asked Mr. Zahra to clarify what he meant by a reference which he had previously made to a *"reverse onus"*. I cannot find a clear answer to that question; but I take Mr. Zahra to have had in mind a proposition that is advanced as follows in paragraph 111 of the appellant's written submissions:

> "111. The evidence also had the effect of impliedly reversing the onus of proof. It is likely that the Jury would have thought that the appellant had to in some way demonstrate that her case was indeed unique in medical history. If it weren't then the Jury would have to convict her."

72 Finally, in connection with Dr. Beal's evidence as pertinent to Ground 3, the following interchanges occurred:

> "HIS HONOUR: I understand that there are difficulties for you in the conduct of the defence of this case; just as there are for the Crown in the prosecution of it, and for me in doing what I have to do, and I sympathise with those difficulties; but should I stop a witness giving evidence because of those difficulties?
> ZAHRA: Your Honour does have discretions to exclude the evidence, based on a prejudicial probative effect. Prejudicial effect here is really quite immense because coming back to my first statement, that we have a witness here who is going to give an opinion more so than any other witness, that in the sense that this is a likely suffocation.
> HIS HONOUR: So you are applying for me to reject all the evidence, are you?
> ZAHRA: Yes, insofar as that it goes outside general statements and it applies to the application of her expertise in the given case, so far as reaching a diagnosis.
> HIS HONOUR: And what is the test? It is not admissible unless the probative value outweighs the risk of impermissible prejudice?
> ZAHRA: Yes. I can only go back to my starting point that really we look at this as an exercise of logic that this witness in a voir dire was preferring these same opinions without looking at the post-mortem reports and indicating, your Honour, in her own statement, the first statement of 8 December that these macroscopic and microscopic examination is rarely helpful, so this is where this witness has started from, and it is just as an exercise in logic. She preferred these opinions each without reading the post-mortem reports.

HIS HONOUR: I am of the opinion that the probative value of the evidence outweighs any risk of unfair prejudice.
ZAHRA: If your Honour pleases.
HIS HONOUR: And I will give reasons later on, if appropriate."

73 I cannot locate in the Appeal Book any subsequently published written reasons.

74 After all of the foregoing discussion had run its course, Dr. Beal was called. She gave evidence that she had been for some 35 years a paediatrician at the Women's and Children's Hospital in Adelaide; and an epidemiologist: that is, one who *"looks at the patterns of diseases to see if they can find out more about what causes them, how to treat them, how to prevent them from occurring ..... "*; and that she had made, for more than 30 years, a specialised study of SIDS. Dr. Beal was, otherwise, highly qualified, by both learning and experience, in her professional specialties.

75 Dr. Beal gave evidence to much the same effect as Professors Herdson and Berry when she spoke of each child's case taken individually and in isolation from the other cases. Dr. Beal gave, as well, this evidence:

"Q. Now, doctor, as at the present time has there been accepted in the medical community, to your knowledge, that there have been any families that you are aware of, either from your own experience or the experience of your colleagues or from the medical literature, in which there have been three or more children who have died from SIDS?
A. No."
"Q. Can you think of any natural cause, that has not been excluded in these children, by the tests they had during their lifetimes and afterwards, can you think of a natural cause that would account for their deaths?
A. No, excluding that natural disasters, like a plane crash or something, no.
Q. In your experience, and in the experience of your colleagues that have been related to you and in the medical literature that you have read over the years, have you ever come across a family in any of that experience or any of that reading or research, a single family in which there have been three or more children who have died suddenly from natural causes in the way that these children died?
A. No."

76 The whole of the foregoing analysis seems to me to show: **first**, that there was no difference of substance between the evidence as foreshadowed by the Crown in connection with preliminary objections and rulings; and the evidence as actually led; and **secondly**, that Ground 3 should be understood as challenging the correctness in law of Barr J's rulings that permitted the Crown to lead the evidence before the jury.

77 Three questions arise.

78 **First**, was the evidence to which Ground 3 refers, relevant in the sense contemplated by section 55 of the **Evidence Act 1995 (NSW)**?

79 In my opinion the correct answer to that question is: yes.

80 The Crown case was a circumstantial one. It posited the circumstances:

> [1] That it was not a reasonable possibility that Caleb's death had been caused by his defective larynx;
>
> [2] That it was not a reasonable possibility that Patrick's ALTE had resulted from either encephalitis or a spontaneous epileptic episode;
>
> [3] That it was not a reasonable possibility that Patrick's death had been caused by an epileptic episode causing him to stop breathing suddenly and for long enough to die;
>
> [4] That it was not a reasonable possibility that Sarah's death had been caused by a displaced uvula;
>
> [5] That it was not a reasonable possibility that Laura's death had been caused by myocarditis;
>
> [6] That it was not a reasonable possibility that there was, in any individual case, some other natural cause of death;
>
> [7] That, absent a natural cause of death in any one of four successive infant deaths in a single family, the only inference rationally available was that the deaths had been caused in some unnatural way;
>
> [8] That the only rational inference as to the nature of the unnatural cause was that each of the children had been suffocated by somebody; and
>
> [9] That the only person to whom the evidence pointed in that connection was, in each case, the appellant.

81 The parts of the evidence of Professors Herdson and Berry, and of Dr. Beal, relevant to Ground 3, constituted evidence tending to prove, in the section 55 sense, the matters itemised above as [6], [7] and [8].

82 **Secondly**, ought the evidence to have been excluded because its probative value was outweighed by the danger of unfair prejudice to the appellant in that the jury would misuse the evidence by reversing the onus of proof in the sense propounded in paragraph 111 of the appellant's written submissions?

83 In my opinion the answer to that question is that there was no reason for Barr J to be apprehensive of any such danger, provided only that his Honour

made clear to the jury that it was from first to last the burden of the Crown to prove its case; and that it was not in any respect the burden of the appellant to prove anything. It suffices for present purposes to say that his Honour gave clear and correct directions on this all-important principle; and did so both in writing and orally.

84 **Thirdly**, ought the evidence to have been excluded because its probative value was outweighed by the danger of unfair prejudice to the appellant in that the jury would misuse the evidence in some other way?

85 In my opinion the correct answer to that question is: no.

86 The appellant submits, in paragraph 110 of the appellant's written submissions, that *"(t)he proposition that a combination of events is entirely without precedent in medical history is not far removed from the expression of the odds of such a combination of events occurring innocently in terms of a statistic"*. This entails, it is submitted, inherent *"…….. vice analogous to that identified in such cases as **GK** (2001) 53 NSWLR 317"*.

87 I do not accept these submissions. *First*, **GK**, and most of the decisions which are cited in it on the point, was a case involving the use of statistical probabilities in cases of DNA profiling. The expression of those probabilities was quite precise: 220,000 : 1 and 99.9995% in the case of one expert witness; and 147,005 : 1 and 99.9993% in the case of another. Any analogy between opinion evidence expressed in that fashion and opinion evidence as expressed by Professors Herdson and Berry and Dr. Beal, is inexact as the appellant's submissions do in fact acknowledge.

88 *Secondly*, the judgment of Mason P in **GK** discusses helpfully what is often called, in DNA profiling cases, *"The Prosecutor's Fallacy"*. Mason P illustrates, at paragraph 33 of his Honour's judgment, how the fallacy operates. The illustration separates out two different propositions, denominated as A and B, and explains that the fallacy is occasioned by *"(t)he slide from Propositon A to Proposition B"*.

89 The two propositions are:

> "A. The probability or chance of C's father being a person selected at random rather than being GK is 147,005 : 1 against.
> B. It is 147,005 times more likely than not that GK is C's father."

90 As Mason P explains, in paragraphs 47 – 54 inclusive of his Honour's judgment, the correct extension of proposition A is to consider how many groups of 147,005 people there are in the relevant population. The number of such groups is what provides the relevant statistic for proposition B.

91 The challenged evidence of Professors Herdson and Berry and of Dr. Beal does not really fit into the Prosecutor's fallacy template. That evidence does no more than to establish, - if accepted, a matter entirely for the jury, - that reputable and apparently reliable expert opinion cannot identify another known case where four infants in one family have died successively from

unknown natural causes. That fact is no more than a piece of circumstantial evidence of which the Crown case argues that, when added to all other known facts and circumstances concerning the four deaths, there is left open no other reasonable hypothesis than that the four deaths were unnatural.

92 For all of the foregoing reasons I would not uphold Ground 3.

**The Convictions Appeal : Ground 4**

93 The Ground is:

> "The learned trial Judge erred in his directions as to the use the Jury could make of coincidence and tendency evidence."

94 This is the first occasion on which the adequacy of some part of the summing-up is challenged by the appellant. It is expedient to make at once two observations about the summing-up. *First*, the summing-up is carefully structured. It was supported by some appropriate written instructions, and by the use of various documents then in the hands of the jurors. *Secondly*, Barr J paused repeatedly throughout the summing-up and invited counsel to indicate any corrections that they might respectively require. On each such occasion both the Crown Prosecutor and Mr. Zahra SC responded unhesitatingly with any desired application. The record of what was said on those occasions seems to me to indicate that both counsel followed the summing-up alertly, and were astute to take promptly any point which seemed to them, respectively, to need clarification by Barr J.

95 The objections now made in Ground 4 were not taken at trial.

96 Barr J explained to the jury at a very early point in the summing-up that the Crown case on each of the five counts was a circumstantial case. His Honour directed the jury to *"carefully examine the evidence and decide whether it is reliable before you draw conclusions from it"*, adding: *"in deciding whether you should draw the conclusions the Crown asks you to draw you must also consider all the evidence pointed to by the accused and give proper weight to the submissions made on both sides"*.

97 A little later his Honour told the jury:

> "The fundamental issue that arises out of each of the five events giving rise to the charges is whether that event happened naturally or by human intervention. It has not been suggested that any of the deaths, or Patrick's ALTE, could have happened in any other way, for example by accidental suffocation. The evidence permits only one conclusion or the other. If any event happened by human intervention the person who intervened could only have been the accused because she was the only person in the vicinity on each occasion and there could be no suggestion that any other person was responsible.
>
> I shall outline for you in due course the circumstances surrounding each of the events giving rise to the charges

but, quite apart from the circumstances immediately surrounding the events giving rise to any charge you are considering, you are entitled, when deciding whether the Crown has proved its case on that charge, to take into account the events giving rise to the other charges as well."

98 Those comments introduced the directions, of which the appellant now complains, concerning coincidence evidence. Those directions were:

"The Crown case is that there was a remarkable degree of similarity in the five events. They were so similar, the Crown submits, that it would be unreasonable to conclude that the deaths and Patrick's ALTE, or any of them, happened naturally.

The law is that sometimes there may be such a striking similarity between different events that a jury may safely conclude that they did not all happen by coincidence. Putting it another way, the circumstances of the events are so remarkably similar that it would be an affront to common sense to conclude that they all happened naturally and coincidentally.

If, having considered the submissions of the Crown and the defence, you come to the view that the five events, or any number of them, are so strikingly similar that they cannot all have happened naturally, you are entitled to take that conclusion into account in considering whether the Crown has proved its case on the charge you are considering.

I must give you a special warning, however, about taking into account when considering any particular charge the facts which give rise to the other charges. You must not say that simply because the accused killed a particular child or caused Patrick's ALTE she must have killed all the children and caused Patrick's ALTE. Putting it another way, if you are satisfied beyond reasonable doubt that the accused is guilty of any of the charges, you may not say that she is therefore automatically guilty of them all. That is an unfair way of approaching the matter and you must not use it."

99 His Honour then gave some general directions about expert opinion evidence and continued:

"When you come to consider whether the accused smothered any child, you are entitled to take into account far more than the doctors were in coming to their opinions. You are entitled to take into account, as they were not, the unexpected deaths of the other three children, and Patrick's ALTE, and all the circumstances surrounding those deaths and that ALTE. You are also entitled to take into account all the other evidence in the case, particularly the entries made by the accused in her diaries from time to time, and any meaning that you attribute to those entries."

100 The summing-up proceeded to deal with matters concerning causation. In that connection His Honour said, without objection from counsel:

> "There are four possible causes of death of Caleb and of any of the other children. They are: identified natural causes, unidentified natural causes, accidental suffocation, and deliberate suffocation. Just those four. There seems to be no other available in logic."

101 The summing-up then turned particularly to the death of Caleb. There was a careful examination of the evidence going to the question whether the death had been caused by some act of the appellant. That examination brought Barr J back to the topic of coincidence evidence, and more particularly to a document marked for identification 41. MFI 41 was a document listing similarities relied upon by the Crown to disprove mere coincidence. There were ten items in the list. Barr J went through the list, item by item, summarising the Crown and defence submissions. The summary was clear, and no objection was taken to it. Barr J used the same method when dealing, later in the summing-up, with the two counts concerning Patrick.

102 The appellant's present complaint is put as follows in paragraph 114 of the appellant's written submissions:

> "114. This direction does not clearly identify for the Jury the logical process by which the "similar fact" evidence may be used in coming to a conclusion about any of the given counts. It is not sufficient to simply tell a Jury that they may "take that conclusion" into account."

103 I disagree with this criticism. The jury was instructed, and correctly so in my opinion, that in considering each individual count of murder there were effectively three possibilities open on the evidence: identified natural causes; unidentified natural causes; and deliberate suffocation. The jury was instructed, clearly and correctly, that if, in any particular case, it remained open as a reasonable possibility that the death had been caused by some natural cause that could be identified, then there must be an acquittal on that count. What had to be explained correctly was that if, in any particular case, the jury did *not* regard it as remaining open as a reasonable possibility that death had been caused by an identified natural cause, then, in considering whether it remained open as a reasonable possibility that the cause of death had been some, albeit *unidentified,* natural cause, it was permissible to have regard to the whole of the context in which the particular death had occurred including, where appropriate, that part of the context was some other death or deaths similarly unexplained but so strikingly similar to the particular death then being considered by the jury as to cause the jury to infer that it was not open as a reasonable possibility that the particular death had been caused by some unidentified natural cause.

104 In my opinion a fair reading of the now challenged passages of the summing-up in the context which I have earlier summarised does not establish that Barr J erred in his Honour's directions about coincidence evidence.

105 Barr J first came to deal with tendency evidence in the concluding portion of the summing-up. His Honour canvassed in clear and careful detail the competing cases; told the jury that he had now said *"... virtually all I want to say to you about the matter"*; and then added the directions that are now challenged. Once again, context is important. The entirety of the relevant directions is:

> "You should, as Mr. Zahra has submitted, look very carefully at the detail of the circumstances attending each of the five events. You should also, as the Crown has submitted to you, look at the picture overall, as shown by the other events and as explained, if you think that they do provide explanation, by the diary entries.
> Now, the Crown has submitted to you that the evidence shows that the accused had a tendency to become stressed and lose her temper and control with each of the children and to react to it by smothering. I won't summarise for you again the evidence upon which the Crown makes that submission, but I want to give you a direction about how you can use evidence of what is called tendency. Both counsel have referred to this during their addresses to you.
> If you are satisfied beyond reasonable doubt that on any of the five occasions giving rise to the charges the accused became stressed, lost her temper and control and smothered her child, then provided certain conditions are fulfilled you may take that conduct into account when you consider whether she is guilty on any other count.
> I said provided certain circumstances are fulfilled, because you need to take care in employing this kind of reasoning. Inherent in the Crown submission is the proposition that if a person behaves in a particular way in a given set of circumstances on one occasion the person will tend to behave in the same way if similar circumstances exist on another occasion.
> First, and obviously, you have to be satisfied about the features and circumstances of the accused's behaviour on the first occasion that you are thinking about. That does not need to be the occasion giving rise to the first charge in time. It can be the occasion of any of the events, but you need to have a clear understanding of exactly what circumstances the accused was in and exactly how she behaved.
> Secondly, you need to be sure that the circumstances repeated themselves on the occasion of the events giving rise to any other charge. You need to be satisfied that on

> such an occasion, there is a similarity of circumstances, a similarity of pattern of behaviour.
> When considering this kind of evidence you are entitled to give consideration to the extent, if any, to which the relevant conduct may have been unusual or unique, since that may reinforce the inference contended for by the Crown, and you need to apply your common sense, because the mere fact that a person has behaved in a particular way on one occasion does not necessarily mean that they will repeat that conduct if the surrounding circumstances are replicated.
> So it is important for you to take into account the nature of any prior behaviour relied on by the Crown, the frequency of its repetition and the extent of its similarity to or dissimilarity from the facts with which you are comparing it. This is the only way in which you can use evidence of any tendency that you find the accused had. You may not say just because you are satisfied that she smothered one of her babies she must or is likely to have smothered the others."

106 As soon as he had concluded those directions, his Honour invited submissions from counsel. There were some submissions from both counsel, but not in any way touching upon the tendency directions.

107 The appellant's written submissions propound two particular criticisms. They are:

> "116. His Honour then went on to list for the Jury certain conditions which had to be fulfilled in part of that process of reasoning. Those directions are at pp 114 – 115. It is submitted that the direction did not identify the legitimate use to which the tendency evidence could be put. It was not sufficient to tell the Jury that they could simply 'take that conduct into account'.
> 119. The directions by the Judge effectively cast an onus on the accused to demonstrate an innocent explanation for each of the deaths. This was an erroneous approach. The Jury should have been warned that it was not necessary for them to find that any of the children died of natural causes in order for them to acquit. The case was about whether the Prosecution had proven beyond reasonable doubt that the appellant had smothered her children. It was not for the appellant to demonstrate that they had died naturally."

108 As to the submission in paragraph 116, it is convenient to take as a starting point the second limb of the well known statement made about tendency or propensity evidence by Lord Herschell in **Makin v Attorney General of New South Wales** [1894] A C 57 at 65:

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the

> indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

109 Speaking of the second limb of Lord Herschell's statement, Lord Hailsham said in **Reg v Boardman** [1975] A C 421 at 456E:

> "The second of Lord Herschell's rules in Makin is not capable of codification into a series of tight propositions or categories of case. Each case must be looked at in the light of all the circumstances and of the sentence containing the rule and of the observations upon it of Lord du Parcq in Noor Mohamed v The King [1949] A C 182 and Lord Simon in Harris v Director of Public Prosecutions [1952] A C 694, and of the ordinary rules of logic and common sense."

110 The reference to Lord Simon is a reference to the following extract from his Lordship's judgment in **Harris** at 706:

> "Lord Herschell's statement that evidence of 'similar facts may sometimes be admissible as bearing on the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental' deserves close analysis. Sometimes the purpose properly served by such evidence is to help to show that what happened was not an accident; if it was, the accused had nothing to do with it. Sometimes the purpose is to help to show what was the intention with which the accused did the act which he is proved to have done. In a proper case, and subject to the safeguards which Lord Herschell indicates, either purpose is legitimate. ..... Sometimes the two purposes are served by the same evidence."

111 It is, of course, the case that Barr J's tendency directions do not tell the jury in terms that the legitimate use of tendency evidence, if the jury finds tendency in fact, is *"to help show that what happened was not an accident"* or *"to help to show what was the intention with which the accused did the act which he is proved to have done"*.

112 It seems to me, however, that a fair reading of the relevant extracts from the summing-up in the context of the summing-up as a whole justifies a conclusion that by the time the summing-up concluded, it had been made quite clear to the jury that the whole point of both the tendency and the coincidence evidence was, precisely, to help show that each death was not

an accident; and to help, as well, to show that, if the jury was satisfied that the appellant had in fact caused a particular death, then any such causative act had been accompanied by the intent appropriate to the crime of murder.

113 As to the proposition advanced in paragraph 119, I repeat that in my opinion the jury could not sensibly have understood from anything said by Barr J that the appellant bore any onus of proof upon any aspect of the proof beyond reasonable doubt of any of the essential elements of any of the crimes charged.

114 For the whole of the foregoing reasons I would not uphold Ground 4.

**The Convictions Appeal : Ground 2**

115 The Ground is:

> "The verdicts of guilty are unreasonable and cannot be supported having regard to the evidence."

116 Paragraph 107 of the appellant's written submissions summarises the appellant's case on this ground:

> "The simple point made by the appellant in this case is that the exclusion by the Prosecution of any definitive known cause of death for the children did not establish a deliberate killing by the appellant. The deaths remained, it is submitted, unknown in their origin."

117 The written submissions rely significantly upon things said in the judgment of the English Court of Appeal in **Reg v Cannings** [2004] 1 WLR 2067, a decision to which it will be necessary to return.

118 Before doing that it is appropriate to note that the definitive statements of principle by which this Court must be guided in dealing with Ground 2 are contained in the joint judgment of Mason CJ and Deane, Dawson and Toohey JJ in **M v The Queen** (1994) 181 CLR 487 at 493. Those statements of principle are now well-known and need not now be repeated at length. They have been reaffirmed by the High Court in **Jones v The Queen** (1997) 191 CLR 439; and in **MFA v The Queen** (2002) 213 CLR 606.

119 In applying these principles to the evidence at the appellant's trial it is useful to have in mind an overview of the relevant chronology. The Crown provided one, which became Exhibit A at trial, and it is reproduced hereunder. The material in parenthesis is the age, respectively of each child at the date of that child's death and, in the case of Patrick, his age, also, as at the date of his ALTE.

| Name | Birth | Event | Death |
|---|---|---|---|

| | | | |
|---|---|---|---|
| Caleb FOLBIGG | 1 February 1989 | | 20 February 1989<br><br>(19 days old) |
| Patrick FOLBIGG | 3 June 1990 | 18 October 1990 – near miss (4-1/2 months) | 13 February 1991<br><br>(8 months 10 days) |
| Sarah FOLBIGG | 14 October 1992 | | 30 August 1993<br><br>(10-1/2 months) |
| Laura FOLBIGG | 7 August 1997 | | 1 March 1999<br><br>(1 year 7 months) |

120 The Crown case, as finally presented to the jury, was a circumstantial case depending upon the combined effect of bodies of evidence respecting, in the case of each child:

> [1] The circumstances of that child's death, including in Patrick's case the circumstances of his previous ALTE;
>
> [2] The similarities, said by the Crown to be striking, between those circumstances and the comparable circumstances in each of the cases of the other three children;
>
> [3] The results of the various medical examinations, and post-mortem examinations, carried out on that particular child;
>
> [4] The results of the various expert medical reviews of the deaths of the four children; and
>
> [5] Things said, done, or recorded in her diary, by the appellant herself.

121 What has been written previously in this judgment deals with items [1] and [2], and with much of the items [3] and [4]; but it is necessary to look further at how the medical evidence stood at the conclusion of the whole of the trial evidence.

122 **As to Caleb**:

[1] Dr. Springthorpe, a consultant paediatrician, gave evidence of having diagnosed the condition, previously herein described, of *“floppy larynx”* . He had discussed Caleb’s case with Dr. Cummings, who had died prior to the trial, and who had carried out the post-mortem examination of Caleb. Dr. Springthorpe was firm in the view that the *“floppy larynx”* had nothing to do with Caleb’s death.

[2] Professor Byard, a specialist forensic pathologist called in the defence case, gave as his diagnosis of Caleb’s death:

> “With Caleb, I would say the cause of death was undetermined and the reasons for that, there are several, one is that I don’t have the death scene examination. The second is that the brain wasn’t examined, so I don’t really know whether there was any pathology in the brain. And thirdly, there is an issue of his voice box, he was said to have a floppy voice box.”

Professor Byard did not agree with Dr. Springthorpe’s conclusions, principally because Caleb’s larynx itself had not been microscopically examined. He was not aware of any case in which it had been reliably established that a child had died as a result of having a floppy larynx; and so he regarded that condition *“as a potential, but a very rare cause of unexpected death”* .

His own diagnosis on the available evidence would be *“an undetermined cause of death”* . His reasoning to that end would be: *“because we don’t have sufficient information. We have the death scene undescribed. We don’t have histology of the brain, and we have got this history of him having problems with his breathing, with a diagnosis of floppy larynx”.*

Professor Byard was of the opinion that there were no positive medical or pathological signs of suffocation. To say that the cause of Caleb’s death was undetermined did not imply that SIDS was excluded as a possible cause.

Professor Byard’s opinion about an undetermined cause of death was tested in cross-examination, and to the following effect:

> “Q. Is this the case : That in this case you can’t say what the cause of death was other than as to it was undetermined for each of these children?
> A. That’s correct.
> Q. And when you say that the cause of death was undetermined, that includes death from natural, death from natural causes and death from unnatural causes?
> A. That’s correct.

Q. And unnatural causes includes deliberate suffocation?
A. That's correct.
Q. In your view is one of the possibilities in this case that all of the deaths and the ALTE were caused by deliberate suffocation?
A. I think that is a possibility. The difficulty is of course that the pathology doesn't really help us."

And later:

"Q. Do you agree that it is highly unlikely that the floppy larynx had anything to do with the death of the child at all?
A. Yes.
Q. Have you yourself ever had an autopsy in which you have found the floppy larynx to be the cause of death?
A. No, no, I haven't.
Q. Have any of your colleagues in South Australia, to your knowledge, had a case of floppy larynx being a cause of death?
A. Not to my knowledge, no.
Q. And have you ever, yourself, read in any of the medical literature of a death being caused by a floppy larynx?
A. No. No, I haven't.
Q. So it would be fair to say this; that if this child had died from a floppy larynx, so far as you are aware, it would be the first time – it would be a world first, insofar as being reported?
A. I believe so, yes.:

Further cross-examination elicited the following evidence:

"Q. So would I be correct in saying that the presence of haemosiderin in this child tends to indicate that there was a previous episode of asphyxiation or attempted asphyxiation?
A. I think it would – that would be one possibility.
Q. Is that the thing that is the most likely cause of the haemosiderin, over and above other possible causes?
A. I am just trying to consider the study that I did. Probably, in the absence of documented trauma."

[3] As previously discussed in connection with Ground 3, the weight of the evidence of Professors Herdson and Berry and of Dr. Beal supported the proposition that Caleb's death could not be attributed to his floppy larynx or to any other identified natural cause.

123 In my opinion it was clearly open to the jury to accept the evidence of the Crown witnesses, and to prefer that evidence to the contrary evidence of Professor Byard. In that event it was clearly open to the jury to accept that the evidence did not leave open as a reasonable possibility that Caleb had died from an identified natural cause.

124 **As to Patrick's ALTE:**

[1] Patrick was first seen upon admission to hospital by Dr. Joseph Dezordi who was at the time on duty as the paediatrics night resident at the hospital. At the time he gave his evidence Dr. Dezordi was a neo-natal Fellow at Townsville Hospital doing *"advanced training in research projects in paediatrics"* , and specifically in the case of new-born babies.

Patrick was observed to be afebrile and unresponsive to stimuli. There was no blockage of his airways. There was no evidence found upon testing and examination of illnesses, of injury, or of trauma. There was an *"unexpected"* discovery of a high level of glucose in Patrick's urine; and, since Patrick did not present as diabetic, this level of glucose suggested to Dr. Dezordi *"a fairly catastrophic event such as an asphyxiating event or a prolonged seizure"* .

In the following days testing continued. A CAT scan was carried out; and it showed abnormalities in Patrick's occipital and temporal lobes, but his lumbar fluid was clear. Dr. Dezordi was strongly doubtful about a possibility that Patrick may have had encephalitis. His ultimate conclusion was one of some unknown cause or causes for Patrick's seizures.

Dr. Dezordi was extensively cross-examined and re-examined. A fair summary of his opinions respecting the origins of Patrick's ALTE can be gleaned from the concluding questions and answers in re-examination:

> "Q. My friend asked you questions about looking at the condition of Patrick with your expertise as it was back in 1990 and you indicated that you had the advantage of intervening years of experience. With those intervening years of experience, can you say what caused the seizures in Patrick?
> A. I cannot say beyond a doubt what caused the seizures in Patrick. All I can do is make conclusions.
> Q. And with the advantage of the intervening years of experience, what do you conclude caused the seizures in Patrick?
> A. My experience over the years has embraced quite a lot of babies who have had asphyxia and hypoxia, that is, lack of oxygen to the brain. I have seen many babies since that time and also quite a number of babies with meningitis and encephalitis and I have no doubt that the whole scenario, as I said yesterday, is most consistent with some catastrophic event that caused the lack of oxygen to the child's brain on the morning of October 18.

Q. And did you find a medical cause for that catastrophic asphyxiating event?
A. No, I did not find any medical cause."

[2] Dr. Ian Wilkinson, an expert paediatric neurologist, assisted in Patrick's treatment after his initial hospitalisation. Dr. Wilkinson gave this evidence:

"We also had white cells stained for a similar process, to see if there were what we called occlusions. Again, that was all negative.
We did all those tests that were available in 1990 at our disposal to look for inherited diseases that might have brought about neurological abnormalities.
Q. Did you find any inherited diseases?
A. No, we found absolutely none.
Q Did you ever find out how Patrick suffered that damage to his brain?
A. We never had any absolute explanation for that.
Q. Was that damage to Patrick's brain consistent with him having suffered from a catastrophic asphyxiating event from unknown causes?
A. Absolutely.
Q. If there is such damage to the brain, can that damage in turn cause seizures to develop within a few days?
A. Yes. It's a very typical sort of story that a child, who's suffered some asphyxial damage to the brain, may then, over the next few days and weeks, develop progressive change within the brain that produces seizures. So, it is quite common that, although the child having suffered such an event and survived, it may not have seizures initially. It's quite common to find that further down the road they may have seizures.
In Patrick's case it became apparent, further down the line, that he had lost visual function. That is, again, something I have seen in a number of situations, where children have suffered various asphyxial events and subsequently developed visual problems. I believe that is because the visual part of the brain is extraordinarily sensitive to lack of oxygen. It is one part of the brain that, following oxygen deprivation, may show malfunction – perhaps even in an isolated fashion.
Subsequently, development of his seizures and the progressive changes on the EEG, electroencephalogram, and the changes on the CAT scan, which became progressive over time too – I think that was all quite in keeping with his having suffered an asphyxial event at the beginning of that, and then evolved over time."

Later, and after his re-call for cross-examination, Dr. Wilkinson gave this evidence:

> “Q. And it is also possible, isn’t it, that prior to his admission to hospital on 18 October 1990, that is the first admission, he had encephalitis?
> A. I think it is absolutely impossible.
> Q. Have you ever considered that it was possible?
> A. Yes, I did certainly so when I realised it had been raised as an issue. I examined all the detail and I believe it is impossible, him having encephalitis.
> Q. In relation to Patrick and the facts and circumstances surrounding him, has it always been your opinion that it is impossible that he suffered from encephalitis?
> A. Not always. At the time of his first admission that was an issue that was a possibility. During that first admission as the evidence, clinical evidence and the investigations unfolded it became progressively clear it was not encephalitis.”
> Dr. Wilkinson never thereafter departed from that view. In his re-examination he re-affirmed his opinion with special reference to a document which he had prepared and in which he had itemised comprehensively the reasons which had led him to dismiss encephalitis as the cause of the ALTE. That part of Dr. Wilkinson’s re-examination concluded thus:
> “Q. Putting all of those together, are you able now to exclude encephalitis as a possible cause of Patrick’s admission when he first came into hospital?
> A. Yes, I can.
> Q. And what do you say now is the most likely cause of the first admission to hospital?
> A. I think the most likely cause was asphyxia.
> Q. And what does asphyxia mean?
> A. Asphyxia is a situation where the end result is that the blood cannot deliver oxygen to the tissues and that may be as a result of a number of issues. It would be as a result of just obstructing the passage of air and oxygen into the lungs, it can be other situations, carbon monoxide poisoning where the oxygen can’t be carried, but I think asphyxia most commonly is the result of oxygen not getting into the body.”

[3] Dr. Christopher Marley saw Patrick, as a General Practitioner, on five occasions for routine childhood illnesses and to administer routine childhood treatment. Despite his epilepsy and his cortical blindness Patrick was *“progressing well and growing well”* . Dr. Marley observed no life-threatening conditions in Patrick apart from his seizure disorder.

[4] Associate Professor David Cooper gave evidence as a specialist in paediatric respiratory and sleep medicine. He had conducted sleep studies on Patrick at the age of about 1-1/2 weeks; and the studies showed no signs of any episode of apnoea. The study results were entirely normal.

[5] Professor Byard gave opinion evidence that Patrick's ALTE could possibly have been caused by encephalitis or by epilepsy. He said that looking at the ALTE in isolation, there were no findings or symptoms which could amount to proof that the ALTE had been caused by suffocation.

Professor Byard's cross-examination on the topic of Patrick's ALTE culminated thus:

> "Q. So if Patrick's ALTE was a first epileptic seizure, it was highly unusual?
> A. Yes.
> Q. I think you in fact in your evidence-in-chief called it "very unusual"?
> A. I would agree with that, yes."
> "Q. Is your conclusion this: That the ALTE was caused by an asphyxiating event of unknown cause?
> A. I think that's the most likely, yes."

[6] As previously herein noted Professor Herdson's opinion was that Patrick's ALTE had arisen from a sudden catastrophic asphyxiating event of unknown causes.

[7] Professor Berry, asked in cross-examination whether it was *"possible that the ALTE was the manifestation of a first epileptic seizure"* , replied that in his view, and although the question might better have been put to a clinician, *"it would be an extraordinary presentation of epilepsy"* .

[8] Dr. Beal, similarly pressed in cross-examination, said that she could not exclude the ALTE as having been caused by an epileptic seizure: *"one hundred per cent, no, but pretty close"* .

125 In my opinion it was reasonably open to the jury to find that the overwhelming preponderance of the relevant medical evidence did not leave it open as a reasonable possibility that Patrick's ALTE had been caused by an identified natural cause.

**As to Patrick's Death:**

[1] Dr. Christopher Walker was director of the emergency department at Newcastle Hospital when Patrick was brought there on 13 February 1991. Dr. Walker's opinion was that Patrick had

suffered an out-of-hospital cardiac arrest. He could find no cause for it; but he could say that such a cardiac arrest could be caused by asphyxiation.

[2] Dr. Wilkinson had certified in Patrick's death certificate that the cause of death had been *"epileptic fits giving rise to asphyxia"* . Having reviewed the matter in the light of the subsequent post-mortem report, Dr. Wilkinson would no longer see epilepsy as having caused the fatal asphyxia, and he would reject *"absolutely"* encephalitis as the cause.

[3] A post-mortem of Patrick's body was carried out on the day of his death. The examination was conducted by Dr. G. S. Khaira under the supervision of Dr. Jan Bishop who was his departmental supervisor.

At a macroscopic level of examination there were no physical abnormalities or signs of trauma. There were, however, observable changes in the brain; and a reference was therefore made to Dr. Alex Kan, a specialist neuropathologist.

That further examination, in which Dr. Khaira took part with Dr. Kan, suggested changes in the brain caused by an old hypoxic event. The indications were consistent with that event's having been four or five months old.

Essentially, Dr. Khaira's position was that he could not assign a cause of death. There were no signs apparent to him, of manual asphyxiation.

[4] Dr. Kan himself gave evidence. His findings did not exclude a catastrophic asphyxiating event. There were no conclusive signs that Patrick had been suffering from encephalitis as at the date of his death. Neither could Dr. Kan exclude, however, that Patrick might have suffered a pre-mortem seizure caused, not by encephalitis, but by some other abnormality of the brain so located in the brain as not to have been identifiable by Dr. Kan's own examination.

[5] The competing opinions which were expressed by Professors Herdson, Berry and Byard and by Dr. Beal in connection with Patrick's ALTE carried over, essentially, into their respective opinions in connection with Patrick's actual death.

126 Once again, I have to say that I do not see why the jurors, who saw and heard the relevant witnesses, could not reasonably have found that the preponderance of that evidence did not leave it open as a reasonable possibility that Patrick's death, like his previous ALTE, had not been caused by some identified natural causes.

**As to Sarah:**

[1] Professor John Hilton performed the post-mortem examination of Sarah's body. The Crown was permitted to cross-examine Professor Hilton upon the contents of a certain American publication, the Crown's objective being to suggest to Professor Hilton that he ought not to have given the cause of Sarah's death as SIDS, that having been in fact his expressed view in his post-mortem report. The end result of that exercise is the substance of the following questions and answers which conclude the Crown cross-examination:

> "Q. Professor Hilton, would you tell us whether or not you agree with this proposition, that there are certain circumstances which should indicate to a pathologist conducting a post-mortem the possibility of intentional suffocation and that they include the following: The previous unexpected or unexplained death of one or more siblings, that is, a brother or sister, of the deceased. What do you say to that?
> A. Yes.
> Q. And another factor that should indicate the possibility of intentional suffocation for a pathologist conducting a post-mortem is an ALTE, that is, an acute life threatening event of a sibling while in the care of the same person who cared for the deceased?
> A. Yes.
> Q. And would you agree with this proposition, that when conducting a post-mortem examination one should give consideration to the possibility of intentional asphyxiation, that is smothering, in cases of unexpected infant death with a history of ALTEs, or one ALTE, witnessed only by a singe care-giver in a family, or of previous unexplained infant deaths. Do you agree with that?
> A. Broadly, yes.
> Q. Now, I want to suggest to you that in the light of those propositions which I have just put to you, that you ought not to have diagnosed Sarah Folbigg's death as being due to SIDS and that you ought to have diagnosed it as being a death from unknown or undetermined causes. What do you say?
> A. With respect, I would disagree with that.
> Q. And I want to suggest to you that particularly because of the punctate abrasions which you saw in the vicinity of her lips and the scratch on her arm, particularly in the light of those findings, that you ought not to have diagnosed her cause of death as SIDS, but rather death from undetermined causes?
> A. Again, with respect, I would disagree with that.

Q. Do you agree with the proposition that it is extremely difficult, if not improper, at autopsy to distinguish between SIDS on the one hand and accidental or deliberate asphyxiation with a soft object on the other hand?
A. It may well be.
Q. Do you agree with that proposition?
A. I agree it may well be.
Q. And would you agree with this proposition, that Sarah Folbigg in essence died from an acute catastrophic asphyxiating event of unknown cause?
A. No, it was my opinion then that the most likely diagnosis on the balance of probabilities was sudden infant death syndrome.
Q. Do you agree that you found that she died from asphyxia?
A. There is no specific autopsy test for asphyxia outside a period of something like six hours from the time of death to the time of examination.
Q. Do you agree that she died from a cessation of breathing?
A. Yes.
Q. Do you agree that you are not able to say why she ceased to breath?
A. That is true."

Professor Hilton gave some evidence about Sarah's uvula; but could say very little about any possible connection that it might have had with the actual death. That was because Professor Hilton felt that he could not exclude the possibility that the post-mortem dissection might itself have caused damage to the uvula.

[2] Dr. Marley, the general practitioner who gave evidence about Patrick, (see above), gave evidence that Sarah appeared to him to be a normal healthy child.

[3] Associate Professor Cooper, who had conducted sleep tests on Patrick, (see above), conducted similar tests on Sarah when she was about 3 weeks old. The tests showed a small handful of apnoeas, but they were not abnormal. There was no apparent reduction in Sarah's oxygen saturation level.

[4] Professor Byard gave in his evidence in-chief the following evidence:

"Q. Is the age of Sarah relevant to your consideration of the cause of death?
A. Not particularly, no.
Q. What is your diagnosis as to the cause of death of Sarah?
A. I'm putting the cause of death down as undetermined for several reasons. One of them is that I have this odd upper

airway. I'm not sure what that means. Secondly, I don't think – I haven't seen a description of the death scene.
Q. Does your diagnosis of undetermined exclude the possibility that Sarah died of SIDS?
A. No, it doesn't. People have said she's quite old for SIDS. The definition of SIDS is up to 12 months of age. 90 percent of SIDS deaths occur under six months, which means one in 10. We have seen six months and twelve months. I diagnose SIDS readily in children of that age.
Q. Is it to be understood that the fact that is preventing you coming to such a conclusion from such a diagnosis is the fact, firstly, that there is not a crime scene?
A. That is one of the reasons, yes.
Q. And the issue concerning the uvula?
A. That's correct.
Q. Putting those to one side; otherwise would your findings be consistent with SIDS or the findings be consistent with SIDS?
A. I think you can't exclude those mechanisms of course, yes.
Q. You referred to the age ranges that is considered in relation to SIDS. What about the child Caleb being 19 days old at the time of the death; what do you say about that age?
A. There is actually no official lower limit for SIDS. Some people say you can't diagnose under eight months, but that is not in the definition. I would diagnose down to a week of age. I may have actually diagnosed it under that.
Q. Looking at all the findings of the pathology of Sarah in isolation, is there any finding or symptom which could amount to proof of suffocation?
A. No, there is not. There's just my concerns about the upper airway and whether that was involved in obstruction."

In cross-examination Professor Byard gave these answers:

"Q. I would like to move now to Sarah. You noted Dr. Littleton's report about a displaced uvula?
A. That's correct.
Q. You noted his evidence that in his view it was not the cause of death but was probably incidental?
A. Yes. I was be certain – yes. Yes.
Q. And is that also your view that it was probably incidental and not the cause of death?
A. I'm not sure of its significance.
Q. Have you, yourself, ever done an autopsy where a displaced uvula was the cause of death?
A. No, I haven't.
Q. Incidentally, how many autopsies have you done?
A. 600 paediatric and about, I think, 1500 to 1600 adults.

Q. Sorry, in all of those 2,000 plus autopsies, you have never had a displaced uvula causing death?
A. No.
Q. Have any of your colleagues in South Australia told you about autopsies in which a displaced uvula has caused death?
A. No. No, they haven't.
Q. And is this the case; that in the medical literature that you are aware of there is only one case that has ever been reported, to your knowledge, of an uvula that has caused a death by obstruction.
A. I believe so, yes.
Q. And that was an elongated and split uvula of a completely different category to Sarah's uvula?
A. I believe so, yes.
Q. So is this the case; that the kind of uvula that Sarah had has, to your knowledge, never been reported, as being a cause of death anywhere in the world?
A. That's correct, yes.
Q. So if Sarah's uvula was her cause of death it would be a first reported world event?
A. I believe so, yes.
Q. And I think that in relation to Sarah you found that her death was from undetermined causes?
A. That's correct.
Q. And – of course that also includes deliberate suffocation?
A. That's correct."

[5] Professor Herdson gave evidence that, in his opinion, Sarah's uvula was not significant in determining the cause of her death. Professor Berry and Dr. Beal gave evidence to the same effect. Professor Berry, had he been carrying out a post-mortem on Sarah's case in isolation, *"..... probably would have, in isolation, given the cause of death as SIDS but with the slight misgiving about Sarah's age"* .

127 In my opinion it was open to a reasonable jury to accept that the entirety of the foregoing evidence excluded Sarah's uvula as an identified natural cause of death; and excluded any other identified natural cause of death.

**As to Laura :**

[1] Dr. Christopher Seton, a specialist in sleep investigation, was consulted by the appellant and her husband before Laura was born. Given the history of the sudden and seemingly unexplained successive deaths of three siblings, Dr. Seton advised and assisted the appellant and her husband in the care of Laura after her birth.

Post-natal monitoring disclosed that Laura had some mild central apnoea, but that was not unusual in premature babies, and occurred in perhaps 2%-3% of non-premature babies. Constant monitoring did not detect any on-going breathing problem, but there was a worry that *"it seemed, on our data, that Laura wasn't always monitored during all her sleeps"* .

Dr. Seton gave this evidence in-chief:

> "Q. In March of 1999 were you informed that Laura had died at her home at Singleton?
> A. Yes, I was.
> Q. In your view, doctor, did Laura Folbigg fit the profile of a high risk SIDS patient?
> A. No, she did not.
> Q. Why is that?
> A. We assessed all the known risk factors and, as you know, some of those are reversible. So, for example, cigarette smoking is something that parents can choose and agree not to do. So we minimise the reversible risk factors. We excluded the risk factor that I was worried about, which was obstructive sleep apnoea, which appeared to run in the family on Mr. Folbigg's side of the family. We excluded that. We excluded other inheritable and non inheritable disorders. We were convinced as a group of doctors that Laura was very healthy and as an added precaution we monitored her. So all those thing, really, reduced her risk of SIDS hugely to a level well below average.
> Q. What do you say about the age at which Laura died and SIDS?
> A. SIDS is highly unusual at Laura's age, but in my view it does happen and I have seen it in the past. But to put it in perspective, most SIDS deaths occur between two and five months and a death at Laura's age is highly unusual. We have seen patients in the past who continue to exhibit risk factors at that age on our testing and we know that those particular babies, though rare, remain at risk of SIDS well beyond their first birthday."

And in re-examination:

> "CROWN PROSECUTOR: Q. You were asked some questions by my learned friend, Mr. Zahra, about excluding inheritable disorders, and you mentioned MCAD. Having excluded MCAD in Laura's case and having excluded obstructive sleep apnoea in Laura's case, what do you say her risks were in relation to, compared to other children, of dying from SIDS?
> A. Laura's risk of dying from SIDS in my opinion was extremely low, infinitely, perhaps less than the average,

which is 1 in 1,000. The reason for that was she was exhaustively investigated, she was monitored and she was well beyond her first birthday when she died."

[2] Dr. Cala, to whom reference has been made earlier herein, conducted a post-mortem examination of Laura. He found, among other things, inflammatory infiltrate on Laura's heart. Of this, Dr. Cala said in-chief:

"Q. Now is that sort of finding, the finding that you found on Laura's heart of inflammatory infiltrate, consistent with the after effects of a cold or flu?
A. I believe so.
Q. In your opinion did it play any role in causing her death?
A. I don't believe so.
Q. Would you explain to the court why you have that opinion?
A. As I said, the heart was normal to the naked eye, but my microscopic examination did reveal inflammation of the heart. Having said that, the inflammation was quite patchy and rather mild in the sense that although the inflammation existed it was of a rather low amount as opposed to other cases that I've seen where the inflammation was much heavier in the heart and in other organs.
Q. Where the inflammation is much heavier, can it cause death?
A. Yes.
Q. And where it causes death is that a condition that is known as myocarditis?
A. Yes, it is.
Q. And if somebody had died of myocarditis of the kind that you have described, what would you expect to see in and around the heart?
A. I'd expect to see a number of things. The heart may, but not always, I have to say, it may be flabby and have a – when you cut through the pump of the heart, the left ventricle in particular, it may have a stripey appearance. In other words, areas of paleness against areas of more normal looking heart, and that is just the way that the inflammatory process is.
Q. Did you find any of those in Laura's case?
A. No. This is with the naked eye, looking at the heart with the naked eye. The left ventricle, that is the main pump of the heart, may be a bit flabby and the chamber itself may be a bit dilated. I didn't find those changes in this case.
Then there may be evidence of heart failure because a number of these people, both children and adults, may have myocarditis and it presents clinically to doctors as heart failure, so they may have fluid around the lungs and they

may have fluid in the abdomen and I didn't find either of those things in this case."

And later:

"Q. What do you say to the possibility that she died of myocarditis?
A. I think, it's known that myocarditis can cause sudden death, usually by cardiac rhythm disturbance, and I can't say that didn't happen with Laura Folbigg but I think it's, in all likelihood, very unlikely.
Q. Is it a reasonable possibility in your opinion that she died from myocarditis?
A. I don't believe it is."
And again:
"Q. What do you say as to whether or not the death of Laura Folbigg can be regarded as just another SIDS case?
A. Well, I don't believe that's correct at all.
Q. And why is that?
A. Firstly, Laura Folbigg was about 20 months old when she died. Now SIDS, as I said, is an invented term but nevertheless to classify a death as SIDS it generally falls within the age of about three to six months of age. So she is clearly three times, over three times the age for that, and that by itself, and I think that's a very important thing to consider, in my opinion would categorically exclude this child's death as being due to SIDS, irrespective of any family history of other deaths and so on. In isolation this would not and should not be called SIDS."

The course of this evidence drew from Mr. Zahra SC this statement:

"There is no issue that this was a SIDS death. It is not part of the way the accused's case will be run."

Much later, and at the end of his examination-in-chief, Dr. Cala gave this evidence:

"Q. In relation to Laura, you have already told us that your diagnosis was that her cause of death was undetermined?
A. Yes.
Q. That it was consistent with smothering?
A. Yes.
Q. Including deliberate smothering?
A. Yes.
Q. And that she probably died from an acute catastrophic asphyxiating event of unknown causes?
A. Yes.
Q. Now, putting those four individual children together is this correct, that they all died from what in your view should

have been diagnosed as undetermined causes?
A. Yes.
Q. That they all died in circumstances consistent with deliberate smothering?
A. Yes.
Q. And that they all possibly died from an acute and catastrophic asphyxiating event of unknown causes?
A. Yes.
Q. Is there any natural cause of death that could account for all those four deaths and the ALTE?
A. No."

In cross-examination Dr. Cala gave this evidence:

"Q. You can point to nothing, so far as your findings overall of Laura are concerned, that can specifically be attributed to suffocation?
A. Because there are no positive findings for suffocation, and my finding of no positive findings doesn't exclude suffocation.
Q. Yes. Do I understand the essence of what you are saying is that because there was nothing, you can't exclude it?
A. Because there was nothing to be found still does not exclude suffocation.
Q. Because it doesn't necessarily follow that if there was suffocation that there could be signs?
A. That's correct.
Q. So your process of reasoning in this case that you can't exclude suffocation or that it is consistent with suffocation is always based on that foundation, that there are no symptoms, therefore you can't rule it out?
A. Yes. There are generally no positive signs of suffocation, so in essence you can almost never rule it out."

Bearing in mind that the defence case at trial was that it was a reasonable possibility that Laura had died from myocarditis, the following evidence in cross-examination of Dr. Cala is important:

"Q. Looking at this case in isolation, the autopsy you carried out, can you exclude myocarditis as the cause of death?
A. I can't exclude it as a cause of death.
Q Might you have given the cause of death as myocarditis looked at individually?
A. I don't think I would because, although it was present, the amount of inflammation was not particularly heavy. There wasn't any evidence of heart failure, the heart to the naked eye looked pretty normal, so – and not only that, there was evidence in other organs, the lungs and spleen in particular, of lymphocytes being in there as well. In other words,

indicative of some viral infection that Laura Folbigg was suffering from around the time of her death.
Q. Did you write to a Detective Ryan on 19 June 2001?
A. Yes.
Q. And did you answer a number of questions?
A. Yes.
Q. And did you say this on the second page of that letter:
"If I examined the body of Laura Folbigg in isolation, I might give the cause of death as myocarditis."
A. Yes.
Q. Is that your view today?
A. Well, I said in the letter I might, and if I was pushed I would take it no further than I might, but I have to – for the reasons that I have given, that the amount of inflammation and so on was not particularly heavy and there weren't any overt signs of heart failure, and so on. But I have to say, as I have said, I can't exclude the possibility that this child did not die of myocarditis.
Q. Particularly in the absence of any other pathology that you can't exclude myocarditis?
A. There really was no other significant pathology that I found, either with the naked eye or looking down the microscope to account for the child's death."

In re-examination Dr. Cala amplified the selected excerpt that had been put to him out of his letter to Detective Ryan. It suffices to quote one further extract from that letter:

"My opinion that the inflammatory infiltrate in the heart represents an incidental finding is not based on the family history but, rather, after consideration of the history provided of Laura's very sudden and most unexpected death, the post-mortem findings of Laura and the histological assessment of the heart together with my own knowledge and experience of the condition of myocarditis"

[3] Dr. Bailey, a consultant cardiologist, gave evidence of having analysed a heart rhythm tracing taken by the ambulance officers who first treated Laura. The rhythm was slow and abnormal. It was called, in technical terms, an agonal cardiac rhythm, and *"it is the last activity that you see in the heart before the heart dies"* .

As to the proposition that Laura's death was caused by myocarditis, Dr. Bailey gave in-chief this evidence:

"Q Now, doctor, in this case, you have read Laura's autopsy report, which refers to her having localised areas of myocarditis?
A. Yes.

Q. Was this, in your opinion, probably related to a viral infection that she had at the time?
A. Yes. I think it most likely was.
Q. And are you able to say whether or not in your view it was of a sufficient extent to account for her death?
A. I would have thought it was unlikely to have accounted for her dying.
Q. And why is that?
A. Well, firstly because of what I have already said, that people with common illnesses are thought to often have or at least in say 5 or 10 per cent to have myocarditis. And of course people with the flu or colds or similar gastric upsets, don't commonly drop dead.
Secondly there are other cardiac conditions where inflammatory cells are found in the heart similar to this, cells similar to what were found in Laura's heart. One is a condition called pericarditis which is an inflammation of the lining outside the heart which causes often a lot of chest pain. But it also happens very often frequently after cardiac surgery and this can be accompanied by a myocarditis which is localised. But patients with pericarditis do not frequently drop dead. In fact they rarely drop dead, otherwise a lot of people would die after cardiac surgery. Another similar condition is transplant rejection. Patients who have had another person's heart put into them need to be on drugs that suppress their immune system because the natural tendency is for the body to reject the transplanted organ and in that conditions there is also inflammation similar to myocarditis in the heart. But in the mild or moderate stages that is often asymptomatic.
Q. Asymptomatic meaning?
A. That the patients have no symptoms. The doctor can't detect anything. But if you were to obtain samples of the heart to look at under the microscope, then you would find they were quite abnormal, and sudden death is not a common feature of that.
Q. For those reasons, you are of the opinion that it is unlikely that myocarditis caused her death?
A. Yes. And I think the other thing to state is that it is found in a number of routine post-mortem examinations. It is not an unusual thing to find a degree of myocarditis in a perhaps four or five percent of post-mortem examinations. So for all those reasons I suspect that this was not likely to have been the cause of death."

[4] Professor Byard gave in-chief this evidence:

"Q. What is your diagnosis in the present case?

A. I've put the cause of death as undetermined because I can't exclude myocarditis as the cause of death.
Q. What is your process of reasoning, coming to the conclusion of that being undetermined?
A. If I looked at her cases in isolation I would, without anything else, I would have said myocarditis. But the fact that there have been other deaths in the family makes me less certain that I can say myocarditis. So I said undetermined cause because of the circumstances."

And later:

"Q. Looking at the finding on pathology of Laura in isolation, what would you have as to the cause of death?
A. In isolation, looking at slides, I have no doubt the cause of death was myocarditis.
Q. Looking at all the findings of pathology of Laura in isolation, is there any finding or symptom which could amount to proof of suffocation?
A. No, no, there is not."
In cross-examination Professor Byard gave this evidence:
"Q. Now, do you agree that Laura's myocarditis could be incidental to her death?
A. Yes.
Q. And do you agree with Dr. Cala, that the myocarditis is probably unrelated to her death?
A. No, I don't.
Q. I would like to put a hypothetical situation to you. If a child, like Laura, had a cold or a flu that had caused mild myocarditis, and the child's mother deliberately smothered her, without leaving any signs, then do you agree that many pathologists would wrongly conclude that Laura had died from myocarditis if they were viewing Laura's case on its own?
A. Yes.
Q. And do you agree that that is a distinct possibility in this case?
A. I think that is a possibility."

And later, after a body of evidence directed to a publication of Professor Byard's own:

"Q. Do you agree that there is a greater chance that she died of some other cause than that she died of myocarditis?
A. I suppose if we are speaking purely statistically, yes.
Q. And there is nothing that you have seen in any of the medical records relating to Laura that would cause you to doubt the applicability of those statistics to her case; is that right?

A. Yes, I think that's right.
Q. Would you also agree that most people – and I deliberately say people, meaning adults and children – most people who have myocarditis, don't die?
A. I think that is probably correct, yes.
Q. And of those who do die, of those people – adults and children – who do die, most of them have symptoms?
A. Yes, I think that's correct.
Q. So for all of those reasons, would you agree with this; that if myocarditis was the cause of Laura's death it was a quite unusual case?
A Yes
Q. Professor, you have given evidence that it is possible in this case that all four of these children died from suffocation?
A. Yes.
Q. And I take it that you also agree that it is possible that Patrick's ALTE was caused by suffocation?
A. Yes.
Q. And by suffocation you would include deliberate suffocation by an adult?
A. That's correct.
Q. Would you agree with this; that it is not a reasonable conclusion to say that they all died from the same natural cause?
A. I think that's – could you repeat that again?
Q. Yes. Do you agree with this: That it is not a reasonable conclusion that they all died from the same natural cause?
A. Yes. I think that's a reasonable statement."

In re-examination Professor Byard reaffirmed his view that myocarditis could not be excluded positively as the cause of death; and that, in more general terms, he could not exclude that Laura had died of natural causes.

[5] Dr. Owen Jones, a specialist in paediatric cardiology, gave evidence in the defence case.

Dr. Jones did not agree with Dr. Bailey's analysis on the topic of Laura's agonal heart beat. Asked whether he thought it *"possible that myocarditis represented an incidental finding"* , Dr. Jones said that he thought that it was possible. Asked whether he thought that *"the myocarditis in the present case would have accounted for Laura Folbigg's death"* , Dr. Jones replied *"I believe it could"* .

In cross-examination Dr. Jones gave this evidence:
"Q. You agree that mild myocarditis almost never leads to death?

A. I know that mild myocarditis can lead to death.
Q. That is not what I asked you, doctor: Do you agree that mild myocarditis almost never leads to death?
A. I think that is a correct statement, yes.
Q. And that even with moderate myocarditis there are very few instances where sudden death occurs?
A. I would agree with that.
Q. Do you also agree that myocarditis is often given as a possible cause of death incorrectly in cases where, in reality, it is an incidental finding?
A. I can't make a comment about that."

And later:

"CROWN PROSECUTOR: Q. Doctor, is this the case: That you don't feel qualified to comment on whether or not Laura's myocarditis was a cause of death?
A. I'm prepared to state that it's a possible cause of death but I'm not in a position to state that it is the cause of death.
Q. Is this the case: That neither do you feel qualified to be able to say whether it is likely or unlikely to have been her cause of death?
A. I'm not in a position to comment on that probability.
Q. Is this the case: That you would defer on issues like that to the better judgment of pathologists?
A. I would defer to the extent that there may be other issues that in their judgment make the consideration of myocarditis as being incidental in her case."

And finally:

"Q. Would you expect to find agonal rhythm if a person had died of myocarditis?
A. It is the final electrical activity that is seen from the wide variety of mechanisms, so I would not be surprised to see it.
Q. Do you agree it is something that you would expect to see in a case of death from suffocation?
A. I think it would be seen, it would be seen in that case, yes, I would agree with that."

Once again, I have to say that I do not see why it was not open to a reasonable jury to find that the preponderance of the entirety of the foregoing evidence closed off any reasonable possibility that the cause of Laura's death was either myocarditis or some other identified natural cause.

128 The whole of the foregoing analysis of the medical evidence establishes, in my opinion, that it was amply open to the jury, which saw and heard the witnesses, to reject the defence hypothesis that each of the five relevant events could be explained away as having derived from

identified natural causes; and so to be satisfied beyond reasonable doubt that the Crown had demonstrated that the five events could not be so explained away. I am myself, and as a matter of independent assessment of the evidence, of the same opinion.

129 That conclusion entails that the next step in the present consideration of Ground 2 focuses upon the only real hypotheses remaining in a practical sense open on the evidence: namely, *first*, death or ALTE caused by unidentified natural causes; or *secondly*, death or ALTE caused by unnatural causes.

130 I have already canvassed the evidence which was given upon that area of inquiry by Professors Herdson and Berry and Dr. Beal. It is pertinent to add the following evidence taken from the cross-examination of the leading defence expert, Professor Byard:

> "CROWN PROSECUTOR: Q. Professor, you would agree with me, would you not, that it is often impossible to distinguish between SIDS and suffocation?
> A. Absolutely, yes.
> Q. And you would also agree with me, wouldn't you, that suffocation, including deliberate suffocation by an adult of a child, often leaves no trace behind?
> A. Particularly with a baby or young child.
> Q. Is this the case : That in these four cases of the four Folbigg children, you cannot exclude deliberate suffocation by an adult as a cause of death for any of them?
> A. In these cases and in a number of my other baby cases, because there is no pathology, no definite pathology so, no, it can't be excluded.
> Q. In this case; each of these children died or had an ALTE suddently?
> A. Yes.
> Q. In this case each child died or had an ALTE unexpectedly?
> A. Yes, I think to say that Patrick's death wouldn't be unexpected given the history but the ALTE was unexpected.
> Q. Next, you have been made aware each child died or had ALTE, apparently during a sleep period?
> A. Yes.
> Q. And in this case you have been made aware that each child died or had an ALTE at home?
> A. Yes, I believe so.
> Q. Have you yourself ever had a case in your practice in which there have been three or more children in the one family who have all died or had an ALTE suddenly, unexpectedly during a sleep period at home?
> A. No, I haven't.
> Q. Have you from your discussions with your colleagues, either here in Australia or overseas, ever heard of a case of three or more children in the one family who have all died or

suffered an ALTE suddenly, unexpectedly during a sleep period at home?
A. That's less easy to answer because there are cases that have been recorded in the literature of up to five deaths or more in a family that has been attributed to SIDS. These are cases from a number of years ago.
Q. Could I interrupt you there: Is it now considered by the medical profession that they were not SIDS?
A. I believe so, yes.
Q. So perhaps if I can refine my questions a little bit. Have you become aware from discussions with your colleagues of any case of three or more children present in one family who have all died of natural causes suddenly, unexpectedly during a sleep period at home?
A. I can't think of any cases.
Q. You can't think of any?
A. That's right.
Q. Are you aware of any such cases from a review of the medical literature?
A. No, I'm not. Although I think that some of the very rare metabolic conditions could cause it and some of the cardiac conditions might cause it, but I can't come up with a paper that details this.
Q. Are those cardiac and metabolic conditions, conditions that you have been told have been excluded in these cases?
A. That's correct."

131 There is to be added to that material the evidence of the relevant contents of the appellant's diary. There is a deal of this material, and it cannot be fairly compressed into a brief paraphrase. The Crown's written submissions extract a little over five A4 pages of diary entries. I set out a number of portions of that extract, acknowledging the selectivity of that method, but concentrating on particular entries that give, in my view, a fair, representative idea of the relevant material:

"3 June 1990: This was the day that Patrick Allan David Folbigg was born. I had mixed feelings this day. wether or not I was going to cope as a mother or wether I was going to get stressed out like I did last time . I often regret Caleb & Patrick, only because your life changes so much, and maybe I'm not a Person that likes change. But we will see?
18 June 1996: I'm ready this time. And I know Ill have help & support this time. When I think Im going to loose control like last times Ill just hand baby over to someone else.
…. I have learnt my lesson this time.
4 December 1996: [found out she was pregnant]. I'm ready this time. But have already decided if I get any feelings of jealousy or anger to much I will leave Craig & baby, rather than answer being as before. Silly but will be the only way I

will cope.
1 January 1997: Another year gone & what a year to come. I have a baby on the way, …… This time. I am going to call for help this time & not attempt to do everything myself any more – I know that that was the main Reason for all my stress before & stress made me do terrible things.
4 February 1997: Still can't sleep. Seem to be thinking of Patrick & Sarah & Caleb. Makes me generally wonder whether I am stupid or doing the right thing by having this baby. My guilt of how responsible I feel for them all, haunts me, my fear of it happening again haunts me.
……. What scares me most will be when Im alone with baby. How do I overcome that? Defeat that?
16 May 1997: …. Craig says he will stress & worry but he still seems to sleep okay every night & did with Sarah. I really needed him to wake that morning & take over from me. This time Ive already decided if ever feel that way again I'm going to wake him up.
25 October 1997: …. I cherish Laura more, I miss her [Sarah] yes but am not sad that Laura is here & she isn't. Is that a bad way to think, don't know. I think I am more patient with Laura. I take the time to figure what is rong now instead of just snapping my cog. … Wouldn't of handled another like Sarah. She's saved her life by being different.
29 October 1997: felt a little angry towards Laura today. It was because I am & was very tired. … she [Laura] doesn't push my Button any where near the extent she [Sarah] did. Luck is good for her is all I can say.
3 November 1997: Lost it with her earlier. Left her crying in our bedroom – had to walk out – that feeling was happening. And I think it was because I had to clear my head & prioritise. As I've done in here now.
I love her I really do I don't want anything to happen.
9 November 1997: … he [Craig] has a morbid fear about Laura. … well I know theres nothing wrong with her. Nothing out of ordinary any way. Because it was me not them. … With Sarah all I wanted was her to shut up. And one day she did.
19 November 1997: Bit nervous tonight. Laura & I are by ourselves tonight."
"8 November [sic, December] 1997: Had a bad day today, lost it with Laura a couple of times. She cried most of the day. Why do I do that. … Got to stop placing so much importance on myself. --- funny how, now she's [Laura's] here, we can't seem to imagine a life without her dominating every move. Much try to release my stress somehow. I'm starting to take it out on her. Bad move. Bad things &

thoughts happen when that happen. I will never happen again."

"New Year's Eve, 1997: Getting Laura to be next year ought to be fun. She'll realise a Party is going on. And that will be it. Wonder if the battle of the wills will start with her & I then. We'll actually get to see. She's a fairly good natured baby – Thank goodness, it has saved her from the fate of her siblings. I think she was warned."
28 January 1998: I've done it. I lost it with her. I yelled at her so angrily that it scared her, she hasn't stopped crying. Got so bad I nearly purposely dropped her on the floor & left her. I restrained enough to put her on the floor & walk away. Went to my room & left her to cry. Was gone probably only 5 minutes but it seemed like a lifetime. I feel like the worst mother on this earth. Scared that she'll leave me know. Like Sarah did. I know I was short tempered & cruel sometimes to her & she left. With a bit of help. I don't want that to ever happen again. I actually seem to have a bond with Laura. It can't happen again. Im ashamed of myself. I can't tell Craig about it because he'll worry about leaving her with me. Only seems to happen if I'm too tired her moaning, bored, wingy sound, drives me up the wall. I truly can't wait until she's old enough to tell me what she wants.
6 March 1998: Laura not well, really got on my nerves today, snapped & got really angry, but not nearly as bad as I used to get.
13 March 1998: Seem to have a good day. She didn't piss me off more than a couple of times.
1 April 1998: Thought to myself today. Difference with Sarah, Pat, Caleb to Laura, with Laura I'm ready to share my life. I definitely wasn't before."

132 These entries make chilling reading in the light of the known history of Caleb, Patrick, Sarah and Laura. The entries were clearly admissible in the Crown case. Assuming that they were authentic, which was not disputed; and that they were serious diary reflections, which was not disputed; then the probative value of the material was, in my opinion, damning. The picture painted by the diaries was one which gave terrible credibility and persuasion to the inference, suggested by the overwhelming weight of the medical evidence, that the five incidents had been anything but extraordinary coincidences unrelated to acts done by the appellant.

133 It remains only to consider in connection with Ground 2 the English decision in **Cannings**, upon which the submissions made for the appellant place great store in the context of Ground 2.

134 It is convenient to begin by quoting the headnote of the report. The headnote sufficiently summarises the relevant facts, and indicates in broad terms the factors that were decisive of the result in that particular case:

> “The defendant was the mother of four children, three of whom died in infancy. She was charged with the murder of both her sons, J and M. The charge of murder of her first child, G, a daughter did not proceed. At the trial the Crown adduced evidence that three of the children, including the daughter who survived, had suffered an acute or apparent life threatening event (“ALTE”). The Crown alleged that the defendant had smothered both her sons, intending to kill them or to do them really serious bodily harm by obstructing their upper airways. To support that allegation it was suggested that the death of G and each of the ALTEs suffered by the other children were also the result of smothering by the defendant and that these actions formed part of an overall pattern. The defendant denied harming any of her children. It was her case that the deaths were natural, if unexplained, incidents to be classified as sudden infant death syndrome (“SIDS”). The expert medical witnesses called by the Crown and on behalf of the defendant disagreed about whether three infant deaths and further ATLEs in the same family led to the inevitable conclusion that the deaths were not natural. The defendant was convicted of murdering both her sons.
>
> On her appeal against conviction -
>
> *Held* , allowing the appeal and quashing the convictions, that where there were one, two or even three infant deaths in the same family, the exclusion of currently known natural causes of infant death did not lead to the inexorable conclusion that the death or deaths resulted from the deliberate infliction of harm; that significant fresh evidence before the Court of Appeal as to the rarity of three natural and unexplained infant deaths in the same family, the interval between the infant’s death, or near death, and the last time when that infant appeared to be well and the possible significance of an ALTE preceding death presented a picture more favourable to the defendant than that which was before the jury; that, accordingly, the basis of the Crown’s case was thereby fundamentally undermined; and that, further, where a full investigation into two or more sudden unexplained infant deaths in the same family was followed by a serious disagreement between reputable experts as to the cause of death, so that natural causes could not be excluded as a reasonable possibility, the prosecution of a parent or parents for murder should not be started, or continued, unless there were additional cogent evidence, extraneous to the expert

evidence, which tended to support the conclusion that the infant or infants had been deliberately harmed."

135 It is appropriate then to set out paragraphs 10-13 inclusive of the judgment, because those passages sound warnings which are as appropriate to the present appellant's case as they were to the case of Mrs. Cannings.

> "10. It would probably be helpful at the outset to encapsulate different possible approaches to cases where three infant deaths have occurred in the same family, each apparently unexplained, and for each of which there is no evidence extraneous to the expert evidence that harm was or must have been inflicted (for example, indications or admissions of violence, or a pattern of ill-treatment). Nowadays such events in the same family are rare, very rare. One approach is to examine each death to see whether it is possible to identify one or other of the known natural causes of infant death. If this cannot be done, the rarity of such incidents in the same family is thought to raise a very powerful inference that the deaths must have resulted from deliberate harm. The alternative approach is to start with the same fact, that three unexplained deaths in the same family are indeed rare, but thereafter to proceed on the basis that if there is nothing to explain them, in our current state of knowledge at any rate, they remain unexplained, and still, despite the known fact that some parents do smother their infant children, possible natural deaths.
>
> 11. It will immediately be apparent that much depends on the starting point which is adopted. The first approach is, putting it colloquially, that lightning does not strike three times in the same place. If so, the route to a finding of guilt is wide open. Almost any other piece of evidence can reasonably be interpreted to fit this conclusion. For example, if a mother who has lost three babies behaved or responded oddly, or strangely, or not in accordance with some theoretically "normal" way of behaving when faced with such a disaster, her behaviour might be thought to confirm the conclusion that lightning could not indeed have struck three times. If, however, the deaths were natural, virtually anything done by the mother on discovering such shattering and repeated disasters would be readily understandable as personal manifestations of profound natural shock and grief. The importance of establishing the correct starting point is sufficiently demonstrated by this example.
>
> 12. Before this trial began, this court, differently constituted, had decided that the fact of three deaths (that is those of Gemma, Jason and Matthew), as well as each of the ALTEs, provided admissible evidence relevant to each count. There

could be no denying that the death of three apparently healthy babies in infancy while in the sole care of their mother was, and remains, very rare, rightly giving rise to suspicion and concern and requiring the most exigent investigation. Given the overwhelming consensus of medical evidence, it would indeed have been an affront to common sense to treat the deaths of the three children and the ALTEs as isolated incidents, entirely compartmentalised from each other. All the available relevant evidence had to be examined as a whole. Nevertheless a degree of caution was necessary to avoid what might otherwise have been the hidden trap of taking the wrong starting point. If, for example, at post mortem it was obviously established that Matthew's death had resulted from natural causes, the situation reverted to precisely where it stood before he died. The concerns which would have arisen as a result of his death – as the third in the sequence – would have been dissipated. There would have been a positive innocent explanation for the death, which would no longer be a SIDS, and might help to confirm that the earlier deaths were indeed natural deaths. Equally, if there were unequivocal evidence that one of these deaths, or even one of the ALTEs, had resulted from deliberate infliction of harm by the defendant, that would be likely to throw considerable light on the question whether the other deaths, or ALTEs, resulted from natural or unnatural causes. If, after full investigation, the deaths, or ALTEs , continue to be unexplained, and there was nothing to demonstrate that one or other incident had resulted from the deliberate infliction of harm, so far as the criminal process was concerned, the deaths continued properly to be regarded as SIDs, or more accurately, could not properly be treated as resulting from unlawful violence.

13. Reverting to the two possible approaches to the problems posed in a case like this, in a criminal prosecution, we have no doubt that what we have described as the second approach is correct. Whether there are one, two or even three deaths, the exclusion of currently known natural causes of infant death does not establish that the death or deaths resulted from the deliberate infliction of harm. That represents not only the legal principle, which must be applied in any event, but, in addition, as we shall see, at the very least, it appears to us to coincide with the views of a reputable body of expert medical opinion."

136 These observations were supplemented towards the conclusion of the judgment, and in paragraph 177:

"177. We recognise that the occurrence of three sudden and unexpected infant deaths in the same family is very rare, or

> very rare indeed, and therefore demands an investigation into their causes. Nevertheless the fact that such deaths have occurred does not identify, let alone prescribe, the deliberate infliction of harm as the cause of death. Throughout the process great care must be taken not to allow the rarity of these sad events, standing on their own, to be subsumed into an assumption or virtual assumption that the dead infants were deliberately killed, or consciously or unconsciously to regard the inability of the defendant to produce some convincing explanation for these deaths as providing a measure of support for the prosecution's case. If on examination of all the evidence every possible known cause has been excluded, the cause remains unknown."

137 The next point to be made about **Cannings** is that it is a case-specific decision, and that it has features that are quite different from the features of the appellant's case.

138 **First**, one of the principal Crown experts had given evidence in another trial, and it had been demonstrated, but only after the conclusion of that other trial, that his evidence had been seriously flawed. The Court of Appeal thought that it *"must reflect on the likely impact on the verdict in the present case if …….. (defence counsel) …….. had been able to cross-examine ……. (the particular witness) …….. and undermine the weight the jury would invariably attach to his evidence by exposing that, notwithstanding his pre-eminence, at least part of his evidence in …. (the other trial) ….. was flawed in an important respect"*. There is no such situation present in the expert evidence given for the Crown at the appellant's trial.

139 **Secondly**, the Court of Appeal in **Cannings** received at the hearing of the appeal a body of fresh scientific evidence. This fresh evidence is described in paragraph 138 as *"a substantial body of research, not before the jury, and received by us in evidence ….."*. There is no such fresh post-trial evidence before this Court.

140 **Thirdly**, the Court of Appeal discusses at paragraphs 31-35 inclusive, what it describes as *"The Family Context"*. In that connection the Court of Appeal considers both trial evidence, and post-trial fresh evidence, about the immediate and extended family tree of Mrs. Cannings. The Court concludes that: *"That there may well be a genetic cause, as yet unidentified, for the deaths of the Cannings children, manifesting itself in some, but not all of the extended family, through autosomal dominant inheritance with variable penetrance. That would mean that the child in question needed only to inherit the gene from one parent to be liable to develop whatever the genetic mechanism may be"*. There is no comparable situation in the present case.

141 **Fourthly**, the Court of Appeal emphasises, (paragraph 160), that in the case of Mrs Cannings: *"there is no suggestion of ill-temper, inappropriate*

*behaviour, ill treatment let alone violence, at any time, with any one of the four children"*. In the appellant's case, there is a body of such evidence, and it was not shown to be inherently incredible. That evidence was, rather, bolstered by the diary entries, for which there was no parallel in the **Cannings** case.

142 The differences between the appellant's case and that of Mrs. Cannings entail that it does not follow that the reasoning which led to the quashing of Mrs. Cannings' convictions must lead more or less as a matter of course to the quashing of the appellant's convictions.

143 In the present case there was, in my opinion, ample evidence at trial to justify these findings, reached beyond reasonable doubt:

> [1] None of the four deaths, or Patrick's ALTE, was caused by an identified natural cause.
>
> [2] It was possible that each of the five events had been caused by an unidentified natural cause, but only in the sense of a debating point possibility and not in the sense of a reasonable possibility. The evidence of the appellant's episodes of temper and ill-treatment, coupled with the very powerful evidence provided by the diary entries, was overwhelmingly to the contrary of any reasonable possibility of unidentified natural causes. So were the striking similarities of the four deaths.
>
> [3] There remained reasonably open, therefore, only the conclusion that somebody had killed the children, and that smothering was the obvious method.
>
> [4] In that event, the evidence pointed to nobody other than the appellant as being the person who had killed the children; and who, by reasonable parity of reasoning, had caused Patrick's ALTE by the same method.

144 In my opinion Ground 2 has not been established.

**The Convictions Appeal : Ground 1**

145 The Ground is:

> "The trials of the appellant miscarried as a result of the five charges in the indictment being heard jointly."

146 It is convenient to begin by reciting the relevant provisions of section 101 of the **Evidence Act 1995 (NSW)**:

> "101(1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.
> (2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the

probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant."

147 The correct construction and application of section 101(2) were considered by a specially convened five Judge Bench of this Court, (Spigelman CJ; Sully, O'Keefe, Hidden and Buddin JJ), in **R v Ellis** (2003) 58 NSWLR 700. The nub of the decision appears in the following portions of the judgment of the Chief Justice:

> "94. The words 'substantially outweigh' in a statute cannot, in my opinion, be construed to have the meaning which the majority in **Pfennig** determined was the way in which the common law balancing exercise should be conducted. The 'no rational explanation' test may result in a trial judge failing to give adequate consideration to the actual prejudice in the specific case which the probative value of the evidence must substantially outweigh.
>
> 95. Section 101(2) calls for a balancing exercise which can only be conducted on the facts of each case. It requires the court to make a judgment, rather than to exercise a discretion. ..... The 'no rational explanation' test focuses on only one of the two matters to be balanced – by requiring a high test of probative value – thereby averting any balancing process. I am unable to construe s 101(2) to that effect.
>
> 96. My conclusion in relation to the construction of s 101(2) should not be understood to suggest that the stringency of the approach, culminating in the **Pfennig** test, is never appropriate when the judgment for which the section calls has to be made. There may well be cases where, on the facts, it would not be open to conclude that the probative value of particular evidence substantially outweighs its prejudicial effect, unless the 'no rational explanation' test was satisfied.
>
> 97. .....
>
> 98. .....
>
> 99. ..... In my opinion, the statutory formulation should operate in accordance with its terms. There is no need for an assumption that all such evidence is 'likely to be highly prejudicial', nor for guidance that the test for admissibility is 'one of very considerable stringency'."

148 Those statements of principle have been subsequently approved by the High Court of Australia: **Ellis v The Queen** [2004] HCA Trans. 488 (1 December 2004).

149 The appellant submits that her case is, indeed, one in which: *"..... it would not be open to conclude that the probative value of particular evidence substantially outweighs its prejudicial effect, unless the 'no rational explanation' test were satisfied"*. In that connection the appellant's

arguments are encapsulated in the following paragraphs of the appellant's written submissions:

> "94. It is suggested that this is such a case. Indeed, it is submitted that the evidence did not even satisfy the tests posed by sections 97 and 98 of the Evidence Act: the evidence did not, on proper analysis, have significant probative value.
> 95. If there were evidence capable of satisfying the Jury in relation to one of the given deaths that, considered alone, the appellant was responsible then the situation would be different. If there were evidence that she had been observed suffocating one of the children or had confessed to such an act then that could be used, given sufficient similarities being established between it and the suspect events, to prove those events. This was not such a case.
> 96. This was a matter where, in essence, the Crown case disclosed five events which were, at their highest from the point of view of the Crown, undetermined in their origins. Without such a proven event the approach of the Crown in its endeavours to use the subject evidence had an element of circularity about it. It is suggested that this defect had not been resolved by the close of addresses and the conclusion of his Honour's summing-up. The circularity is that it rested upon an impermissible assumption that each event (considered individually) was relevant in the sense required by the Evidence Act in that it was a non-accidental death."

150 Relevant case law apart, I do not agree with that reasoning.

151 It seems to me that the four deaths and Patrick's ALTE satisfy every relevant part of section 98 of the **Evidence Act**, the section dealing generally with coincidence evidence. The five events were substantially and relevantly similar. The circumstances in which they occurred were, plainly I should have thought, substantially similar. The five events were, therefore, *"related events"* in the statutory sense established by section 98. The admissibility, when considering any one of those events, of evidence respecting all four other events depended, therefore, upon the section 98(1)(b) test: Does the Court which is asked to admit the coincidence evidence "*think"* that the particular evidence has *"either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence"*, what the section describes as *"significant probative value"*?

152 The concept of *"significant probative value"* is meaningless unless it is related to the fact or facts in issue towards the proof of which the coincidence evidence is being tendered at all. The fact or facts in issue is or are those facts described in section 98(1) itself:

> "…… Because of the impossibility of the …. (related) ….. events occurring coincidentally, …… (the accused person) …….. did a particular act or had a particular

state of mind."

153 Had any one of the five counts charged in the present case been severed and tried separately, there must have been a Crown application to lead as coincidence evidence, evidence that the event central to the severed count was not, in truth, an isolated event at all; but was, rather, but one in a chain of events that were *"related events"* in the section 98 sense; that whole chain of events having occurred in such an overall context, of which the diary entries were a most cogent feature, as to negate any reasonable possibility of mere, albeit somewhat astonishing, coincidence.

154 I can see no persuasive argument that would have rendered the proposed coincidence evidence inadmissible, except, of course, for the possible operation of section 101, or of section 137 of the **Evidence Act**; - (and perhaps sections 135 and 136, although I would myself have thought that those sections were, as a practical matter, academic in a case of the0 present kind).

155 For the foregoing reasons, I would not be persuaded that, absent binding authority to the contrary, there was any miscarriage by reason of the joint trial of all five counts in the indictment. There is, as it happens, authority which seems to me to support the foregoing reasoning.

156 It is convenient to begin that canvass by referring back to part of the contents of paragraph 12, previously herein quoted, of the judgment of the English Court of Appeal in **Cannings**. The judgment of a differently constituted Bench of the Court of Appeal which dealt with the interlocutory application of which paragraph 12 speaks, was made available to this Court. That judgment takes as its starting point the decision, earlier herein mentioned, of **Makin**. There follows a detailed and helpful canvass of subsequent English authority. The conclusion reached upon the basis of that canvass is put as follows in paragraph 31 of the judgment:

> "In our judgment, it would be, in the words used in the authorities, 'an affront to common sense' if the evidence in relation to the deaths and ALTEs of each of these children was not admissible in relation to the deaths referred to in the indictment. As we have said, we do not accept that it is a necessary prerequisite to the admission of such evidence that, when viewed in isolation in relation to each child, it gives rise to a prima facie case. Whether or not there is, in relation to either count in the indictment, a prima facie case, is a matter, of course, determinable at the close of the prosecution case at trial. But, in our judgment, when fairness to the prosecution, as well as fairness to the defence, are considered, there is nothing either wrong in law or unfair in the evidence in relation to each of these children being admitted, in relation to the death of the others. It follows that, in our judgment, the judge was correct to rule in relation to admissibility as she did and to rule that severance was inappropriate."

157 Of the authorities which are canvassed by that interlocutory judgment of the Court of Appeal there is one, **Director of Public Prosecutions v P** [1991] 2 AC 447, in which the Lord Chancellor, Lord Mackay of Clashfern, states a number of propositions which are, I think, helpful to the present discussion.

158 At 460D – 461A his Lordship says:

> "As this matter has been left in Reg v Boardman I am of opinion that it is not appropriate to single out 'striking similarity' as an essential element in every case in allowing evidence of an offence against one victim to be heard in connection with an allegation against another. Obviously, in cases where the identity of the offender is an issue, evidence of a character sufficiently special reasonably to identify the perpetrator is required and the discussion which follows in Lord Salmon's speech on the passage which I have quoted indicates that he had that type of case in mind.
> From all that was said by the House in Reg v Boardman I would deduce the essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused intending to show that he was guilty of another crime. Such probative force may be derived from striking similarities in the evidence about the manner in which the crime was committed ..... . But restricting the circumstances in which there is sufficient probative force to overcome prejudice of evidence relating to another crime to cases in which there is some striking similarity between them is to restrict the operation of the principle in a way which gives too much effect to a particular manner of stating it, and is not justified in principle."

159 And 462D – G:

> "When a question of the kind raised in this case arises I consider that the judge must first decide whether there is material upon which the jury would be entitled to conclude that the evidence of one victim, about what occurred to that victim, is so related to the evidence given by another victim, about what happened to that other victim, that the evidence of the first victim provides strong enough support for the evidence of the second victim to make it just to admit it notwithstanding the prejudicial effect of admitting the evidence. This relationship, from which support is derived, may take many forms and while these forms may include 'striking similarity' in the manner in which the crime is committed, consisting of unusual characteristics in its

> execution the necessary relationship is by no means confined to such circumstances. Relationships in time and circumstances other than these may well be important relationships in this connection. Where the identity of the perpetrator is in issue, and evidence of this kind is important in that connection, obviously something in the nature of what has been called in the course of the argument a signature or other special feature will be necessary. To transpose this requirement to other situations where the question is whether a crime has been committed, rather than who did commit it, is to impose an unnecessary and improper restriction upon the application of the principle."

160 For the whole of the foregoing reasons I am, therefore, of the opinion that Ground 1 has not been made good.

**The Convictions Appeal : Conclusion**

161 In my opinion no one of the grounds of appeal has been made good; and I would, therefore, dismiss the convictions appeal.

**The Sentence Application**

162 As previously herein noted Barr J passed sentences structured so as to produce an overall head sentence of imprisonment for 40 years and a non-parole period of 30 years.

163 The practical structure of the sentences was:

> [1] Count 1 – imprisonment for a term of 10 years to commence on 22 April 2003 and to expire on 21 April 2013;
>
> [2] Count 2 – imprisonment for a term of 14 years to commence on 22 April 2005 and to expire on 21 April 2019;
>
> [3] Count 3 – imprisonment for a term of 18 years to commence on 22 April 2006 and to expire on 21 April 2024;
>
> [4] Count 4 – imprisonment for a term of 20 years to commence on 22 April 2013 and to expire on 21 April 2033; and
>
> [5] Count 5 – imprisonment for a term of 22 years to commence on 22 April 2021 and to expire on 21 April 2043. Non-parole period of 12 years to commence on 22 April 2021 and to expire on 21 April 2033.

164 Three matters are at once apparent.

165 **First**, Barr J correctly fixed a distinct sentence for each distinct offence. This conformed to what is required by the decision of the High Court of Australia in **Pearce v The Queen** (1998) 194 CLR 610.

166 **Secondly**, his Honour made each sentence in the sentencing sequence incrementally larger than the preceding sentence in that sequence. I see no error of principle on that account. His Honour was dealing, after all, with five distinct offences separated by not insignificant periods of time.

167 **Thirdly**, his Honour built in to the sentencing structure a measure of cumulation. As a matter of broad sentencing principle there was, in my respectful opinion, no manifest error in that approach.

168 The appellant submits that the end result achieved by Barr J is manifestly excessive. It is submitted that the degree of cumulation as between the sentences passed in connection with Counts 1 and 4, a cumulation of 10 years, which is the entire term of the Count 1 sentence; and as between Counts 1 and 5, a cumulation of 18 years; is itself indicative of error. It is submitted, as well, that the sentences do not allow adequately, if indeed at all, for the unusual personal and psychological profiles of the appellant; and, further, that the sentences do not allow for the special features of the harshness of the custodial regime to which the appellant is, and is likely to remain, subject.

169 There can be no gainsaying, in my opinion, that the objective criminality of the five offences was, overall, very serious indeed. On this topic Barr J made these findings:

> "The stresses on the offender of looking after a young child were greater than those which would operate on an ordinary person because she was psychologically damaged and barely coping. Her condition, which I think she did not fully understand, left her unable to ask for any systematic help or remove the danger she recognised by walking away from her child. She could confide in nobody. She told only her diary. Even when her diary was discovered and her feelings realised she was persuaded to stay with Patrick. I think that the condition that gave rise to her fears and anxieties prevented her from refusing the well-intentioned offer.
> The attacks were not premeditated but took place when she was pushed beyond her capacity to manage. Her behaviour after each attack contained elements of falsity and truth. She falsely pretended the unexpected discovery of an accident and falsely maintained her innocence. That, I think, was because she could not bring herself to admit her failure to anyone but herself. However, her attempts to get help, including what I think was a genuine attempt to perform cardio-pulmonary resuscitation on Laura, were genuine and made out of an immediate regret of what she had done. Her anger cooled as fast as it had arisen.
> However, even with these mitigating features one would not hesitate, without the evidence of the events of the offender's childhood and their eventual effect on her behaviour as an adult, to say that, taken together, her offences fell into the

> worst category of cases, calling for the imposition of the maximum penalty. As the Crown said in its written submissions, the real issue that arises is whether the offender's dysfunctional childhood provides any significant mitigation of her criminality.
>
> I think that it does. I think that notwithstanding the stable family environments afforded by the Platt and Marlborough families and by Mr. Folbigg the effects on the offender of the traumatic events of her childhood operated unabated. She was throughout these events depressed and suffering from a severe personality disorder. I accept the evidence of Dr. Westmore that her capacity to control her behaviour was severely impaired.
>
> I accept that throughout her marriage the offender was affected by the abuse perpetrated upon her during the first eighteen months of life. The effects included an inability to form a normal, loving and forbearing relationship with her children. Although she realised that shortcoming she lacked the resources to remedy it. She was unable to confide in Mr. Folbigg. He never knew that she was at the end of her tether. The result was that he continued to leave everything to her and her fear of the consequences became settled. Her depression went unrelieved and on occasions turned itself into anger. The offender was not by inclination a cruel mother. She did not systematically abuse her children. She generally looked after them well, fed and clothed them and had them appropriately attended to by medical practitioners. Her condition and her anxiety about it left her unable to shrug off the irritations of unwell, wilful and disobedient children. She was not fully equipped to cope.
>
> On occasions she appeared cool, detached, self-interested and unaffected by the fate of the children. In truth, she suffered remorse which she could not express."

170 All of these findings were, in my respectful opinion, amply open to his Honour upon the whole of the evidence, but particularly the evidence of Drs. Giuffrida and Westmore, that was put to his Honour during the proceedings on sentence.

171 I add, because the matter is very important in the present context, that the psychological damage to which Barr J refers in paragraph 91 as quoted above, was not trifling or peripheral damage, but was serious, deep-seated damage caused over a period of some years commencing when the appellant was a baby. The details make sad and shocking reading. It is unnecessary to rehearse now all of the ugly and distressing particulars.

172 The appellant was born on 14 June 1967. She was aged, therefore, a little more than 36 years when she stood for sentence. Her subjective profile was shaped in large part by the psychological damage to which I have

previously referred. The just balancing of the appellant's objective criminality, as found by Barr J, and her subjective profile, posed three particular questions for his Honour.

173 **First**, to what extent was the appellant, now and in the foreseeable future, a continuing danger to the well-being of the community. Barr J concluded:

> "Dr. Guiuffrida and Dr. Westmore agree that the offender's condition is for the most part untreatable. Her chronic depression may respond to medication. Her feelings of vulnerability and failure may respond to psychotherapy, though there may be doubt whether it will be possible to offer her the fortnightly services that Dr. Westmore considers necessary for that purpose. She will always be a danger if give the responsibility of caring for a child. That must never happen. She is not a dangerous person generally, however, and her dangerousness towards children does not disentitle her to eventual release upon parole on conditions which will enable risks to be managed."

174 I respectfully agree with those conclusions, but subject to a note of caution in connection with the proposition that the appellant: *"will always be a danger if given the responsibility of caring for a child. That must never happen."*. I think, with all due respect to his Honour, that such an assessment is unacceptably speculative insofar as it treats of distant future probabilities. There is also, I think, a risk that such a cut-and-dried look into the far distant, and in truth unknowable, future will introduce into the sentencing process an impermissible element of mere preventative detention which punishes the appellant, not for the crimes that she has undoubtedly committed, but for crimes which it is feared, in an incohate general sense, that she might commit in that future: cf **Veen (No. 2)** (1988) 164 CLR 465 per Mason CJ, Brennan, Dawson and Toohey JJ at 473.5 – 474.2.

175 Allied to that question is the issue of general, as well as personal, deterrence. It is submitted for the appellant that an offender with the appellant's damaged psychological profile is not a suitable vehicle for the provision of general deterrence. If that submission means that in the case of such an offender the factor of general deterrence will not have in the nature of things the importance that it would have in the case of an offender whose objective criminality was not so mitigated, then I would accept the submission as being both sound in logic and consistent with relevant authority. It the submission means, however, that there is *no* room in such a case for a measure of general deterrence, then I would not accept the submission. A theme of much of contemporary social behaviour is "stressing out" and then lashing out. To say that "stressing out" should have a sensibly mitigating effect upon objective criminality, and upon the accompanying subjective factors, is one thing. It is quite a different thing to encourage any view in any segment of society that "stressing out" is some

sort of licence to commit criminal offences; and *a fortiori* the criminal offences of manslaughter and murder.

176 **Secondly**, to what extent did the appellant have prospects of rehabilitation? Barr J dealt with this topic thus:

> "…….. She is not a dangerous person generally, however, and her dangerousness towards children does not disentitle her to eventual release upon parole on conditions which will enable risks to be managed.
> Because of the intractability of her condition, the offender's prospects of rehabilitation are negligible. She is remorseful but unlikely ever to acknowledge her offences to anyone other than herself. If she does she may very well commit suicide. Such an end will always be a risk in any event."

177 I see no error in these findings and opinions. I do see a need to make sensible allowance for the fact that no Court which now deals with this appellant can really foresee how she will develop in decades from now, should she be given humane, professional treatment and support.

178 **Thirdly**, what needs to be done about the likely circumstances of this appellant's imprisonment?

179 Barr J describes these circumstances simply, clearly and graphically thus:

> "Gaol is a dangerous environment for any serving prisoner. It will be particularly dangerous for the offender. In order to protect her from the danger of murder by other inmates the authorities will have to keep her closely confined for the whole of her time in custody. The number of people with whom she will have contact will be limited. So far she has been locked up for twenty-two hours in every twenty-four and the indications are that some such regime will obtain indefinitely. For these reasons she will serve her sentences the harder and is entitled to consideration."

180 I see no error in any of those findings or in that assessment.

181 The foregoing questions apart, Barr J speaks of the perceived need to accommodate *"the outrage of the community"*. This is, I apprehend, a fairly conventional notion in the context of sentencing; but it seems to me to need some carefully discriminating application in particular cases. The concept itself cannot mean, surely, outrage that is seen and assessed through the normally distorted prism of the coverage given to high-profile criminal cases in the mass media of social communication. The concept must entail, surely, a notion of the outrage that would be reflected in a properly informed, sensible and thoughtful community consensus.

182 I apprehend that the appellant's crimes would be regarded by any person who was properly informed, sensible and thoughtful, as terrible crimes, not only on account of their substance, but also on account of the

tragic background which explains to some extent, although it does not excuse to any extent, how the crimes came to be committed. I apprehend that any such person would understand readily enough the need which arises when punishing such crimes, not unthinkingly, (and to borrow from the oral submissions of Mr. Jackson QC), to treat the appellant as somebody *"to be locked up and the key thrown away"*.

183 When this Court comes, in adjudicating an appeal against sentence, to consider whether there has been any error at first instance, it is important, in my opinion, that the Court not depart either insouciantly or idiosyncratically, from the findings and conclusions of the sentencing Judge, and particularly in the present case when the sentencing exercise was so extraordinarily difficult. As has been said many times in the cases, sentencing is an art and not a science. *"That is"*, to quote from the joint judgment of Gaudron, Gummow and Hayne JJ in **Wong v The Queen** (2001) 207 CLR 584 at 611, *"what is meant by saying that the task is to arrive at an 'instinctive synthesis'. This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which, in the case of an offence like the one now under discussion, balances many different and conflicting features"*.

184 I have considered anxiously the particular question now posed for this Court, that is to say, whether some other and more lenient sentence is warranted in law: see section 6(3), **Criminal Appeal Act 1912 (NSW)**. I can see no proper answer other than an affirmative one.

185 **First**, I think that there is an identifiable particular error in Barr J's method of cumulation. That some cumulation was warranted is, in my opinion, plainly correct. But the structuring of the sentences passed in connection with Counts 4 and 5 entails that the sentence on Count 4, a heavy sentence in any event, does not commence until 7 years after the commencement of the sentence on Count 3, and 10 years after the commencement of the sentence on Count 1; while the sentence on Count 5, an even heavier sentence, does not commence until 8 years after the commencement of the sentence on Count 4, and 18 years after the commencement of the sentence on Count 1.

186 These are quite extraordinary cumulations. The prospect that they offer the appellant is so crushingly discouraging as to put at risk any incentive that she might have to apply herself to her rehabilitation. That seems to me to indicate, without more, error.

187 **Secondly**, I am of the opinion, with every proper respect to Barr J, that the overall results of a head sentence of 40 years and a non-parole period of 30 years are so crushing as to manifest covert error.

188 The written submissions of the appellant draw attention to a number of cases which are said to indicate, at least in a broadly helpful way, a pattern of sentencing that suggests such a covert error in the present case. The individual comparisons are necessarily inexact, as the appellant's written

submissions fairly acknowledge. But they do tend to strengthen my opinion that the overall results in the present case are simply too high.

189 As matters stand, the appellant cannot be paroled until she is aged 66 or thereabouts. She might well not be paroled until she is even older; and if political reaction to media pressure and to meretricious polling operates at that future time as it tends to operate now, she might well not be released until she is aged 76 or thereabouts. That is, it seems to me, a life sentence by a different name.

190 Barr J stopped short of passing a life-means-life sentence, and that for reasons with which I respectfully agree. An end sentencing result which does not have the same pedantic theoretical operation, but which is likely to have the same practical effect, is in my respectful opinion such as to warrant the section 6(3) intervention of this Court. In my opinion, justice would be done by an overall result entailing a head sentence of 30 years and a non-parole period of 25 years.

191 The non-parole period thus proposed is about 83 per cent of the proposed head sentence rather than the statutory norm of 75 per cent. I think, as did Barr J, and for the same reasons as his Honour, that a somewhat longer than normal non-parole period is justified in order to reflect the reasonable requirements overall of the appellant's case.

**Orders**

[1] That there be granted any extension of time necessary to permit of the hearing of the present appeal and application;

[2] That the appeal against convictions be dismissed;

[3] That leave be granted to appeal against sentence; that the sentences passed at first instance on Counts 4 and 5 be quashed, and that the appellant be re-sentenced on those counts as follows:

· On Count 4 to imprisonment for 20 years to commence on 22 April 2008 and to expire on 21 April 2028; no non-parole period being set because of the overall structure of the appellant's re-sentencing;

· On Count 5 to imprisonment for 22 years to commence on 22 April 2011 and to expire on 21 April 2033. A non-parole period of 17 years, to expire on 21 April 2028, is set.

192 **DUNFORD J:** I agree with the orders proposed by Sully J and with his Honour's reasons for such orders.

193 **HIDDEN J:** I agree with Sully J.

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that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

**[2005] HCATrans 657**

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No S94 of 2005

B e t w e e n -

KATHLEEN MEGAN FOLBIGG

Applicant

and

THE QUEEN

Respondent

Application for special leave to appeal

McHUGH ACJ
KIRBY J
HEYDON J

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON FRIDAY, 2 SEPTEMBER 2005, AT 9.29 AM

**MR D.F. JACKSON, QC:** If the Court pleases, I appear with my learned friend, **MR A.P. COOK**, for the applicant. (instructed by Legal Aid Commission of New South Wales)

**MR M.G. SEXTON, SC**, Solicitor-General for the State of New South Wales: If the Court pleases, I appear with my learned friend, **MS A.M. MITCHELMORE**, for the respondent. (instructed by Solicitor for Public Prosecutions (New South Wales))

**McHUGH ACJ:** Yes, Mr Jackson.

**MR JACKSON:** Thank you, your Honours. May I deal with matters in this order: first, with the question that I might call tendency and coincidence evidence; secondly, with probability evidence of the medical practitioners; and, third, with our responses to two matters in the Crown's submissions.

Your Honours, if I could turn to the first of those matters. The applicant was found guilty of five offences in relation to her four children, one of manslaughter, three of murder and one of grievous bodily harm to a child who was later the victim of one of the counts of murder. Your Honours will see that recited in paragraphs 1 to 7 of the Court of Criminal Appeal at page 190.

It was accepted at the trial that the evidence on each count, considered individually, would not justify a verdict of guilty. Your Honours will see that referred to at page 197, paragraph 43. That is in the Court of Criminal Appeal. We have given the trial reference in our written submissions at page 292, paragraph 53.

Your Honours, the evidence of the deaths, if I can put them collectively in that way, to put it shortly, of the other children, was relied on in respect of each count as evidence which the jury might take into account as leading to an inference of guilt on that charge. In other words, the others could be taken into account as leading to an inference of guilt on that charge. That takes one to the provisions of the *Evidence Act* dealing with tendency and coincidence evidence, namely sections 97, 98 and 101 and I will go back to sections 55 and 56 in just a moment.

Your Honours, it is probably sufficient to refer to the position as to coincidence evidence as distinct from tendency because there are somewhat similar considerations. Under section 98, evidence that two or more related events occurred is not admissible to prove that because of the improbability of their occurring coincidentally a person did a particular act or had a

particular state of mind unless some of the conditions of the remainder of the provision are satisfied.

One is, your Honours, subsection (2) and that is that they are taken to be related events, which goes back to the opening words of section 98(1), "if and only if" and your Honours will see the two criteria there set out. There is, your Honours, in criminal proceedings the further requirement of section 101 to be made out, and section 101 provides that the evidence, evidence on either tendency or coincidence that is adduced cannot be used unless the probative value "substantially outweighs any prejudicial effect", to put it shortly.

If I could return to section 98, what your Honours, will see is that it is a rule which excludes evidence of a particular kind unless certain criteria are met.

**McHUGH ACJ:** But is not the difficulty that you have to face up to the words that I will say are in parentheses in section 98(1)(b), "or having regard to other evidence adduced", and is not the difficulty facing you, Mr Jackson, that the diary entries lend very cogent weight to what inferences can be drawn from the unexplained deaths? You have a diary entry to say:

> Wouldn't of handled another like Sarah. She's saved her life by being different.

Diary entries saying:

> My guilt . . . haunts me, my fear of it happening again haunts me . . .
>
> if ever feel that way again I'm going to wake –

up her husband. Why, when the coincidence evidence is read in the light of those diary entries, was it not open to a court to think that the evidence was of significant probative value?

**MR JACKSON:** Your Honour, can I come to that in just a moment because I do intend to go to that.

**McHUGH ACJ:** Yes.

**MR JACKSON:** What I want to do really is to go, if I may, just to one stage anterior to that as well and I need to go back to section 98 for that end. Your Honours will see that if one goes to section 98, it excludes evidence of a particular kind unless certain criteria are met. It is a rule which excludes evidence. The anterior question, in a way, is how does the evidence

otherwise get in and that takes one back to the test for relevance which is found in section 56 which provides two things. One is in section 56(1), that evidence that is relevant is admissible, and the second is that evidence that is not relevant is not admissible.

Your Honours, what one sees then is that one has to decide what is the evidence that is relevant and your Honours will see that referred to in section 55 and section 55 is that:

> The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue –

Now, your Honours, that is where, in our submission, one comes to the applicability in deciding that question of the approaches adopted in the reasoning in *Perry v The Queen* (1982) 150 CLR 580 and if I could go to that for just a moment. I wanted to go, very briefly, to three passages in the judgments starting with Justice Murphy, at page 594 - - -

**HEYDON J:** Dissenting.

**MR JACKSON:** Yes, your Honour, not I think in relation to the general principle. I was going to refer also to Chief Justice Gibbs and Justice Wilson. Page 594, the passage to which I wish to refer is that commencing under the heading at the bottom of the page, "Circular reasoning", and your Honours will see that in that passage, which I will not read out, particularly the passage at the bottom of the page and at the top of the next page and the passage that goes through the whole of that paragraph.

One goes then to Justice Wilson, at page 612, in a passage of reasoning about halfway down the page:

> To seek to prove a fact in issue by a chain of reasoning which assumes the truth of that fact is, of course, a fallacy, repugnant alike to logic and to the practical processes of criminal courts.

Also, Chief Justice Gibbs, at page 587, in a passage which commences, I think, clearly on principle and also at page 589 - - -

**KIRBY J:** Where does this lead in your submission. Assume that there have been 10 children who have died in a very similar way, there must be a point at which it has to be left, in our system, to the jury to evaluate these things so long as the jury is properly instructed.

**MR JACKSON:** Your Honour, I accept that generally speaking, if I may say so, but in circumstances where – I would say two things about it. The

first, and your Honours this is not a direct response to what your Honour put to me, I accept - that really goes to the second point I wanted to seek and that is about medical evidence of doctors being given of the improbability of this occurring. But, if I could leave that aside and go back to a more direct answer, your Honours, the point we would seek to make is really that, if you have circumstances where one is dealing with the decision in *Makin*, what your Honours will see is that in that and other cases where evidence of this kind has been admitted, there is evidence which makes the happening of the event itself suspicious.

That case, which is one relied on by our learned friends, is one where you had people who were in the pattern of the day described as baby farmers who took in children, many bodies were found afterwards, but it was not just that. What it was was a case where, at the time when they were taken in – this is a point made in the judgment, page 68 in that case – that they had taken them in in circumstances where the money was obviously, inadequate, three guineas to keep them for the whole of their childhood, in effect, and where, I think, what was also found was they had declined offers of clothing for the children so one had circumstances of submission, circumstances raising a suspicious case in the first place. Once one makes the assumption here, which was accepted, that if you looked at the deaths themselves there was nothing to indicate one way or the other.

**KIRBY J:** But, as in that case, it is said that in this case there is that additional powerful evidence from the diary, which the Court of Criminal Appeal, I think, described as chilling.

**MR JACKSON:** Your Honour, that is perhaps one view. Could I say in relation to that that what they were, of course – this has been referred to in a number of the cases in the United Kingdom dealing with the deaths of a number of children – they really are capable of description as the reflections of a grieving mother with a range of emotions which include guilt for the death of a child, self-blame, feelings of responsibility and that is particularly so in circumstances where the deaths would appear to be quite mysterious to her and they are by no means unequivocal statements of her guilt in relation to them.

**McHUGH ACJ:** You have to look at the positive similarities. Two deaths occurred during the day, two deaths and the acute life-threatening event occurred in the early hours of the morning. In each case the applicant was alone with the child, the child ceased breathing, the husband was either absent or asleep and there was no clear, natural cause of death and all the children showed signs that were consistent with smothering with a pillow. When you add the diary entries to those facts, why was it not open to the jury to conclude that the applicant had murdered the children? When you have things like, "Wouldn't of handled another like Sarah", talking about

the last child, "She's saved her life by being different", and, "my fear of it happening again haunts me", and I am going to get my husband if I feel like this again.

**MR JACKSON:** Your Honour, all those things, "my fear of it happening again haunts me" is exactly the sort of thing one would say by any mother who had had that number of children die.

**McHUGH ACJ:** Why would she say, in front of those remarks about the "haunt":

> My guilt of how responsible I feel for them all, haunts me - - -

**MR JACKSON:** Any mother who has had a number of children die, your Honour, would say something like that and one could hardly expect the most rational things to be said, the most rational things considered in a courtroom afterwards. The point we would seek to make about it, your Honour, is that really the starting point of what your Honour put to me is, in a sense, where the difficulty in the matter lies because what you do have is something that may be consistent with smothering in the sense that smothering does not really leave traces of it, as it were, but deaths that are unexplained do not leave traces of it either. Your Honours, that is the point we would seek to make, if I may, that we would derive a little from the decision of the English Court of Appeal in *Cannings* – I think the copy your Honours may have may be [2004] 1 All ER 725.

**KIRBY J:** Yes, we have looked at that.

**McHUGH ACJ:** Yes.

**MR JACKSON:** Your Honours, the point that we would seek to make about it is that if one starts from the view that these things do not commonly happen, it is not much of a leap to say, therefore, someone did it. If, on the other hand, one sees these are things for which there is no explanation – I am referring to paragraphs 10 and 13 - - -

**McHUGH ACJ:** I know, but *Cannings* is a very different case.

**MR JACKSON:** Your Honour, I accept that and I am not referring to it for the detail of it. What I am seeking to say is if one looks at those paragraphs to see what is the right starting point, the right starting point, in our submission, is that you have, in respect of each of the events, the death or injury to a child which is unexplained and, in our submission, remains unexplained.

**KIRBY J:** You have to be careful in the light of recent scientific knowledge, of which I am generally aware, about judging a reaction of the mother to the death of children in an entirely rational way. People react to situations of this kind very differently but it is the combination of the coincidences which are collected by the prosecution submissions and the diary entries which seem to me to be very powerful in combination, in this case, and lifting the case above the *Cannings Case* and more like the *Makin Case.*

**McHUGH ACJ:** Or *Brides in the Bath.*

**MR JACKSON:** Your Honour, it becomes a question of the starting point really and the starting point argument does not reason very apposite to the *Brides in the Bath Case* which is a rather different thing altogether.

**KIRBY J:** We do not have an appeal against the redetermination of sentence, do we, because that is the curious thing in this case, it seems to me, that, assuming that there was enough to go to the jury and the jury was properly instructed that any mother who would be in this position is almost, by definition, mentally disturbed - - -

**MR JACKSON:** Your Honour, all I can say is that the best that I hoped could be done was done in the Court of Criminal Appeal which achieved some reduction from the sentence that I there submitted was barbarous.

**KIRBY J:** It is 22 years, is it not, with no parole?

**MR JACKSON:** Yes, very high.

**KIRBY J:** It is still a very long sentence and that is a sentence which is appropriate to a person who has wilfully murdered this number of human beings but, in the whole context, it would seem to indicate some mental disturbance.

**MR JACKSON:** Yes, your Honour. Your Honours, could I go to the second point which we seek to raise and we put these things by themselves but also, to a degree, in combination. This was the evidence given by the medical practitioners in relation to the question of probability. Could I just indicate what the evidence was and your Honours will see that, if I can go briefly to page 205, there are three passages I want to go to. At paragraph 65, your Honours will see the evidence that he gave. I do not think I need to go to the other two passages but they can be seen in Berry, paragraphs 67 and 68 and Dr Beal, paragraph 75.

Your Honours, could we say the question that arose about this was, in a sense, its relative probative value and its prejudice. As we have said in

our written submissions at page 292, paragraph 56, the evidence carried with it the implication that to find the applicant not guilty, the jury would have to find that the circumstances of the case were, in a sense, unique in medical history.

Allowing, in our submission, and I would refer again in that regard to the two passages from *Cannings* to which I referred earlier, could I just say your Honours that allowing that evidence of likelihood effectively, in our submission, as we have said in paragraph 65, reverses the burden of proof because one has to prove, one has to seek to persuade the jury, that what happened and was not known previously to happen was something that was quite, quite out of the ordinary.

**KIRBY J:** But the standard directions on onus of proof and burden of proof were given by the trial judge.

**MR JACKSON:** Yes, your Honour, I accept - - -

**McHUGH ACJ:** When the trial judge dealt with at the bottom of 26 and 27, he said:

> SIDS deaths are rare in the community. There is no authenticated record of three or more such deaths in a single family. This does not mean, of course, that such events are impossible. It is an illustration of the rarity of deaths diagnosed as SIDS.

**MR JACKSON:** Your Honour, I accept that is what the judge said.

**McHUGH ACJ:** I understand the point you are making.

**MR JACKSON:** There was evidence, however, the evidence should not have been there, that is the point we are seeking to make, and that must have had a significant effect. Your Honours, those are our submissions.

**McHUGH ACJ:** Thank you. We need not hear you, Mr Solicitor.

We are not convinced that error has been shown in the conclusions or the reasoning of the Court of Criminal Appeal of New South Wales such that it would warrant the grant of special leave to appeal to this Court. Essentially, we think that this was a case for the decision of the jury on the coincidence or tendency evidence led against the applicant in this unusual case. But apart from the coincidence evidence, there was other strong evidence, especially the diary entries made by the applicant, that was available to support the inferences that could be drawn from the tendency or coincidence evidence. In addition, we can detect no relevant misdirection of the jury by the learned trial judge. Nor are we convinced that there has

been any miscarriage of justice in this case. Accordingly, special leave to appeal must be refused.

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**AT 9.50 AM THE MATTER WAS CONCLUDED**

New South Wales
Court of Criminal Appeal

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|---|---|
| **CITATION:** | **FOLBIGG v R [2007] NSWCCA 128** |
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| **HEARING DATE(S):** | 12 December 2006 and<br>23 April 2007 |
| **JUDGMENT DATE:** | 16 May 2007 |
| | |
| **JUDGMENT OF:** | McClellan CJ at CL at 1; Simpson J at 33; Bell J at 34 |
| | |
| **DECISION:** | Application to re-open appeal allowed |
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| **CATCHWORDS:** | CRIMINAL LAW - Application to reopen appeal - allegation of irregularity in appellant's trial after appeal judgment delivered - appeal against conviction dismissed - appeal against sentence allowed - jurisdiction of Court of Criminal Appeal to reopen appeal and consider a further ground of appeal - whether court orders had been entered - date upon which orders perfected - Prothonatory satisfied that orders not entered - assurance given to appellant that order would not be entered - orders subsequently perfected |
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| **LEGISLATION CITED:** | Crimes Act 1900<br>Crimes (Appeal and Review) Act 2001 No 120<br>Criminal Appeal Act 1912 |
| | |
| **CASES CITED:** | Burrell v R [2007] NSWCCA 79<br>R v Reardon (No 2) (2004) 60 NSWLR 454<br>Regina v Lapa (No 2) (1995) 80 A Crim $ 398 |
| | |
| **PARTIES:** | Kathleen Megan Folbigg (Appl)<br>The Crown |
| | |
| **FILE NUMBER(S):** | **CCA** 2006/2004 |
| | |
| **COUNSEL:** | B Walker SC/A P Cook (Appl)<br>M G Sexton SC/J A Girdham (Crown) |
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| **SOLICITORS:** | Legal Aid Commission of NSW (Appl)<br>Director of Public Prosecutions (Crown) |
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| **LOWER COURT JURISDICTION:** | Supreme Court |
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| **LOWER COURT JUDICIAL OFFICER:** | Sully; Dunford; Hidden JJ |
| | |
| **LOWER COURT DATE OF DECISION:** | 17 February 2005 |
| | |
| **LOWER COURT MEDIUM NEUTRAL CITATION:** | R v Folbigg [2005] NSWCCA 23 |

**IN THE COURT OF CRIMINAL APPEAL**

**2006/2004**

**McCLELLAN CJ at CL**
**SIMPSON J**
**BELL J**

**WEDNESDAY 16 MAY 2007**

FOLBIGG, Kathleen v R

**Judgment**

1 **McCLELLAN CJ at CL**: The issue before the court is whether it has jurisdiction to reopen Kathleen Folbigg's appeal which was previously determined by the court.

2 The appellant, Kathleen Megan Folbigg was tried for four counts of murder and one count of maliciously inflicting grievous bodily harm with intent. On 21 May 2003 a jury returned verdicts of guilty in respect of 3 counts of murder, one count of manslaughter and one count of maliciously inflicting grievous bodily harm. On 24 October 2003 the appellant was sentenced to imprisonment for 40 years with a non-parole period of 30 years.

3 A notice of appeal against conviction and sentence was filed on 8 July 2004. The appeal was heard in this Court on 26 November 2004 when judgment was reserved.

4 On 17 February 2005 the court delivered judgment. The appeal against conviction was dismissed but the appeal against sentence allowed and the appellant resentenced to a total period of imprisonment of 30 years with a non-parole period of 25 years.

5 On 18 February 2005 a solicitor employed by the Legal Aid Commission, who has had the carriage of the appellant's matter, became aware of information concerning a possible irregularity in the consideration of the matter by the jury. He informed the Director of Public Prosecutions of the potential problem on 1 March 2005. The matter was then referred to the Office of the Sheriff and an investigation was conducted. The Sheriff prepared a report which was provided to the Supreme Court.

6 By letter dated 1 May 2006 the Prothonotary of the Supreme Court wrote to the solicitor for the appellant. In that letter he said:

> "I am directed to inform you that at this stage there may be evidence of procedural irregularity. I am not at liberty to disclose to you or the Crown the contents of the Sheriff's report at this stage.
> The Court appears to be functus in this matter. You may recall that in *R v K* (2003) 59 NSWLR 431 and *R v Skaf* (2004) 60 NSWLR 86, the allegations in those trials were raised whilst an appeal was pending. It may be appropriate for your client to make an application under s 474D of the *Crimes Act* 1900 to further progress the investigation."

7 It will be necessary for me to trace the history of the matter in greater detail. However, it was not until 31 July 2006 that an application was made to reopen the appeal.

8 There is evidence before this Court which suggests that the orders of the Court of Criminal Appeal may have been entered on 5 July 2006. Upon the assumption that this occurred the Crown submitted that there is no jurisdiction in this Court to entertain an application to reopen the appeal. It was submitted that the appellant should be confined to any remedy which may be available pursuant to s 474D of the *Crimes Act* 1900 (now s 78 *Crimes (Appeal and Review) Act* 2001 No 120).

9 The appellant's position is that this Court could not find that the order was entered on 5 July and indeed could not be satisfied that it was entered before the application which was made on 31 July 2006. Accordingly, it is submitted that, even if thereafter the order was perfected, this Court has jurisdiction to consider a further ground of appeal (see *Regina v Lapa (No 2)* (1995) 80 A Crim R 398; *R vReardon (No 2)* (2004) 60 NSWLR 454).

**Relevant provisions of the Criminal Appeal Rules**

10 The Criminal Appeal rules provide for the determination of appeals and the entry of the orders. Rules 50A to 54 are in the following terms:

> **50A Determination of appeal or application**
> An appeal or application for leave to appeal is determined on the making of orders disposing of the appeal or application.
> NOTIFYING RESULTS OF APPEAL
> **51 Notice of determination of appeal etc**
> The Registrar shall send a notice (Forms Nos XI and XII) of the determination of any appeal, or of any application incidental thereto, to the appellant, if he was not present when the matter was determined, to the proper office of the Court of Trial, to the Director-General of Corrective Services and to the Sheriff, if the appeal is against a conviction involving a sentence of death or is against a sentence of death.
> **52 Notice of orders or directions by Court**
> The Registrar shall also notify the proper officer of the Court of Trial of any orders or directions made or given by the Court

in relation to such appeal.

**53 Records of Court of Trial to be noted**

(1) Such proper officer shall thereupon enter the particulars of such notification on the records of the Court of Trial.

(2) Such entry shall be made in conformity with the administration of the Court of Trial on:

(a) the indictment,

(b) the appropriate Court file, or

(c) the appropriate computer record.

**54 Depositions etc to be returned**

After the final determination of any appeal, or the final refusal of any application for leave to appeal, the Registrar shall, subject to any order made by the Court, return to the officer from whom he received them all depositions, pleadings, inquisitions or other documents relating to such matter."

11 The "Proper Officer of the Court of Trial" is defined by r 1 to mean "the officer who has the custody of the records of the Court of Trial." The "Court of Trial" is the trial court from whom the appeal was brought (s 2 of the *Criminal Appeal Act* 1912). The Court of Trial in the present matter was the Supreme Court. Accordingly, the orders of this Court were perfected when the particulars of a Notification made to the Prothonotary were entered on the records of the Supreme Court. Pursuant to r 53(2) the entry could have been made on the indictment, the appropriate court file, or the appropriate computer record. However, the evidence indicates that the relevant administrative practice of the Supreme Court has been to attach the orders of this Court to the trial indictment. Accordingly, the date on which this occurred is the issue which this Court must presently resolve.

## The relevant events

12 The Prothonotary of the Supreme Court, Mr Riznyczok, is the Registrar of the Common Law Division of the Court to which the criminal list had been assigned. He gave evidence that he received a report from the Sheriff concerning an investigation into an alleged irregularity in the trial of the appellant. He says that he drew this possible irregularity to the attention of both the Legal Aid Commission and the Director of Public Prosecutions. Apparently the parties were already aware of the issue but the matter was formally brought to their attention by letter from the Prothonotary dated 1 May 2006. I have already referred to the letter written to the appellant's solicitor [6]. The allegation was that a member of the jury may have researched the appellant's personal and family history on the internet during the course of the trial.

13 On 19 June 2006 the appellant's solicitor wrote to the Prothonotary indicating that his client may wish to make an application to reopen the appeal. The solicitor questioned whether the order of the Court of Criminal Appeal had been perfected. He said:

> “I would request that you enquire as to whether or not the order or judgment of the CCA has been perfected in the Court of Trial in accordance with the rules. I would request that forward (sic) to me a copy of the appropriate record which is said to perfect the order or judgment if that has happened. Given the consequences of this particular matter I would request that if the order has not been perfected that you do not take any action to perfect the order until you notify myself and further submissions are considered.”

14 Thereafter the Prothonotary took steps to locate the court file and the indictment and made enquiries as to whether the orders of the Court of Criminal Appeal had been entered. The Prothonotary recognised the importance of the issue and directed the relevant officer, Mr Lacey, to “have somebody inspect the file and indictment to check whether a copy of the CCA result has been filed with either file.” The Prothonotary was told by Mr Lacey:

> “It’s unlikely we have entered the results. We haven’t had the resources to do that for some time now as we have been focused on getting the appeal books up to date. There have been a number of staff changes and we have a number of office temps who aren’t up to speed yet.”

15 The Prothonotary said to Mr Lacey:

> “This is an important issue as it will determine whether Ms Folbigg will need to proceed by way of 474 or whether she can reopen her appeal. Somebody will have to inspect the file. If the orders haven’t entered, then they must not be entered until this is resolved.”

16 A search was made and it was reported to the Prothonotary that although results had been found for an interlocutory appeal the ultimate appeal “results” had not been found for the “last appeal.”

17 The Prothonotary took steps to have these findings confirmed. He went himself to the office of the Court of Criminal Appeal Registrar but could not find anything which indicated the entry of the Court of Criminal Appeal orders in the final appeal. He also spoke to another officer, Mr Godfrey, and asked him to check the computer system to determine whether the Court of Criminal Appeal orders had been entered on the record of the trial. The Prothonotary satisfied himself that they had not been entered. The Prothonotary also satisfied himself that no entry had been made on the CourtNet system which was then being used to record details of criminal cases.

18 Ultimately the Prothonotary came to the conclusion that the orders of the Court of Criminal Appeal had not been entered into the records of the Supreme Court. The Prothonotary wrote to the solicitor for the appellant on 14 July 2006 in the following terms:

> “…

> A search of the court file reveals that a copy of the notification from the Court of Criminal Appeal has not been attached to either the indictment or placed in the trial file for Ms Folbigg.
> I also understand that a notation of the Court of Criminal Appeal's order has not been made on the Court's computer system either.
> At this stage, I am unable to confirm that the particulars of the determination of the Court of Criminal Appeal have been entered on the Supreme Court's trial file.
> On the assumption that the determination has not been entered, no steps have been taken to enter it at this stage. I will cause the particulars to entered (sic) after a suitable period of time should your client not proceed with an application to reopen the appeal, or should your client intend to proceed with a section 474D instead. I will give you notice before I do so, so that you may make any necessary application."

19 Mr Lacey also gave evidence. In his affidavit he said that he received an email from the Prothonotary on 28 June 2006 asking that he extract the Folbigg trial file and the folder containing the appellant's indictment. He said that the Prothonotary asked Mr Lacey to place these documents in the office of the Court of Criminal Appeal Registrar.

20 Mr Lacey complied with the request and said that in early July he looked through the file and noticed that the trial indictment was still on it. However, there was no notification of the Court of Criminal Appeal orders on the file. He also checked the lever arch folders in which the court kept trial indictments but could not locate a copy of the indictment relating to the appellant.

21 Sometime in early July 2006, but after he had inspected the appellant's file, Mr Lacey directed Mr Byron, who was a clerk in the court registry, to process orders of the Court of Criminal Appeal and ensure they were attached to the relevant trial indictments. There is no evidence that he gave Mr Byron particular instructions in relation to the appellant's matter.

22 Mr Byron also gave evidence. He said that sometime in July 2006 Mr Lacey directed him to print out "Notifications of the Court of Criminal Appeal matters and attach them to the Supreme Court indictment to which they related." Mr Lacey also advised him to stamp each of the notifications and sign them.

23 Mr Byron was given 5 lever arch folders each of which contained a number of indictments in plastic sleeves. They were collected by calendar year. He was advised to commence with the most recent notifications and proceed backwards. Mr Byron said that some of the folders contained indictments with notifications already stamped, signed and attached, but there were many without notifications attached. Some notifications were

held loosely in the back cover of the folder. Some of these were already stamped but were not signed. Others were neither stamped or signed. For some matters a notification had not been printed and accordingly Mr Byron was required to find the notification on the computer system and print it out. He said that he first undertook this task before attaching the notifications to the indictments.

24 He said:

> "The practice I followed was to access the sub directory called 'notifications' in the computer system for the matter for which I located an indictment in the relevant folder. Once I located the relevant Notification, I then printed the Notification out. At the time I attached the notification to each indictment, I would then stamp it with the stamp I was provided, bearing the date I attached it to the indictment, and sign it. I would then staple it to the indictment. On some occasions I did the process with one indictment from start to finish -- that is I printed, signed, stamped and attached the notification to an indictment in the one episode. On other occasions, I printed a number of notifications, then signed and stamped each one in that group, and then attached them to the relevant indictments. In some instances, there was a delay of several days between the various steps in the process I have described.
> I have viewed the folder marked 2003, containing a number of blue indictments. In that folder, there are 25 indictments bearing Notifications stamped '5 July 2006' and signed by me. I stapled each of the Notifications to these indictments. The trial indictment in Folbigg is one of the indictments with the notification attached in that folder. It is the 15th indictment with such notification attached, stamped and signed by me in that folder."

25 Mr Byron has no recollection of dealing with the appellant's indictment. However, he says of the process which he undertook:

> "On most occasions, I would attach, stamp and sign the notifications to the indictments at the same time. However, on some occasions there was a delay of several days between the step of printing, signing, stamping and attaching. For example, I may have stamped the notification, but then had to attend to other tasks, or had a day off, and attached the notification to the indictment on another day after that.
> When I say in some instances there was a delay of several days between various steps, from my estimate, it would not have been any more than about a week from the time the notification was stamped to the time I attached it to the indictment."

26 Although the appellant carries the burden of persuading the court to reopen her appeal it is the Crown which asserts that the application is barred by reason of the perfection of the order. Accordingly, the Crown carries the onus of proving that the order was perfected before the application was made. In my opinion that onus has not been discharged.

27 Although the stamp on the notification of the court's determination of the application for the appellant bears the date 5 July 2006, this cannot be the date on which the orders were entered. The evidence of the Prothonotary indicates that the notification had not been attached to the indictment by 14 July. Although Mr Byron said it was usual for him to attach the notification to the indictment within about a week as I have indicated he does not recall processing the appellant's indictment. It must be remembered that the file had been placed in the office of the Court of Criminal Appeal Registrar with orders from the Prothonotary that judgment not be entered until the matter was resolved. There is no reason to conclude that his instructions were not carried out with the consequence that the orders would not have been entered until after the application to reopen had been filed. In these circumstances I could not find that the order of the Court of Criminal Appeal was attached to the appellant's indictment before the appellant filed her application to reopen the appeal on 31 July 2006.

28 In these circumstances I am satisfied that this Court has jurisdiction to entertain the appellant's application. Although the order has subsequently been perfected this is not a bar to the making of the application. In *Lapa* Clarke JA said:

> "For my part there are two considerations which lead me to conclude that, accepting that the power of the court to vary a judgment cannot be enlivened, absent any relevant rule, after the judgment has been perfected it does have power to remedy an oversight here application is made before that has occurred, notwithstanding that the judgment is perfected while the court is considering the matter. The fundamental consideration which should determine whether a court of criminal appeal should reconsider its judgment is whether the failure to do so might lead to a miscarriage of justice. To put it another way, the application should be determined upon the interests of justice, giving full weight to the principle of finality."

29 The appellant also submitted that even if the orders had been perfected this Court has jurisdiction to reopen the appeal. That jurisdiction was said to be founded upon the power of the court to ensure that its intentions, as expressed by the Prothonotary, were given effect to. In the alternative it was submitted that the residual discretion recognised in *Lapa* and acknowledged in *Burrell v R* [2007] NSWCCA 79 permits this Court, in the circumstances of the present case, to reopen the appeal.

30 Although the appellant acknowledged the significance of the principle of finality, it was submitted that the circumstances of the present case are

such that this Court would be careful to ensure that an injustice was not occasioned to the appellant. The possible necessity for an application was identified well before the court's order was perfected, whatever be the date upon which that occurred. At a time when the prospect of such an application was imminent the appellant's solicitor was informed that the order had not been perfected and no further step towards perfection would be taken until the applicant had an opportunity to finally consider the matter. If, as the Crown submitted, that opportunity was lost it was not occasioned by any fault on the part of the appellant but by a failure within the court whereby the Prothonotary's directive that the order not be entered was not carried out.

31 It is unnecessary to resolve these arguments. However, I would be reluctant to accept that where the court has undertaken to a party that it will not take a step which could extinguish that party's right to seek leave to reopen an appeal without further notice and that undertaking is breached, that party is precluded from seeking relief from this Court.

32 I am satisfied that this Court may proceed to hear the appellant's substantial application and directions should now be made for the further conduct of the matter.

33 **SIMPSON J:** I agree with McClellan CJ at CL.

34 **BELL J:** I agree with McClellan CJ at CL.

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New South Wales
Court of Criminal Appeal

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| **CITATION:** | **FOLBIGG v R [2007] NSWCCA 371** |
| | |
| **HEARING DATE(S):** | 27 November 2007 |
| **JUDGMENT DATE:** | 21 December 2007 |
| | |
| **JUDGMENT OF:** | McClellan CJ at CL at 1; Simpson J at 66; Bell J at 67 |
| | |
| **DECISION:** | Appeal dismissed |
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| **CATCHWORDS:** | CRIMINAL LAW – appeal against conviction – miscarriage of justice – fair trial – material irregularity – jury irregularities – test in Marsland – juror misconduct – juror inquiries – internet research – discussing trial with persons other than fellow jurors – prejudicial material – departure from rules of evidence and procedure – trial judge directions and warnings – Proviso – substantial miscarriage of justice |
| | |
| **LEGISLATION CITED:** | Criminal Appeal Act 1912<br>Jury Act 1977 |

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|---|---|
| **CASES CITED:** | Burrell v R [2007] NSWCCA 65<br>Davies v The King (1937) 57 CLR 17<br>Evans v The Queen [2007] HCA 59<br>MG v R [2007] NSWCCA 57<br>Mraz v The Queen (1955) 93 CLR 493<br>Nudd v The Queen (2006) 162 A Crim R 301<br>Qing An v Regina [2007] NSWCCA 53<br>R v Booth [1983] 1 VR 39<br>R v Folbigg (2005) 152 A Crim R 35<br>R v Folbigg [2007] NSWCCA 128<br>R v Forbes (2005) 160 A Crim R 1<br>R v K (2003) NSWCCA 406; 59 NSWLR 431<br>R v Skaf [2004] NSWCCA 37, (2004) 60 NSWLR 86<br>TKWJ v The Queen (2002) 212 CLR 124<br>Weiss v The Queen (2005) 224 CLR 300 |
| **PARTIES:** | Kathleen Megan Folbigg (Appl)<br>The Crown |
| **FILE NUMBER(S):** | **CCA** 2006/5504 |
| **COUNSEL:** | B Walker SC/A P Cook/R Graycar (Appl)<br>M G Sexton SC SG/J A Girdham (Crown) |
| **SOLICITORS:** | Legal Aid Commission of NSW (Appl)<br>Director of Public Prosecutions (Crown) |

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| **LOWER COURT JURISDICTION:** | Supreme Court |
| **LOWER COURT FILE NUMBER(S):** | 70046/02 |

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| **LOWER COURT JUDICIAL OFFICER:** | Barr J |

**IN THE COURT OF CRIMINAL APPEAL**

**2006/5504**

**McCLELLAN CJ at CL**
**SIMPSON J**
**BELL J**

**FRIDAY, 21 DECEMBER 2007**

FOLBIGG, Kathleen v R

**Judgment**

1 **McCLELLAN CJ at CL**: The appellant, Kathleen Megan Folbigg, stood trial in the Supreme Court on an indictment containing 4 counts of murder and 1 count of maliciously inflicting grievous bodily harm with intent. The victims of these offences were the appellant's children: C (Craig), P (Patrick), L (Laura) and S (Sarah). The charges were particularised as follows:

> **Count 1** charged the appellant with having murdered, on 20 February 1989, C (Caleb).
>
> **Count 2** charged the appellant with having maliciously inflicted, on 18 October 1990, grievous bodily harm upon P (Patrick) with intent to do grievous bodily harm.
>
> **Count 3** charged the appellant with having murdered, on 13 February 1991, P (Patrick).
>
> **Count 4** charged the appellant with having murdered, on 30 August 1993, S (Sarah).
>
> **Count 5** charged the appellant with having murdered, on 1 March 1999, L (Laura).

2 On 21 May 2003, the jury found the appellant guilty on all counts except count 1. On that count the jury found the appellant guilty of manslaughter.

3 The appellant appealed against her convictions and sentences. In February 2005, this Court dismissed the appeal against the convictions (*R v Folbigg* (2005) 152 A Crim R 35). The appeal against the sentences in respect of counts 4 and 5 was allowed in some limited respects.

4 On 16 May 2007, this Court granted an application for leave to reopen the appeal against conviction (*R v Folbigg* [2007] NSWCCA 128). The appellant now pursues the following grounds of appeal:

> 1. The trial miscarried by reason of a juror or jurors obtaining information from the internet, which revealed that the appellant's father had killed her mother.
> 2. The trial miscarried as a result of a juror or jurors informing themselves, away from the trial, as to the length of time an infant's body is likely to remain warm to the touch after death.

**The jury irregularities**

5 On 1 March 2005, Mr Krisenthal, solicitor of the Legal Aid Commission, who had carriage of the appellant's matter since 2002, wrote to the Director of Public Prosecutions to raise concerns about a possible irregularity in the conduct of the appellant's trial. The matter had been brought to the attention of Mr Krisenthal by Ms Smyth, a solicitor who at the time of the appellant's trial was a law student undertaking her practical legal training. She was assisting Mr Krisenthal in the preparation of some matters in the trial. Ms Smyth emailed Mr Krisenthal on 17 February 2005 stating that one of the jurors, whom Ms Smyth knew, had told her "during the trial one of the jurors had researched Kathy's history etc on the internet". On 2 March 2005, the DPP wrote to the Sheriff.

6 On 20 April 2005, the Sheriff wrote to the Court seeking instructions as to whether investigations should proceed. By letter dated 22 April 2005, the Court directed the Sheriff to carry out investigations relating to the allegations of irregularity in the jury trial of the appellant.

7 On 31 March 2006 the Sheriff provided a report of the investigations. The report concluded that there were two instances of potential irregularity in the conduct of the jury trial.

8 At the hearing of this appeal the parties agreed the facts which were relevant to the determination of the appeal. They were as follows:

> " **Agreed Fact 1**
> 5. During the course of the trial several of the jurors became aware of the fact that the appellant's father had murdered her mother when the appellant was a young child. One particular juror did a general search of the internet under Ms Folbigg's name and found several related sites. It was as a result of this search the juror obtained the information. This juror then told other jurors.
> **Agreed Fact 2**

> 17. Inquiries were made by a juror or jurors concerning the length of time a body remains warm after death. There was discussion between jurors regarding information from a friend of one of the jurors who was a nurse. The effect of the information, which gained some currency amongst jurors, was that a body would go cold after an appreciable period of time."

9 The admissibility of evidence relating to the conduct of a jury and its deliberations has been considered on many occasions (*R v K* (2003) NSWCCA 406; 59 NSWLR 431; *Burrell v R [2007] NSWCCA 65*). *R v K* was concerned with internet searches by some jurors in which they had discovered that the accused, who was on trial for the murder of his first wife, had previously been tried, but acquitted, for the murder of his second wife. After a detailed review of the authorities Wood CJ at CL concluded that the fact of the internet searches and the information which had been gathered by the three jurors who made the search should be received in evidence. His Honour's conclusion was that the evidence should be received: at [54]

> "Upon balance, I have reached the conclusion that evidence concerning the fact of the internet searches and the nature of the information which had been gathered by the three jurors who had made the search, should be received, by analogy with the cases where evidence has been received to the effect that documents, which were not in evidence in the trial, had found their way to the jury room. In this regard, the information was potentially prejudicial, in so far as it risked inviting an application of tendency and/or coincidence reasoning, or risked raising bad character in circumstances in which that kind of evidence would not have been admissible, and in which no occasion had arisen for the kind of jury instructions which would have been required."

10 I am satisfied that a similar approach is appropriate in the present case and for that reason the agreed facts should be received in evidence.

**Irregularity and miscarriage of justice**

11 Section 6(1) of the *Criminal Appeal Act* requires the court to consider two questions. Firstly, whether on any ground there was a miscarriage of justice. If the answer to that question is in the negative the court will dismiss the appeal. However, if the court is of the opinion that the point or points raised in the appeal might be decided in favour of the appellant it may nevertheless dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

12 In *MG v R* [2007] NSWCCA 57, this Court said:

> "It is fundamental to our legal system that an accused person is entitled to a fair trial according to law: see *Jago v District Court (NSW)* (1989) 168 CLR 23 at 56. As Deane J, in

> *Jago,* recognised the notion of fairness “which has inspired much of the traditional criminal law of this country defies analytical definition.” Although relevant general propositions may be formulated and examples from past experience identified, an “ essentially intuitive judgment ” is involved...

13 In *Mraz v The Queen* (1955) 93 CLR 493 at 514, Fullagar J said:

> "[E]very accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law."

14 (See also *TKWJ v The Queen* (2002) 212 CLR 124 at [65] per McHugh J; *Nudd v The Queen* (2006) 162 A Crim R 301 at [6] per Gleeson CJ).

15 The High Court in *Davies v The King* (1937) 57 CLR 170, to which Gleeson CJ referred in *Nudd* at [4], said:

> “From the beginning, [the English Court of Criminal Appeal] has acted upon no narrow view of the cases covered by its duty to quash a conviction when it thinks that on any ground there was a miscarriage of justice, a duty also imposed upon the Supreme Court of Victoria ... It has consistently regarded that duty as covering not only cases where there is affirmative reason to suppose that the appellant is innocent, but also cases of quite another description. For it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled .” (at 180 per Latham CJ, Rich, Dixon, Evatt, McTiernan JJ; *emphases added* )

16 If the court concludes that a material irregularity has occurred, it must determine whether there is a significant possibility that the irregularity affected the outcome of the trial (*TKWJ v The Queen* (2002) 212 CLR 124 at [97] per McHugh J). Not every departure from the relevant laws and procedures for proper conduct of a criminal trial may “prejudice or colour the overall trial so as to affect the verdict” and may not constitute a miscarriage of justice (*TKWJ v The Queen* (2002) 212 CLR 124 at [67] per McHugh J).

17 In *R v Forbes* (2005) 160 A Crim R 1 Spigelman CJ (with whom McClellan

CJ at CL and Hall J agreed) said at [26]-[30]:

> [26] The occurrence of an irregularity in a criminal trial, including an irregularity involving the jury, invokes the overriding principle of a fair trial. As Lord Devlin put it in *Connelly v Director of Public Prosecutions (UK)* [1964] AC 1254 at 1347:
>
> > [N]early the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their powers to see what was fair and just was done between prosecutors and accused.
>
> [27] The issue before this Court is, as is usually the case:
>
> > ... whether something that was done or said in the course of the trial ... resulted in the accused being deprived of a fair trial and led to a miscarriage of justice.
>
> ( *Dietrich v The Queen* (1992) 177 CLR 292 at 300, 64 A Crim R 176 at 179 per Mason CJ and McHugh J, see also Toohey J at 353; 220)
>
> [28] The reference to "miscarriage of justice" invokes the traditional formulation found in this State in s 6 of the Criminal Appeal Act 1912 NSW. Clearly not every irregularity can constitute a miscarriage of justice. It is often said that the irregularity must be a "material irregularity" . (See eg *R v Minarowska* (1995) 83 A Crim R 78 at 87-89)
>
> [29] The test for determining the materiality of an irregularity has been variously stated. The test applied in this State is that set out by Gleeson CJ, with whom Lee CJ at CL and Hunt J agreed, in *R v Marsland* (unreported, Court of Criminal Appeal, NSW, No 60263 of 1990, 17 July 1991) :
>
> > ... [T]he question we must ask ourselves is whether we can be satisfied that the irregularity has not affected the verdicts, and that the jury would have returned the same verdicts if the irregularity had not occurred. ( *emphases added* )

18 The test in *Marsland* was applied in *R v K* (2003) 59 NSWLR 431 at [68]-[70] and recently in *Qing An v Regina* [2007] NSWCCA 53 at [21] per Beazley JA (with whom Hislop J agreed). It requires consideration of the irregularity; the relevance of the irregularity to the issues before the jury; whether the material arising from the irregularity was prejudicial; and the extent of the prejudice (*Qing An* at [25]).

19 In recent years there have been occasions when jurors have engaged in inappropriate conduct with the potential to compromise the trial. In *R v K* (2003) 59 NSWLR 431 this Court set aside a conviction after it became apparent that some jurors had accessed the internet and discovered information which was both inadmissible at any trial and prejudicial to the accused (at [75]-[79]). Commenting on the issue in *R v Skaf* [2004] NSWCCA

37, (2004) 60 NSWLR 86 this Court said “there must be a new trial unless this Court can be satisfied that the irregularity has not affected the verdict and that the jury would have returned the same verdict if the irregularity had not occurred” (at [242]).

**The Crown case and the previous appeal**

20 The Crown case in relation to each of the infant victims was essentially that the appellant had smothered them. Each death occurred suddenly and unexpectedly and each involved the cessation of breathing. The Crown case was circumstantial.

The death of C

21 On 19 February 1989 at around 10-10.30pm, the appellant with her husband, Craig Folbigg, saw C fast asleep in his bassinette in a sunroom adjacent to their bedroom. They went to bed. Before 3am Mr Folbigg was awoken by “screamed words”. He ran into the adjoining room and saw the appellant standing at the end of the bassinette screaming, “My baby, there’s something wrong with my baby”. C was lying on his back in the bassinette wrapped in a rug. Mr Folbigg picked C up from the bassinette and noticed that his lips were blue and eyes closed. C was still warm to touch but Mr Folbigg could not hear him breathe. He told the appellant to call the ambulance and attempted to perform CPR on C. The ambulance officers arrived at 2.55am. They attempted to resuscitate C, but he was already dead.

22 At the time of C’s death, there was nothing known to indicate that the cause of death was other than natural. A diagnosis of SIDS (sudden infant death syndrome) was carried out. When C was born he was a healthy full-term baby except for a condition diagnosed as *laryngomalacia* (‘floppy larynx’) where the child breathed noisily and stopped breathing in order to feed. The condition was diagnosed as mild and the baby would grow out of it. The post-mortem and medical review of C’s death ruled this out as a cause of death.

The death of P

23 At the time P was 4½ months old there was an episode of an apparent life-threatening event (‘ALTE’), when Mr Folbigg was awoken in the early hours of the morning by the appellant’s scream. He ran into P’s bedroom and saw the appellant standing at the end of the cot. He lifted P out of the cot and performed CPR. He noted that P was warm to the touch. Ambulance officers took P to hospital where he was treated for respiratory difficulties. P regained consciousness several hours later. During P’s stay in hospital, he had an epileptic-like seizure. Further tests were carried out to ascertain the cause of the apparent life-threatening event. He was subsequently diagnosed with epilepsy and cortical blindness.

24 The appellant had given the doctor, who treated P, a brief history of the

events, which had occurred immediately prior to P's respiratory problems at home. She had said that she went into P's room at about 3am to see why he was coughing but did not notice anything wrong and went back to sleep. At about 4.30am, the appellant heard P gasping and saw that he was blue around the lips. She found him listless and floppy but making minimal respiratory efforts and making a high-pitched cry.

25 In the days following this event, the appellant found it difficult to cope with the care of P, as she "would lose her temper a bit", become frustrated, "growl" and was generally in an angry state, according to Mr Folbigg's evidence. As a result, arrangements were made for Mr Folbigg's sister, Mrs Newitt, to help the appellant look after P.

26 On 13 February 1991, Mr Folbigg who was at work received a phone call from the appellant at about 10am. She screamed, "It's happened again." He left his work immediately for home. Mrs Newitt was the first to arrive. She saw P lying on his back in the cot. She tried to pick P up from the cot but was prevented from doing so by the appellant. Mr Folbigg arrived at the same time as the ambulance, which the appellant had called. He, too, found P still lying on his back in the cot and his lips blue. He picked P up from the cot and attempted to perform CPR. The ambulance officers took over and transported P to hospital, where he died shortly thereafter.

27 The doctor attending P at the hospital determined that P had suffered a cardiac arrest, but could not identify the cause. A subsequent post-mortem did not reveal the cause of death.

The death of S

28 Due to the death of their previous children, from the time S was born, the appellant and her husband used a sleep apnoea blanket to monitor S so that any SIDS-related problems could be detected. The alarm was activated frequently. After its use for several months, the appellant "hated" the blanket and agreed with her husband to discontinue its use this happened a week before S's death.

29 On the night before S's death, she was unwell with a cold and runny nose and uncooperative. The appellant was frustrated and bad-tempered with the child, as she had been frequently to date. At one point that evening, while Mr Folbigg was sitting in the lounge, the appellant approached him and from a distance of "roughly two or three steps short" of him, she "threw" S at him and said, "You fucking deal with her" and "stormed off back up to the bedroom". Mr Folbigg calmed S and put her to bed in the cot situated at the end of the matrimonial bed and went back to sleep. This was at about 10.30-11pm.

30 Mr Folbigg awoke briefly at about 1.10am. He noticed a light coming from around the bedroom door. He also noticed that neither the appellant nor S was in the room. He went back to sleep only to be awoken by the appellant screaming. The appellant was standing at the bedroom door. S was lying in her cot. Mr Folbigg found S "all floppy", no covers on her, lying

on her back with her legs straight out and arms alongside her body. S was warm but not breathing. His efforts at CPR and those of the ambulance officers were unsuccessful.

31 A post-mortem examination revealed small abrasions near S's mouth, which were consistent with the application of force to the area around the mouth either by the child herself or another person. Her lungs and heart showed haemorrhaging, which was consistent with death by asphyxiation. A displaced uvula was detected but dismissed as the cause of death. The official finding was that death was due to an unknown cause.

The death of L

32 From the time of L's birth, a "corometric monitor" was attached to the baby, especially during her sleeping period, to monitor her vital signs. The information stored was downloaded and conveyed by telephone to Sister Tanner at Westmead Children's Hospital. However, when L was about 2 or 3 months old, the appellant was not using the monitor and recording the necessary information.

33 Thereafter, the appellant's indifference and lack of interest or diligence became more apparent, so much so that Mr Folbigg wrote a letter to Sister Tanner expressing his concerns, including "[the appellant] finds it all tedious and frustrating and would probably rather not use it at all, merely entrusting [L's] survival to fate! You would think that after all she had been through as a mother she of all people would be more diligent with the monitoring".

34 During the two days preceding L's death, the appellant showed disturbing levels of angers and frustration at L. At one point, because L was whinging and moaning, the appellant "lost it" with L, spun her around, knocked her over and screamed at her.

35 On 1 March 1999, as Mr Folbigg was having his breakfast and preparing himself to go to work, L became upset and was not eating her breakfast. The appellant lost her patience with L and the appellant heard her growl at the child. Mr Folbigg complained at the appellant's hysterical behaviour but the appellant told him to "Fuck off" and accused him of spoiling the child.

36 Later that morning at about 8:30am, the appellant rang her husband to apologise for losing her temper and appeared to be in a much better mood. After her morning gym class, the appellant took L to Mr Folbigg's workplace for a visit. They then left at about 11.30am to return home.

37 Close to noon, Mr Folbigg was alerted to an emergency at home and told to go immediately to the hospital. The ambulance had been called to the home and arrived at about 12.14pm. The ambulance officers found the appellant crying and performing CPR on L, who was lying on the breakfast bar. According to one of the ambulance officers, L was warm to the touch but was not breathing and had no pulse. Attempts to resuscitate L were unsuccessful.

38 Following a post-mortem, a mild inflammatory condition of the heart was detected but was dismissed as a cause of death. There was collapse and haemorrhaging of the lungs, consistent with asphyxiation or with other causes. The formal finding was one of undetermined cause. SIDS at 20 months of age was considered to be highly unusual, since most deaths from SIDS occur when the child is between two and five months old.

**The appellant's diaries**

39 The Crown case relied, in part, on the contents of the appellant's diaries. It was submitted that the diaries contained virtual admissions of guilt of the deaths of C, P and S and admissions that she realised that she was at risk of causing the death of L. The diary entries record descriptions of her state of mind from time to time, her feelings of tiredness and frustration, her feelings of guilt for having mistreated her children. Examples of relevant extracts include (emphases added):

> Difficulties with caring for the children
> "…And I know I'll have help and support this time. When I think I'm going to lose control like last time I'll just hand baby over to someone else…" (18 June 1996)
> "…But I think losing my temper stage & being frustrated with everything has passed. I now just let things happen and go with the flow. An attitude I should have had with all my children if given the chance I'll have with the next one…" (14 October 1996)
> "…maybe then he will see when stress of it all is getting to be too much & save me from ever feeling like like I did before, during my dark moods. Hopefully preparing myself will mean the end of my dark moods, or at least the ability to see it coming & say to him or someone hey, help I'm getting overwhelmed here, help me out. That will be the key to his babies survival…" (6 June 1997)
> "…very depressed and angry with myself, angry & upset – I've done it. I lost it with her. I yelled at her so angrily that it scared her, she hasn't stopped crying. Got so bad I nearly purposely dropped her on the floor & left her. I restrained enough to put her on the floor and walk away…" (28 January 1998)
> Admissions
> "…I think I am more patient with [L]. I take the time to figure what is rong now instead of just snapping my cog … Wouldn't of handled another like [S]. She's saved her life by being different …" (25 October 1997)
> "…[Craig] has a morbid fear about [L] … well I know theres nothing wrong with her . Nothing out of ordinary any way. Because it was me not them … With [S] all I wanted was her to shut up. And one day she did…" (9 November 1997)
> "…She's a fairly good natured baby – Thank goodness, it has

saved her from the fate of her siblings . I think she was warned…" (31 December 1997)
"…Went to my room and left [L] to cry. Was gone probably 5 minutes but it seemed like a lifetime. I feel like the worst mother on earth. Sacred that she'll leave me know. Like [S] did. I know I was short tempered & cruel sometimes to her & she left. With a bit of help . I don't want that to ever happen again. I actually seem to have a bond with [L]. It can't happen. I'm ashamed of myself. I can't tell Craig about it because he'll worry about leaving her with me. Only seems to happen if I'm too tired her moaning, bored, wingy sound, drives me up the wall…" (28 January 1998)

**Similarities of each death**

40 The Crown emphasised the similarity in the circumstances of each death. The trial judge summarised this aspect of the Crown case in the following terms:

"The Crown case is that there was a remarkable degree of similarity in the five events. They were so similar, the Crown submits, that it would be unreasonable to conclude that the deaths and Patrick's ALTE, or any of them, happened naturally.
The law is that sometimes there may be such a striking similarity between different events that a jury may safely conclude that they did not all happen by coincidence. Putting it another way, the circumstances of the events are so remarkably similar that it would be an affront to common sense to conclude that they all happened naturally and coincidentally.
If, having considered the submissions of the Crown and the defence, you come to the view that the five events, or any number of them, are so strikingly similar that they cannot all have happened naturally, you are entitled to take that conclusion into account in considering whether the Crown has proved its case on the charge you are considering.
I must give you a special warning, however, about taking into account when considering any particular charge the facts which give rise to the other charges. You must not say that simply because the accused killed a particular child or caused Patrick's ALTE she must have killed all the children and caused Patrick's ALTE. Putting it another way, if you are satisfied beyond reasonable doubt that the accused is guilty of any of the charges, you may not say that she is therefore automatically guilty of them all. That is an unfair way of approaching the matter and you must not use it."

**Expert evidence**

41 The Crown also relied on a body of evidence given by a number of expert witnesses. It was summarised in *R v Folbigg,* which I gratefully adopt (at [80]):

· That it was not a reasonable possibility that C's death had been caused by his defective larynx;

· That it was not a reasonable possibility that P's apparent life-threatening event had resulted from either encephalitis or a spontaneous epileptic episode;

· That it was not a reasonable possibility that P's death had been caused by an epileptic episode causing him to stop breathing suddenly and for long enough to die;

· That it was not a reasonable possibility that S's death had been caused by a displaced uvula;

· That it was not a reasonable possibility that L's death had been caused by myocarditis;

· That it was not a reasonable possibility that there was, in any individual case, some other natural cause of death;

· That, absent a natural cause of death in any one of four successive infant deaths in a single family, the only inference rationally available was that the deaths had been caused in some unnatural way;

· That the only rational inference as to the nature of the unnatural cause was that each of the children had been suffocated by somebody; and

· That the only person to whom the evidence pointed in that connection was, in each case, the appellant.

**The reasoning of the Court of Criminal Appeal**

42 The challenge in the previous appeal was argued, inter alia, on the basis that the verdicts were unreasonable. The Court rejected the submission and confirmed the convictions. The Court said (at [143]):

> "[1] None of the four deaths, or Patrick's apparent life-threatening event, was caused by an identified natural cause.
> [2] It was possible that each of the five events had been caused by an unidentified natural cause, but only in the sense of a debating point possibility and not in the sense of a reasonable possibility. The evidence of the appellant's episodes of temper and ill-treatment, coupled with the very powerful evidence provided by the diary entries, was overwhelmingly to the contrary of any reasonable possibility of unidentified natural causes. So were the striking similarities of the four deaths.
> [3] There remained reasonably open, therefore, only the conclusion that somebody had killed the children, and that

smothering was the obvious method.
[4] In that event, the evidence pointed to nobody other than the appellant as being the person who had killed the children; and who, by reasonable parity of reasoning, had caused Patrick's apparent life-threatening event by the same method.

**Submissions in the present appeal**

43 The appellant submitted that the evidence which was now available to this Court confirmed that the trial was defective in two respects. There had been (i) a departure from the rules of evidence and (ii) “a form of infringement of audi alteram partem”.

44 It was submitted that the material procured by the jurors was prejudicial to the appellant and contrary to the requirement that the jury should be confined to evidence properly before them. In the case of the knowledge that the father had killed the appellant’s mother, it was submitted that there was a substantial risk that the jury would engage in a chain of impermissible reasoning based on some family trait or an “illegitimate inherited propensity.”

45 The appellant submitted that the evidence of a juror speaking to a friend who was a nurse to obtain information bearing upon the length of time an infant’s body is likely to remain warm to the touch after death, demonstrated the jurors’ preparedness to engage in their own enquiries in defiance of specific directions given by the trial judge. The trial judge had told the jury “not to discuss the case with anybody other than your fellow jurors from now until the trial is over” although “you will be tempted to discuss the matter with your family and friends, but it is important that you do not do so, because anything they may say will not be based on the evidence”.

46 It was submitted that the detriment to the appellant from the information obtained by the juror was that it may add to the Crown case of unacceptable or incredible coincidence in that, in each case, the appellant discovered her children shortly after they had stopped breathing. It was submitted that the information was “calculated to enhance rather than cast doubt upon” the Crown case that these events were no mere coincidences.

47 The appellant submitted that the ‘audi alteram partem’ rule entitles the parties to be heard on the materials subject to forensic presentation before the Court. Particularly in respect of the information about the appellant’s father having killed her mother, given the appellant was on trial for the murder of her own children, she was deprived of her right to resist such material ever going to the jury. Likewise, in relation to the information about the cooling of a dead body, the appellant was denied the opportunity to test both its admissibility according to the Evidence Act and the reliability of the information.

48 The appellant submitted that the irregularities under both grounds of

appeal constitute “a departure from the basal norms of a fair trial”. The relevant policy of the law, although not embodied in legislation at the time of the trial, has since been given statutory expression by the introduction of s 68C of the *Jury Act* 1977 which commenced on 15 December 2004 and established a statutory offence if jurors undertake their own inquiries to obtain information from persons other than the Court or fellow jurors about the accused or any matters relevant to the trial.

49 Although the Crown acknowledged the irregularities which had occurred it was submitted that there had been no miscarriage of justice. It was submitted that the information, obtained by a juror conducting research on the internet, that the appellant’s father had killed her mother was not prejudicial to the appellant. Instead it was submitted that knowledge that her father had killed her mother would tend to engage the jury’s sympathy for the difficulties which she obviously suffered during her upbringing.

50 In relation to the information from the nurse it was submitted that the knowledge that bodies remain warm for an appreciable time after death tended to assist the appellant by leaving open the possibility that she found each child and raised the alarm some time after they had stopped breathing. If the information had been that the bodies would remain warm for only a short time it would be more likely that the appellant had caused their deaths at about the same time as she raised the alarm.

**Consideration**

51 It is more common that if an irregularity in the conduct of the juror occurs it is identified in the course of the trial. When this happens the trial judge can take steps to deal with the situation by giving directions which remind the jurors of their obligation to decide the case in accordance with the evidence given in court and not on any other material. If it is believed that irreparable problems exist the jury can be discharged before a verdict is taken. However, it is necessary to consider the evidence of the jurors’ conduct in the present case having regard to the fact that the jury returned verdicts of guilty. The primary question for this Court is whether it can be satisfied that the irregularities have not affected the verdicts.

**Ground one**

52 With respect to the knowledge that the appellant’s father killed her mother it is apparent that the juror obtained the information from the internet, at the latest, during the second week of the trial. The jury had been warned at the beginning of the trial against making their own enquires. They had been told by the trial judge on several occasions that they were to confine their considerations to the evidence tendered at the trial. The knowledge gained from the internet preceded the evidence in the trial which occupied 14 hearing days.

53 The occasions on which the trial judge reminded the jurors that they were not to discuss the case with persons other than fellow jurors or be

influenced by extraneous materials were Day 2 of week 1 (T137.37-45, 2/4/03), Day 3 of week 1 (T211.46-54, 3/4/03), Day 5 of week 2 (T333.5-17, 8/4/03), Day 10 of week 4 (T664.10-42, 15/4/03), Day 11 of week 4 (T824.1-12, 16/4/03), Day 22 of week 7 (T1292.57-T1293.10, 8/5/03). Typical of those directions were his Honour's remarks on day 11 of the trial on 16 April 2003 when he said:

> "Will you forgive me if I remind you of that thing I have said to you now on a number of occasions. You now know, having heard a good part of the evidence and a good part of the cross-examination of the Crown witnesses, what issues are likely to arise for your decision and now that you know so much more about the case you are, I hope you appreciate, so much more vulnerable to persuasion if you happen to talk to anybody who is not concerned with this case. You must not discuss the evidence at all, except when you are present in the jury room with all your fellow jurors. So please take that to heart."

54 Although, as in *K,* a juror obtained information by internet searches, the knowledge gained in the present case was fundamentally different to that obtained in *K.* In *K*, the applicant was convicted of the murder of his first wife. The information obtained by the juror related to a charge (of which he was acquitted) that he had murdered his second wife. In the present case, the information related to the criminal history of the appellant's father and not of the appellant. Even if the information had been about the appellant's criminal history, whether this will be significant requires careful consideration. In *R v Booth* [1983] 1 VR 39 Lush J (with whom Young CJ and Gray J agreed) said at 44:

> "[T]he mere possession by a juror of knowledge of prior convictions or of bad character which has been acquired from sources outside the trial will not provide ground for quashing a conviction. The relevant authorities are *R v Thompson* (1961) 46 Cr App R 72 … where the foreman had a list of prior convictions; *R v Box* … and *R v Hood* [1968] 1 WLR 773, where the juror's knowledge came from acquaintance with the mother of the prisoner's wife. In *R v Hood* the *ratio decidendi* may have been that the evidence was so strong that there was no miscarriage of justice, but it is clear that the Court of Appeal took the view that the conviction was not to be quashed merely by reason of the existence of this knowledge."

55 It was submitted that with the knowledge that the appellant's father had killed her mother the jury may have engaged in impermissible coincidence or tendency reasoning. To my mind the submission should be rejected. Even though the appellant was the child of a person who killed another I do not believe there was any likelihood that a juror would reason that it was more likely that the appellant would kill her own children. The killing of a spouse may tragically occur in circumstances of the break down of a relationship or

be occasioned by temporary loss of control accompanied by a violent and fatal act. The circumstances and motive for the killing are likely to be quite different from those which will exist if a mother has killed her own children. There could be no suggestion that the killing of the appellant's mother by her father indicated any tendency in the appellant to kill her own children. In my judgment the knowledge obtained by the juror did not lead to a miscarriage of justice.

**Ground two**

56 In relation to this ground the appellant asked the question "why would somebody have made the inquiry unless they were not satisfied to remain with material properly before them". Although the inquiry suggests a curiosity in the juror and a breach of the restraint from personal inquiry, which the trial judge emphasised was the juror's obligation, I do not believe it could have affected the jury's verdicts.

57 The evidence at the trial indicated that each infant-victim, although deceased, was "warm to the touch" after the appellant raised the alarm. The appellant's case was that she came upon each child after they had died. She then raised the alarm.

58 The appellant submitted that the information the juror obtained added "argumentative force" and "cogency" to the similar fact evidence at the heart of the Crown case, because the juror's conduct was "highly deliberate … in the sense that it was obviously not an accident" and "that juror wasn't satisfied with what he or she already had." With respect I do not understand how this could be the case. If a child's body lost heat quickly following death it would increase the likelihood that the appellant was present at the death. If, as the information given by the nurse revealed, the body would remain warm for sometime, the likelihood that the appellant was telling the truth was enhanced.

59 In my judgment if it had any impact at all the information obtained by the juror would have tended to assist rather than prejudice the appellant. The longer the time for the deceased's body to go cold the more likely was the possibility that the appellant discovered each child and raised the alarm well after their death.

**Conclusion: no material irregularity, no miscarriage of justice**

60 As I have indicated this Court dismissed the earlier appeal in which it was argued that the jury's verdicts were unreasonable (*R v Folbigg* (2005) 152 A Crim R 35 at [115]-[144]). The Court concluded that the defence hypothesis that the events the subject of each of the five counts could be explained by natural causes was not a reasonable possibility. I agree with this conclusion.

61 The jury verdicts indicate that they carefully considered the evidence and in particular the question of the appellant's intention. They returned a verdict of not guilty to murder on Count 1 but guilty to manslaughter. On the other counts the jury returned verdicts of guilty to murder. Moreover,

there were a series of notes from the jury during the trial, further indicating that the jury was actively engaged in listening to and following the evidence.

62 In these circumstances, although the irregularities should not have occurred, for the reasons I have given I am satisfied that they were not material and did not give rise to a miscarriage of justice.

**Applying the proviso**

63 It follows that in my opinion, even if my conclusion that there has not been a miscarriage of justice is wrong, I am satisfied that no substantial miscarriage of justice has actually occurred.

64 As required by *Weiss v The Queen* (2005) 224 CLR 300 and discussed in subsequent decisions (see eg *Evans v The Queen* [2007] HCA 59) I have reviewed the whole of the evidence. I am satisfied that this was an overwhelming Crown case. I am entirely satisfied that notwithstanding the irregularities no substantial miscarriage of justice has occurred.

**Orders**

65 In my opinion the appeal should be dismissed.

66 **SIMPSON J**: I agree with McClellan CJ at CL.

67 **BELL J:** I agree with McClellan CJ at CL.

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