

Part 5 - The appellant's case in this appeal:
general matters

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The appellant submits to this Court that, because of the fresh evidence tendered and admitted before Davidson ADCJ and the findings of fact which his Honour has made, the conviction in relation to each count must now be quashed. Although some of the fresh evidence is directly relevant only to an individual count, it is submitted that, because all of the counts were heard together, the difficulties which are now apparent with the evidence in relation to any particular count affects the reliability of the jury's verdict in relation to the others. The essential submission is that because each count required the jury to reach a view as to the appellant's credit and determine whether the appellant's evidence as to the relevant events should be rejected, and because the fresh evidence raises serious doubts as to the Crown case, on at least some of the counts and, furthermore, if accepted would be consistent with the conspiracy alleged by the defence, a jury properly instructed and, having regard to the fresh evidence may have come to a different view in relation to all of the counts.

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The fresh evidence comes from a number of sources and must be analysed separately. It includes the evidence of the Catt children which is now unfavourable to the appellant, medical evidence with respect to the allegation that the children were sexually abused, evidence with respect to the police investigation of the matters, evidence as to the method of investigation of the police officer in charge of the matter, Det Sgt Thomas evidence of later statements by Det Sgt Thomas as to his actions in the investigation, and other evidence which casts doubt on evidence

which was apparently accepted by the jury at the trial.

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The evidence tendered before Davidson ADCJ related both to specific counts and to issues of general relevance. Before considering the evidentiary position of each count it is appropriate to consider the evidence which has general significance.

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It will be obvious that the defence case at the trial carried significant risks. If the jury concluded that the "conspiracy theory" had no basis it would be likely to influence the view which it formed about the credit of the appellant and could affect its conclusion in relation to each count, even those counts where the involvement of Det Sgt Thomas in the gathering of evidence was minimal.

Was there a conspiracy to create a case? - evidence with respect to Det Sgt Thomas

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Evidence was tendered before Davidson ADCJ in relation to the methods which Det Sgt Thomas employed both as a policeman and as a private enquiry agent when seeking evidence in relation to events which may have involved a crime. Evidence was also tendered of statements which he has made since the trial in relation to his investigation of the appellant and the collection of evidence for the brief which was prepared for the prosecution. The evidence is directly relevant to at least counts five and nine and it is submitted by the appellant that, if accepted by a jury, raises a relevant doubt as to whether the Crown evidence in relation to any of the counts could be accepted.

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There were a number of unusual aspects of the investigation. They are discussed by Davidson ADCJ and only a brief reference to them is now necessary.

The base used for the investigation
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The base used for the investigation

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Irregularities with respect to the execution of search warrants and the disposition of property seized pursuant to them were also raised. In relation to these matters Davidson ADCJ draws an inference "adverse to Det Sgt Thomas from the evidence in relation to the disposition of some of the property in purported compliance with the warrant."

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However, again this evidence, not being fresh evidence, only contributes to the background material in relation to the appeal.

The appellant's bail applications - criticism by Allen J

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Davidson ADCJ reviewed the material in relation to the appellant's bail applications, in particular, the occasion on 22 September 1989 when her private prosecution of Mr Catt in respect of the rock incident was due to commence and she was arrested for alleged breach of her bail conditions. In relation to these events Davidson ADCJ was extremely critical of Det Sgt Thomas. His Honour said

that "whether or not Ms Catt's case had merit, it was lawfully before a court, the authority of which was flouted."

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Both Allen J, who dealt with various bail applications made by the appellant and Mathews J, at the trial, commented adversely on Det Sgt Thomas in relation to the events surrounding bail matters. However, Davidson ADCJ concludes that the relevant material was before, or capable of being before, the jury. His Honour concluded:

"It is therefore not fresh but it does provide background or contextual evidence against which to assess fresh evidence which supports the conclusion that the lack of objectivity to which Allen J (and Mathews J) referred, crossed the line into malice and abuse of power. It also tends to support Ms Catt's claim of the existence of collusive conduct on the part of persons including Det Sgt Thomas to secure her conviction irrespective of the merit in the prosecution case."

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As a result of the criticisms by Allen J Det Sgt Thomas was directed not to do any further work on the Catt matters. However, he did not obey that directive and Davidson ADCJ formed the opinion that "it is likely that he persisted in being so involved for unprofessional and improper reasons."

Pressure on witnesses by Det Sgt Thomas

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There was evidence available at the time of the trial and considered by Davidson ADCJ of attempts by Det Sgt Thomas to damage the appellant by complaints made about her and her association with a former Attorney General and

Allen J. The allegations were entirely baseless.

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Davidson ADCJ formed the view that the letters which Det Sgt Thomas wrote making the various allegations were an indication of "his propensity to improperly use his office to damage Ms Catt irrespective of the risk of gratuitous collateral damage to others." His Honour also said that "it indicates a lack of objectivity having descended into malice and abuse of power."

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A number of witnesses were called at the Section 12 hearing on the question whether Det Sgt Thomas, either as a police officer or insurance investigator, had a propensity to bring improper pressure to bear on prospective witnesses and others. His Honour concluded that there was evidence which, if accepted, could lead to a conclusion that Det Sgt Thomas had applied pressure to Ms Marie Whalen, Mr Frank Farrar, Dr Richardson, Mr Barry O'Brien, Mr Michael Jones, Mr George Baird, Mr Shane Golds and Mr James Morris. It will be necessary to examine his Honour's findings with respect to some of these persons in detail.

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The submission for the appellant is in effect that, if called at the trial, this evidence would have thrown new light favourable to the appellant on the evidence already before the jury as to the investigative methods of Det Sgt Thomas, particularly as to the evidence of important witnesses such as Ms Whalen, Mr Golds and Mr Morris, but also as to the finding of the revolver and the part Det Sgt Thomas played in relation to the investigation leading to the charge in Count 5.

The evidence of Mr Arthur Bates regarding Det Sgt Thomas

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Mr Bates said that in the 1980s he had been the licensee of hotels at Moree and Lawrence. The Lawrence Hotel had been leased to a man named Mr Ray Coucher. In 1987 the hotel burned down and, although insured, it appears that the insurer had gone into liquidation and no claim in respect of that fire was met.

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As a consequence of the fire, Mr Bates said that he had been charged by Det Sgt Thomas with arson. Twelve months later the charge was "no billed".

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As Davidson ADCJ found whatever may have been the strength or weaknesses of the Crown's case, the fact is that there was a committal for trial involving the finding of a prima facie case. There is some evidence as to a similarity between these events and those of the fire in the appellant's premises. However, in my opinion, this incident has no significance to the appeal.

Mr Ramon Bracamonte/Ms Crista Van der Merwe

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Davidson ADCJ made various findings in relation to issues involving Mr Bracamonte and Ms Van der Merwe. Neither Mr Bracamonte nor Ms Van der Merwe was called at the trial, the matter not coming to light until after its conclusion. Nor was either of them called at the section 12 hearing. The facts established came in documentary form.

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In an affidavit submitted in support of the granting of the petition, Mr Harrison, Crown Prosecutor, deposed that he acted for the Crown in the trial of Mr Bracamonte and Ms Van der Merwe who were charged with damaging a building with intent to gain financial advantage.

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Other evidence establishes that the building had been a restaurant operated by the accused jointly at the time of the alleged offence. Ms Van der Merwe was then Mr Bracamonte's fianc and they subsequently married.

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The trial was listed to commence on 27 July 1992. One of the principal issues was to be whether the accused were in fact at their domestic premises and away from the restaurant building when the bomb exploded.

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Mr Harrison deposed that on 13 July 1992, solicitors for each of the accused saw him in chambers. They produced a copy of what purports to be the transcript of an electronically recorded conversation which Davidson ADCJ was satisfied took place between Ms Van der Merwe and Det Sgt Thomas on 31 May 1989.

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Det Sgt Thomas was one of the police officers involved in investigating the matter. He had given evidence at the committal proceedings and was due to give evidence if called at the forthcoming trial as was his colleague, Det Connolly. Mr Harrison elected not to call either of these officers.

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Notwithstanding the absence of witnesses to the issue, Davidson ADCJ indicated that he was satisfied on the basis of Mr Harrison's evidence that the transcript which was tendered is sufficiently reliable as a source of evidence from which to draw inferences and base conclusions.

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The transcript attributes the following words to Det Sgt Thomas which were addressed to Ms Van der Merwe, "Ramon (Bracamonte) did it, Ramon did it. There's no risk in the world. How he did it I'm not sure. I don't know whether you were there or you weren't there but I know you knew about it. You helped him set this thing up". Further words are attributed to him including an assertion that Ms Van der Merwe was the "ringleader of it". He states, "You know you're in heaps of big shit Crista (Van der Merwe), I The transcript attributes the following words to Det Sgt Thomas which were addressed to Ms Van der Merwe, "Ramon (Bracamonte) did it, Ramon did it. There's no risk in the world. How he did it I'm not sure. I don't know whether you were there or you weren't there but I know you knew about it. You helped him set this thing up". Further words are attributed to him including an assertion that Ms Van der Merwe was the "ringleader of it". He states, "You know you're in heaps of big shit Crista (Van der Merwe), I'll tell you how". Ms Van der Merwe is then recorded as denying that she had done anything and Det Sgt Thomas responds that "the whole thing's been set up to defraud the insurance company and you played a major part in it".

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Ms Van der Merwe then enquires of Det Sgt Thomas, "Well, you tell me more about the deal" to which he responds, "Well what are you going to do - the deal is this - you can walk out if you (give?) me Ramon up. That's it."

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Having spoken of the "deal", Det Sgt Thomas is then recorded as indicating how it might be implemented.

"Det Sgt Thomas: I will go to the court and say look.....

Ms Van der Merwe: Could you go to the court or to my solicitor or go through him through the right channel? I mean I'm not saying Ramon has done it because I don't have any proof right?.

Det Sgt Thomas: This is what I can do. I can apply to the Attorney-General, because you've given me information leading to the conviction of an appropriate person to have your matter squashed.....and you can see the report on it, I'll do it in your presence. I'll give a copy to your solicitor. Only on the condition, only on the condition you give Ramon up. I can't go any further unless you do".

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Det Sgt Thomas describes Mr Bracamonte as a "grub" and a "dead set bastard". He states, "In the long run we will shake the life out of both of you because - I can never guarantee what the court will do to you, but by the Christ there is a lot we can do to you and you come over Crista, as a painted lady - Crista the ringleader". Ms Van der Merwe challenged the truth of this statement. Det Sgt Thomas proceeded, "But it looks that way. You're the one who effects the insurance increases - you're the one who does the books".

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At page 6 of the transcript, Det Sgt Thomas is recorded as saying, "I'm prepared to do this. You tell me exactly what you know about it and what happened and how he did it and I will type

up a report to the Attorney-General now and at the time we go to court and say, I want the matter to be adjourned until the Attorney-General will make a decision and this lady At page 6 of the transcript, Det Sgt Thomas is recorded as saying, "I'm prepared to do this. You tell me exactly what you know about it and what happened and how he did it and I will type up a report to the Attorney-General now and at the time we go to court and say, I want the matter to be adjourned until the Attorney-General will make a decision and this lady's given an undertaking to give evidence against that bloke there and I am seeking an approval to withdraw the charge". Ms Van der Merwe asks for time to think about it "because I don't have any information that can implicate Ramon".

"Det Sgt Thomas: You know how much you know about Ramon. I don't know how much you haven't told me, but you've got to cut your losses. I don't care if you were involved. Just tell me you weren't. Only Ramon did it and I don't care what.....even tell me - this is what we did, this is what we talked about".

Ms Van der Merwe: But I can't lie".

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At page 7, Ms Van der Merwe: "Ramon never discussed the actual bombing with me....".

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At page 8, Det Sgt Thomas after Ms Van der Merwe indicated that she would speak to her solicitor, "You can mention this Crista - if you give me the evidence I'm looking for against Ramon and that's telling me everything you know about it and I'm satisfied with it, I'll make representations to.....change his mind and get you indemnify to defer prosecution (sic). But you've got to give me Ramon and anybody else who might be involved".

Ms Van der Merwe: If I don't know that part?.

Det Sgt Thomas: Just tell me the truth. Tell me how it might have been how it might have happened".

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At page 9 of the transcript, Det Sgt Thomas advised Ms Van der Merwe to go to a "completely independent" solicitor and say "can the police do it".

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Davidson ADCJ points out that it is not uncommon for the police to "do a deal" with an accomplice who is subsequently called as a witness in the Crown's case against the co-accused.

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Such a witness may be given an indemnity from prosecution or at least a "use" undertaking (s19 Such a witness may be given an indemnity from prosecution or at least a "use" undertaking (s19 Director of Public Prosecutions Act 1986). However, such a witness should be either already dealt with for his/her part in the offence or a nolle prosequi entered (R v Grant & Ors (1944) 30 Cr App R 99 ; R v Norfolk Quarter Sessions, ex parte Brunson (1953) 37 Cr App R 6; c/f R v Robert Smith (1924) 18 Cr App R 19; but see now ss17 and 165(1)(d) Evidence Act 1995).

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Davidson ADCJ points out that current practice in New South Wales seems to be that an indemnity from prosecution or a "use" undertaking together with an appropriate warning under s165 of the Evidence Act 1995 is regarded as sufficient. Sometimes no indemnity or undertaking is given, in which case privilege against self-incrimination is raised, reliance is then placed by the Crown on the

court granting a Certificate under s128 of the Evidence Act 1995.

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Davidson ADCJ expressed conclusions in relation to this material in the following terms:

"The issue is whether on a reasonable interpretation the contents of H.Ex L ("the transcript") may be regarded as an exhortation, express or implied, by Det Sgt Thomas to Ms Van der Merwe that she should provide information to the police as the basis for later evidence on oath or affirmation, regardless of its truth or whether she believed it to be true, in return for her not being prosecuted.

The portions of the document which tend to support that proposition are those in which she makes it clear that she had no information which could implicate Mr Bracamonte but nevertheless Det Sgt Thomas continues to press her to "give him up" and at one point said, "I don't care if you were involved, just tell me you weren't". The passage "just tell me the truth, tell me where it might have been, how it might have happened" immediately after Ms Van der Merwe had asked rhetorically what would be her position if she did not know who "might be involved" also tends to be indicative of an attitude of Det Sgt Thomas that he was not concerned about the truth of any statement Ms Van der Merwe might have made as a witness provided it did implicate Mr Bracamonte.

On the other hand Det Sgt Thomas is recorded a number of times as having indicated to Ms Van der Merwe that he wanted "the truth" from her and his invitation to her that she consult a "totally independent" solicitor before deciding to make a statement tends to militate against the position for which Mr Molomby of counsel for Ms Catt contends. On the other hand Det Sgt Thomas is recorded a number of times as having indicated to Ms Van der Merwe that he wanted

"the truth" from her and his invitation to her that she consult a "totally independent" solicitor before deciding to make a statement tends to militate against the position for which Mr Molomby of counsel for Ms Catt contends.

The conversation recorded although ambiguous in places, is capable of supporting a conclusion adverse to Mr Thomas of complicity in a serious criminal offence. It supports the contention that Det Sgt Thomas had a propensity to apply pressure by way of promise as well as threat to potential witnesses in a way calculated to produce false evidence. This further supports the conclusion that he may have exhibited that propensity in the Roseanne Catt investigation and trial."

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I accept the conclusion of Davidson ADCJ in respect of this evidence. The conversation raises serious issues with respect to the propensity of Det Sgt Thomas to pressure witnesses to provide false evidence. There was also evidence before Davidson ADCJ which His Honour found suggests that Det Sgt Thomas may have committed perjury at the committal proceedings of Mr Bracamonte and Ms Van der Merwe. This material would only be relevant if Det Sgt Thomas gave evidence and is not directly relevant to the issues which must be resolved in this appeal.

The investigation of a fire at the Royal Hotel at Monto

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Davidson ADCJ received evidence relating to the investigation of the fire which on 12 June 1999 destroyed the Royal Hotel at Monto in Queensland. His Honour's account of the evidence is as follows:

"Ms Margaret Nagy

After the fire Ms Nagy, a licensee of the hotel jointly with her husband George, said she was contacted by Mr Thomas who was then an insurance investigator. At that time she was separated from her husband. She said in evidence at the section 12 hearing that Mr Thomas had said to her words to the effect, "If you tell me that your husband torched the pub, I will make you a very wealthy woman" (H/T p1778). She said that her husband had never "torched the pub" nor had he told her that he had and she had told Mr Thomas so.

Thereafter Ms Nagy said Mr Thomas contacted her again offering bottles of wine and "comfort" which she said she refused.

She claims he said again, "Why don't you convince me that your husband has done it and I will make you a wealthy woman? I will make it worth your while. Just tell me the truth. I can even give you some money to pull you through She claims he said again, "Why don't you convince me that your husband has done it and I will make you a wealthy woman? I will make it worth your while. Just tell me the truth. I can even give you some money to pull you through". She claims that he told her that he would put her husband away for life and that she could rest assured that she would live thereafter in comfort.

Ms Nagy said that on the night of the fire she had been living at the hotel with Ms Gina Hart, a family friend.

Ms Hart gave evidence and said that on the night of the fire she had been living in Mitchell Street about three to four kilometres from the hotel. Having seen signs of the fire she had gone to it and had there spoken to various members of the Nagy family.

Ms Hart said that some months later she had been telephoned by Mr Thomas and had gone to

see him in Brisbane. He had said that he was certain that Mr Nagy had started the fire. Ms Hart said that she had expressed doubts about this and had referred to the financial costs from the loss of trade which would have ensued to the Nagy family if he had. Mr Thomas had then referred to income protection insurance cover which Mr Nagy had.

Ms Nagy claimed that Mr Thomas had asked whether she had ever had a sexual relationship with Mr Nagy. She denied having done so and he said words to the effect that he, Thomas, had come prepared to offer her \$10,000 on the off-chance that during a wild moment of passion in "pillow conversation" Mr Nagy admitted to her that he had lit the fire. She said that again she denied that she had ever slept with Mr Nagy.

In cross-examination, Ms Hart was referred to notes which she agreed that she had initialled during the conversation which she had with Mr Thomas in Brisbane. She claimed, however, that she had not been able to read through the notes although she had initialled each page of them. She claimed that he had told her not to bother reading them as his secretary would send her a copy. She said she had never received a copy.

Mr Peter Thomas

At the section 12 hearing Mr Thomas said that he had investigated the fire. He agreed that he had interviewed Ms Nagy but denied that he had offered, or was in a position to offer, anyone money for evidence as to the fire. He said that he had asked Ms Nagy questions about her sexual life because he claimed that was what she wanted to talk about.

Mr Thomas also said that he had spoken to Ms Hart but denied he had told her that he had suspected that Mr Nagy had an income protection policy. He denied any discussion with her about that. He claimed to have obtained from her a "signed statement" and said he could not recall

saying that he would send her a transcript of the recorded interview. He denied having said words or words to the effect that she might be paid \$10,000 if she was prepared to say that Mr Nagy had admitted "in a moment of passion" having started the fire."

The conclusion of Davidson ADCJ with respect to Ms Nagy and Ms Hart

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Davidson ADCJ concluded that both Ms Nagy and Ms Hart are credible witnesses whose evidence is capable of being accepted. His Honour considered whether their evidence is relevant to the determination of any factual issue arising in the Section 12 hearing. It was submitted that the evidence goes beyond credit and tends to establish a propensity in Det Sgt Thomas to act in a particular way, namely to improperly influence potential witnesses into giving information and obtaining evidence regardless of its truth. The submission was based on the terms of s97 of the Evidence Act 1995.

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His Honour expressed his conclusions in the following manner:

"As to the giving of reasonable notice as provided in that section, this question does not arise and in any event I would dispense with notice pursuant to s100 of the Evidence Act 1995. As to whether it is of "significant probative value" it should be considered in light of evidence relating to witnesses such as Ms Marie Whalen, Mr Shane Golds, Mr James Morris, Dr Richardson, Mr Barry O'Brien and Mr Farrar. It may also be relevant to the question of the alleged finding of the pistol in the ensuite bathroom of Ms Catt on 24 August 1989 in light of the evidence of Mr Caesar, as indicating a propensity in Mr Thomas to act

dishonestly in the gathering of evidence.

In no instance in the trial of Roseanne Catt, however, was any allegation made of Det Sgt Thomas having held out a financial inducement to a witness to give false evidence.

Nevertheless, there were substantial issues before the jury in the trial as to whether Det Sgt Thomas' methods of investigation may have tended to induce the giving of false or at least questionable evidence. In no instance in the trial of Roseanne Catt, however, was any allegation made of Det Sgt Thomas having held out a financial inducement to a witness to give false evidence. Nevertheless, there were substantial issues before the jury in the trial as to whether Det Sgt Thomas' methods of investigation may have tended to induce the giving of false or at least questionable evidence.

Notwithstanding the difference in methods involved in the allegations contained in the evidence of Ms Nagy and Ms Hart as compared with the methods suggested on behalf of Ms Catt at her trial, the evidence of Ms Nagy and Ms Hart does have "significant probative value", as does that relating to the Bracamonte/Van Der Merwe matter.

In addition, adopting the analogy of evidence of conduct of police officers at the New South Wales Police Royal Commission and applying the more stringent test propounded by Meagher JA in *R v Vastag* NSWCCA unreported 12 May 1997, the evidence, like that as to the Bracamonte/Van der Merwe matter, is relevant and cogent as going to whether Det Sgt Thomas may have used improper and dishonest methods of gathering evidence in the investigation of charges laid against Ms Catt."

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I am satisfied that the conclusion expressed by Davidson ADCJ should be accepted. The defence

of the appellant at her trial raised significant issues as to the evidence tendered against her and the manner in which Det Sgt Thomas assembled the prosecution case making this further evidence significant when considering whether the jury's verdict should now be set aside.