Analysis of the Lloyd Rayney Case

By Barbara Etter*, 4 November 2012

Barbara Etter in WA Police uniform speaking at a conference in 2009.

I have now had the opportunity to read the 239 page judgment by Martin J in the Rayney case from the AustLii website.

It is important, in considering the case, to consider the context or history of the matter. Corryn Rayney, the Registrar of the WA Supreme Court, went missing on the evening of 7 August 2007 and her body was not found until 15 August 2007 in a grave in Kings Park in Perth. The post-mortem (including a preliminary examination) on Corryn's body was conducted on 16-17 August 2007 - a fact which is important given the allegations of police planting evidence (i.e. the Liquidambar seed pods) in her hair and the body bag (some months later).

On 20 September 2007, Senior Sergeant Jack Lee, the then officer in charge of the Major Crime Squad, made his statement that Lloyd Rayney was the "prime" and "only" suspect for Corryn's murder. On 16 September 2008, Mr Rayney commenced defamation action against the WA Police. In December 2010 he was arrested and charged with Corryn's murder. It would therefore seem that there may have been abnormal pressure on the police to charge Rayney for the murder.

In fact, Counsel for the accused stated that the defamation proceedings were to be set down virtually on the day that Rayney was arrested (p.98). Counsel for the accused identified 20 September 2007 as the date after which the police were "locked in to making a case against the accused" (p.98). (Note, the defamation proceedings were put on hold pending the outcome of the criminal case).

The issue of whether Corryn had returned to the family home from her evening bootscooting class was critical to the Crown case (p.4). The case was based on the fact that it appeared that Corryn had been attacked or murdered at the family home given the finding of Liquidambar seed pods (from a tree on the family property) in her hair and in the body bag, other material such as soil and particles of paint and brick found on her body etc. and damage to her boots. The Crown theory was that Corryn had been dragged across the couple's suburban front yard.

The couple had clearly been having marital difficulties and Rayney had also been tapping the family phone. Rayney had been unfaithful to his wife and had lost large sums of money through gambling. Corryn, at the time of the murder, was bringing the issue to a head and there were to be discussions that night about finances and Rayney vacating the family home.

I will now turn to the actual decision by Justice Martin, the former Chief Justice of the NT, who was brought in to hear the case given that all the members of the Judiciary in WA would have had a perceived conflict of interest in the matter. The matter was also held without a jury as the atmosphere within the broader community was, at least potentially, prejudicial to the accused. (Rayney was a high profile barrister in WA and a former Crown Prosecutor).

It cost the WA Government $3 million to prosecute Rayney. The hearing in the matter commenced in July 2012 and the final decision was handed down on Thursday 1 November 2012. During the trial, the accused exercised his right not to give evidence. Some 216 statements were tendered without the witnesses being called and an additional 107 witnesses were called to give oral evidence (and statements of many of those witnesses were also tendered).

The judgment itself is divided into various sections:

1. Deals with the legal principles, as required by the law, that the Judge applied in his consideration of the evidence and determination as to whether the evidence proved guilt or otherwise.

2. Deals with the history of the relationship between the accused and the deceased. The issues here were important to motive.

3. Canvasses the the evidence concerning the deceased's intention to go home when she left bootscooting and whether other evidence leaves room for doubt as to whether she headed home. This section also deals with the abandonment of the deceased's car in Subiaco, not far from Kings Park.

4. Discusses evidence concerning the conduct of the accused.

5. Discusses evidence concerning the conduct of the police. It was the case for the accused that the police conducted a biased and narrowly focused investigation which concentrated upon the accused to the exclusion of a proper investigation. Counsel submitted that the conduct of the police should cause the Judge to doubt the integrity and reliability of a number of areas of evidence, particularly evidence concerning the finding of Liquidambar seed pods in the hair of the deceased and in the body bag.

6. Deals with the gravesite, exhumation, postmortem examinations and evidence relating to the cause of death.

7. Discusses evidence upon which the State relied to establish that the deceased carried out her intention to return home on 7 August after bootscooting and was killed at home. This section deals with issues such as blood, fingerprints, DNA, a handkerchief found in the grave and the question of opportunity.

8. This final section deals with various matters relied upon by the State and the accused in supporting their competing cases and the Judge's findings.

One of the first things that struck me looking at the judgment was the lack of referral to, or reliance on, legal authorities. It seems that apart from relying on well established legal principles, the Judge felt no need to determine any contentious legal issues. It seems that he was able to draw his conclusions from the evidence alone.

My review is concentrating on key issues, particularly the police conduct in the investigation in light of the Judge's comments that there were instances of police conduct ranging from "inappropriate to reprehensible" (p.111). The first comment about possible inappropriate behaviour by police occurs at page 73 in relation to the statements of Detective Sergeant Paul Robinson and Senior Constable Warren Wheatley, which were prepared in September 2008 and March 2009. They both attended the Como home on 8 August 2007 and gave evidence about the accused's responses to questions concerning the home alarm system. There was an issue about identical sections in their statements and Mr Wheatley had initially denied that he had copied Mr Robinson's statement. The Judge stated (pp. 73-74):

> *At the least, Mr Wheatley's initial denial that he copied Mr Robinson's statement demonstrated a lack of care. A more sinister view could easily be taken. I am far from satisfied that Mr Wheatley exercised an independent mind and memory when preparing his statement. It appears that the opposite occurred. I am unable to rely upon Mr Wheatley's statement or evidence in any respect.*

The Judge also had concerns about the lack of contemporaneous notes made by Robinson in relation to the alarm questions. His Honour said that he had significant reservations about this evidence to the point that he doubted that the accused gave the answers. He also found it difficult to understand why police would have been interested in the alarm. He stated that he was unable to rely upon this evidence and thus ignored it (p. 74).

Fuller discussion of police conduct occurs from page 98 onwards. One of the issues is the statement made by Inspector Stuart Bartels to the pathologist Dr Gerard Cadden on 16 August 2007 (see p.99). Prior to Dr Cadden conducting the preliminary examination of the deceased, Mr Bartels told Dr Cadden that police knew the accused was responsible for the death of the deceased and "matters were going to roll up soon". Mr Bartels said police knew the accused had killed his wife either by himself or with the help of a lover. To Dr Cadden this was a "bombshell". The Judge regarded the statement by Bartels as "inappropriate" but not indicative of police bias at that time. He found it to be the statement of an individual officer engaging in a piece of idle speculation and gratuitously "shooting off at the mouth" (p.100). However, it is interesting to note that in his evidence, Dr Cadden stated that if it had not been for the conversation with Mr Bartels, at the conclusion of the postmortem examination he would have reported that the cause of death was "undetermined pending ongoing investigations" (p.114). Dr Cadden explained that as a consequence of the conversation with Mr Bartels, rightly or wrongly, he was under the impression that an arrest was "imminent" (p.115).

There is also discussion about the possibility of police leaking information to the media (at p.100) particularly in relation to the execution of a search warrant at the family home on 22 August 2007. Rayney had even phoned police to advise them that he had been told by a reporter that his house was about to be searched.

The Judge was also critical of police naming Rayney as a person of interest at a 29 August 2007 press conference, when he was clearly a suspect at that time (pp.100-101), as evidenced by the interception of his phones and in the "critical decisions log".

The Judge also commented on the 20 September 2007 press conference at which Senior Sergeant Lee referred to Rayney as the "prime" and "only" suspect (pp.101-102). Martin J referred to it as "inappropriate conduct" (p.103) and commented:

> *To put the position at its lowest, Mr Lee was gravely in error in identifying the accused as a 'suspect' in the murder of the deceased and in conveying a police view that the accused was the prime and only suspect... Mr Lee's lack of judgment was compounded by allowing the media to continue to ask questions and by giving a number of utterly inappropriate responses.*

At p.103 the Judge comments that the first example of the "type of police conduct that should not be tolerated" is to be found in the evidence of Ms O'Brien who was interviewed on 20 September 2007 and signed a typewritten statement that day. It was claimed that one of the detectives had said to her:

> *You know how it works, Clare. We charge you. You lose your job. Your reputation is destroyed. You can't get a good lawyer because you have no money and then we drop the charges and you are yesterday's news.*

It seems that Ms O'Brien was not given the opportunity to take legal advice and that she was told that police had been given clear or firm instructions that if she didn't cooperate that night she was to be charged. The "tipping point", however, was said to be when she was told police were holding her brother at a police station and it was implied that they would charge her and her brother (p.104). She found the manner in which the questioning was conducted "quite threatening and offensive" but said that she had no difficulty with either of the two police officers. The Judge commented (at p.104):

> *Those officers misused their position of authority and threatened to abuse their power of arrest which should only be exercised when the evidence justifies an arrest. As I said earlier, that sort of conduct should not be tolerated.*

The Judge then considered the issue of Mr McKenzie as the family liaison officer. Rayney had complained about him and asked that he be removed from that position. It appears that Mr McKenzie had endeavoured to obtain information from Rayney in his capacity as the family liaison officer without telling the accused that he was the second in charge of the investigation. Mr McKenzie had acknowledged that he had been "intelligence gathering". The Judge was satisfied that, on more than one occasion, Mr McKenzie had actively attempted to mislead the accused as to the capacity in which he was acting when he spoke with the accused. He declined to admit evidence of such conversations. At p.106 the Judge commented that there was a difference between "legitimate tactics" and "actively attempting to mislead persons in the position of the accused".

The Judge then stated that another area in which investigators behaved inappropriately concerned the report of Dr Cadden in which he stated that three seed pods were found in the hair of the accused during the postmortem examination on 17 August 2007 (p.106).

Investigators set about persuading Dr Cadden to change his report because it did not fit with police records that only two seed pods were found during the examination and a third was found over three months later in the body bag. The police kept at Dr Cadden and he eventually changed his report. Mention was also made of Senior Constable Matthew Ward rifling through the papers belonging to Dr Fabian, the neuropathologist, when she left the room to go to the bathroom (p.107).

The Judge commented (at p.108) that the police conduct in relation to Dr Cadden's report was "totally inappropriate". The Judge stated:

> *In substance, they set about persuading a witness to alter that witnesses' evidence to fit with the police view of the evidence. The fact that the police pressured Dr Cadden rather than a lay witness is not to the point. It is the job of investigators to obtain evidence and let the Court decide whether the evidence is reliable or otherwise. It is an abuse of their position for officers to pressure any witness to change their evidence in order to fit with other evidence or the view of investigators.*

The Judge was also critical about the very public nature in which Rayney was arrested some three years after the event. He described the police account as to the place of arrest and the need to handcuff the accused as "arrant nonsense" (p.111). He also stated (ibid):

> *The evidence compels a conclusion that Mr Correia decided to put on a show of force with officers wearing vests in a busy city street close to the Supreme Court and to humiliate the accused in public.*

From page 174 onwards of the judgment there is significant discussion about the Liquidambar seed pods, supposedly in the hair of the deceased. It was the case for the accused that the Judge should have grave reservations about whether the seed pods were in the deceased's hair when her body was removed from the grave (p.176). The explanation advanced was that police "planted" the seed pods in the hair for the purpose of linking the deceased to the family home at Como and implicating the accused in her death. The evidence of the third seed pod found months later in the body bag was strenuously challenged. Counsel for the accused also alleged that this was planted in the bag.

The Judge commented that he was impressed with certain evidence of police forensic personnel. His Honour, in reference to Sergeant O'Loughlin, Senior Constable Byass and Acting Sergeant Gelmi, stated (at p.189):

> *In their own individual ways, each of those witnesses impressed me as a serious, conscientious and truthful witness. They were thoroughly and firmly tested in crossexamination.*

The Judge spent a great deal of time considering the seed pod evidence, including the integrity of the exhibit. He went on to express reservations about the evidence of Ms Rogers (p.197) about the non-application of a seal to a container holding the seed pod exhibit. His conclusion as to the seed pod evidence, both found in the hair and in the body bag, is found at pp.204-210.The Judge commented that there were a number of "unsatisfactory features" concerning the evidence about the seed pod found in the body

bag and that the evidence left him "with a distinct feeling of unease". For instance, he considered that the reason advanced for the search of the body bag in December possessed "an air of unreality". He was also concerned with the lack of photography that occurred, contrary to normal practice. The Judge was also concerned about the timings of the finding of the seed pod in that it took place over 3 hours after the hair was found in the soil in the body bag. He made comment at p.204:

> *[T]he evidence of Ms Rogers must be approached with greater than usual caution. She demonstrated a willingness to construct a false explanation in connection with the issue of sealing the crucial exhibit. In my view there is a real risk that she has done likewise in explaining why the decision was made to examine the contents of the body bag.*

The Judge also found it "curious" that the soil from the seed pod was found to be consistent with soil from Como rather than Kings Park (p.204). The Judge concluded (p. 205):

The combination of these factors, considered in conjunction with the proven attitude of some investigators to the accused, had led me to have significant doubts about the reliability of the evidence concerning the finding of seed pod PAG57C in the body bag. I cannot make a finding as to how the seed pod came to be in the bag, but the possibilities discussed earlier have not been excluded. In addition, the evidence demonstrates that contamination of the exhibit is a real possibility. My doubts are such that I cannot rely on the evidence concerning the finding of the seed pod in the body bag and, as a consequence, I cannot rely on any of the evidence concerning artefacts in the seed pod. I have put this evidence aside and ignored it.

The Judge went on to reject any suggestion that the seed pods in the hair of the deceased had been planted (p.206). He found that if any officer had been minded to fabricate evidence against the accused, it was far too early to do so (p.207).

The overall conclusions are provided at p.233 onwards. They include considerable discussion about the forensic evidence in the case. At p.237 the Judge stated:

> *Put shortly, the scenario created by the State is a critical step in the process of implicating the accused in the attack upon the deceased. There is no evidence at Como that implicates the accused and no evidence to support the State scenario. The evidence tends to contradict the State scenario. In these circumstances, the State case in this crucial area of the crime scene does not rise above speculation advanced in an endeavour to fill a very significant gap in the State evidence.*

The Judge commented that there was a lack of logic in several areas of the case for the State (p.238). Further, the Judge considered that the case for the State was plagued by "improbabilities and uncertainties at each step" (p.239). He went on to state (ibid):

> *The case for the State is beset by improbabilities and uncertainties. Crucial evidence is lacking and the absence of evidence tells strongly against the State. Endeavours by the State to fill critical gaps and explain away improbabilities are primarily no more than speculation without foundation in the evidence.*

His Honour's comments at p.238 are a suitable statement upon which to conclude this summary/overview:

> *[I]t does not follow that the State has proven guilt. Sometimes an apparently incriminating piece of evidence has an innocent explanation that is not obvious; sometimes an apparently implausible explanation is true. Human affairs are not like jigsaws cut to size and shape. Strange events happen for odd reasons. Mysteries emanating from evidence given in criminal cases remain unsolved. The criminal law is replete with examples of miscarriages of justice caused in cases reliant on circumstantial evidence, particularly when the heart of the case rests on the interpretation of forensic evidence ... [T]he law guards against miscarriages of justice by requiring a particular approach to circumstantial evidence that leaves no room for doubt that the burden of proof has been discharged.*

It will indeed be interesting to see what the outcomes are from this case in relation to the various comments by Martin J about the conduct of the WA Police. I and others would like to see a national inquiry into miscarriage of justice cases involving wrongful convictions and recent "failed" cases such as Rayney and Johnny Montani (also in WA) to ensure that police and prosecution policies, procedures and practices are improved to prevent not only future miscarriages of justice cases but to also ensure that only suitable cases are carried through to the very expensive and protracted prosecution stage. Having said that, I do fully appreciate the difficulties in assessing a case properly and a trial may well be the only way to ventilate the issues and present and consider all the evidence.

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This article appeared first on her blog:
http://www.betterconsult.com.au/blog/analysis-of-the-lloyd-rayney-case/

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