



AUSTRALIAN ADVOCACY INSTITUTE

PORCINE

V

ROYAL BRIDGEWATER

GOLF CLUB

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Revised: by Professor the Hon. George Hampel AM QC 2003/2014

Australian Advocacy Institute

CASE STUDY



PORCINE v ROYAL BRIDGEWATER GOLF CLUB

You are sitting in your room at **2.00pm on a Friday afternoon**.

A telephone call announces the impending arrival of a client with a legal problem that requires urgent attention.

Mr Harvey Porcine, noted hotelier, arrives bearing some papers. He is slightly out of breath. You settle the client down and elicit the following information.

He instructs you to apply for an urgent injunction. You telephone the court and are told that a judge will be available for 5 or 6 minutes only. There is no time to prepare documentation.

Instructions from Mr Harvey Porcine

I live in a house at the address below and moved in two days ago. It is one of four low, single story houses which were completed six months ago. Two of the other three houses are currently unoccupied. My side fence abuts the rough next to the fairway leading to the fifth hole of Royal Bridgewater Golf Course. There are 18 holes in all. The fifth is a 200m fairway dog-legging to the right. The tee is approximately 70m from my unit, which is to the right of the fairway as you stand to tee off. The 'rough' consists of a 5m wide belt of long grass with sporadic undernourished and stunted ti-trees set at 50m intervals. None of them is more than 1.5m tall and they have very sparse foliage, so you can clearly see past them and over the top of my house to the 5th green which is on top of a slight rise. There are a series of small hillocks just beyond the houses that children use of the weekend to ride their bikes on.

I was standing in my backyard this morning at about 11.30am when I heard a whistling sound coming from overhead. This was followed by a dull 'thunk' as something hit a terracotta pot. The thing, which I saw to be a golf ball, ricocheted off the pot through a window and landed in my kitchen. I located the ball beneath my dented refrigerator door. The noise sent my prize Burmese cat, Roger, into quite a state. I was settling him down when I heard a voice saying "Can I have my ball back?"

I turned and saw a man in a yellow shirt looking over my fence. I walked out into my yard and opened the side gate to be greeted by a fellow who was wearing a yellow shirt, puce trousers and a green visor-type eye shade. He had an expensive-looking trolley with armour of golf clubs in an expensive leather bag trailing behind him. I was about to ask him about the ball when he called out "duck!" There was another whistling sound and a golf ball bounced off his golf-bag and sailed to my roof. A tile shattered. A second group of golfers had teed off on the 5th, not having seen the first group talking at my side fence. They too had been tempted to take a shot over my roof.

The man introduced himself as Louis Canze, the Secretary of the Golf Club and said "That was a close thing." I remonstrated with him about the two balls.

He said: "You were luckier than your neighbour. He was hit by a ball in his backyard about two weeks ago. He was taken to the hospital with a head injury. He gets out soon. We had a bit of

trouble with the balls leaving the fairway in the past because people try to take a short cut by driving across the crook of the dog leg to straighten it out and shorten the distance to the hole. Shortly after he was hit the club closed the fifth down and sought some advice about building a fence. I know that the Board members are still thinking about it but no decision has been made yet. I understand that there was a problem because an effective fence would disturb the habitat which is under an Environment Protection Order. Anyway, fences are expensive.”

I said: “Why was the fifth re-opened?”

He said: “We have a big amateur tournament starting tomorrow at 8.00am. It’s to raise money. I suggest you and the cat stay inside over the weekend.”

I said: “I’ve no intention of doing that. I’ll see my solicitor. You ought to close down until a fence is built. There will be kids riding on the hillocks on the weekend. They might get hit.”

He said: “We’re not going to do that. We’ve got amateurs coming from all over the country for this tournament. It’s a fund raiser to get Royal Bridgewater back on its feet. It’s a tradition that a prize be awarded for the best score on the fifth. That’s why many people come here. You could always buy the cat and yourself some hard hats.”

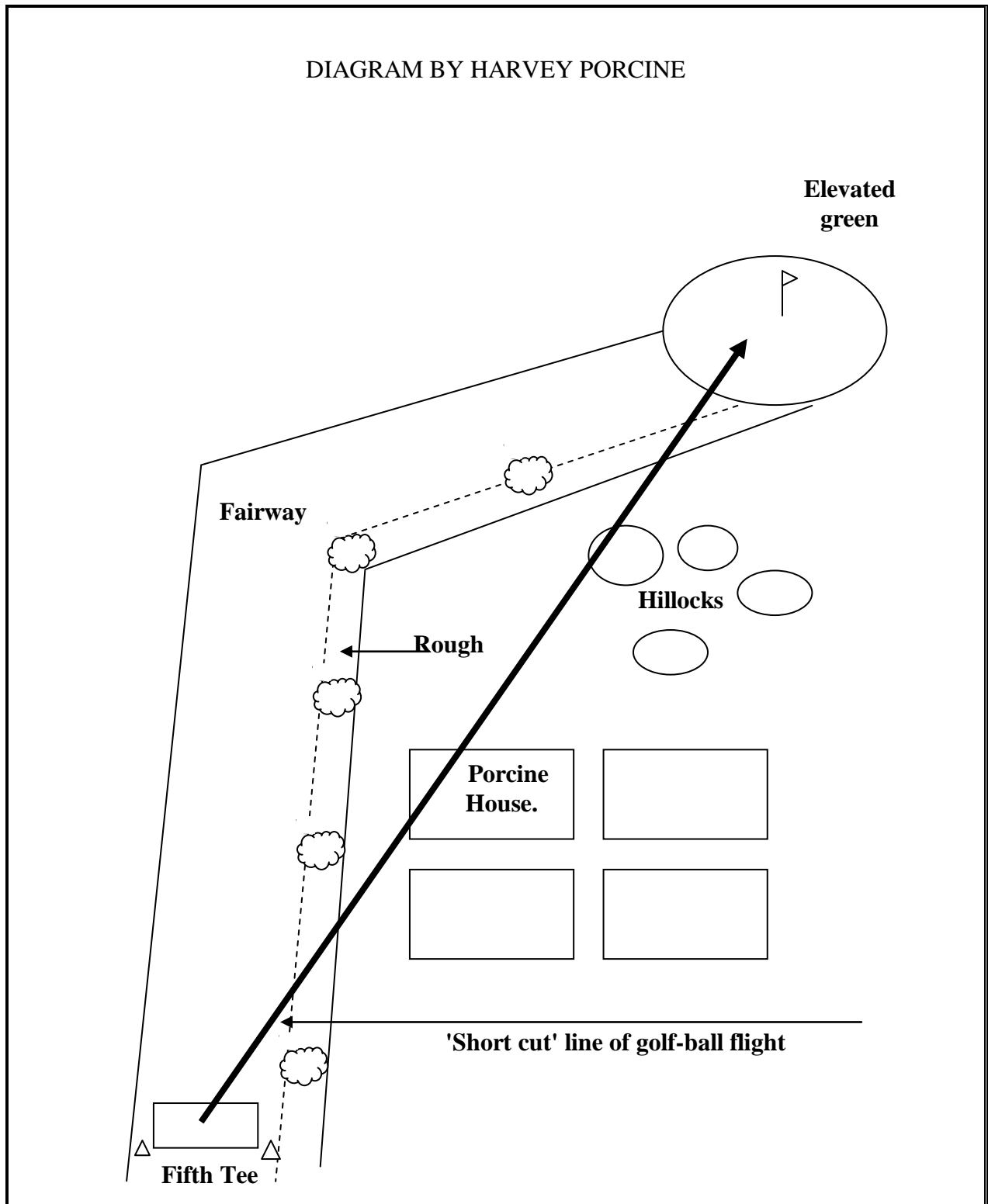
I said: “We’ll see about that.”

He said: “Do what you like but we’ll be playing off the fifth tomorrow”.

He then left. I kept the ball. I don’t see why I should have to leave my house or be imprisoned inside if I stay here. Anyway I’ve asked a few friends over to a Bar-B-Q. There are 17 other holes they can use. I want them stopped. I had no idea when I moved in that my neighbour had been hurt. There were no golf balls in the yard prior to the one this morning. I can’t afford to pay for any damage. I’ve just renovated at great expense. I have drawn a diagram - just a rough sketch- to make the position clear.

Harvey Porcine
4/4 Elspeth Crescent
Bridgewater

DIAGRAM BY HARVEY PORCINE





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DPP v URI ZUKOV

PLEA IN MITIGATION

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Revised by Prof. the Hon George Hampel AM QC

[04-2016]

INSTRUCTIONS FROM URI ZUKOV

Uri Zukov is 50 years of age. He was born in The Ukraine and educated to tertiary level. He then completed an accounting and bookkeeping course. He was employed by the government but was dismissed because he tried to implement western style transparent accounting procedures.

He migrated to Australia as a single man fifteen years ago. He attended English classes and became an Australian citizen. He worked hard in two jobs for five years and saved up for a deposit on a house. The house is mortgaged but he is still paying it off. Ten years ago he married his Australian wife, Maria. They have two children, aged 6 and 8.

Until about two years ago Uri worked at the ANZ bank as an assistant accountant, while Maria had a part time job in a local supermarket.

Two years ago Uri and Maria borrowed more money on an overdraft of \$120,000, secured by their house, and started their own business. They rented premises near their house and started a newsagency and milk bar business. They also had a sub post office license, which provided an additional income of \$500 per week.

After about six months they found that the business was not sufficiently profitable and they started amassing debts. At about the same time the older child, Natasha, developed multiple sclerosis and needed considerable medical attention. Although they were able to reduce their overdraft, there was still about \$100,000 owing and the interest rates had gone up. Their only car needed repairs, which exceeded \$5000 and there were pressings medical bills and debts for rates and telephone. They were behind in their interest repayments.

The Zukovs decided to sell their business and an agent found them a buyer who paid a deposit of \$10,000. Settlement was to take place three months later. There was little goodwill but the agreement for the business including stock and fittings was for \$105,000. This represented their capital in the business. Believing that they were assured of the sale, Uri started using money deposited at their post office business for payments of superannuation, to pay their bills. It was his intention to repay that money once the balance of the purchase price was paid.

During those three months Mr Zukov made false entries in the books and used a total of \$110,000. This was taken out in four amounts. These were \$30,000 twice, \$40,000 and finally \$10,000. This enabled him to pay for the car repairs, a special bed and wheelchair for his daughter, some back interest on the overdraft, medical and hospital bills, rates and other expenses. He also paid \$30,000 off his overdraft.

Uri intended to repay the money to the post office when the sale was completed. Unfortunately the prospective purchaser died and the sale fell through just after the last withdrawal. The falsifications were discovered by a Commonwealth Post Office auditor and Uri was charged with four counts of theft and six of false accounting. He intends to plead guilty.

He has no previous convictions and intends to start paying the money back as soon as he can. They lost the post office business but continue to run the newsagency and milk bar business where he and his wife now work long hours.

The bank has been very supportive and has come to an arrangement which will keep the business going if there is no downturn. In the evenings Uri drove taxis and was able to save \$100 a week to pay back his debt to the post office. He has now saved \$600 which is in a special account for that purpose.

With all this on his mind he felt depressed and started drinking. Unfortunately last month he was convicted of driving over .05, on a reading of .08, and careless driving. He lost his license for six months and has had to stop driving the taxi. All this happened after a fund raising social which he hosted. This was for the Multiple Sclerosis Society. He had to toast a number of donors and did not realise how three small glasses of vodka would affect him. He is not a regular drinker. Uri hopes to drive again when he gets his license back. In the meantime his wife has to do all the driving for the business and with the children. Despite his long hours at the shop Uri manages to coach a local school soccer team in which his son plays.

Fortunately they received good news that Natasha's condition has significantly improved and she will be able to resume her normal schooling and hopefully lead a normal life.

The shop is doing well since the development of a new housing estate nearby. They hope to be able to repay the money taken from the post office. Their life ambition is to educate their two children in private schools.

The Zukov's are very embarrassed about what Uri did and have not told anyone about the charges. No character witnesses are therefore available. He is confident that he will not offend again and has been terrified about going to gaol.

Consider –

- ***What is the theme or case theory of this plea?***
- ***What are the aggravating factors?***
- ***What are the mitigating factors?***
- ***How should the plea be structured?***

On that basis, prepare to present or oppose the plea, depending on your allocated task.



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Case Study:
DPP v Phillip BALL

Plea

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**Originally adapted for the AAI by Professor George Hampel AM QC
Revised by Grant Brady SC for the AAI 2015. Revised 2020**

2020



Case Study: *DPP v. Phillip Ball*

Instructions to participants.

You are required to make a submission on sentence either for Phillip Ball or for the Crown. Both sides are to analyse and prepare how this case may be dealt with on a plea of guilty to recklessly causing serious injury.

Consider how to present this plea

- What are the sentencing considerations?
- How do they relate to the facts?
- What case theory can be developed?
- How will the plea be best presented?

THE CASE

At three quarter time, in the Grand Final of the Interstate Football League between the Central Dingoes and the Southern Devils, the scores were level.

After first bounce, in the last quarter, the ball was kicked towards the Dingoes' goal. As the Devils' centre half forward, Paul Ford, was jogging back to his position, the Dingoes' half back, Phillip Ball, glanced towards the umpire who was looking the other way, came up from behind Ford and with a round blow, knocked him out.

As a result, Ford received a fractured jaw and severe bruising to the nose. Play was stopped and Ford was taken to hospital, where he remained an in-patient for 3 days. He required surgery and his jaw was wired shut. It remained wired shut for 8 weeks. Upon removal of the wires his jaw has healed well but he continues to suffer from occasional pain and headaches. It is anticipated that the pain and headaches will continue to abate and there should be no ongoing problems.

The incident was seen by Sergeant Harris, who was a spectator and a local police officer. Ball was charged on summons with an offence under Section 33 of the Crimes Act of intentionally causing grievous bodily harm, which carries a maximum sentence of 25 years imprisonment.

At the first mention of the matter, Ball's solicitor indicated that Ball would be prepared to plead guilty to recklessly causing grievous bodily harm under section 35(2) of the Crimes Act, for which the penalty is maximum 10 years imprisonment. The solicitor said his instructions were that Ford called Ball "a black bastard". It was indicated by the prosecution that there would be a factual dispute about the claim that Ford had called Ball "a black bastard" before he was struck.

One week ago Ball's solicitor wrote to the DPP saying that he was instructed that Ball says that he heard the comment made by a player but accepts Ford's denial that it was he who made the racial slur.

The prosecution responded saying that there will not be a factual contest. The DPP was prepared to accept the Plea to recklessly causing grievous bodily harm and to withdraw the more serious charge.

Paul Ford's victim impact statement reveals that he is 25, married with 2 children, aged 2 & 5. As well as playing football, he is studying Physical Education to become a teacher, and works part-time as a Personal Trainer at a gym. As a result of his injury, he has had to give up his gym job and has missed a semester of his course. He still suffers occasional pain in the jaw and headaches. He hopes all this will pass. He would love to play football again however he is very worried he will be unable to get past what happened. He is worried that he will be constantly looking over his shoulder and not be able to focus on the game. He will be devastated if he can't play again.

Phillip Ball is 26 and has no previous convictions. He has had a spectacular football career, but has been suspended twice for rough play. He is well liked and respected in the community. Letters from his referees confirm that he is employed as a part-time mechanic. He trains his old school senior football team.

Phillip understands that he has a short fuse on the football field. He sees this as the result of regular abusive racial comments which he experiences. He has also been subject to racially motivated violence in the past. He was the victim of a racially motivated bashing in which he ended up with a fractured cheekbone.

He was brought up by his mother, who was a member of the "stolen generation" and was taken into foster care. Phillip has never known his father. He is conscious of the abuse suffered by his mother and other members of his family. He received little guidance at home and had no paternal role model.

Phillip is single. He lives with and supports his ailing mother who suffers from cardiovascular disease that restricts her ability to get around. She is also required to attend doctors regularly. His mother also has the onset of dementia. Phillip looks after her and in particular is needed to get his mother to her various appointments. She is likely to forget her appointments if Phillip is not there to remind her and to take her. He is an only child and his mother has 2 brothers. While they live in the area they have shown little interest in helping his mother.

A specialist letter has been tendered confirming his mother's ill health and particularly noting that her attendance at the various doctor's appointments are essential otherwise her health may deteriorate significantly, causing the real risk of a heart attack and/or stroke.

As a result of this incident, Phillip has been suspended indefinitely by his club. He will have to find a full-time job to keep up the rent on the house. He is concerned that he will not be able to resume his football career. He has asked his club to reinstate him and has begun an anger management course. He has attended 3 sessions of a 6 session course.

A pre-sentence report is available which reflects the facts stated above. Further it states that he needs a moderate level of intervention as a result of his anger management issues. There are a number of courses run by corrective services that would assist with anger management. Those courses are run in custody and out of custody. It was noted that he had already begun a course and appeared to be doing well.

The incident received widespread publicity in the Australian Media. It has been used as an example of "football thuggery" and has been cited in various campaigns designed to deal with such problems. There is strong press presence in court and there was a reference in the news last night to the need for stern penalties and the need to "clean up the game."

Apparently, the judge before whom this case is listed, is a keen football follower and was, about 3 years ago, a guest speaker at the League's annual dinner on the topic of violence by footballers both on and off the field.



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DPP v Evelyn Cannon

TRIAL

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[v. March 2020]

Instructions

On 6 October last year Evelyn Cannon was charged with conspiracy with Taras Shenko and others to traffic in cocaine and with possession of cocaine. Approx. 2 months after she was charged, the police delivered a hand-up brief to her solicitor with all witness statements.

She was committed for trial. She could not afford to be represented and witnesses were not cross examined. The prosecution brief is attached.

Attached also is Evelyn Cannon's statement made to her solicitor on 7 October. It was sent to the police in an attempt to persuade the prosecution not to proceed.

One week before the trial the statement made by Luigi Fiorelli was sent to the prosecution.

Taras Shenko, who was charged and bailed, has not been found and the trial will proceed against Evelyn Cannon alone.

Evelyn Cannon instructs that what she said in her statement to her solicitor is correct. She also confirms that, as far as she can recall, the record of interview is correct.

When she was asked in Q.10 if she knew Shenko, she became frightened but shortly after conceded that she knew him.

You are instructed to **prepare for the trial, both for the prosecution and the defence** in accordance with your allocated roles.

At a preliminary hearing the judge ruled that the evidence of the conversation between Constable O'Rourke and Shenko is not admissible.

STATEMENT OF CONSTABLE PAUL O'ROURKE

I am a Senior Constable of the Australian Federal Police stationed with the Drug Squad based in Central City.

As a result of information received about a likely drug drop in High St, Central City, near Luigi's Bar, I went to High Street, Central City, on surveillance duty.

At about 11.00 pm on 3 October, I parked my unmarked vehicle opposite Luigi's Bar. I alighted from the vehicle, walked north and took up a position opposite the telephone box which was on the other side of the street.

The traffic was medium and there were a few people moving about on the footpath.

At about 1.00 am on 4 October, I saw a person I now know to be Evelyn Cannon come out of Luigi's Bar. I had a good clear view of her and noticed that she was wearing a black overcoat, black stockings and ankle boots. She was about 170 cms. tall, of medium build and had short blond tipped hair.

She walked north along the footpath. She then entered the phone box and closed the door. It was a glass sided phone box so I had a clear view of her. She looked around furtively, reached into her large tapestry handbag and withdrew a small silver box and placed it underneath the phone stand. She then left the phone box.

She crossed High Street diagonally to where my car was and then walked south down High Street. I lost sight of her. As she was crossing the road I noticed that her hair was spiked on top, she wore large hooped earrings and red framed glasses.

I continued my surveillance and at 1.10 am saw a black Jaguar TS 0173 stop beside the telephone box.

A person I know to be Taras Shenko alighted from the Jaguar, went into the telephone box and appeared to remove the silver magnetic box. I arrested him and removed the box from the lining of his overcoat. In it was a Southern Central Station Locker key No 013.

I cautioned Shenko and said "We've got you this time Taras." He replied "You may have got me but you will never prove it. You missed Evie and she has the key to it all. If you ever find her she will give you an alibi you will never bust." I tape recorded this conversation.

I subsequently recovered a parcel from locker No 013. It contained a powdered substance which upon analysis proved to be cocaine. Its value is approximately between \$90,000 - \$100,000.

Next evening I went to High Street and prepared the sketch plan of the area. (Produced). Whilst I was there I noticed the waitress who was serving coffee and recognised her as Evelyn Cannon. She had changed her hair style, it was no longer spiked. I heard her speak to the proprietor Luigi Fiorelli. She said "Did you know Taras was busted last night just outside here." Due to the noise of the espresso machine I did not hear any further comments. I later ascertained from Mr Fiorelli that Evelyn Cannon lived at 13 Black Street, North City.

I had earlier obtained a photograph of Evelyn Cannon which has a notation on the back "January, last year".

I had also interviewed Peter Porter who identified the photograph as being of a woman like the woman who hired locker No 013.

At about 3.00 pm on 6 October I went to 13 Black Street, North City where I spoke to Evelyn Cannon. After I confirmed who she was, I said, "It is alleged that you were involved with Taras Shenko in a cocaine deal." She said, "You've got the wrong woman."

I asked her to come down to the station, where I conducted a formal record of interview which was tape recorded.

I produce a transcript of that interview.

Statement made – 5.30 pm on 6th October.

EXTRACTS FROM PAGES OF O'ROURKE'S DIARY

- 1/10 Informer (Code "Deep Throat") makes contact. Says cocaine deal is being made. Coke will be left in locker at Southern Central Station. Key to locker will be concealed in telephone box near Luigi's Bar in High Street in early hours of the morning in four days time.
- 3/10 **11.00 pm.** Park unmarked car in High Street on western side of the road opposite Luigi's Bar. Surveillance position - opposite telephone box.
- 4/10 **1.00 am.** Woman approaches phone box, enters, places container under phone stand, exits, crosses the road and walks away.
About 179 cms, medium build, wearing black coat.
1.05 am. Jag TS 0173 beside phone box. Male (Taras Shenko) enters phone box, arrested. Find container in lining of coat with locker key 013.
- 5/10 Attend offices of AFP. Access Shenko on computer. Evelyn Cannon listed as known female associate. Shenko suspect in large scale cocaine importing but never before arrested.
Given photograph of Cannon dated January.
Take statement from Porter. Porter identifies person in photo as that of Cannon.
Attend scene. Identify Cannon at Luigi's Bar. Overhear conversation.
- 6/10 Attend 13 Black Street, North City. Conversation with Cannon. Cautioned. Allegations put. Comment "I think you've got the wrong woman".
Taken to HQ. Further interview. Wearing glasses. Denials.
Short statement produced later.

STATEMENT OF PETER PORTER

I am in charge of the luggage lockers at Southern Central Station. These are available for rent each day for \$15.00. We keep records of the lockers used.

Some time after 9.00 am. on 3 October I rented the last available locker to a tall blonde woman with spiked hair. That was locker No 013.

She gave her name as Carmel and signed the book C. O'Caine, High Street, Central City.

I remember that she had large earrings which stood out and looked nice because of her short hair.

She was very friendly and chatty. She asked if there were more than one key to the locker. She said she had a Russian friend who might pick up the parcel.

I assured her that there is only one key per locker and we do not have access to the lockers once the key is given out.

I saw her place a brown paper parcel in the locker after she got the key.

On 5 October I was visited by Senior Constable O'Rourke. And I told him what happened on the 3rd.

He produced a photograph of a woman and asked me if she looked like the woman who rented locker 013. The woman in the photograph had large hooped earrings and short blond spiked hair.

I said that it did look like Carmel O'Caine.

Signed
P. Porter
5 October

Record of interview

Record of interview between Senior Constable O'Rourke and Evelyn Cannon, conducted on 6 October last year.

Interview commenced at 4.00 p.m.

Senior Constable O'Rourke asking questions. The interview was tape-recorded.

Q1 Your full name is Evelyn Cannon and you live at 13 Black Street, North City. Is that right?

A Yes.

Q2 How old are you?

A 22, nearly 23.

Q3 I wish to interview you in relation to a conspiracy to supply cocaine and to the possession of cocaine. Before I do so I must inform you that you are not obliged to say or do anything and that anything you do say or do may be given in evidence. Do you understand that?

A Yes. What's a "conspiracy"?

Q4 "Conspiracy" means an agreement. I must also inform you that you may communicate with a friend or relative to inform that person of your whereabouts, or a legal practitioner. Do you understand those rights?

A Yes.

Q5 Do you wish to exercise any of those rights?

A No.

Q6 Do you understand why you are here today?

A You asked me down, I don't know why.

Q7 It is alleged that you conspired with Taras Shenko to supply cocaine. What do you say to that?

A I had nothing to do with it.

Q8 Well, you were working at Luigi's on the 3rd and 4th of October, weren't you?

A Yes, I was.

Q9 I saw you leave Luigi's and enter the nearest phone box where you deposited a key to a locker which contained cocaine.

A You didn't see me. You've got the wrong woman.

Q10 Do you know Taras Shenko?

A Never heard of him. No wait, I think I know who you mean. I think he is a customer but I don't know him. I have had nothing to do with him.

- Q11 I heard you tell Luigi, your boss, that you knew that Taras was arrested outside the phone box.
A OK, I might have been set up.
- Q12 What did you do after you left work at about 1 am?
A I walked past the telephone box and got a taxi home.
- Q13 Do you own a black overcoat?
A Yes I do. I just got it. As a matter of fact, as I walked past the phone box I saw another woman in a coat just like mine, near the door of the phone box. It struck me because I thought that mine was a one-off.
- Q14 You were identified by a man at Southern Central Station as the woman who deposited a parcel which we found to contain cocaine.
A It wasn't me.
- Q15 I showed him this photo of you (shown to the defendant).
A Yes but I haven't looked like this for a long time! Not since May, when I got back from Bali.
- Q16 What do you mean?
A I changed my hairdo after I got back from holidays, months ago and I don't wear hooped earrings anymore. I swapped them for a Balinese painting.
- Q17 Do you wear glasses?
A Only for reading and sunglasses.
- Q18 Do you have a large tapestry bag?
A No. Only this normal sized, red leather bag.
- Q19 Tell me why you happened to be at the phone box just before Shenko turned up?
A I am not answering any more questions. I want to see my solicitor.

Interview terminated 4.40 pm

EVELYN CANNON STATES:

I am a waitress at Luigi's Bar. Two days before I was arrested I remember leaving the Bar at about 1.00 am. just before closing time. I walked North up High Street looking for a taxi. I saw a taxi pull up outside the 24 hour video shop on my side of the road. I walked quickly towards it. As I passed the phone box I noticed that there was a woman near the door of the phone box. There were other people about but I remember her because she was about my own height and wearing a black coat similar to mine. I continued past her and got the cab home to North City where I live alone. I did not go into the phone box or leave any box or key there. I know a Russian man Taras Shenko. He has been to the bar many times over the last three months before my arrest. He has bought me a few drinks there but I've never been out with him. The next day, all I heard was that Taras had been arrested.

I was afraid to tell the police more about me and Taras Shenko because they would associate me with him, as they have done.

I have no previous convictions and I deny that I was in any way involved with drugs with Taras Shenko.

Signed: **Evie Cannon**
 E. Cannon
 11.00 am, 07 October

LUIGI FIORELLI STATES

I am the proprietor of Luigi's Bar in High St, Central City. I employed an old girlfriend of mine, Evelyn Cannon, as a waitress in my bar 5 years ago. I have known her since school days and since she has been working for me we are just good friends. Evie had blond spiked hair on and off for ages. I didn't like it very much. She changed it when she got back from Bali. I complimented her on it and said it made her look more elegant. She did not spike it from then on.

On 5 October last year Evie was working behind the bar making coffees. She told me that she had overheard that a customer of ours, Taras, was arrested the night before outside the bar. She went on to say "I don't know what it was all about. You know he has been asking me out. He is Russian, but he speaks good English. I'm glad I kept away from him. He's obviously a bit dodgy". I said "You can't be too careful".

Later that night I spoke to a policeman who came into the bar. He asked me where Evie lived and I told him. He didn't ask me to make a statement.

I've been in trouble with the police twice. 10 years ago I had 2 marijuana plants in a pot on my balcony and had to do 50 hours community work for that.

Last year I was convicted of assaulting a customer who was drunk. The Magistrate realised I had to get rid of the customer and gave me a bond.

Statement made to Evelyn Cannon's solicitor two weeks ago

