IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY No. B20 of 2019

BETWEEN: STEVEN MARK JOHN FENNELL
Appellant

and

THE QUEEN
Respondent

APPELLANT'S REPLY

Part I:

I certify that this submission is in a form suitable for publication on the internet.

Part II:

1. The ground of appeal requires this Court to make "an independent assessment of the evidence, both as to its sufficiency and its quality".[1] Contrary to the implication in the Crown submissions, is not for the appellant to establish a reasonable inference consistent with innocence.[2]

2. The Crown refers to *R v Baden-Clay*,[3] which restated the longstanding principle that in a circumstantial case the evidence "is not to be looked at in a piecemeal fashion, at trial or on appeal."[4] This is, with respect, an ironic submission in this case. At no stage does the Crown advance a coherent case theory which the various strands of its case

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1 *SKA v The Queen* (2001) 243 CLR 400, [14], [20]-[24] as quoted in the Respondent's Submissions dated 7 June 2019, [6].

2 Paragraph 9 of the Respondent's Submissions argues that, in circumstances of this case, any matters permitting an inference that somebody else murdered the deceased must *require* that conclusion before the jury verdict can be overturned. To the extent that submission attempts to narrow the bases upon which the appellant can succeed on this appeal, it is rejected and not supported by the cited passage from *R v Hillier* (2007) 228 CLR 618, [51].

3 (2016) 258 CLR 308.

4 Ibid [65]-[66] quoted in the Respondent's Submissions, [8]. See also, e.g., *R v Hillier* (2007) 228 CLR 618, 638 [48]; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521, 535.

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are said to support. Rather, the Crown submissions refer to the evidence in the very piecemeal fashion that it cautions against. It steadfastly fails to appreciate that its strands are internally inconsistent and fail to combine to form a rational case theory.

The hammer

3. The Crown downplays the importance of the hammer identification evidence to its case when it submits that other factors mean that "it did not matter whether the hammer was Mr Matheson's".[5] This belies the proper characterisation of this evidence by the trial judge who said that "[t]he case against the defendant turns to a significant degree on the correctness of the identification of this hammer by each of Mr and Mrs Matheson". The Crown Prosecutor had also deployed it as central to the reasoning process to guilt.[6]

4. The Crown argues that the "commonality of location" between the hammer and other items found at Thompson's Point suggested a "commonality of person who left them there".[7] However, if the hammer was not Mr Matheson's then there was no link between it and Mr Fennell, and nothing else linking the hammer to the murder. The hammer was found 15 metres from the other items and in any event there was no evidence that Mr Fennell had deposited those other items.

5. The biscuit tin found on the deceased's patio does not support the finding of guilt, whether it was placed there on 12 or 13 November 2012.[8] If the appellant had stolen a tin of banking documents while robbing the deceased, there is no sensible explanation why he would return the tin while disposing of the documents at Thompson's Point.

Opportunity

6. The evidence of opportunity must be seen against the background of a trusting, lengthy and positive relationship which saw the appellant attend daily on the deceased.

7. The Crown argues that the deceased was killed between abut 9:45am and 9:20pm on 12 November 2012. Paragraph 11(b) refers to the pathologist's "opinion as to the likely time of death." As noted in the Appellant's Amended Submissions, the evidence

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5 Respondent's Submissions, [52].

6 Summing-up at CAB 21 ll 23-24; Crown closing address at AFM 803 ll 12-22. See also the comments of Gotterson JA on appeal: CAB 78 [84].

7 Respondent's Submissions, [51].

8 Notably, the police found the tin beneath a newspaper dated 13 November 2012, which suggests Carol Bowen was mistaken: See Respondent's Submissions, [11(d)]; AFM 360 l 16 – 361 l 24; Exhibit 5.

on this issue was inconclusive and based upon a number of interacting factors.[9] Dr Olumbe said he would "prefer" 12 November 2012 over the following day but did not express his opinion any higher than that.[10]

8. The evidence at trial left open a broad period during which death could have occurred.[11] In those circumstances, it is unsurprising that the appellant could not provide a substantiated alibi for the entire period of alleged opportunity.

9. The Crown identifies four "gaps" in the appellant's movements on 12 November 2012 during which it is said that he had an opportunity to commit the crime and perhaps clean up the scene.[12] These gaps are said to be supported by the following:

10 a. The absence of evidence placing the appellant at another location;

b. The evidence of Mark Robinson sighting the appellant's utility outside the deceased's house at around 11:00am;

c. The evidence of Loretta McKie placing the appellant at the house between around 2:00 and 2:30pm;[13] and

d. The evidence of Ulla Doolan that the appellant attended the house between 6:00 and 7:30pm.

10. Even so, there were major difficulties with this evidence. Ms McKie had never previously met the appellant.[14] Ms Doolan was a bare acquaintance and her evidence

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9 See 2 [2] and fn 1.

10 AFM 103 ll 34-38. This observation was in part based upon the sighting of the deceased at around 9:30am on the morning of 12 November 2012. Dr Olumbe noted, "I suggested the time of death will be more to the time when [the deceased] was last seen as opposed to when the body was found.": AFM 103 ll 23-32; 105 ll 15-22.

11 The Respondent's submissions refer to unanswered phone calls made to the deceased's home and the clothing the deceased was wearing on the morning of 2 November 2012 and at the time of death: [11(e)], [12]. The evidence did not establish that it was unusual for the deceased not to answer the phone – the limited phone records admitted include five unanswered calls on 2 November 2012: AFM 970-975. The evidence of her attire earlier in the day did not establish that she had not changed into the nightdress in the evening: see AFM 316 ll 1-3; 185 l 8.

12 See Respondent's Submissions, [16], [17], [21], [22]-[23].

13 In relation to her viewing of the appellant, the Respondent's Submissions state "while the appellant contends that the 'angle was unusual' that was not the evidence": [20]. The appellant refers the Court to Exhibit 1, the map of Macleay Island, noting that Ms McKie's home is the property with the green roof at a 45° angle from the deceased's home: Respondent's Book of Further Materials (**RBFM**), 7. As at the time of the murder, a house had been built in the vacant block shown on the map: AFM 201 l 44 – 202 l 9.

14 AFM 204 l 35.

that Mr Fennell remained at the deceased's home until 7.30pm was demonstrably wrong.[15] The identification of the utility by Mr Robinson was not relied on by either party at trial given that he conceded that his sighting may have been "a reconstruction".[16]

Motive

12. There is no direct evidence that the appellant stole money from the deceased. The evidence that he did was weak and speculative. It stands in stark contrast with the evidence of their relationship otherwise.

13. In arguing that the appellant was under financial strain, the Crown relies upon the loss of $347 per week from an IGA contract.[17] However, the evidence of Tyrone Jones did not establish that this amount was charged on a long-term basis. He only took over the IGA in September 2012 and there was no evidence about the income the appellant received from the previous owners.[18]

14. The Crown submissions allege theft only in relation to $5,000 from the 2 November 2012 withdrawal and any cash at the deceased's home.[19] On that basis, the evidence that the deceased was missing $4,000 a couple of weeks prior to her death explains the large withdrawal on 2 November 2012 but does not support the alleged motive.[20]

15. The Crown accepts that there was nothing to suggest that the appellant's level of gambling in the period leading up to the murder was unusual,[21] while at the same time claiming that financial need based on his gambling habit provided the motive for theft. Paragraph 31 cites Gotterson JA: "Forensic accounting evidence sought to draw a correlation between the five Westpac withdrawals to which I have referred and the appellant's betting at the TAB agency."[22] This statement refers to *all five withdrawals*,

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15 AFM 216 ll 14-23. Her evidence is contradicted by the activity on the appellant's home computer: AFM 961-962. In the course of her evidence Ms Doolan was confused about the date, first placing Mr Fennell at the house from 6:00 to 7:30pm on 11 November 2012, and shortly thereafter during the same period on the following day: AFM 217 ll 33-36; 218 ll 19-45.

16 AFM 269 ll 21-44. See also the Respondent's Submissions at fn 23 and the Appellant's Amended Chronology at fn 3. In summing-up the learned trial judge warned the jury about the issues with this evidence: CAB 12 l 38 – 13 l 4.

17 Respondent's Submissions, [29]-[30].

18 AFM 661 ll 1-24.

19 Respondent's Submissions, [25].

20 See Respondent's Submissions at [32] *cf.* [34].

21 Respondent's Submissions, [26]. At [28] the Crown seems to suggest there was something notably unusual about reduced gambling activity following the death. It is not clear how that information is probative of guilt.

22 *R v Fennell supra*, [24] at CAB 65; Exhibit 102.

contradicting the Crown case theory, and cites the correlation analysis of *all* bets placed at the Macleay Island TAB while referring the "the appellant's betting". This confusion highlights the absence of a coherent prosecution narrative.[23]

16. The Crown theory about the theft of $5,000 required the jury to find that the deceased provided the appellant with a signed but partially incomplete withdrawal slip. This is contradicted by the other evidence that suggested, as the Crown states, that "the deceased paid a close interest in her financial affairs". Further, the documents found at Thompson's Point included receipts for the withdrawals made on 22 August 2012, 17 and 28 September 2012.[24] This suggests she would have expected a receipt from the appellant on 2 November 2012 rather than relying on reconciliation of bank statements to be received at a later date.[25]

Conclusion

17. The Crown submissions demonstrate the extent to which the jury had to impermissibly cherry pick evidence in order find the appellant guilty. The evidence at trial was demonstrably insufficient and incapable of supporting the jury verdict. A verdict of acquittal should be entered.

Dated: 30 June 2019

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23 *Cf.* The submission that the "limitations of the financial evidence were clear": Respondent's Submissions, [27].

24 RBFM, 35 – 37.

25 As noted in the Respondent's Submissions at fn 67, the deceased was also particular about receiving receipts for the purchase of her groceries.