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

BETWEEN: **STEVEN MARK JOHN FENNELL**
Appellant

and

THE QUEEN
Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I:

We certify that this outline is in a form suitable for publication on the internet.

Part II:

1. The sole ground of appeal focusses attention on the sufficiency and quality of the evidence. The asserted errors of fact in the reasoning of the Court of Appeal may assist to understand if the conclusion is erroneous, but these errors are not free standing appellable errors. Satisfaction of one or more does not necessarily result in the success of the appeal.

2. Further, asserted complaints about the conduct of the trial are of little or no assistance to this Court in determining the issue before it.

3. The principles to be applied by this Court in undertaking the task required of it are well understood, and are not in contest in this appeal. It is not accepted that the assessment of the witnesses in this trial is of limited relevance. Juries are regularly told, as was this jury, that their assessment of the witnesses plays a role in their deliberations. To ignore that is to ignore, in part, the fundamentally important role of a jury in the criminal trial process and the respect to be paid to its verdict – *The Queen v Baden-Clay* (2016) 258 CLR 308, [65]-[66]. The ability of the jury to assess the witnesses was appropriately recognized by Gotterson JA in his conclusions at CAB 78 [87]. (Respondent's submissions [6]-[8])

4. There is a compelling body of evidence to conclude that the deceased woman had been killed certainly by about 9.20pm on Monday 12 November 2012, but more

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likely by about 2.53pm on the same day. Once that is accepted, the body of evidence concerning witnesses hearing cars, dogs and people in the streets during the late Monday evening or early Tuesday morning becomes little more than a distraction. (Respondent's submissions [11])

5. The evidence of Mrs McKie and Mrs Doolan as to respectively seeing the appellant at the deceased's house at about 2.00pm and about 6.00pm was each of sufficient substance and quality to permit acceptance, although there is naturally some room to accept that neither is completely precise about the times they spoke of. (Respondent's submissions [20] – [23])

6. It is open to conclude that the deceased's house was set up to look like a burglary had occurred. A real burglar would not have any reason to do that. It is likely therefore to have been one of a select group of people who had free and ready access to the house, of which the appellant was one, in order to divert attention from him. (Respondent's submissions [33], [55])

7. Although it is not accepted that the evidence linking the hammer found at Thompson's Point to the appellant is crucial to the success of the prosecution, it is accepted that the prosecution case is notably stronger if that conclusion is reached. (Respondent's submissions [46] - [47], [52])

8. A close examination of the evidence of Mr and Mrs Matheson reveals there is little by way of real conflict in their evidence as to the identification of the hammer. The conclusion at CAB 78 [84] that Mr Matheson's identification of the hammer had an appealing practicality to it was justified. (Respondent's submissions [39] - [43])

9. It cannot have been an error for the Court of Appeal to not specifically consider the matters mentioned, as *obiter*, by Kirby A-CJ (as his Honour then was) in *R v Clout* when those matters were not specifically urged on the Court, and the decision was not placed before it. Further the comments were made in respect of an identification of a vehicle which was "crucial" in leading to a conclusion of guilt; that is not this case. (Respondent's submissions [48] – [50])

10. The appellant was a heavy gambler. In the space of just under 1 hour on 12 November 2012 he lost a little over $1200. There is nothing to suggest that this was an unusual level of gambling and the evidence reveals he was in the TAB on the 9th

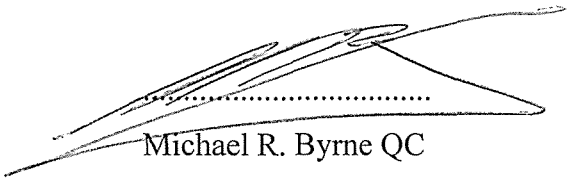
and 10th November 2012 for just under 2 hours on each occasion. The financial analysis shows that, particularly for the period commencing 1 November 2012 he was withdrawing significantly more cash than was coming into his accounts. There is no explanation for this expenditure other than gambling. The extent of the gambling combined with the loss of income to the already meagre income was relevant to assessing the likelihood that the appellant had in fact stolen money from the woman he had been helping for about 12 months prior. (Respondent's submissions [26]-[30].

11. The motive asserted by the prosecution was related to the asserted theft of $5000 from the $8000 withdrawal performed by the appellant on 2 December 2012. Whilst it cannot be known whether in fact the deceased woman was aware of this discrepancy at the time of her death, there was at least a real risk that he would be confronted by her over it, eventually if not presently. The conclusion at CAB 78 [86] that there was an evidential basis for concluding that the appellant had stolen at least $5000 and was at risk that the theft would soon be discovered was open. (Respondent's submissions [34])

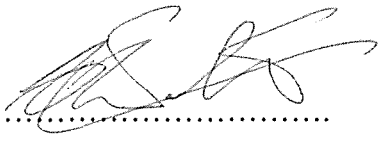
12. Whilst it is accepted that there is a factual error in the statement of evidence at CAB 64 [19], it is of no moment and does not appear to have materially affected the conclusion reached. (Respondent's submissions [35])

13. The respondent abandons reliance on the "proviso" referred to in the written submissions. (Respondent's submissions [58]-[59])

Dated: 11 September 2019



Michael R. Byrne QC



Clayton Wallis