IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

No. B60 of 2019

BETWEEN:

EAMONN CHARLES COUGHLAN
Appellant

and

THE QUEEN
Respondent

APPELLANT'S REPLY

1. Under the heading **"The Crown Case"** the Respondent sets out five propositions, to which it refers as "broad bodies of evidence."[1] For ease of reference, they are set out verbatim:
    a) Opportunity – the appellant's presence at the scene of the explosion;
    b) The cause of the explosion being from a build- up of vapours like gas or petrol;
    c) Petrol residues on the appellant's clothing;
    d) Witnesses smelling petrol before the explosion; and
    e) Flight and false alibi.

2. To these claims the Appellant replies:

    a) The Appellant's mere presence at the scene of the explosion is logically neutral and, by itself, is as probative of victimhood as guilt. To establish opportunity, the Crown needs to establish opportunity to do what, on the Crown account, is alleged to have occurred. The Crown asserts that the Appellant caused his house to explode by distributing large quantities of petrol around his house and igniting that petrol when it had sufficiently evaporated to give rise to a massive gaseous explosion.[2] There is no evidence alleging when or how the Appellant obtained the putative petrol (or how he managed to transport it to the house)[3] or how the Appellant got into the house (police accepted in cross-examination that he did not have the keys to the house).[4] Neither did the Crown even adumbrate a

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[1] Respondent's submissions page 13 paragraph 47
[2] Respondent's submission page 13 paragraph 47, initial sentence and b)
[3] The Crown presented no evidence of purchase of cans of petrol by the Appellant or of neighbours observing the Appellant transporting or unloading petrol. Indeed, petrol legitimately on the property had not been utilised: Respondent's Further Materials ("RFM") 476 lines 11-29 and RFM 475 lines 12-15
[4] RFM 951 lines 11-12

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scenario in which the Appellant could have ignited a large body of gas and survived.

b) The expert testimony was to the effect that the cause was unknown. Expert witness Gorman testified: *"The ignition source was unable to be determined. The first fuel ignited was unable to be determined. The cause of the fire was unable to be determined."*[5] Similarly, Spencer said he was unable to determine the ignition source or the fuel.[6] The experts did have opinions: Spencer said "*I believe*"[7] the explosion was caused by a build-up of vapours and Gorman said: "*in my experience there has to be a large amount of fuel in gaseous form.*"[8] However, Gorman could not rule out a spontaneous fire[9] or a gas bottle[10] and further noted that: "*where there's been renovation work, where there's a fuel there that can naturally heat up and then, mixed with oxygen, can ignite.*"[11] Further, she could not rule out an electrical fire,[12] commenting that an electrical fire "*certainly can*" cause *"that kind of damage."*[13] She said: "*Normally, if we can, we will get an electronic- electric safety officer to come in"* but, in this case, that did not occur.[14] Accidental causes were not ruled out.[15] Neither was use of a remote detonation device.[16] Whether a crime was committed remains unproven.[17]

c) The evidence of petrol residues on the appellant's clothes was probabilistic. "*What I could, probably, say in this case is that the tracksuit pants and the shoes were, probably, in contact with liquid petrol and the other three items were, probably, in contact with petrol vapour.*"[18]

d) The witnesses said to have smelled petrol, Patruno and Dyke, were not witnesses whom a reasonable jury could treat as reliable. Patruno admitted that the wind was blowing in the wrong direction to carry such a

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[5] RFM 755 lines 9-12
[6] RFM 760 lines 1-8
[7] RFM 760 line 8
[8] RFM 748 lines 40-41
[9] RFM 749 line 44 to 750 line 2
[10] RFM 750 lines 30-33. A barbecue was present: RFM 763, lines 35-40
[11] RFM 744 line 46-47
[12] RFM 749 lines 4-5
[13] RFM 749 lines 15-17
[14] RFM 749 lines 9-13
[15] RFM 768 lines 1-4
[16] RFM 777 lines 10-19
[17] We note that the commission of a crime needs to be proved to a "*moral certainty*" to avoid the *melancholy experience of the conviction and execution of supposed offenders charged with the murder of persons who survived their alleged murderers*: *Peacock v The King* (1911) 13 CLR 519 at 628, per Griffith CJ adopting "Starkie on Evidence" (1842) p. 574, O'Connor J concurring on this point at 661
[18] RFM 501 lines 1-4

smell.[19] Dyke agreed that he had given a different version of his story in an earlier statement and pleaded a recall problem.[20] Patruno did not give a statement to police until two years and four months after the incident, saying he was persuaded to give the statement because of "*The fact that Ben was having trouble with – Mr Weare - sorry – was having trouble with the evidence.*"[21] He also stated that he believed investigating officer Weare was *trying to make sure we are safe and nothing happens to us.*[22] Patruno and Dyke both had convictions including drug dealing.[23] Asked in the second trial (2017) whether Weare had promised him he would not be charged with anything, Patruno replied: "*I cannot recall,*" though, by the third trial (2018), during which, on at least one occasion, Weare gave him a lift into court,[24] his recall had improved to the extent that he was able to make a confident denial.[25] No other witness corroborated Patruno's "*shitload of petrol*":[26] unsurprisingly, since expert witness Gorman said that persons, even if (as the Appellant was), on the scene for an hour, would not necessarily smell petrol if doors and windows were closed.[27]

e) Like his presence at the explosion, the Appellant's flight from the scene is as probative of victimhood as it is of guilt. He said he thought someone was trying to kill him.[28] In the circumstances of the blast and his injuries,[29] this is not unreasonable.[30]

As to the allegation of a false alibi, this has not been suggested previously. The appellant made no claim to be elsewhere. He stated clearly and consistently that he was there. If the Crown is referring to the Appellant, while in hospital receiving treatment for third degree burns, and heavily medicated including with drugs that affected the memory,[31] and whose appearance to police earlier that day was consistent with his being scared and in shock,[32] not remembering where his car was, this is not a false alibi.

The Crown says that the appellant had "*parked his own car within view of CCTV cameras ... giving the impression that he was far from Bribie Island in the lead up*

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[19] RFM 183 line 45 to RFM 184 line 10
[20] RFM 231 lines 39-45
[21] RFM 177 lines 1-8
[22] RFM 176 lines 1-4
[23] Patruno - RFM 188 lines 40-44, Dyke- RFM 320 lines 37-40
[24] RFM 962 line 25
[25] RFM 174 lines 40-44
[26] RFM 184 line 14
[27] RFM 752 lines 9-18. We note the prosecution case theory requires the doors and windows to be sealed to allow a build up of gases.
[28] RFM 1161 lines 20-24, RFM 384 lines 37-39, RFM 46 lines 34-41, RFM 998 line 41
[29] RFM 1138 line 20 to RFM 1139 line 23
[30] RFM 1234 lines 49-55 RB 1135 lines 53-55
[31] RFM 717 lines 36-43
[32] RFM 374 lines 40-45

to the fire."[33] The inference is baseless. The boat owning[34] Appellant rode past the very obvious CCTV cameras on Bribie Island Bridge on a motorbike advertised for sale on Gumtree.[35] This could not be thought to be a clandestine journey.

3. The Crown accepts, at various points, that propositions that constitute its case are based on qualified opinions[36] or merely probabilistic propositions.[37] Indeed, the Crown appears to accept that[38] uncertainty surrounds each piece of its circumstantial case. Nonetheless, Crown repeatedly asserts unproved factual propositions as established fact. These include "*The appellant's clothes had petrol on them*";[39] "*for such an explosion to occur there had to be a large amount of fuel in a gaseous form from an ignitable liquid like gas or petrol*";[40] and "*Two witnesses, Dyke and Patruno, who arrived at a neighbouring house shortly before the explosion, smelt petrol.*"[41]

4. The Crown also asserts that the doubts and qualifications that attach to any particular proposition can be removed by invoking the authority of the others. "*The uncertainty that may attach to a particular piece of evidence can disappear when considered with other evidence*".[42] The Crown asserts that such reasoning also *works the other way*. The Respondent argues that, if one dubitable proposition is considered in the light of another, the second will confer both plausibility and render both propositions true.

5. While it is true that the weakness of one (inessential) piece of circumstantial evidence may not be fatal to a Crown case, the loss of key aspects (cause of fire; motive; scientific evidence linking accused to fire; failure to exclude innocent explanations for possible residues) cannot be ignored in considering whether a verdict is safe. The loss of a key element of a circumstantial case is fatal unless:

    i. Guilt is *"the only inference open to reasonable men upon consideration of all the facts in evidence*"[43] and
    ii. All of the propositions relied on are "strands in a cable" rather than "links in a chain."[44]

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[33] Respondent's submissions page 12 paragraph 45.
[34] RFM 473 line 6
[35] RFM 1004 lines 1-2
[36] Respondent's submissions page 2 paragraph 7: "*While the site was too damaged for experts to examine it more closely ...*"
[37] Respondent's submissions page 13 paragraph 51
[38] Respondent's submissions page 6 paragraph 21
[39] Respondent's submissions page 5 paragraph 16 g). The Respondent also treats this as an established fact in its reasoning at page 8 paragraph 30
[40] Respondent's submissions page 2 paragraph 7 b). The respondent also treats this as an established fact at page 8 paragraph 30
[41] Respondent's submissions page 4 lines 16-18. The respondent also treats this as an established fact at page 5 paragraph 16b), page 5 paragraph 16c), and page 8 paragraph 30
[42] Respondent's submissions page 8 paragraph 31
[43] *Peacock v The King* (1911) 13 CLR 619, 661. We note that the respondent actually cites this passage at Respondent's submissions page 9 paragraph 36

6. As to 5(i), another inference that must be excluded is that the Appellant was not the perpetrator but the victim of a malicious arson or an accidental explosion. The requirement that a hypothesis consistent with innocence must rise above mere conjecture or speculation[45] has little role to play where the proposition (innocence) is the fundamental matter which the Crown must exclude to establish its case.

7. For completeness, in respect to 5(i) above, it may be noted that the Crown, echoing the Court of Appeal,[46] seeks that the Appellant be judged on the basis of whether his account (in this instance his account of why he was at his house) was "*compelling*."[47] But the only evidence there is, including his own interview with police, supports his account. He said he was there to sell a motorbike which was indeed for sale on Gumtree, to a man who presented as a local,[48] a detailed description of whom the Appellant gave to police.[49] The Crown, having elected not look for this person of interest cannot complain of an evidentiary vacuum on the subject. Nor is it relevant to assert, generally, that "*The appellant's account might reasonably have been seen to contain elements of implausibility such that it need not have been generally accepted by the jury.*"[50] While the Appellant's account is, indeed, plausible, the relevant matter is that the Crown failed to exclude the rational hypothesis that the explosion was caused by some agency other than the Appellant.

8. As to 5(ii) above, the Crown asserts that none of the propositions on which it relies are "links in a chain".[51] This is not correct. The Crown needs to prove that the explosion was deliberately lit, using petrol, and that the Appellant's clothes contained petrol residues that did not result from innocent contact with petrol. Any failure of proof with regard to any of those elements leaves a gaping hole in the Crown's circumstantial case. Each such element is a link in the chain of proof.[52]

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[44] *Shepherd v The Queen* (1990) 170 CLR 573, per Dawson J at [5]: the Crown's proposition that one uncertain fact may make another uncertain fact more certain (set out above at [4]) is analogous to the blood in the Chamberlain car becoming foetal blood because of another piece of unrelated evidence relied upon in the case against the Chamberlains.

[45] *R v Coughlan* [2019] QCA 65 at [398], cited in the Respondent's Submissions at page 8 paragraph 27

[46] *R v Coughlan* [2019] QCA 65 at [296]

[47] Respondent's submissions page 12 paragraph 44

[48] RFM 1204 lines 36-7

[49] RFM 1205 lines 30-43

[50] Respondent's submissions page 5 paragraph 17

[51] Respondent's submissions page 8 paragraph 29

[52] Where propositions are truly analogous to strands in a cable, it may be argued that, if you do not accept proposition A, it is of no matter because the other propositions (of which you will be satisfied) will be sufficient to establish guilt beyond reasonable doubt. The approach that, if the evidence does not satisfy you in respect of proposition A or B, nonetheless, you can be satisfied of both of them because they are not alone, is novel.