

BETWEEN:



DANIEL GLENN FITZGERALD

Appellant

and

THE QUEEN

Respondent

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APPELLANT'S SUBMISSIONS

Part I: Certification re Internet Publication

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

20 **Part II: Issues**

2. Is DNA evidence alone sufficient to establish both presence and participation for the purposes of joint enterprise liability beyond a reasonable doubt in circumstances where the issue is not whether there is a match but when and how it got there?
3. Was it unreasonable to convict the appellant in circumstances where an expert called by the prosecution to give evidence about DNA testified that:
 - 3.1. the science concerning "secondary transfer" of DNA was in its infancy;
 - 3.2. there were no statistical studies about the frequency of its occurrence;
 - 3.3. in her reading of scientific literature, some put it at 1%, others 5%, and others higher;
 - 30 3.4. "secondary transfer" might occur through a handshake;
 - 3.5. it was not possible to date the DNA found; and
 - 3.6. secondary transfer of DNA was possible in this case.

such that there was a reasonable hypothesis consistent with innocence.

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Part III: Judiciary Act 1903, s 78B

4. Consideration has been given to the question of whether any notice should be given in compliance with section 78B of the Judiciary Act 1903 with the conclusion that this is not necessary.

Part IV: Report of reasons for judgment

5. This appeal is from a decision of the South Australian Court of Criminal Appeal, reported at *R v Sumner; R v Fitzgerald* (2013) 117 SASR 271 (**Judgment**). That was an appeal against conviction by jury verdict.

Part V: Relevant facts

- 10 6. The applicant (**Fitzgerald**) was jointly charged (with **Grant Sumner**) on Information with one count of murder and a second count of “aggravated causing serious harm, with intent to cause serious harm” contrary to ss 11 and 23(1) respectively of the *Criminal Law Consolidation Act 1935* (SA) (“CLCA”).¹
7. The prosecution case was that both accused were part of larger group of men that, in the early hours of 19 June 2011, attacked and killed one person (Kym Bruce Drover) and seriously injured another person (Leon Karpany) in a house on Hogarth Road, Elizabeth South in South Australia.²
8. It was not part of the prosecution case that either Sumner or Fitzgerald did the actual killing.³
- 20 9. The prosecution called a number of eyewitnesses to the attack.⁴ None of the eyewitnesses identified Fitzgerald as being present during the crimes.⁵

The didgeridoo

10. The prosecution alleged that the evidence of Fitzgerald’s presence at the crime scene was established by the presence of his DNA in one mixed sample (“3.B”) found on a didgeridoo, which didgeridoo also had the DNA of the deceased on it (see also 13.1 below).⁶

¹ Section 23 of the Criminal Law Consolidation Act 1935 (SA) provides as follows:

(1) A person who causes serious harm to another, intending to cause serious harm, is guilty of an offence.

Maximum penalty:

(a) for a basic offence - imprisonment for 20 years;

(b) for an aggravated offence - imprisonment for 25 years.

² Judgment at [10].

³ Summing up of trial Judge at pp. 7, 13.

⁴ N.L. Wanganeen, K.R.Oats, N.A. Fidler, S. J. Drover, L.P.L. Webb, D.J. Webb.

⁵ Exhibit P44 (Agreed Facts), [8]; Judgment at [82].

⁶ Judgment at [16].

11. Evidence was given that the didgeridoo had been acquired in 2009 by Wayne Goldsmith, the father of the children of Nardene Wanganeen (the aunt of the deceased, and the tenant of the Hogarth Road house).⁷

12. There was no evidence given as to when or how Fitzgerald's DNA got on to the didgeridoo. No witness said it was used in the attack on the occupants of the house. No eye witness identified Fitzgerald as being present⁸.

13. Evidence was given by the sister of the deceased, Leticia Webb that:

13.1. The didgeridoo had been played by the deceased at the Hogarth Road house earlier that day, at around 5pm.⁹

10 13.2. During the incident, she grabbed the didgeridoo from next to the freezer in the kitchen and held it to defend herself.¹⁰

13.3. She did not hit anyone with the didgeridoo, but put it down against the wall next to the freezer when she was told to do so.¹¹

13.4. She remained in the kitchen while the intruders ran into the living room,¹² and she did not see any of the intruders take the didgeridoo into the living room.¹³

13.5. The intruders were inside the house for only a few minutes.¹⁴

Expert evidence

14. At the trial, a Dr. Henry gave evidence for the prosecution about DNA to the effect that:

20 14.1. DNA identification is expressed in terms of the chance that the DNA identified is that of the person concerned and not that of another person ("the likelihood ratio"¹⁵);

14.2. there is a difference between "primary" and "secondary" transfer. Primary transfer occurs when a person's DNA is placed on a thing or object by that person; secondary transfer occurs, when the first person's DNA is placed on a thing or object by a second person;¹⁶

⁷ T194.32.

⁸ Judgment at [82].

⁹ T597.27.

¹⁰ T590.17; T597.10-T598.23.

¹¹ T591.3-T592.2.

¹² T594.9

¹³ T621.4.

¹⁴ T594.22. See also T184.33 (Nardene Wanganeen gave evidence that "everything just happened real fast").

¹⁵ T833.28.

¹⁶ T869-870.35-38.

14.3. The DNA found on the didgeridoo (“sample 3.B”) contained a mixed profile of “major” and “minor” contributors;¹⁷ Fitzgerald’s DNA was the “major”, but an unknown source was the “minor”;¹⁸

14.4. Dr. Henry was unable to say with any confidence how the DNA was placed on the didgeridoo and said that it was not possible to determine its age;¹⁹

14.5. secondary transfer of DNA can occur through a handshake;²⁰

14.6. secondary transfer of DNA is still possible after a few hours;²¹

14.7. secondary transfer of DNA is less likely than primary transfer;²² and

10 14.8. it was possible that DNA could have been transferred to the didgeridoo by secondary transfer.²³

15. Fitzgerald’s counsel cross-examined Dr. Henry and established the following:

15.1. Fitzgerald was excluded from all of the other DNA results including some from the didgeridoo, with the exception of the one sample “3.B” and the DNA on sample “3.B” could have been blood or something other than blood;²⁴

15.2. the understanding of how secondary transfer occurs is in its infancy²⁵ and the occurrence of secondary transfer was not based upon scientific statistics but upon her reading of its occurrence in [scientific] papers in which it was postulated that it was 1% to 5% and some put it higher;²⁶ and

20 15.3. it was possible that the accused Fitzgerald’s DNA was transferred on to the didgeridoo.

15.4. DNA can accumulate over a period of time and it is not possible to date when particular DNA was transferred to an item.²⁷

15.5. it was possible that the DNA in sample “3.B” derived from a source other than blood.²⁸

The movements of Sumner on 18 June 2011

¹⁷ T860.18-25.

¹⁸ T865.16-26.

¹⁹ T862.32-36.

²⁰ T870.1-10.

²¹ T871.12-29.

²² T871.30-38.

²³ T872.1-14.

²⁴ T907.1-13.

²⁵ T912.19-22.

²⁶ T922.1-11.

²⁷ T903.16; T913.21.

²⁸ T907.14; T910.16.

16. Evidence was given that, on the evening of 18 June 2011 Sumner and Fitzgerald both attended an amateur boxing tournament held at the West Adelaide Football Club.²⁹
17. At the boxing tournament, Sumner shook hands with and put his arm around Fitzgerald to greet him.³⁰ Sumner again shook Fitzgerald's hand upon leaving the tournament.³¹
18. Sumner gave evidence that he did not know Fitzgerald very well, and the two had only met seven or eight times previously; both Fitzgerald and Sumner trained at the same gym.³²
- 10 19. Sumner testified that, after leaving the boxing tournament, he dropped his cousin off at an 'On the Run' petrol station on Churchill Road, after which Sumner was himself dropped off at the Hogarth Road house.³³ The Hogarth Road house was rented by Sumner's aunt.
20. Sumner gave evidence that he had been on good terms with his aunt, that he had previously lived nearby and that he had attended at the house previously.³⁴
21. During Sumner's visit to the Hogarth Road house, he spent a portion of the evening sitting on the freezer in the kitchen, because there were not enough chairs.³⁵
22. During the course of the evening Sumner was 'sparring' or play fighting with the deceased (Kym Bruce Drover) in the kitchen, ending in Sumner pushing the deceased into the kitchen wall, leaving a hole.³⁶

Directions to the jury

- 20 23. The trial judge gave directions to the jury on the elements of the offences and on the elements of joint enterprise liability.
24. On the DNA evidence, the trial judge largely referred to parts of the expert's evidence about the "likelihood ratio",³⁷ the handshake example, primary transfer, secondary transfer, "major" and "minor" contributors³⁸ and the possible sources of DNA.³⁹
25. Both Fitzgerald and Sumner were convicted by a jury of both counts and both appealed against their convictions.
26. Fitzgerald appealed to the Court of Criminal Appeal (the court below). Relevantly, Fitzgerald's primary ground of appeal to the court below was that the verdict was unsafe or unreasonable and was not supported by the evidence.

²⁹ T1033.11-16.

³⁰ T1155.20; T1195.30

³¹ T1196.4.

³² T1155.15.

³³ T1157.26 – T1158.16.

³⁴ T1150.21; T1158.20; T1200.12.

³⁵ T253.8; T1163.35

³⁶ T315.1

³⁷ Summing up of Trial Judge at p.71.

³⁸ Summing up of Trial Judge at p.77.

³⁹ Summing up of Trial Judge at p.81.

The Court below

27. The Court of Criminal Appeal (the court below) dismissed the accuseds' appeals.

28. On the first count, murder, Gray and Sulan JJ considered that the presence of Fitzgerald at the crime scene was established by the DNA evidence and considered that there was no other reason for a person to be present "except to participate in the implementation of an agreement".⁴⁰

10 29. Gray and Sulan JJ (with whom Blue J agreed) also considered that Dr. Henry's opinion was that secondary transfer in the present case was "very unlikely".⁴¹ Their Honours described what they considered to be the hypothesis advanced by Fitzgerald as to how his DNA may have got on to the didgeridoo and went on to state that the hypothesis depended upon the occurrence of a "succession of unlikely events"⁴² and, in effect, considered that Dr. Henry's evidence concerning secondary transfer supported the unlikelihood of each step in that succession of events. Their Honours asserted that the transfer of DNA by a handshake is "comparatively rare".⁴³

30. With respect, the hypothesis postulated by the court below as to how Fitzgerald's DNA may have ended up on the didgeridoo⁴⁴ (namely, that the DNA could only have been transferred via Sumner at the time the home intruders attended at the Hogarth Road house at about 6am) did not reflect the facts about which Dr Henry had been asked to speculate.

20 31. Further, and with respect, the evidence of Dr. Henry did not support the views expressed by their Honours as to the rarity of secondary transfer by handshake or the likelihood or otherwise of secondary transfer in the circumstances of this case.

Part VI: Argument

32. The Court in this appeal must apply section 353 of the *Criminal Law Consolidation Act 1935* (SA) (see below). This has the effect of requiring the conviction to be set aside if, inter alia, it is unreasonable or cannot be supported having regard to the evidence or if there is a reasonable hypothesis consistent with innocence.

30 33. The verdict of the court below was unreasonable as it cannot be supported having regard to the evidence, and there were also at least two reasonable hypotheses consistent with innocence.

Insufficiency of evidence

34. *First*, there was no evidence that the appellant was present at the crime scene during the crime (or, indeed, at any time).⁴⁵ The one small DNA sample from the didgeridoo,

⁴⁰ Judgment at [62].

⁴¹ Judgment at [103].

⁴² Judgment at [106].

⁴³ Judgment at [106].

⁴⁴ Judgment at [105].

⁴⁵ Exhibit P44 (Agreed Facts), [8]; see also Judgment at [[82].

referred to by Dr Henry as “Sample 3B” could not establish the presence of the appellant beyond a reasonable doubt for the reasons set out below.

35. This is not a case involving the high statistical probability following from a DNA match. It was not disputed that the sample came from the appellant. The issue is when and how it got there. The prosecution did not seek to lead evidence excluding other occasions as to when the DNA may have got onto the didgeridoo.

10 36. *Secondly*, it had to be an indispensable step in the reasoning towards guilt of the accused by the jury that the DNA was placed on the didgeridoo *during* the attack. This was because the jury were being asked to reason from the presence of the DNA to the presence of the accused and participation. In such circumstances, the jury had to be satisfied beyond a reasonable doubt as to (at least) *when* and *how* the DNA was placed on the didgeridoo.⁴⁶ There was no evidence as to the primary facts as to when or how the DNA got onto the didgeridoo. In the absence of other evidence it is not possible to draw an inference beyond a reasonable doubt as to when or how the DNA was placed on the didgeridoo. No attempt was made by the prosecution to exclude other occasions or the possibility of secondary transfer.

20 37. *Thirdly*, and in particular, there was no evidence of motive or that Fitzgerald was a regular associate of a relevant group of people or that he had any association with the participants in the crime other than the evidence of Sumner⁴⁷ that he had previously met him on about eight occasions, and saw him by chance at the boxing match earlier that day when he shook hands with him (and other people who he ran into there). However, that chance meeting preceded what was on the prosecution case the catalyst for the attack – the fight between Sumner and the deceased some hours later – and there was no evidence of any direct or indirect communication between Sumner and Fitzgerald in the two hour period between the fight and the attack nor any other evidence to establish that Fitzgerald was aware of the alleged joint enterprise, let alone that he was invited to participate in it and had agreed to do so.

30 38. *Fourthly*, the DNA sample 3B was small and could have come from two or three different people.⁴⁸ Other samples on the didgeridoo were not Fitzgerald’s. The minor part of the subject sample 3B was not from the deceased, Karpany or Sumner.⁴⁹

39. *Fifthly*, it was not shown that the Fitzgerald sample was part of a blood sample. In fact, the evidence of the prosecution expert was that it was difficult to conclude from the yield of DNA recovered from sample 3B that the DNA came from blood,⁵⁰ and she could not rule out that the DNA came from a source other than blood.⁵¹ The suggestion by the Respondent that one can conclude that Fitzgerald’s DNA formed part of a blood sample because it was the larger part of the sample and blood is a stronger carrier of DNA is not supported by the evidence of the Crown’s expert, but is merely the Respondent putting together two unrelated pieces of evidence in an impermissible

⁴⁶ *Shepherd v The Queen* (1990) 170 CLR 573 at 579 per Dawson J.

⁴⁷ T1155.15.

⁴⁸ Sample 3B consisted of 2 separate stains, the first measuring 2mm x 1mm; the second had a diameter of less than 1mm: T859.15; see also Judgment at [85].

⁴⁹ T865.16; T904.13; T933-934; Summing Up of the Trial Judge at p.81.

⁵⁰ T906.33

⁵¹ T910.16.

way.⁵² This is particularly so in circumstances where evidence was given that the didgeridoo was usually stored in the laundry next to the washing machine,⁵³ and Dr Henry testified that the Hemastix screening test (used to identify blood) can give a false positive to substances which are not blood, including rust, soil, bleach and some vegetable juices.⁵⁴

40. *Sixthly*, the suggestion made by the Respondent that it is likely that all of the various samples of DNA found on the didgeridoo are likely to have been deposited at the same time is without foundation where the DNA is not able to be dated and there is no evidence as to how the DNA was deposited.

- 10 41. Accordingly, it is the primary submission of the appellant that, in circumstances where:
- 41.1. There is no evidence as to how and when the DNA was deposited on the didgeridoo;
 - 41.2. The didgeridoo was first acquired in 2009, some 2 years prior to the incident;
 - 41.3. It was not proven the DNA formed part of a blood sample; and
 - 41.4. It is not possible to date the DNA,
- there was insufficient evidence, or the conviction cannot be supported having regard to the evidence, to convict the appellant beyond reasonable doubt.

Hypotheses consistent with innocence

- 20 42. Furthermore, the Crown's expert gave extensive evidence, both in chief and in cross-examination, to the effect that there could be a secondary transfer of DNA through shaking hands, and that that could have occurred in this case.⁵⁵
43. It is possible that secondary transfer can occur in this way without any of the agent's own DNA being transferred with it.⁵⁶
44. This need not have occurred in this case because the appellant's DNA was part of a sample comprising DNA from 2-3 persons (none of whom were Sumner).
45. Therefore, there are at least two independent hypotheses consistent with innocence, namely:
- 45.1. that the transfer occurred through a person other than Sumner, and
 - 45.2. that the transfer occurred through Sumner who did not transfer any of his own DNA to the didgeridoo, but may have transferred Fitzgerald's DNA via the handshake earlier that evening, or a transfer at an earlier time resulting from an earlier interaction with Fitzgerald.
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⁵² T907.11; Summing Up of the Trial Judge at p.81.

⁵³ T195.17.

⁵⁴ T842.17

⁵⁵ See T1195-1197; see also, T911ff, Summing Up of the Trial Judge, p.73ff.

⁵⁶ T919-920; T930.21; T931.8.

46. Although the Crown's expert said that secondary transfer was *less likely* than primary transfer, that evidence was not based on statistics or, indeed, anything other than the fact she had seen more examples of primary than secondary transfer in the literature.⁵⁷ That evidence could not be of assistance to the jury in establishing guilt beyond a reasonable doubt as the question of fact for the jury was whether secondary transfer could be excluded beyond a reasonable doubt in the circumstances of this particular case.
- 10 47. The court below described the hypothesis consistent with innocence as an unlikely chain of events.⁵⁸ This takes no account of the possibility of transfer through a person other than Sumner or at a time other than the time of the offence on 18 June 2011.
48. The comment of the court below at [104]⁵⁹ ignores the chaotic events at the earlier visit to the Hogarth Road house, especially:
- 48.1. the deceased being pushed by Sumner into the kitchen wall and making a hole in it;⁶⁰
- 48.2. Sumner having sat on the freezer during the evening;⁶¹ and
- 48.3. Sumner drinking seven cans of vodka⁶² and his shadow boxing with persons in the kitchen.⁶³
- 20 49. The didgeridoo was in the kitchen next to the freezer.⁶⁴ It would have been natural for Sumner to have moved it or accidentally touched it, either whilst sitting on the freezer or during the melee. Neither Sumner, nor anyone else, would be likely to have noticed or have the slightest recollection if he had done so.
50. It follows that one cannot assume that Sumner transferred the appellant's DNA during the crime, rather than on the earlier visit, very shortly after the farewell handshakes.⁶⁵

Part VII: Applicable legislation

51. Section 353 of the *Criminal Law Consolidation Act 1935* (SA) is relevant to the argument in this case. It appears below in the form it took at the time of the trial and decision in the court below; it has not been materially amended since then:

353 – Determination of appeals in ordinary cases

⁵⁷ T924.16; T926.5; T928.22.

⁵⁸ Judgment at [106].

⁵⁹ The court below found there was no suggestion that, during Sumner's attendance at Hogarth Road earlier in the evening after the boxing tournament, Sumner had any contact with the didgeridoo.

⁶⁰ See Summing Up of the Trial Judge, p.53.

⁶¹ T253.8; T1163.35.

⁶² T1163.12.

⁶³ T315.1.

⁶⁴ T590.

⁶⁵ T1196.4 and T1157.26 – T1158.16.

(1) The Full Court on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal; but the Full Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

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(2) Subject to the special provisions of this Act, the Full Court shall, if it allows an appeal against conviction, quash the conviction and either direct a judgment and verdict of acquittal to be entered or direct a new trial.

Part VIII: Orders Sought

52. The appellant seeks orders that:

- (1) The appeal be allowed.
- (2) The judgment and orders of the Court of Criminal Appeal of South Australia, dismissing the appeal, be set aside.
- (3) The appellant be acquitted.
- (4) In the alternative to Order (3), that a new trial be ordered.

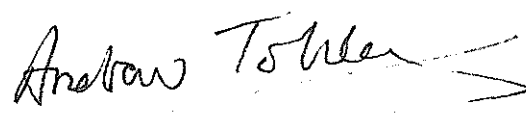
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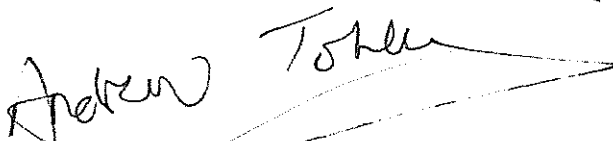
Part IX: Time estimate

53. The appellant's oral submissions are estimated to take no more than 2 hours.

Dated: 22 April 2014

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