IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY **No. B20 of 2019**

BETWEEN: **STEVEN MARK JOHN FENNELL**

Appellant

and

THE QUEEN

Respondent

RESPONDENT'S SUBMISSIONS

Part I:

1. This submission is in a form suitable for publication on the internet.

Part II:

2. The respondent contends that this appeal will be resolved by the application of well-established principles concerning the consideration of a ground of appeal alleging an unreasonable verdict on the basis that the evidence is insufficient to support the conviction.

3. A further matter to be considered by the Court will be whether the occasion has been established by the appellant to consider details of an asserted error by the intermediate appellate court which was not raised before that Court.

Part III:

4. The respondent has considered whether notice should be given in accordance with section 78B of the *Judiciary Act* 1903. No notice has been given.

Part IV:

5. The appellant's chronology is acknowledged. Additionally the following events are submitted to be relevant:

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Saturday 10 November, 2012		
About 1.30pm	Pauline Jensen located a blue toiletries bag in mangroves at Thompson's Point. She saw it held a rock and Westpac documents which bore the name "L. Watson". She handed it to police.	AFM 528-534; Exhs 1, 71 & 72 – RFM 7, 72 & 74.
Sunday, 11 November, 2012		
Between about 7:00am and 8:00am or around 9:00am to 9:30am	Steven Fennell attended John Jackson's house. He arrived on his red scooter and remained there for half an hour	AFM 378-379 AFM 381
About 10:00am	Loretta McKie attended the house of the deceased and stayed for about half an hour	AFM 212.11-.17
Around 4:00pm	Ulla Doolan saw the deceased in her yard feeding birds. Shortly afterwards she saw the appellant deliver pamphlets to the deceased's residence and he did not stop in for any length.	AFM 217.6-.13 AFM 217.15-.31
Monday, 12 November, 2012		
Approximately 6:45am	Carol Bowen delivered a paper to the deceased's residence. The blinds were down and the door was shut.	AFM 197.24 - .43
6:45:48	Fennell internet usage commences. Website logged into as "Steven" at 7:03:09am. Website accessed by "Steven Fennell" at 7:11:02	Exh 68 - AFM 961; AFM 486.29 - .42
7:45:28am	Website logged into with username "Steven"	Exh 68 - AFM 961; AFM 486.44 – 489.6

7:47:16am	Internet article "Weird places people hide money around the home" accessed.	Exh 68 - AFM 961; AFM 487.21
8:36:07am	Yahoo mail logged into with username "Steven".	Exh 68 - AFM 961; AFM 488.42 - .48
9:29:28am	The first unanswered call made to the deceased's house.	Exh 70 - AFM 972
Late morning before lunch	John Cooper hears a woman screaming either on 12 or 13 November. Some people who lived in the area were in the habit of yelling and screaming. In cross examination, it could have been either 11 or 12 November.	AFM157 AFM 159
Between about 3:49pm and 4:43pm.[1]	Steven Fennell was present at Pub Paradise placing 12 bets at the TAB for a total expenditure of $1357.10.	Exh 67–RFM 45-70;[2] AFM557-558;
6:11:07pm	Fennell internet usage begins	Exh 68 - AFM 962; AFM 484-496
6:22:39 pm	Logged into LinkedIn as "Steven Fennell"	Exh 68 - AFM 962
6:34:45pm	Fennell internet usage pauses	Exh 68 - AFM 962
7:08:51pm	Fennell internet usage resumes	Exh 68 - AFM 962
7:25:26pm	Fennell Internet usage ceases.	Exh 68 - AFM 962
Around 10pm	Mary Roberts retired to bed	AFM 276
Tuesday, 13 November, 2012		
2:40am	Mary Roberts awoke to hear dogs barking, then a "murmur" by a male on Michael	AFM 276 – AFM 278

[1] The appellant suggests at footnote 6 of his chronology that the times that appellant was at the Pub Paradise TAB cannot be stated with accuracy. Cross matching the still images in Exhibit 67 with the times recorded by the TAB (evidence of Bronwyn Richardson AFM 557-558) demonstrates, allowing for the fact that the images do not show the precise moment that the respective TAB slips are processed by the machine, that the timer on the CCTV is ahead of the time recorded by the TAB records by roughly 40-45 seconds. The evidence was led on this basis at trial.

[2] Note that the image at RFM 57 is a duplication of the image at RFM 55.

	Street, then further barking before hearing a car.	
Approximately 7:00am or "a little earlier"	Carol Ann Bowen delivered a paper to the deceased's residence. The blinds were down and the door was shut but, unusually, the screen door was open. The paper delivered the previous day was not there, nor was a tin.	AFM 198
Between about 8:30am and about 9:30am	Steven Fennell spoke on the phone to Mr Whitfield.	AFM 499.30-.35
Approximately 10:55am	Steven Fennell attended the Capalaba Motorcycle Centre and left his motorbike to be serviced. He collected it and left between about 12.10pm and 12.20pm.	AFM 501.4-.38
Thursday, 15 November, 2012		
About 2:00pm	Police located the Translink wallet, purse and hammer at Thompson Point.[3]	AFM 539.27 – 545.22; Exhs 1 & 73-76 – RFM 7 & 77-83.

Part V:

Some of the Applicable Legal Principles

6. The respondent acknowledges the applicability of the principles, and cases cited, at paragraphs 13 and 14 of the appellant's submissions. It is also to be noted that under the presently relevant ground of appeal, "*the Court is to make 'an independent assessment of the evidence, both as to its sufficiency and its quality'* ".[4]

7. The respondent does not accept that the observation cited in paragraph 14 of the appellant's submissions is of limited relevance in the present matter. It is fundamental to the jury's function that they assess the witness; not just what is said but also how it is said and their physical demeanour overall. A number of witnesses' observations and evidence are

[3] This entry is found in the appellant's chronology, however corrections to that entry are made herein.

[4] *SKA v The Queen* (2011) 243 CLR 400, [14], [20]-[24].

potentially in conflict with that of other witnesses in this matter and so this is a potentially important factor. A "convincing but mistaken witness" may be the appellation attached to any class of witness. That possibility must be taken into account, but it does not mean that the appellate Court should not afford appropriate respect for the role of the jury, and the force of their verdict. In fact, it must.

8. The fundamental importance of the jury, the respect that an appellate court will have for the jury's verdict and the particular regard had for the advantages enjoyed by the jury were noted more recently by this Court in *The Queen v Baden-Clay.*[5] The Court there also noted the task of the jury in a circumstantial case, and hence the task of the appellate court in considering a ground such as the present.[6] In particular at [47] the Court stated:[7]

> "For an inference to be reasonable, it "must rest upon something more than *mere conjecture*. The bare possibility of innocence should not prevent a jury from finding the prisoner guilty, if the inference of guilt is the only inference open to reasonable men upon a consideration of all the facts in evidence" (emphasis added). Further, "in considering a circumstantial case, *all of the circumstances* established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence".(emphasis added). The evidence is not to be looked at in a piecemeal fashion, at trial or on appeal." (*emphasis in original, footnotes omitted*)

9. In the circumstances of this case, any matters that permitted an inference that someone other than the appellant murdered the deceased must *require* that conclusion before the verdict of the jury can be properly called unreasonable and overturned.[8]

The Response

10. The only issue at trial was whether the prosecution had proven beyond reasonable doubt that the appellant was the person who had murdered the deceased. Broadly, the prosecution case against the appellant substantially rested on three areas of evidence.

    a. Opportunity,
    b. Motive, and

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[5] *The Queen v Baden-Clay* (2016) 258 CLR 308, [65]-[66].
[6] See in particular *The Queen v Baden-Clay, supra* at [46]-[48].
[7] Citing in part *The Queen v Hillier* (2007) 228 CLR 618, [46] and [48].
[8] *The Queen v Hillier, supra* at [51].

c. Other features of the evidence that pointed to or were consistent with the appellant's involvement in the killing.

Opportunity

11. The nature of the injuries suffered by the deceased was such that they were consistent with having been caused by a hammer.[9] Although the time of death could not be identified with precision by the pathologist, overall there is a compelling argument that the murder occurred on Monday 12 November 2012 at some time between about 9.45 am and about 9.20 pm that night and likely before 2.53 pm or 4.14 pm that day.[10] That conclusion is supported by:

a. When Timothy Baker and Evette Uzzell saw the deceased in her yard. She had been there for "*[m]aybe 5-10 minutes. In that range. It wasn't an extremely long time.*" prior to about 9.45am.[11]
b. The pathologist's opinion as to the likely date of death.[12]
c. Ms Roberts returned home shortly after 9.20 pm that night and noticed that no lights were on in the deceased's house, which was very unusual.[13]
d. That when Carol Bowen delivered the newspaper to the deceased's house on the morning of Tuesday 13 November, the paper she had left on the front porch the previous morning was no longer there. Neither was there then a tin at the front door.[14]
e. No phone calls to the deceased's house are answered from and including 2.53 pm on 12 November 2012, including the next one at 4.14pm.[15]

12. That the deceased was found wearing a nightdress does not detract from this conclusion. It is consistent with the clothing she was seen to be wearing by Timothy Barker at about 9.45am,[16] and the deceased's GP noted that during home visits in 2012 the deceased would, on occasions, still be wearing a nightdress when the doctor arrived, in the mornings.[17]

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[9] *R v Fennell* [2017] QCA 154, [30] & [84] at CAB 66 & 78.

[10] Gotterson JA expressed it in terms of evidence providing "*a basis for the jury to conclude that the deceased was killed by hammer blows to the skull in the late morning or early afternoon of Monday 12 November 2012*" – *R v Fennell, supra* at [83] – CAB 77-78. (see also at [32] – CAB 66.)

[11] AFM 184.29-185.16 and AFM 314.16 – 316.4; *R v Fennell, supra* at [33] – CAB 67.

[12] *R v Fennell, supra at* [31] at CAB 66.

[13] *R v Fennell, supra* at [34] at CAB 67.

[14] *R v Fennell, supra* at [32] & [61] at CAB 66 & 72; AFM 198.35 - .40

[15] *R v Fennell, supra* at [34] & [83] at CAB 67 & 77-78; Exhibit 70 - AFM 973. There is also an unanswered call at 9.29 am. It is likely this was unanswered because, according the testimony of Ms Uzell footnoted above, the deceased was probably in the yard at that time.

[16] AFM 574.1

[17] AFM 385.1 line 44

13. It can be accepted that the appellant was on the computer at home on the Monday morning, especially given the prosecution tendered an admission to that effect.[18] This provides some support for the timeline of movements and his accounts provided by the appellant to police, but in that respect only.

14. The appellant's accounts had been introduced into evidence and the jury were directed that they could accept or reject all or part of those accounts.[19] More precisely, it was open to the jury to afford those parts of that account that were not supported by reliable evidence less weight than they might have otherwise done should they so choose, and that approach was open to the Court of Appeal.[20] Many of the appellant's submissions in this Court implicitly suggest that the appellant's accounts must be accepted. This is not the case.[21]

15. As Gotterson JA noted at [59] (CAB 72) some of the appellant's asserted movements on 12 November were uncorroborated. Also some were supported only by the testimony of his wife, and that too was susceptible of rejection.

16. First, there is the period between about 9.30am[22] and about 12.30pm. The jury were entitled to have regard to the evidence of Mark Robinson regarding seeing the appellant's utility outside the deceased's house. It was problematic, but the jury were instructed about it and they were entitled, if they chose, to have regard to it.[23]

17. Secondly from whenever the appellant again left the house until about 3.49pm[24]. The identification of the commencement of this time period requires some consideration.

18. Mrs Fennell's testimony and the appellant's accounts suggest he stayed home until about 2.30pm, when he said he was going to deliver a tin to the deceased's house. That a tin was located at the front door of the deceased's house after police became involved[25] supports

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[18] Exhibit 70 - AFM 966

[19] CAB 14.31 – 15.2

[20] *R v Mule* (2005) 79 ALJR 1573, [22]; [2005] HCA 49.

[21] At paragraph 65 of the appellant's submissions, he complains about submissions made by the prosecutor at trial about the omission of the appellant to mention his attendance at the Pub Paradise TAB on 12 November 2012. This was a legitimate submission, given that the jury were not required to accept the truth of the diary. Notably it was not relied on as a lie probative of guilt, and the jury received no such direction. The submission was relevant to an assessment of credit only. Contrary to the appellant's submission at paragraph 66, the trial prosecutor's submission only underlined the unlikelihood that the appellant would have forgotten his attendance at the TAB, and no further.

[22] i.e, immediately after the unanswered phone call from the appellant's house to the deceased's house at 9.29 am.

[23] *R v Fennell, supra* at [83] at CAB 77-78. It is acknowledged that they jury were not pressed with this evidence by the trial prosecutor (AFM 767.11 - .23), but it remained open to the jury to accept it. In any event, the prosecution case did not rise or fall on its acceptance.

[24] When he is recorded on CCTV as arriving at Pub Paradise, nearby to the deceased's house.

[25] AFM.1 – 360.13; Exhibit 52 – RFM 27.

that he attended the house, not necessarily when he did. Notably Mrs Bowen did not see a tin there shortly before 7.00am on 13 November 2012.[26]

19. Ms McKie's testimony suggests that this period started a little earlier, about 2.00pm. The appellant contends in his chronology at footnote [5] there were deficiencies in Ms McKie's testimony. Of note she testified to having seen only one person on the Island deliver *"junk mail"* who rode a *"little red bike...like a postie used to use"*[27]. She described the person she saw on 12 November as the same person who attended the deceased's residence in the preceding 12 months daily, sometimes twice daily.[28] Although Ms McKie did not know that person's name, and had never spoken to him, the deceased had told her that "*he'd do her shopping and her banking and that for her and keep an eye on her ...*".[29] There is no evidence to suggest that this could be Mr Cornell or anyone else other than the appellant.

20. Her evidence was that Mr Dallas' house was between hers and the deceased but that *"from my bathroom window I had a clear view right down to [the deceased's] front gate*".[30] While the appellant contends that the *"angle was unusual"* that was not the evidence. When pressed on her ability to see,[31] she confirmed again that she could *"clearly see"* the red motorcycle which remained there for 20-30 minutes. It was open to the jury to accept the evidence of Ms McKie on this point notwithstanding other evidence suggesting that the appellant was at home at 2.00 pm. In that case, the jury may well have thought that a period of about 30 minutes was too long to knock on the door, realise that no-one was at home and leave the tin, and that something else happened during his attendance.

21. Thirdly, the jury could have considered that there was another unaccounted for period between about 4.43pm[32] and whatever time they accepted the appellant arrived at Linda and Walter Crook's house.

22. Fourthly, it was open to the jury to accept that Ulla Doolan saw the appellant arrive at the deceased's house in his utility at about 6.00pm, and that what she thought was the same vehicle left about 7.30 pm.[33] That would require the rejection of Mrs Fennell's evidence about this period. It was open to do so. It was clear that Mrs Fennell's account was arrived

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[26] See footnote 14.
[27] AFM 204.7-.21.
[28] AFM 204.23-.37, 205.5-.21.
[29] AFM 204.33-.40
[30] AFM 205.32.
[31] AFM 210 by reference to exhibit 43.
[32] When the appellant is seen to leave Pub Paradise on the CCTV.
[33] The actual evidence is in contrast to the appellant's submission at paragraph 34.

at through a process of collaboration[34] with the appellant and the fact that Ms Doolan described seeing the distinctive marking on the back of the appellant's utility which she identified on Exhibit 2.[35] Further reason to doubt the veracity of Mrs Fennell's evidence arises if the jury accepted the separate evidence of Walter Crook[36] and Emma Watson,[37] as they were entitled to do, that the tin was not used to keep cake or biscuits by the time of the death, but rather large amounts of cash, and the evidence of Ms McKie that the deceased had stopped baking for at least the previous 12 months.[38]

23. Contrary to the appellant's submission,[39] the Crown case theory did not limit itself to the time of death being between 2.00pm and 2.20 pm. Those time frames referred to by the appellant were raised simply as a possibility on the evidence. The trial prosecutor submitted that the jury would infer that the death occurred "*at least by 2.53 or 4.14 in the afternoon*".[40] Even had it been so limited, the jury – and in turn the Court of Appeal – was not bound by how the prosecution conducted the case.[41] There were a number of periods of time that the appellant could conceivably have attended the house, both when the killing occurred as well as to search and/or clean the premises.

Motive

24. Evidence of the relationship between the deceased and the appellant was important to assist the jury to assess the probability of a fact in issue being proven or not.[42] The evidence termed as motive was led in this trial so that then jury could assess "*[t]he relations of the murdered ... [person] to his [or her] assailant, so far as they may reasonably be treated as explanatory of the conduct of the accused as charged in the indictment*".[43]

25. The prosecution contended that the appellant had stolen money from the deceased, namely the disputed amount of $5000 from the otherwise properly conducted withdrawal of 2 November 2012.[44] Gotterson JA at [86] (CAB 78) correctly described the asserted motive

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[34] On the appellant's own account she had assisted him to compile the timeline.
[35] AFM 218.19 – 220.10; Exhibit 2 – RFM 10-13.
[36] *R v Fennell, supra* at [40] at CAB 68.
[37] *ibid*
[38] *R v Fennell, supra* at [39] at CAB 68.
[39] Appellant's submission at paragraph 32.
[40] AFM 764.37
[41] *Williams v Smith* (1960) 103 CLR 539, 545; *Stevens v The Queen* (2005) 227 CLR 319 per McHugh J at [29].
[42] *R v Heath* [1991] 2 Qd. R. 182, 204.
[43] *R v Bond* [1996] 2 KB 389 at 401 cited in *The Queen v Baden-Clay, supra* at [67].
[44] The appellant's contention at footnote 66 of the submission that the Crown position changed in relation to the previous withdrawal is not accepted, and is not borne out by the cited passage.

as being the "*risk that his theft would soon be discovered*". The use of the term "*at least $5000*" is referable to the inferences to be drawn from the possession of the biscuit tin, referred to earlier, and the finding of the purse (see below).

26. The appellant was a heavy gambler who had meagre income. The combination of the CCTV stills[45] and the evidence of Ms Richardson demonstrated that in about 45 minutes on 12 November 2012 the appellant wagered $1357.10, for a return of $149.51. There is nothing to suggest that this level of gambling was unusual.[46]

27. While the forensic accounting evidence revealed only comparatively meagre amounts of 'unsourced' income between July 2010 and November 2012[47] it also demonstrated the appellant had modest financial means from verifiable sources. The appellant's sourced income would be unlikely to maintain his level of gambling, even in combination with the quantifiable unsourced income. His wife did not know he was a gambler, and he was keen to keep that fact from her.[48] The limitations of the financial evidence were clear, but did not render the evidence so weak as to be irrelevant, nor limit its relevance to that advanced by the appellant at [46] of his submissions. This evidence was capable of bearing the weight, and satisfying the purpose attributed to it by Gotterson JA at [110]-[112] (CAB 82).[49]

28. The forensic accounting evidence also demonstrated that, overall, the level of withdrawals closely followed the level of deposits into the various accounts, especially over the previous 12 months.[50] Other evidence established that if the appellant placed a winning bet that reaped more than about $500, the proceeds would be credited to his EFTPOS account.[51] The analysis also showed that any TAB deposits were quickly withdrawn.[52] Notably there were no such deposits, and hence no such withdrawals, in November and December 2012.[53] Further, the analysis demonstrated that the combined Fennell accounts contained combined

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[45] Exhibit 67 – RFM 45-71

[46] *R v Fennell, supra* at [75] at CAB 74; AFM 441.21-.44

[47] $10,833.50; Exhibit 87 – AFM 997.

[48] *R v Fennell, supra* at [22] at CAB 65. See also AFM 297.4-.14

[49] Although this body of evidence was not expressly relied upon by Gotterson JA when considering ground 1 below, (and it does not appear to have been argued as directly relevant to ground 1 below) the considerations are effectively imported by his finding at [86] that there was an evidential basis for concluding that the appellant had stolen money.

[50] Exhibit 98 – AFM 1009.

[51] *R v Fennell, supra* at [75] at CAB 74.

[52] Exhibits 92 & 93 - AFM 1003 and 1004.

[53] *ibid*

accessible savings[54] of $4770.93 as at 21 August 2012. By 12 November 2012 that had decreased to $2731.27.[55]

29. The appellant submits that the analysis demonstrates that the family adjusted their spending as necessary and lived within their means.[56] Whether or not that be the case, it fails to take into account two potentially significant events that happened relatively shortly before the impugned transaction of 2 November 2012, namely

a. In August 2012 his sister told him that she would not lend him any more money.[57]

b. In the week of 22 October 2012 the appellant was told that a contract he held for the distribution of flyers for a local supermarket was to be terminated. It was worth about $347 per week, and was terminated on Monday 5 November 2012.[58]

30. The appellant correctly notes that the appellant financially benefitted from other contracts. Regardless, the loss of $347 per week from what was clearly a relatively meagre income had to hurt the family's financial position,[59] and hence impact his surreptitious gambling. His sister was no longer a potential source of relief. His wife did not know he was gambling, and he was keen to keep that from her. There was evidence that the deceased had said a few months before her death that she had lent the appellant $5000. He denied it.[60] Nonetheless there was evidence from which a jury could conclude that the appellant was financially stressed, and would be more so if he continued to gamble, as he did.

31. Contrary to the appellant's submission,[61] Gotterson JA did not understand the forensic financial analysis to establish a general absence of financial resources. The references at [24] (CAB 65) and [111] (CAB 82) demonstrated that his Honour was alive to the fact that there were financial resources available, but found that they could be understood by a jury to be such that they were unable to support the appellant's level of gambling. That is, the gambling could not be sustained by verifiable sources of income. It was open to conclude that the relatively meagre amount of unsourced income was also insufficient.

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[54] That is, not including the payments in advance on the home loan.

[55] Exhibit 102 – AFM 1013.

[56] Appellant's submissions at paragraph 51.

[57] AFM 283.26 – 284.37. It is not suggested the appellant was borrowing from his sister to fund his gambling.

[58] *R v Fennell, supra* at [22] at CAB 65; AFM 661.16 – 662.20.

[59] Note for example the balances of the Fennell Business Account in Exhibit 102 at AFM 1013.

[60] AFM 381.9-.27

[61] See paragraphs 72 and 73.

32. The sum of $8000 as a withdrawal was unusual given that on most occasions during the financial analysis period the amount was about $3000.[62] There was nothing in the evidence to directly explain why this amount was required.[63] The handwriting analysis was inconclusive but consistent with an alteration from the usual amount of $3000 to $8000. It was well open to the jury to conclude that he needed another source of money to sustain his gambling, and that he stole from the deceased.[64]

33. The evidence overall established that the deceased carefully monitored her expenditure. The bank statements located at her residence[65] included every statement between May 2010 and August 2012. Curiously the statements for September 2012 and October 2012 were not there. Referring to that curiosity did not mean that the Crown case changed mid-trial as to what was alleged to have been stolen. Rather the purpose was to highlight that it was open to conclude that it may have indicated a targeted theft rather than a random burglary.[66]

34. Many of them had hand written notations, suggesting the deceased paid a close interest in her financial affairs.[67] She had at some time, apparently shortly prior to her death, spoken to her daughter about some $200 or $300 that had gone missing, and said that she was going to speak to the appellant about it for him to "*sort it out for her*".[68] A couple of weeks prior to her passing she spoke to a neighbour about $4000 that she at that she said was missing.[69] Whether she was referring to the same to sums of money does not matter. Whether she confronted the appellant about the missing money or raised it in a non-accusatory manner, the risk of him also being confronted about the $5000 discrepancy was obvious, eventually if not presently. He must have been aware that she was likely to discover the discrepancy. He had no obvious way of making it up from his own meagre savings to rectify the situation and deflect suspicion.[70] It justified the finding by Gotterson at [86] (CAB 78).

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[62] *R v Fennell, supra* at [23] and footnote 18 at CAB 65; Exhibit 100 - AFM 1011.

[63] The appellant has suggested an explanation at paragraph 56 of his submissions. This could properly have been discounted by the jury given that Ms McKie saw a discussion with apparent tradesmen after the $800 was withdrawn.

[64] *R v Fennell, supra* at [112] at CAB 82. Again, although this body of evidence was not expressly relied upon by Gotterson JA when considering ground 1 below, the considerations are effectively imported by his finding at [86] that there was an evidential basis for concluding that the appellant had stolen money.

[65] Exhibits 103 and 104 - AFM 1014 - 1078

[66] *cf* appellant's submissions at paragraph 41.

[67] Also, a few days before she died, the deceased contacted the supermarket and said that she no longer got receipts for her groceries and complained about the cost of her groceries. It was discovered the appellant was putting her order through on his loyalty points card – AFM 418.29 – 419.3.

[68] AFM 966

[69] AFM 408.46 – 409.17

[70] Although the Fennells were in advance on their home loan repayments by $4578.65, there was no facility to access that money – see annotation on bank statement - Exhibit 103 - AFM 1014.

35. It is accepted that Gotterson JA erred at [19] (CAB 64) when summarizing the Crown case and stating that the appellant had claimed that he had taken some of the $8000 to the deceased's daughter. The remainder of the paragraph is accurate and the error is of no consequence. It was made during a factual summary of the prosecution case and not in the consideration of the ground of appeal, it does not detract in any way from the conclusion at [86] (CAB 78) that there was evidence that the appellant had stolen at least $5000 from the deceased and it was not relied on as a lie probative of guilt.[71]

Other features of the evidence that pointed to or were consistent with the appellant's involvement in the killing.

10 36. On 10 November, 2012 at about 1:30pm a blue toiletries bag, subsequently identified as the deceased's,[72] was found at Thompson's Point. The area is covered by scrub and mangrove and can properly be described as "out of the way".[73] It is considerably closer to the appellant's home than the deceased's.[74]

37. The bag was weighed down by a rock and also held a white Westpac banking folder and banking documents relating to, *inter alia*, the first three of the five withdrawals conducted by the appellant on the deceased's account.[75] Mrs Fennell testified that the appellant had the folder prior to his going to the bank on 02 November 2012[76]. There was no evidence that it was seen again before being found there on 10 November 2012.

38. On 15 November 2012 and only a matter of metres from where the toiletries bag had been
20 found, police found a Translink folder containing cards in the deceased's name,[77] a purse,[78] and a hammer. According to Emma Watson, the toiletries bag and the purse were the deceased's. She said her grandmother used the purse in 2012 "*quite a lot for money*".[79]

39. The prosecution case was that hammer belonged to Mr Matheson and had been lent to the appellant but never returned. The circumstances by which they came to recognize the hammer are outlined in the appellant's submission, and need not be repeated.

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[71] *cf* appellant's submission at paragraph 70.
[72] AFM 402.41-.46. Although the witness identified the item from exhibit 64, it is the same item as is in Exhibits 13 and 14 – RFM 21 and 23.
[73] Exhibits 1, 71 & 72 – RFM 7, 73 & 75.
[74] Exhibit 1 - RFM 7.
[75] Exhibits 13, 14 and 57 – RFM 21, 23 and 51-43.
[76] *R v Fennell, supra* at [85] and footnote 140 at CAB 78.
[77] Exhibits 56 and 73 – RFM 29 and 77.
[78] Exhibit 74 – RFM 79.
[79] AFM 402.40-.46

40. There were a number of aspects of the identification of the hammer which were consistent as between each of Mr and Mrs Matheson.

a. Each recognized the hammer from a paint mark on the hammer head.[80]

b. Each were consistent in their recollection that it had been bought in about 1994 or 1995[81] and it held some sentimental value, having been purchased for Mr Matheson by his wife and children in South Australia.

c. Although each differed as to when it was lent to the appellant, each were consistent with their recollection that it was lent to him in the course of Mr Matheson helping the appellant with repairs of a trailer.[82] Notably, Mrs Matheson volunteered that she was not very good with dates.[83]

d. Although each differed as to how various other marks on the hammer were caused, they were consistent in their recognition of these marks being on the hammer that had been lent to the appellant.

41. The Mathesons had differing recollections about what was said on the news broadcast in which the hammer was displayed, and what was said between them at that time. None of that necessarily detracts from the identification evidence. In particular, the fact that Mr Matheson does not recall his wife suggesting to him that it was his hammer before he identified it himself suggests that, even if it was said, he did not hear it and identified it independently of his wife's input. Neither witness was challenged on the basis of their evidence having been tainted by the other, nor that it was the result of collaboration, and so any suggestion now made to that effect[84] has a limited evidential basis.

42. The appellant contends that Mr Matheson's inability to identify other tools of his detracts from his identification of the hammer. It is of note that when challenged at trial about this Mr Matheson stated[85] that he *"used to buy cold chisels by the dozen...because you broke them all the time and just throw them away."* Thus there was a plausible reason for him to recognise a hammer he owned for more than a decade and which held sentimental value in contrast to his inability to identify other tools of his.[86]

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[80] AFM 593.42-594.6, 601.9-.25, 607.22-.24. Gotterson JA referred only to the evidence of Mr Matheson on this topic – *R v Fennell, supra* at [65] at CAB 73.

[81] AFM 594.9; AFM 606.21

[82] AFM 588.11-.16; AFM 609.17-.21

[83] AFM 613.18

[84] For example, appellant's submissions at paragraph 19.

[85] AFM 594.41-.46

[86] *R v Fennell, supra* at [63] at CAB 72.

43. Mr Matheson gave detailed evidence about the hammer such that it had, as Gotterson JA said, *"an appealing practicality to it"*.[87] Although only expressly referring to the Mr Matheson's identification evidence at [84] (CAB 78), his Honour was cognisant of Mrs Matheson's testimony and the submissions concerning the inconsistency between the two witnesses impacting on the identification of the hammer.[88]

44. The *obiter* by Kirby A-CJ in *R v Clout*[89] is directly concerned with appropriate trial directions. So, it assumes the admissibility of the evidence.[90] The dissenting judgment does not contain a prescriptive list of matters that must be considered by every jury. The need for the directions must be evaluated in the context of the other evidence and any submissions by Counsel.

45. It is accepted that, subject to the observations above, the matters listed by Kirby A-CJ in *Clout* may on occasion be relevant to an assessment by an appellate court of the sufficiency and quality of the evidence.[91] They are well known to the appellate courts, and in this case were sufficiently mentioned below to permit the conclusion that they were properly considered.[92]

46. This trial was conducted on the basis that the identification of the hammer was an important part of the prosecution case, however it was not an indispensable link.[93] The jury received standard circumstantial evidence directions,[94] as well as specific directions concerning the evidence of identification of the hammer, the fact that Mr and Mrs Matheson were not united in their recollection on some matters and the need for special caution before convicting in reliance on that evidence.[95] Gotterson JA was alive to the fact those directions had been given.[96] The nature of those directions had been the subject of submissions before the summing-up,[97] and no re- directions were sought.

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[87] *R v Fennell, supra* at [84] at CAB 78.

[88] See *R v Fennell, supra* at [66]-[69] at CAB 73 (including the footnotes referring to the directions on the identification) and [127] at CAB 84.

[89] (1995) 41 NSWLR 312, 321.

[90] For reinforcement of that proposition see the observations of Heydon J in *Evans v The Queen* (2007) 235 CLR 521 at 163, esp footnote 146.

[91] *SKA v The Queen* (2011) 243 CLR 400, [22]-[24].

[92] *R v Fennell, supra* at [44]-[46], [63]-[69], [84] & [127] at CAB 69-70, 78 & 84.

[93] *Shepherd v The Queen* (1990) 170 CLR 573 per Dawson J at 579, Toohey and Gaudron JJ agreeing at 586.

[94] CAB 11.11-.19; CAB 16.31 – 17.33

[95] CAB 21.17 – 22.16

[96] See footnote 88.

[97] AFM 725.22-.40; AFM 733.6 & .19

47. It was not then and it is still not asserted that the evidence required a "link in the chain" direction. While the appellant contends that the impugned hammer was vital to the prosecution case and it was, he says, the impetus for the appellant being charged, there is simply no evidence of this. It is clear that the police investigation was substantial and protracted. There was a period of 40 days between the Mathesons' identification of the hammer from photos (as opposed to on the news broadcast) and the arrest of the appellant.[98] With respect, the inference drawn by the appellant is speculative.

48. The appellant contends that as the dangers identified as requiring a warning as suggested by Kirby A-CJ in *Clout* were not considered an error has occurred.[99] First, this complaint was not raised below to the level that it is now raised[100] and *Clout* was not then cited to support the appellant's submissions.[101] As a matter of policy, this Court will ordinarily only entertain points taken for the first time if there are exceptional reasons to do so.[102] Further, the ground of appeal before this Court alleges error. It cannot be an error if the Court of Appeal did not take into account matters that were not urged on it.[103]

49. Secondly, this appeal does not require a consideration of the directions to the jury. It requires an analysis of the Court of Appeal's independent assessment of the sufficiency of the whole of the circumstantial case to assess whether the evidence was sufficient to support a conviction. It is accepted that as part of that assessment the Court of Appeal was required to consider the sufficiency and quality of the evidence, and that some of the complaints made by the appellant are relevant to that consideration, but the Court of Appeal is entitled to expect that cogent arguments will be placed before it for its consideration.

50. The appellant was represented below by senior Counsel experienced in the criminal jurisdiction who, it can be inferred given the meticulous argument presented in the Court of Appeal, made several conscious decisions as to how the argument below should be framed. Should an intermediate appellate Court happen to identify matters that were not placed before it, then they must be considered and dealt with. Otherwise, the Court cannot be expected to conduct its own meticulous assay of the material in an effort to find that which

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[98] See appellant's chronology.

[99] Appellant's submissions at paragraph 23.

[100] The appellant's submissions below were summarised at [63]-[64] and [67] – [69] (CAB 72 and 73)

[101] It is notable that the appellant has never contended that the summary of the submissions recited by Gotterson JA at [63]-[69] - CAB 72-73 failed to understand the submission which was made.

[102] *Crampton v The Queen* (2000) 206 CLR 161, [10], [14]-[19], [122].

[103] *Dhanhoa v The Queen* (2003) 217 CLR 1 per McHugh and Gummow JJ at [38] and [49].

Queens Counsel did not consider necessary or appropriate to rely upon. To do so would risk the Court going behind Counsel's instructions, which are not known in this case and would run counter to the recognition that trials (and appeals) are an adversarial process and generally speaking defendants (and appellants) are bound by Counsel's conduct and decisions.[104]

51. The combined effect of a number of aspects of the evidence were compelling in the prosecution case. There were circumstances which evidenced a commonality of location between the toiletries bag[105] (the folder in which the appellant possessed as recently as 10 days before the killing), the Translink wallet, the purse[106] and a weapon which was consistent with that used to kill the deceased. The banking folder and the hammer could be linked to the appellant and were found in the same out of the way location suggesting a commonality of person who left them there.[107] Those circumstances lent weight to the proposition that the hammer was the murder weapon. That the documents were financial based and dominantly concerning the withdrawals circumstantially provided a context as to why the hammer was also there. To be added to that are the areas of evidence referred to above as evidence going to opportunity and motive.

52. Linking the appellant to the hammer was not an essential step before the jury could convict. Put another way, it did not matter whether it was Mr Matheson's hammer or someone else's. The co-location of a hammer with an item (the banking folder) that could be recently linked to the appellant together with other circumstances was sufficient to permit a conclusion of guilt of the murder.

53. In the circumstances of this case it was incumbent on the prosecution to exclude as reasonable a possibility that some other person was responsible for the murder. It is noted by the appellant that a number of people knew that the deceased kept cash at the house and one, who rode a "postie bike" similar to the appellant's, was the author of a partial DNA profile located on the toiletries bag.[108]

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[104] *TKWJ v The Queen* (2002) 212 CLR 124; *Crampton v The Queen, supra* esp. per Gleeson CJ at [17] - [19].

[105] Which was necessarily stolen before the killing.

[106] It cannot be known whether these, individually or together, were stolen before the killing.

[107] *R v Fennell, supra* at [85] at CAB 78.

[108] Scott Cornell, who had died by the time of trial. The appellant has also hinted at the possibility of Ms Uzzell being a possible suspect – see appellant's submissions at paragraphs 10 and 31. It is notable that not only was Ms Uzzell not cross-examined about how her partial DNA could have gotten onto the toiletries bag (assuming it was hers), it was never suggested to her that she was responsible for the death. This cannot be assumed to be a minor omission in cross-examination that can now be overlooked or excused.

54. Gotterson JA explained why he was satisfied that the alternative hypothesis consistent with innocence was not reasonable at [89] (CAB 78). His Honour's reasoning is sound and is adopted by the respondent. The references to a "burglar" and the like must be understood to be referring to someone other than the appellant; a random burglary. His Honour's reasoning must also be seen in light of earlier references, including the summary of the appellant's submissions at [52]-[57] (CAB 70-71) and his Honour's discounting of some propositions at [58] (CAB 71).

55. The following observations are also relevant on the issue of excluding as reasonable a hypothesis that someone other than the appellant was responsible:

a. The absence of evidence of a forced entry or rummaging of drawers[109] suggests that the killer had access to the house and was familiar with inside the house.

b. The appellant visited the deceased "on almost a daily basis"[110] over about the preceding 12 months,[111] he was familiar with the house, had performed odd jobs around it and was acquainted with the deceased's habits.[112]

c. The locating, removal, opening and assumed sorting through of a small suitcase that the deceased referred to as her "storm bag"[113] suggests an intimate knowledge of places where significant sums of money might be kept.

d. By the appellant's own admission, he was familiar with the suitcase that Emma Watson referred to as the "storm bag".[114]

e. There was no suggestion that any other person who could remotely be considered as a suspect had anywhere near the same degree of access and familiarity.

f. Notwithstanding the frequency of attendance of the appellant at the deceased's house, there was only one identifiable fingerprint attributable to the appellant, and only 10 were located that were considered identifiable over a 3 day examination.[115] It is suggestive, although admittedly not strongly, that whoever killed the deceased had time to clean up, either at the time of the killing or later. Given the gaps identified

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[109] *R v Fennell, supra* at [89] at CAB 78; McDougall at AFM 56.37-.45; Strang at AFM 121.16-.26; Emma Watson at AFM 400.39 – 401.4. See also exhibits 6, 10 28, 31 and 33-35 at AFM 923-935 and exhibits 7 and 11 at RFM 14 and 16. Note that Sgt McDougall initially thought there had been a burglary on the basis of seeing, as he first entered that "*cupboards and drawers were open*" – AFM 42.11-.13. His evidence cited immediately above was on the basis of a more considered opinion.

[110] *R v Fennell, supra* at [14] at CAB 63.

[111] AFM 1083.39

[112] *R v Fennell, supra* at [14]-[16], [135] at CAB 63-64, 85.

[113] Emma Watson at AFM 401.5-.42 and Exhibits 28 and 29 – AFM 927 & 928.

[114] MFI B – AFM 1238.25 – 1239.20

[115] AFM 633.1-.634.16.

earlier in his account of his movements on 12 November 2012, this is consistent with the appellant's guilt.

Conclusion

56. There were compelling circumstances that pointed, beyond reasonable doubt, to the guilt of the appellant, and the jury's verdict was justified on the evidence before it.

57. The Court of Appeal identified the salient evidence and assessed it appropriately. The Court of Appeal's reasons are required to demonstrate that an assessment of the sufficiency and the quality of the evidence. The appellant has now argued that certain matters were not taken into account which were not fully articulated before it, and on the basis of an interstate authority that was not placed before it. The Court gave appropriate consideration to the matters raised. This appeal should not now be determined on a basis not argued before the Court of Appeal.

58. Should this Court conclude that the Court of Appeal failed to give proper consideration to the sufficiency and quality of the evidence, the Court might apply the "proviso" at section 668E(1A) of the *Criminal Code (Qld)*, depending on the particular nature of that failure.[116]

59. Should the Court consider that to be an inappropriate course, the Court would remit the matter back to the Court of Appeal for proper consideration.

Orders Sought

60. Appeal dismissed.

Alternatively, if this Court considers that the Court of Appeal failed to properly consider the sufficiency of all of the evidence, order that the orders of the Court of Appeal, Supreme Court of Queensland be set aside and the matter be remitted to that Court for rehearing.[117]

Part VI:

61. Not applicable.

Part VII:

62. It is estimated that 1 – 1½ hours are required for the presentation of the respondent's argument.

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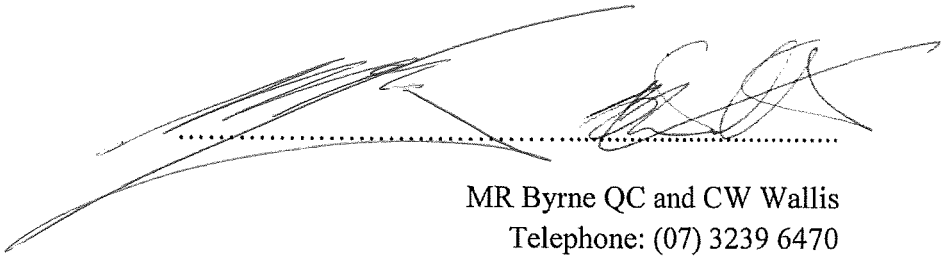
[116] *Weiss v The Queen* (2005) 224 CLR 300.

[117] A similar order was made in *The Queen v Hillier, supra.*

Dated 7 June 2019.



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