IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY No. B60 of 2019

BETWEEN: EAMONN CHARLES COUGHLAN

Appellant

-and-

10 THE QUEEN

Respondent

## APPELLANT'S SUBMISSIONS

**Part I:**

I certify that this submission is in a form suitable for publication on the Internet,

**Part II:**

The key issue is whether the jury verdicts were unsafe and should have been set aside. That issue may be decided in company with whether the Court of Appeal's consideration of the appeal applied accepted authority correctly.

**Part III:**

20 The Appellant considers that it is unnecessary to issue s 78B *Judiciary Act 1903* notices.

**Part IV:**

Primary Court: before the District Court of Queensland at Brisbane, Her Honour Judge Clare SC with a jury on 6 June 2018.[1]

Intermediate Court: *R v Coughlan* [2019] QCA 65

**Part V:**

1. A two count indictment was presented on 22 May 2017.[2]
2. The indictment charged:



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[1] Transcript of the taking of the verdicts is at Core Appeal Book, 31

[2] Core Appeal Book, 6

Filed on behalf of the Appellant
ADDRESS FOR SERVICE
Anderson Fredericks Turner
Lvl 10 / 420 George Street, Brisbane QLD 4000

Date of filing: 6 December 2019
Tel: (07) 3369 2200
Fax: (07) 3511 7979
Email: david.svoboda@aft.legal
Ref: David Svoboda

a. That, on 18 July 2015, the Appellant unlawfully and wilfully set fire to a house at 62 First Avenue,[3] Bongaree in the State of Queensland;[4]

b. That, on 19 July 2015, at Herston[5] or elsewhere, the Appellant attempted to induce NRMA Insurance Limited to deliver a sum of money to him.

3. The Crown case is that the explosion occurred at 6.15 pm on 18 July 2015. The house in the indictment belonged to the Appellant.

4. In a trial before Her Honour, Judge Kefford, on 30 November 2017, the jury was discharged on the first day because of an impermissible statement in front of the jury.[6] A second trial commenced on 1 December, again before Her Honour, Judge Kefford. The
10 jury for this trial was discharged on the fifth day, 7 December 2017, when jury members indicated they were unavailable to sit in the week before Christmas.[7]

5. The Appellant was convicted of both charges on 6 June 2018 after a 12 day trial before Her Honour, Judge Clare SC.[8] The Appellant was unrepresented.[9]

6. The learned trial judge stated, after the verdict, that she would adjourn the sentence[10] until after an appeal to the Court of Appeal was heard. Her Honour stated that there was a very strong argument concerning the safety of the verdict.[11] Her Honour granted bail without a reporting condition.[12]

7. The Court of Appeal heard the Appellant's appeal on 12 November 2018.[13] The Appeal was dismissed on 16 April 2019.[14] The lead reasons were delivered by Morrison
20 JA[15] with the concurrence of Fraser JA[16] and Mullins J.[17]

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3 AFM, 12 (Crown opening)
4 Bongaree is a residential suburb located on Bribie Island, the northernmost of the islands in Moreton Bay. Bongaree is, therefore, north of Brisbane off the Bruce Highway to the east.
5 Herston is a near northern suburb of Brisbane. By way of a well-known landmark, the Royal Brisbane Hospital is located in the suburb of Herston.
6 AFM 8
7 AFM 9
8 AFM 10
9 AFM 10
10 AFM 152, line 21
11 AFM 152, lines 35-37
12 AFM 154, lines 21-30
13 Core Appeal Book, 44
14 Core Appeal Book, 44
15 Core Appeal Book, 45
16 Core Appeal Book, 45
17 Core Appeal Book, 119

8. The Appellant was sentenced on 8 July 2019[18] to three and a half years on the arson and 15 months on the attempted fraud, both to be suspended after 15 months.[19] The learned sentencing judge found that the Appellant was, otherwise, of good character and had no previous convictions. He was a decorated police officer in England and had an admirable work history in policing and ethical standards.[20] He suffered from a chronic back injury as a result of an injury sustained while serving in the Australian Army Reserve. The Appellant suffered from scarring from third degree burns incurred in the explosion.[21]

**Part VI:**

Introduction

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1. As the notice of appeal indicates, the Court of Appeal's analysis as to whether the verdicts of the jury were unsafe merely mapped a pathway to guilty verdicts, rather than weighing those matters which militated against a guilty verdict to determine whether the jury should have had a reasonable doubt as to the Appellant's guilt. In essence, in failing to apply the strictures of this Court, the Court of Appeal passed over discrepancies and inadequacies in the evidence which should have caused it doubt and should have caused it to conclude that, even allowing for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted.[22]

2. The Appellant was convicted of arson and insurance fraud. The Appellant's house
20 exploded as he was walking from the back to the front yard on 18 July 2015. The case against the Appellant was entirely circumstantial. The Appellant's presence at the house;[23] his rapid flight from the vicinity of the house;[24] and some scientific evidence suggesting that his shoes and tracksuit pants may have come into contact with petrol[25] were aspects of the case heavily relied upon by the Crown.

3. Other factors severely weakened the Crown case. The Appellant had no financial or other motive to commit insurance fraud;[26] the forensic evidence left open the causes of the

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18 Core Appeal Book, 37
19 Core Appeal Book, 38
20 The Appellant's employment history was in evidence in the trial at AFM, 193 lines 1-50
21 Core Appeal Book, 2
22 *M v The Queen* (1994) 181 CLR 487 at 493-4: cited by Court of Appeal at *R v Coughlan* [2019] QCA 65 [293] (Core Appeal Book, 95)
23 *R v Coughlan* [2019] QCA 65, [2]-[3] (Core Appeal Book, 45-46)
24 *R v Coughlan* [2019] QCA 65, [4] (Core Appeal Book, 46)
25 AFM, commencing at 57, line 15; *R v Coughlan* [2019] QCA 65, [142] (Core Appeal Book, 46)
26 *R v Coughlan* [2019] QCA 65, [389] (Core Appeal Book, 114): One aspect of this was that the Appellant has recently renovated the subject dwelling: AFM 194, lines 1-20

fire including failing to exclude remote ignition;[27] there were inadequacies and other deficiencies in the investigation; the Appellant's flight was explained by the Appellant;[28] later that evening, the Appellant presented himself to the Caboolture Police Station;[29] and the forensic evidence as to petrol contact was inconclusive.

Cause of the Fire not Established

4. The Court of Appeal relied heavily on the scientific evidence for its path to guilty verdicts. In doing so, it overstated the effect of that evidence.[30] The Court of Appeal also relied for scientific conclusions on the questionable evidence of two lay witnesses.[31] These errors in reasoning highlight the weakness of the Crown's scientific evidence. The state of the scientific evidence is set out in the paragraphs that follow.

5. The prosecution's forensic witnesses explained that they did not know the cause of the explosion at the house. Neither expert entered the footprint of the building.[32] Both made it clear that there was little left behind to analyse. Ms. Gormon's testimony was *"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."*[33] She could not identify the origin of the fire,[34] the ignition source [35] or the fuel.[36] She could not rule out a spontaneous fire[37] or a gas bottle.[38] She said of spontaneous combustion: "*... or where there's been renovation work, where there's a fuel there that can naturally heat up and then, mixed with oxygen, can ignite.*"[39] She could not rule out an electrical fire,[40] commenting that an electrical fire "*certainly can*" cause *"that kind of damage."*[41] She said

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27 *R v Coughlan* [2019] QCA 65, [190] (Core Appeal Book, 75) (Gormon) and [200] (Core Appeal Book, 77) and [202] (Spencer) (Core Appeal Book, 77)
28 *R v Coughlan* [2019] QCA 65, [314] (Core Appeal Book, 101)and [319] (Core Appeal Book, 102)
29 *R v Coughlan* [2019] QCA 65, [5] (Core Appeal Book, 46)
30 *R v Coughlan* [2019] QCA 65, [337], [349], [351], [390]-[392] (Core Appeal Book, 104, 106, 107, and 114-115)
31 *R v Coughlan* [2019] QCA 65, [392]-[393] (Core Appeal Book, 115)
32 Per Gormon AFM 88 line 40- AFM 89 line 2, per Spencer AFM 103 lines 35-37
33 AFM 98, lines 9-12
34 AFM 90, line 9
35 AFM 91, line 25
36 AFM 91, lines 35-45
37 AFM 92, line 44 – 93, line 2
38 AFM 94, lines 30-39. A barbecue was present: see AFM 107, lines 35-40
39 AFM 87, lines 46-47
40 AFM 92, lines 5-15
41 AFM 92, lines15-16

that there was no point in engaging an electronic-electric safety officer because of the extent of the destruction and it would have been unsafe for him to enter the … building.[42]

6. Mr Spencer was likewise unable to determine the ignition source or the fuel;[43] and could not rule out an electrical fire.[44]

7. Both Ms Gormon and Mr Spencer offered an opinion that a large amount of the fuel was in gaseous form.[45] This was expressed in tentative terms. Mr. Spencer said: "*I wasn't able to determine the fuel, however, the damage remaining allowed me to conclude ... rapid developing fire with that explosion,* ***I believe****, a vapour explosion.*"[46] Ms Gormon said: *For an explosion to occur there has to be, in my experience ... a large amount of fuel in a gaseous form.*[47] Ms Gormon said that a gas cylinder could have precipitated the fire.[48]

8. The oral evidence relied on by the Court of Appeal to bridge the gaps in the scientific evidence was dubious at best. The prosecution had opened by alleging that police officers smelled petrol on the appellant.[49] In the event, no witness gave such evidence. The Court of Appeal relied on the evidence[50] of Mr Patruno and Mr Dyke[51] to establish, in the absence of scientific opinion, that the cause of the fire was petrol. Mr Dyke admitted to a prior inconsistent version of his evidence and pleaded a recall problem.[52] Mr Patruno accepted that the wind on that day was blowing in the opposite direction to that which would have brought smells from the Appellant's house to him.[53] Also, he claimed to have smelled petrol before, not after, the explosion. Ms. Gorman's evidence was that people nearby would not necessarily have been able to smell petrol in a shut up house,[54] as one might infer would be the case if a gaseous explosion were being attempted.

9. Mr Patruno's evidence was questionable for other reasons. He had been convicted on his own plea of dealing in illicit drugs.[55] He failed to give police a witness statement until

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42 AFM 92, lines 9-13
43 AFM 104, line 1-7
44 AFM 112, lines 1-5
45 Per Gormon AFM 91 lines 40-47, per Spencer AFM 104 line 8
46 AFM 104, lines 6-8 (emphasis supplied)
47 AFM 91, lines 40-41
48 AFM 91, line 41
49 AFM 16, lines 35-36
50 To the effect that they had smelled petrol prior to the explosion occurring
51 *R v Coughlan* [2019] QCA 65, [393] (Core Appeal Book, 115)
52 AFM 34, lines 39-45
53 AFM 22, lines 1-14
54 AFM 95, lines 7-12
55 AFM 26, lines 40-46

two years and four months after the incident[56] at which point the prosecution case theory was already public after exposure in court during multiple hearings. He explained that he did not wish to be involved with the Bribie police referring to their conduct towards him.[57] But he became willing to assist when he discovered that the officer in charge of the investigation was Constable Weare (as he then was) who was not stationed at Bribie.[58] Asked in the second trial (2017) whether Weare had promised him he would not be charged with anything, he replied: "*I cannot recall*". However, by the third trial (2018), during which on at least one occasion Weare gave him a lift into court,[59] his recall had improved and he was able to make a confident denial.[60] He said he was persuaded to give the statement because "*Ben was having trouble with – Mr Weare - sorry – was having trouble with the evidence.*"[61] He also explained that he believed that Weare "*was trying to make sure we are safe and nothing happens to us.*"[62] The Court of Appeal's unquestioning reliance on Mr Patruno's olfactory evidence was unjustified in the circumstances.

Ms Maxwell's Ambivalent Evidence as to Petrol: Assumptions of the Court of Appeal

10. The pathway to a guilty verdict mapped by the Court of Appeal depended, as has been described, on using lay witnesses to establish, in the absence of scientific evidence to similar effect, that petrol was involved in the cause of the fire.

11. The Court of Appeal had to engage in another line of flawed reasoning to link the Appellant with a non-innocent contact with petrol at a time relevant to the offences.

12. Under the heading "Conclusion", the Court of Appeal commences a line of reasoning with the words: *"the mere fact that the appellant's shoes and tracksuit pants were in contact with liquid petrol that afternoon."*[63] This overstated the evidence of Ms Maxwell which was posited as probabilistic, not as a "*mere fact*". Ms Maxwell testified: "*What I could, probably, say ... is that the tracksuit pants and the shoes were, probably, in contact with liquid petrol.*"[64] She was consistent in this, saying in re-examination "*the*

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56 AFM 16, lines 24-30
57 AFM 15 line 40 to 16 line 23
58 AFM 17, lines 10-13
59 AFM 146, line 25
60 AFM 19, lines 38-43
61 AFM 21, line 45 to 22 line 8
62 AFM 21, lines 2-3
63 *R v Coughlan* [2019] QCA 65, [392] (Core Appeal Book, 115)
64 AFM 60, lines 1-3

*shoes and the track suit pants probably had liquid petrol on them.*"[65]

13. Of the upper body garments, Maxwell said, after saying *"I think,"* that she had identified ten out of twelve compounds she associated with petrol such that *"I couldn't call it petrol but it appeared to be petrol."*[66] The chemical components of petrol are very numerous[67] and Maxwell did not say that she had included them all.[68] In any case, no evidence was given as to what those ten compounds were or why they were selected.

14. The Court of Appeal stated that the "*mere fact*" of contact occurred that very afternoon even though Ms. Maxwell's evidence was "*I can't offer any opinion on the age of the contact.*"[69] The Court of Appeal drew its own conclusions and attributed them to the
10 expert despite Ms Maxwell explicitly refusing to offer any opinion. The Court of Appeal also misquoted Ms Maxwell as saying, on the basis of studies by a colleague, that "*petrol residue degraded after about four hours.*"[70] Ms. Maxwell had said that there were no published studies but she knew a Masters student who had once done some experiments in which they had been unable to detect half a millilitre of petrol on unspecified types of clothing after four hours.[71] No scientific conclusion can be drawn from an isolated anecdote of this kind. A fortiori, it says nothing about any possible recent contact by the Appellant with petrol or other solvents or how any such contact might have occurred. It cannot be applied to the possible circumstance of the Appellant, as a home handyman/ house renovator,[72] having spilled petrol on himself on earlier occasions including that
20 morning when he had "*blowed all the leaves and stuff like that*".[73] There was no evidence of the fabrics tested; whether the student's experiment was competently done; or even whether the student passed or failed the assignment.

15. Probabilistic evidence of petrol residue has, previously, been found by the Court of Appeal to be inadequate to base a conclusion beyond reasonable doubt in a case of arson.[74]

16. Apart from misrepresenting Ms Maxwell's evidence, the Court of Appeal jumped to

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65 AFM 70, lines 14-15
66 AFM 59, lines 41-44
67 We respectfully ask the Court to take judicial notice of this notorious matter of general knowledge
68 AFM 59, 40-43
69 AFM 60, lines 13-14
70 *R v Coughlan* [2019] QCA 65, [391] footnote 579 (Core Appeal Book, 115)
71 AFM 60, lines 16-24
72 AFM 183, passim
73 AFM 183, lines 28-50
74 *R v Omid No 2* [2012] QCA 363, particularly, at [50], [58] and [65].

the "*obvious explanation*" of petrol on the appellant's clothes, namely, that he was "*involved in distributing petrol which led to that explosion.*"[75] This was in the absence of evidence establishing that petrol was associated with the fire; establishing beyond reasonable doubt that petrol was detected on the Appellant's clothing; and evidence excluding beyond reasonable doubt possible innocent explanations for any solvents located on the Appellant's clothing.[76] This was reasoning in an evidentiary vacuum. This was exacerbated by reversing the onus of proof by stating that, because the Appellant had not given evidence, the jury could not allow the possibility of innocent contact with petrol.[77]

Uncontroverted evidence that the appellant did not go into his house

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17. The Court of Appeal relied on its erroneously drawn conclusion that the Appellant had petrol on his clothes to fill other gaps in the Crown case and to reject other evidence pointing to the Appellant's innocence. This was said to be powerful "*evidence compelling rejection*"[78] of the Appellant's claim that he did not go into his house that afternoon.

18. The Appellant said in statements to the police that he waited round the back[79] and, when it appeared that the purchaser was not coming, he walked back towards the front of the house,[80] having never entered the house[81] and, indeed, not having a key with him.[82] It was essential to any plausible Crown case to establish that the Appellant either did enter the house or caused the explosion without so entering. The Crown did not seek to prove

20 either alternative.

19. The Appellant's statements on these points were not contradicted. The police admitted that the Appellant did not have a key to his house with him;[83] nobody gave

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75 *R v Coughlan* [2019] QCA 65, [391] (Core Appeal Book, 114)

76 Ms. Maxwell referenced a study of people carrying out activities such as filling a motor mower with petrol. That particular activity (carried out once) gave an 18% chance petrol being detected on one's clothes or shoes. See evidence at AFM 68, line 25 – 421, line 7. The Court of Appeal reproduced this evidence at *R v Coughlan* [2019] QCA 65, [344] (Core Appeal Book 106)

77 *R v Coughlan* [2019] QCA 65, [390]: This was said in circumstances where the person in charge of the investigation had avoided taking a statement from the Appellant's wife for clearly improper reasons. An obvious opportunity to investigate possible innocent explanations for the presence of petrol residue was deliberately foregone by the Crown resulting in a failure to present all relevant evidence to the Court. See paragraphs [49]-[51], below.

78 *R v Coughlan* [2019] QCA 65, [392]

79 AFM 176, line 12

80 AFM 176, line 13

81 AFM 209, lines 33-46

82 AFM 209, lines 38-39. We note that the Appellant elsewhere refers to the police having his keys: but this is in the context of questioning about his car keys AFM 202, lines 1-3

83 AFM 143, lines 11-12

evidence they saw or heard him go into, or break into, the house or come out of it; and no evidence was adduced that controverted his account that he went to his Bribie Island property to meet a purchaser for a friend's motor bike that he had advertised on Gumtree.[84] No evidence suggested that the Appellant had been inside his house that afternoon.

20. It follows that, just as the Court of Appeal's petrol hypothesis purported to smooth over other difficulties in the Crown case, the flaws in the petrol hypothesis highlight the multi-faceted difficulties evidencing the unreasonableness of the guilty verdict.

Flight in the circumstances is entirely consistent with innocence

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21. The Court of Appeal accepted that the Appellant may have thought he was being pursued[85] and goes on to focus on whether there was convincing evidence of actual pursuit. The key issue is the Appellant's state of mind because a belief by the Appellant that he was pursued negatives any adverse inferences flowing from a failure to stay at the scene. The Court of Appeal failed to appreciate this significance and, thereby, fell into error.[86]

22. The evidence supports a conclusion that the Appellant believed that he was being pursued by someone who had tried to kill him. The explosion knocked the Appellant to the ground and caused him third degree burns. He rolled around to put out the flames on his clothes.[87] Such a terrifying experience might reasonably lead to a belief that this was

20 "*more than a house fire*" and that "*someone's tried doing something to me personally,*"[88] The Appellant saw a person standing outside his property and believed that person[89] was the author of the explosion[90]. The Appellant also saw an unfamiliar vehicle outside his property and sensed the person "*screaming*" at him.[91] Mr Dyke's evidence was of unthreatening language, namely, "*Are you okay*?"[92] but there is no reason to doubt either person. Though the Appellant said that he heard the voice of the man standing outside his property,[93] his senses, including his hearing, are likely to have been impaired by the shock of the blast. This is supported by Constable Pilgrim's observations that the Appellant was

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84 AFM 195, lines 25-36
85 *R v Coughlan* [2019] QCA 65, [319] (Core Appeal Book, 102)
86 *Edwards v The Queen* (1993) 178 CLR 193
87 AFM 176, lines 10-30
88 AFM 198 lines 20-24
89 The evidence suggests that this was Mr. Dyke.
90 AFM 198, lines 53-55
91 AFM 196, line 20- AFM 197, line 23
92 AFM 32, line 11
93 AFM 196, line 9

still in shock when he reported in to the police station more than two hours later.[94] Constable Burgess did not demur from the proposition that he told her "*someone tried to kill me.*"[95] Later that night, he told Constable Weare that he ran because he thought that he, rather than the house, was the target of the bomber.[96] That story never changed.[97]

23. Despite the Court of Appeal's failure to appreciate the significance of this evidence, it provided an explanation for the Appellant's departure from the scene and neutralized what might have, otherwise, been part of the Crown's circumstantial case.

The time of presenting to police is entirely consistent with innocence

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24. In the leave to appeal hearing, the Crown made the submission that the Appellant "fled from the scene and was absent, essentially, and unaccounted for, for about three hours after that, before at about 9.15 pm he presented at the Caboolture Police Station."[98]

25. The submission, even were it factually accurate, nevertheless loses much of its impact in the light of the Appellant's explanation for his departure from the scene.[99]

26. The intervening period of time is, in any event, overstated. The prosecution alleges that the Appellant was seen on CCTV footage crossing the bridge between Bribie Island and the mainland at 6.21.[100] The time when the police officer let him into the station "may well have been before 9 pm."[101] The period was more like two and a half hours than three.

20 27. The only road off the Bribie Island road that doesn't circle back or dead end is the Bruce Highway at Caboolture, the entrance to which is 20 minutes and 22 seconds from the Bribie Island Bridge according to the RACQ website.[102] The Appellant turned "*right*" (i.e. north) at the highway.[103] The Appellant stated that, after he left the Bruce Highway, he did a series of lefts and rights to make sure that he was not being followed.[104] The Appellant ended up in a street with a garden tap and washed his hands and face.[105] He was

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94 AFM 49, lines 39-44
95 AFM 52, lines 37-39
96 AFM 198, lines 20-24
97 AFM 150, line 41
98 *R v Coughlan,* Special leave application, 18 October 2019, page 7 lines 264-266
99 See paragraphs [21]-[23] of these submissions, above.
100 AFM 123, line 25 and exhibit 37
101 AFM 51, lines 39-40
102 The Court is asked to take judicial notice of the geographical facts in this section.
103 AFM 206, line 17
104 AFM 206, lines 17-18
105 AFM 206, lines 19-21

burned but not in pain.[106] He did not want go to his Narangba home because he did not want to take his problem back home.[107] In his panic,[108] the Appellant realised that he must get to a police station as the only place he could be safe.[109]

28. The Appellant did not know how far he travelled up the Bruce Highway.[110] He suggested, in the interview, that the police might like to check the odometer of the motorbike and compare the reading with the kilometres mentioned in the internet advertisement.[111] There is no indication that police chose to obtain this evidence.

29. The evidence suggests that the Appellant was in some form of shock. Neither is it surprising that he was panicking rather than thinking clearly. Whether he rode a considerable distance north or whether he spent a significant time beside the garden tap, or both, the elapse of two hours before turning up at the Caboolture Police Station to report the event was not in any way indicative of or consistent with guilt.

Circumstances of means, motive and opportunity

30. The circumstance that the Appellant was at his house when it exploded is part of the Crown's circumstantial case. However, the open-ended nature of the scientific evidence as to the origin of the fire,[112] and the absence of evidence that the Appellant went inside the house that afternoon,[113] means that the Appellant's presence adds little to the Crown case.

31. The Crown case fell far short of establishing how the Appellant might have caused the explosive fire. While the Court of Appeal embraced a theory that the fire originated in a petrol vapour explosion and the appellant was "*involved in distributing petrol which led to that explosion*",[114] the evidence failed to establish the feasibility of that theory. There was no evidence suggesting that the Appellant had purchased or stockpiled fuel to cause the explosion. No purchase receipts were adduced even though the Appellant's bank and taxation documents were available.[115] There was no forensic evidence from examination of

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[106] AFM 206, lines 16-22
[107] AFM 206, lines 24-30
[108] AFM 206, line 25
[109] AFM 206, 28-30
[110] AFM 206, lines 37-43
[111] AFM 206, lines 39-43
[112] Paragraphs [4]-[7] of these submissions, above
[113] Paragraphs [17]-[19] of these submissions, above
[114] *R v Coughlan* [2019] QCA 65, [391] (Core Appeal Book 115)
[115] Even though he offered officers Weare and Eaton access to his accountant and financial records. AFM 192, lines 20-60

the remnants of the house to establish transport of flammables by the Appellant.[116] There was no evidence from neighbours of suspicious conduct by the Appellant.

32. The Crown offered no evidence as to how the Appellant might have ignited a petrol or any other type of fire and survived the explosion. The Appellant's presence at the front of the house soon after the explosion, albeit shocked and burned, as witnessed by Mr Dyke,[117] is inconsistent with the Appellant igniting a petrol explosion inside the house moments before. Even the Appellant's quite serious injuries (third degree burns on his back[118] and only "superficial"[119] burning to his front) and burns to the left thumb and hand[120] suggest someone walking with their back to an explosion with the house to their left rather than someone involved in the ignition of a vapour explosion gone wrong.[121]

33. The evidence of Mr Spencer that the fire could have been detonated remotely[122] makes the Appellant's presence at the house a circumstance ambivalent rather than inculpatory. Equally, the absence of any evidence of remote detonation mechanisms found on the Appellant, or otherwise associated with or traced to him, adds to the lack of evidence establishing any plausible method, consistent with the evidence, by which the Appellant could have acted in accordance with the Court of Appeal's theory that he doused the inside of the house with petrol and ignited a petrol vapour explosion (and lived).

34. While proof of motive is not essential for conviction,[123] absence of motive has probative value.[124] The Court of Appeal accepted that there was a *lack of obvious motive*.[125] This was an understatement of the state of the evidence. This was truly a case where the Appellant had nothing to gain from destroying his own property.[126] This court has noted: "*there is a critical distinction between absence of proven or apparent motive ...*

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[116] Ironically, there was petrol found in the garage after the fire. Thus, there was no evidence of the Appellant's purchasing and transporting petrol and even the petrol that was on hand was not used.
[117] AFM 31, lines 29-41
[118] AFM 78, lines 24-29
[119] AFM 78, line 5-11
[120] AFM 77, lines 40-45
[121] There was no evidence that the Appellant was left-handed.
[122] AFM 120 lines 10-19
[123] *De Gruchy v The Queen* (2002) 211 CLR 85
[124] *De Gruchy v The Queen* (2011) 211 CLR 85, per Gaudron, McHugh and Hayne JJ at [28]
[125] *R v Coughlan* [2019] QCA 65, [391]. Earlier, the Court of Appeal had stated, also understating the evidence, "there was no obvious financial motive to carry out the arson: *R v Coughlan* [2019] QCA 65, [389] (Core Appeal Book 114)
[126] AFM 75, lines 5-12, 145 lines 14-17 and 213 lines 40-60. The Court of Appeal noted also that the Appellant had lost personal items in the fire which added to the absence of financial motive at *R v Coughlan* [2019] QCA 65, [394] (Core Appeal Book 115).

*and proven absence of motive"*.[127] The investigators were at a loss to put any plausible motive to the Appellant when interviewing him.[128] The Court of Appeal's glossing over the importance of motive was a failure to weigh the inadequacies of the evidence on its part.

35. The Court of Appeal sought to map a pathway to conviction by suggesting that the fire might have been the result of a "black mood" on the part of the Appellant.[129] This was speculation that was not supported by the evidence. The Court of Appeal set out evidence of the way in which the Appellant dealt with his mental health problems.[130] None of the cited evidence indicated that the Appellant's propensity to find situations difficult had or might lead to illegal conduct or property destruction. Indeed, he had no criminal history and had held down employment of high social value and involving trust at a high level.[131]

No evidence or attempt to exclude other agency: failures in the investigation

36. It is particularly important, where the Crown case is circumstantial, to exclude alternative explanations consistent with the innocence of the accused. Those alternative possibilities loom large in the absence of meticulous ruling out work. In this case, the investigation operated with a tunnelled focus. It operated on the basis that the appellant was always the "*prime and only suspect*".[132] The officer in charge, asked whether he investigated the possibility of other suspects, said: "*I never really investigated*".[133]

37. The open ended nature of the forensic evidence as to cause of the fire[134] and the inconclusive nature of Ms Maxwell's evidence[135] heightened the need to rule out all possible agents of the fire other than the accused. An ineffective police investigation has the potential to lead to an unfair trial (which is to be avoided)[136] because the burden of establishing hypotheses consistent with innocence shifts, in practical terms, to the accused.

38. The Court of Appeal missed the significance of failures in the investigation by looking for explanations for why things were or were not done.[137] It is the effect of failures

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[127] *De Gruchy v The Queen* (2002) 211 CLR 85, per Gaudron, McHugh and Hayne JJ at [29]
[128] AFM 213, lines 48-50
[129] *R v Coughlan* [2019] QCA 65 [395] (Core Appeal Book 115)
[130] *R v Coughlan* [2019] QCA 65 [396(a)-(h)] (Core Appeal Book 115-116)
[131] See footnote 20, above, and AFM 193, lines 1-50. See, also AFM 213, lines 10-20
[132] *R v Coughlan* [2019] QCA 65 [237]
[133] AFM 144, lines 2-20
[134] Paragraphs [4]-[7], above
[135] Paragraphs [10]-[16], above
[136] *Jago v District Court of NSW* (1989) 168 CLR 23 per Mason CJ at [11]
[137] *R v Coughlan* [2019] QCA 65 [386] (Core Appeal Book 113): *"looking at the things not done there are good reasons to see why they were not done ..."*

in an investigation, not the reason why they happened, that is important. The placing of the onus of proof in criminal prosecutions upon the Crown recognises that an accused person has neither the resources nor opportunity to redress the injustice caused by failed investigation. Speculation about what may have been discovered by particular lines of inquiry, if they had been carried out, is often futile because one simply cannot know what might have been happened. Further, while an accused person may be able to suggest some missed lines of inquiry, they will be at a gross disadvantage even in that process.

39. The Court of Appeal expressly addressed the question of deficiencies in the investigation[138] but other discussions in the reasons also touch upon these deficiencies.[139] Using Messrs Patruno, Drayton, Long and Dyke as examples,[140] the Court accepted, without question,[141] the evidence of the two who testified and was unconcerned about the absence of the two who did not provide any statement.[142] The obvious example of the unknown unknowns that arise in an inadequate investigation is that no one can say what information might have been obtained if four young persons who were present at the time of the explosion and who left before the police arrived[143] had been tracked down that night and their clothes and other appurtenances been seized and tested for flammables. No massaging by an intermediate appeal court can fill the information vacuum that so arises.

40. There were matters, apart from presence at, and departure from, the scene that militated in favour of assiduous investigation concerning the young men. Mr. Patruno was in the area, and at the time, of the early morning hours April 2015 arson attack on the Appellant's car[144] and, strangely, he claimed to have been attacked by persons wielding machetes on his way home from the local Caltex Service Station on another occasion.[145]

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[138] *R v Coughlan* [2019] QCA 65 [386] (Core Appeal Book 113-114)

[139] By way of example, the failure to obtain statements from Mr. Drayton and Long is expressly considered in the context of whether it constituted a fatal flaw in the investigation at [386(f)] but the Court had, earlier, canvassed the evidence of various witnesses interviewed by the police (albeit in a number of cases, belatedly) including Mr. Drayton and Mr. Drayton's colleagues, Mr. Dyke and Mr. Patruno at [375]-[382] (Core Appeal Book 111-112).

[140] Messrs Patruno and Dyke's evidence as to smelling petrol is discussed above at [8]-[9].

[141] The Court of Appeal even found affirmatively that none of the four were involved in the offences and that none of them should ever have been considered to be suspects: *R v Coughlan* [2019] QCA 65 [336] (Core Appeal Book 104)

[142] Two, Messrs Drayton and Long, travelled interstate and, it seems, Mr. Drayton has never returned: *R v Coughlan* [2019] QCA 65 [384 (o)] (Core Appeal Book 113).

[143] And two of whom at least had criminal records for drug offences: AFM 45 lines 29-40 (Dyke) and AFM 26, lines 40-46 (Patruno)

[144] AFM 148, lines 5-10

[145] AFM 29, lines 1-14

The Court of Appeal stated that the Applicant did not put to Mr Patruno that he was involved in the house fire.[146] This was an error on the part of the Court of Appeal.[147]

41. The analysis of the Court of Appeal concerning the live redhead match allegedly found by police in the appellant's backpack missed the point of the issue raised in a way similar to its treatment of the failure to promptly interview and investigate Mr. Patruno and his friends. The Appellant had argued, on the assumption that it was improbable that any live match would have withstood the heat of a blast which caused third degree burns to his back and set his clothes alight, that its improbable presence suggested an action by someone (possibly, a police officer) to create incriminatory evidence against the Appellant.[148] Addressing this argument, the Court of Appeal made findings that the police officers who gave evidence about the backpack could not have placed the match in situ and had no reason to do so.[149] The Court of Appeal failed to address, however, the improbability of the presence of the match; the implications of that; and whether its presence was a matter that should have been thoroughly investigated and, ultimately, explained. This failure to investigate, including whether the match could have withstood the blast without igniting, was a matter to be weighed with other insufficiencies in the investigation. To simply wipe away the concern by concluding that the Appellant had not affirmatively established that a particular person was responsible for the improbable presence of the match was a failure to weigh the evidence and consider whether the jury should have had a reasonable doubt (and, effectively, reversed the onus of proof).

42. The police investigation failed to investigate those matters arising out of the Appellant's account as to why he was at the house at the time (as it turned out) of the explosion and his account as to why he parked his motorbike a little away from the house. In his recorded interview, on the same night as the explosion, the Appellant told police that, on or around the previous Wednesday, while he was renovating the house by working on the shelving in the garage,[150] a man came past and said he was interested in buying the

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[146] *R v Coughlan* [2019] QCA 65, [322] (Core Appeal Book 102): the proposition contains a perceptual problem in that it was not, and could not, be the Applicant's case that any specific person was responsible for the arson. There was no reason why he would have knowledge of the person responsible for the crime.
[147] In fact, the Appellant did put the proposition, receiving evasive answers: AFM 28, lines 9-39.
[148] Ms Maxwell had acceded to the possibility that the residues detected by her may been caused by someone placing a drop of petrol into the container in which the clothes had been placed. See AFM 66, lines 20-35
[149] *R v Coughlan* [2019] QCA 65 [369] (Core Appeal Book 110)
[150] AFM 210, lines 19-60

motorbike which the Appellant had with him.[151] The Appellant had advertised a motorbike for sale on the Internet on Gumtree.[152] The man was described by the Appellant as six foot two or three, clean-shaven, wearing casual but not scruffy apparel, apparently thirty something, tattooed and apparently of Maori/Islander extraction.[153] The prospective purchaser had arrived on foot.[154] The man offered to pay immediately by cheque but the appellant declined to accept a cheque from this stranger.[155] The man said he would come back with cash at 5pm on Saturday 18 July 2015.[156] So, on 18 July 2015, at around 5pm,[157] the Appellant arrived by motorbike and waited at the house.[158] He felt that the man was "*too blasé*" [159] and he did not know whether the man's offer was "*dodgy*:"[160] The person was a big bloke; the appellant was aware of EBay scams; and he didn't want the bike going without him getting cash[161] so he did not park the bike at the house but parked it a short distance "*down the road in a little car park*".[162] This car park was opposite the church.[163] Services were held at that time and Mr Weare agreed that the appellant may have informed him that there was a service on that particular Saturday evening and that he had parked it there because it was busier there.[164] At or around 6.15pm, the purchaser having failed to arrive, the appellant started to walk towards his front gate and the house exploded.[165]

43. This narrative of the events leading up to the fire provided the police with a template for investigation (including a very clear description of a person who might have had knowledge of the circumstances of the fire). Locating a local resident[166] meeting the description might have verified what the Appellant said in his interview and confirmed the valid reason to be at the house. It might have turned up an alternative suspect for careful questioning and forensic investigation. There is no evidence that police used any standard police methodologies (like doorknocking or letterboxing flyers) to engage the community

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[151] AFM 175, lines 15--60
[152] AFM 175, lines 20-40
[153] AFM 211, lines 10-60
[154] AFM 183, lines 1-10
[155] AFM 211, lines 1-15
[156] AFM 175, line 54 to AFM 176 line 10
[157] AFM 176, lines 5
[158] AFM 176, lines 1-13
[159] AFM 212, line 20-30
[160] AFM 176, lines 5-7
[161] AFM 183, lines 7-16
[162] AFM 212, lines 18-19
[163] AFM 140, lines 40-42
[164] AFM 141, lines 36-37
[165] AFM 177, lines 10-20
[166] AFM 210, lines 36-37

in an endeavour to find this person. The description of the putative buyer pointed to a distinctive person who should have been relatively easy to locate. The Court of Appeal found that a more comprehensive investigation would not have meaningfully changed the evidence[167] but the failure of investigators to attempt to locate the putative buyer denied the Appellant the opportunity to have important aspects of his statements to police establishing his innocence confirmed by an independent and highly relevant witness.

44. It was essential to the Crown case to negative the presence of a second person seen leaving First Avenue, Bongaree soon after the explosion. If there were a second person, he constituted a potential suspect who may have detonated the explosion remotely and travelled via a different path to the spot where he was seen. While the Appellant was observed by a number of witnesses, two young women, Ms Trindall and Ms. Freeman, clearly observed a person meeting a very different description. Ms Trindall and Ms Freeman were together and very close[168] to the man they saw fleeing the area. This man differed from the Appellant in that he was short,[169] bearded,[170] wore different clothing,[171] carried a different bag,[172] rode a different motorbike[173] and had been parked in a different car park.[174] They described a person who differed over six variables from the description of the Appellant on the night. There was no basis to treat their evidence as mistaken.

45. The Court of Appeal dealt with the issue by saying that "the evidence of the man having a beard was not compelling."[175] This reversed the burden of proof in that it was for the Crown to exclude beyond reasonable doubt the presence of a second person fleeing the area. The actions of the Court of Appeal in discounting the evidence of Ms Trindall and Ms Freeman[176] was the antithesis of weighing the evidence to ascertain whether the jury should have had a reasonable doubt.

46. The failure to interview promptly, and investigate forensically, the four young men who were present when the explosion occurred and who left the scene was just one example of the lackadaisical way in which the investigation was conducted in its early

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[167] For example, in respect of the timely investigation of Mr. Patruno
[168] Ms Trindall agreed that it would have been one to three metres: AFM 169, lines 30-40
[169] AFM 173, lines 23 33, AFM 142, lines 17-20
[170] AFM 39, lines 16-44, AFM 41, lines 33-47
[171] AFM 156, line 33, AFM 166, line 28, AFM 168, lines 16-21
[172] AFM 161, lines 30-60
[173] AFM 158, lines 29-34, AFM 159, lines 11-21, AFM 166, line 28,
[174] AFM 36, lines 10-20
[175] *R v Coughlan* [2019] QCA 65 [312] (Core Appeal Book 101)
[176] *R v Coughlan* [2019] QCA 65 [310]-[313] (Core Appeal Book 100-101)

stages. There was no evidence that police made a list of who was present in the sequel to the event.[177] They did not seek to interview people leaving the scene. For example, Ms Trindall told the police that her cousin and uncle, Mick and Ethan Spinks, had been present soon after the event. The two Messrs Spinks showed a distinct desire to stay around.[178] When Ms Trindall spoke to them, they were already near the church which is well clear of the scene.[179] In court, Ms Trindall was reluctant to name them and had to be told by the judge to do so.[180] There was no evidence that either man had been interviewed by investigators or had their clothes taken for forensic analysis.

47. In addition, as Ms. Freeman approached the scene, she saw unknown male persons running out of the back of the Patruno house to join the onlookers in front of the burning house.[181] Again, there is no evidence that investigators asked the residents of that house who the male persons might be or sought to follow this lead in any way.

48. With so many potential witnesses (and alternative suspects) at the scene, it was important that a thorough investigation process be instated so that the investigators' information base was as complete as possible. The failure to identify every person at the scene and follow up each person with a thorough interview and forensic testing in appropriate cases led to an incomplete picture of the evening's events. Some of this additional information may have thrown a very different light upon those matters which investigators regarded as throwing suspicion upon the Appellant. The Appellant was denied the opportunity of exculpatory information coming to light. The defective information base was particularly relevant in the light of Mr Spencer's evidence that the explosion could have been remotely detonated.[182] Not only did no-one enter the ruins of the house[183] to see if any remains of a detonation device survived but the chance that someone had seen something relevant some distance from the house was prevented from coming to light through a failure to thoroughly interview all persons who were gathered at the scene in the immediate aftermath. Whatever inferences could reasonably be drawn

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[177] Ms Blakers saw 20-30 people present at the scene: AFM 72, line 45- AFM 73, line 3. By 22 July 2015, four days after the event, the investigators had only obtained five statements: AFM 131, lines 15-20.
[178] AFM 171, lines 10-30
[179] AFM 37, lines 2-25
[180] AFM 37, lines 1 – 38, line 10
[181] AFM 42, lines 25 – 43, line 45
[182] AFM 121, lines 10-19
[183] AFM 89, line 40 – AFM 90, line 2

from the evidence placed before the jury, such inferences were based on incomplete information possibly lacking undiscovered exculpatory evidence.

Coordination of investigation by inappropriate officer implies doubt

49. The implications arising from the investigation failures discussed above were exacerbated by the circumstance of Mr Weare's unsuitability to carry out such an important responsibility.[184] It was evident from the investigators' own words that no one was treated as a person of interest other than the Appellant who was described during the investigation as the "*prime and only suspect*".[185] The evidence establishes that Mr Weare held animus towards the Appellant. Just days after the incident, Mr. Weare interviewed the Appellant's wife behind closed doors and did not record the conversation,[186] made no notes,[187] and engaged in threatening behaviour.[188] Then, (not knowing that Mrs. Coughlan had been recording the conversation), Mr. Weare declined to take a statement from Mrs. Coughlan giving the reason that *I've just proceeded under the guise that we were going to get some bloody good lies from you, fair enough.*[189]

50. In addition, Mr and Mrs Coughlan lodged a complaint about Mr Weare's conduct. Rather than standing down from the investigation to let a less invested person take over, one week later, Mr Weare charged the appellant with arson.[190] Subsequently, Mr Weare falsely stated in a statutory declaration that Mrs. Coughlan had declined to make a statement.[191] He did not forbear from telling other witnesses, both police and civilian, that the appellant made complaints against police.[192] He stated that he hated the appellant.[193]

51. One of the possible implications of Mr Weare's key involvement is that Mr Weare failed to pursue leads that were likely to be exculpatory of the Appellant. The failure to conduct a proper recorded interview of Mrs Coughlan is one obvious clear choice by Mr Weare that is likely to have slanted the totality of the evidence against the Appellant. Mr

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184 *R v Catt* [2004] NSWCCA 279
185 *R v Coughlan* [2019] QCA 65 [237] (Core Appeal Book 82)
186 AFM 130, lines 1-5
187 AFM 127, line 39 - 128, line 4
188 AFM 131, line 44 – AFM 132 line 20, and AFM 132, line 40- AFM 133, line 12
189 AFM 133, lines 30-31
190 Complaint 31 July 2015: AFM 125, line 35- 126 line 14, charge 6 August 2015: AFM 134 lines 20-21
191 AFM 135, line 29 – AFM 136, line 14
192 AFM 55, lines 21-24, AFM 149 lines 1-4, AFM 47, line 46 to AFM 48, line 3
193 AFM 129, lines 37-43

Weare's inappropriate involvement was a factor tending to create a reasonable doubt in its own right as well as adding weight to the other substantial weaknesses in the Crown case.

Conclusion

52. The circumstantial case against the Appellant was very weak in the light of a complete absence of any reason why the Appellant would destroy his own valuable asset. The open-ended evidence as to the mechanism of the fire and the inconclusive evidence as to possible petrol residue on the Appellant's clothing left the circumstantial argument without support. Other aspects of the case contributed to the doubt that any reasonable jury must have held. The Court of Appeal's analysis failed to execute the requirement that the deficiencies in the evidence be weighed to determine whether a reasonable jury should have had a reasonable doubt. The decision below should be set aside. The appeal to the Court of Appeal should be upheld. The jury verdicts should be set aside.

**Part VII:**

1. The decision of the Court of Appeal is set aside.
2. The appeal to the Court of Appeal is upheld.
3. The guilty verdicts are set aside and replaced with verdicts of not guilty
4. There is no order as to costs

**Part VIII:**

The Appellant estimates that he will require 3 hours to present his oral argument.

Dated: 9 December 2019

Name: Stephen Keim SC Mark Thomas Dean Wells

Telephone: 0433 846 518

Facsimile: 61 7 32217781

Email:s.keim@higginschambers.com.au

## Annexure (Legislative Provisions)

### Criminal Code 1899 Section 461 Arson

**461 Arson**

(1) Any person who wilfully and unlawfully sets fire to any of the things following, that is to say-

(a) A building or structure;

(b) A motor vehicle, train, aircraft, or vessel;

(c) Any stack of cultivated vegetable produce, or of mineral or vegetable fuel;

(d) A mine, or the workings,, fittings, or appliances of a mine;

is guilty of a crime, and is liable to imprisonment for life.

(2) It is immaterial whether or not a thing mentioned in *subsection (1) (a) or (b)* is complete.

### Criminal Code 1899 Section 408C(1)(c) Fraud

**408C Fraud**

(1) A person who dishonestly-

...

(c) induces any person to deliver property to a person;

...

commits the crime of fraud.

### Criminal Code 1899 Section 535 Attempts to commit indictable offences

(1) If a person attempts to commit a crime, the person commits a crime.

...