IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY No. 9 of 2014

BETWEEN:

DANIEL GLENN FITZGERALD
Appellant

and

THE QUEEN
Respondent

APPELLANT'S REPLY

Part I: Certification re internet publication

1. The Appellant certifies that this submission is in a form suitable for publication on the internet.

Part II: Appellant's submissions in reply

2. As to [17.1.1] of the Respondent's Submissions, although the didgeridoo was generally kept in the laundry,[1] the evidence of Letitia Webb (who held the didgeridoo during the attack) was that, on the night of the attack, the didgeridoo was leaning against the wall in the kitchen/dining room, next to the door leading to the passage.[2]

3. As to [17.1.2] of the Respondent's Submissions:

    3.1. Ms Wanganeen's evidence was that, when Wayne Goldsmith was living, people who came to the house would touch the didgeridoo.[3] After Wayne Goldsmith died, she said, "no one would touch" the didgeridoo "[b]ecause it was his".[4] Ms Wanganeen's evidence did not exclude the possibility of contact between the Appellant and the didgeridoo while Wayne Goldsmith was alive.

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1 AB13-1; Tx194-5.
2 AB400, Tx590.18-23.
3 AB131, Tx195.26. On one fair reading of her evidence, she was saying that people who came to the house would "often" do so.
4 AB131, Tx195.31.

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There was no evidence of the date of Mr Goldsmith's death.[5] The evidence of Dr Henry was she could not say how long DNA had been deposited and that it could "accumulate over a period of time, days or even weeks".[6] DNA could not be "aged".[7] She agreed that it could have been there "for some time".[8]

3.2. Moreover, the general evidence of Ms Wanganeen that no-one "would" touch the didgeridoo after Wayne Goldsmith died was directly contradicted by the specific evidence of Letitia Webb that she had witnessed Kym Bruce Drover (the deceased, and Ms Webb's brother) playing the didgeridoo at about 5pm that very evening.[9]

4. As to [17.1.3] of the Respondent's Submissions:

4.1. The first and third sentences of [17.1.3] tend to reverse the onus of proof and could only derive force by a process of reasoning of the kind associated with *Jones v Dunkel.*[10] Such reasoning is inappropriate in the criminal setting where the accused is bound neither to call nor give evidence and where it is for the prosecution to prove its case beyond reasonable doubt.[11] An absence of evidence that the Appellant had been to 127 Hogarth Road was not capable of excluding the possibility that he had.

4.2. Further, the assertion that, had the Appellant been to the house, "he would not have been permitted to touch the didgeridoo" is inconsistent with the evidence both that persons *did* touch the didgeridoo when Wayne Goldsmith was alive[12] and that, on that very evening, Kym Bruce Drover had touched and indeed played the didgeridoo.[13]

5. As to [17.1.4] of the Respondent's Submissions:

5.1. The first sentence of [17.1.4] again tends to reverse the onus of proof and invite impermissible reasoning.

5.2. The second sentence simply does not follow from the first. The *absence* of an evidential basis *for concluding* (positively) that the Appellant had ever used or touched the didgeridoo could not logically exclude the possibility that he had done so.

6. As to [17.2.1] of the Respondent's submissions, a wooden plank or slat was located in

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5 It was evidently in or after 2009: see AB130, Tx194.32.
6 AB517, Tx903.11-25.
7 AB527, Tx913.22.
8 AB517, Tx903.28-32.
9 AB407, Tx597.27.
10 (1959) 101 CLR 298.
11 *Dyers v The Queen* (2002) 210 CLR 285 at 292-4 [9]-[15] per Gaudron and Hayne JJ and at 328 [121] per Callinan J (Kirby J agreeing).
12 AB131, Tx195.20-26.
13 AB407, Tx597.27.

the house.[14] The descriptions of intruders holding wood planks[15] are thus likely to be correct and it is unlikely that the didgeridoo would be so described. The relevant witnesses (Ms Wanganeen and Ms Oats) were Aboriginal and might have been expected to have identified a didgeridoo had they seen it. Ms Wanganeen was familiar with the didgeridoo and would have recognised it. The evidence of Letitia Webb (see below at [7]) was inconsistent with any of the attackers using the didgeridoo.

7. As to [17.2.3] of the Respondent's submission, the references to the evidence are selective. The following should be added. Letitia Webb initially said that, when she was told to put the didgeridoo down, she kept holding it behind her back.[16] Then she said she thought she did not have the didgeridoo in her hands the whole time but was unable to remember whether she did.[17] She thought she put it behind her against the wall where it was when she first grabbed it.[18] She did so while the men were still in the house and immediately before she started yelling out for her brother.[19] The intruders came through the back door and through the kitchen, past Ms Webb and into the passageway.[20] Ms Webb only left the kitchen after all the men "had cleared out of the passageway".[21] She did not see anyone else handle the didgeridoo during the attack.[22] When asked again what she did with the didgeridoo when she was told to put it down, Ms Webb said that she put it down.[23] In the circumstances, had one of the intruders picked up the didgeridoo, it is almost certain that Ms Webb would have observed this. After leaving the kitchen/dining room, Ms Webb went straight to the lounge room.[24]

8. As to [17.2.4] of the Respondent's Submissions, the didgeridoo was found in the lounge room where the deceased had been lying.[25] Large quantities of blood, presumably the blood of Leon Karpany and the deceased, were distributed around the house, including in the passageway between the kitchen/dining room and the lounge room.[26] The evidence was not capable of excluding the possibility that their blood (assuming it was blood) was deposited on the didgeridoo otherwise than by the didgeridoo being used as a weapon in the attack.

9. As to [17.3] and [17.4] of the Respondent's Submissions, those paragraphs attempt to demonstrate that the Appellant's DNA was likely found on the didgeridoo because a speck of his blood landed on or was transferred to it during the course of the attack.

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14 AB98-9, Tx136-7 (N J Metcalfe XN); Exhibit P1, photos 13-18, 108-113, AB862-3, 894-895; AB128, Tx192-3 (N L Wanganeen XN).
15 AB120, Tx184.22; AB124, Tx188.6 (N L Wanganeen XN); AB216, Tx324.33 (K R Oats XN).
16 AB401, Tx591.11.
17 AB401, Tx591.36.
18 AB402, Tx592.1.
19 AB402, Tx592.3.
20 AB401, Tx591.29.
21 AB404, Tx594.23.
22 AB408, Tx598.6.
23 AB408, Tx598.23.
24 AB404, Tx594.29.
25 AB864-5, Exhibit P1, photographs 21-23.
26 See, eg, AB73, Tx111; AB88-9, Tx126-7; AB867-70 and 883-5, Exhibit P1, photographs 30-38, 77-84.

However, Dr Henry's evidence in cross-examination was that the amount of DNA obtained from the samples was "probably lower than what I would expect for stains of that size", had they been blood stains.[27] The reasoning advanced by the Respondent in [17.3]-[17.4] depends upon the jury concluding, as a necessary step in their reasoning process, that the DNA sample at 3.B originated from blood, but the contrary was not excluded.

10. Moreover, despite the DNA testing of samples from several objects located in the house[28] and several swabs taken within the house,[29] there was no evidence that the Appellant was a contributor to any of them.[30] Multiple samples were taken from other parts of the didgeridoo and the Appellant was not identified as a contributor to any of those samples.[31] This suggests that the sample at 3.B was *not* deposited by the Appellant's being present at the house and bleeding in such a way as to produce a splatter of blood on the didgeridoo. It was not explained by what mechanism a single tiny speck of the Appellant's "blood" could have come to be on the didgeridoo while no other detectable blood or DNA of the Appellant was deposited on the didgeridoo or any other item in the house. Further, it is not at all apparent that, had the Appellant been an intruder using the didgeridoo as a weapon, his DNA was likely to have been deposited onto the didgeridoo in the manner which the Respondent's Submission supposes. Further again, the position where the didgeridoo was found and the placement of a drink can on top of it[32] are *prima facie* inconsistent with what might be expected in relation to an item that had been used as a weapon in the attack.

11. As to [18], the inference referred to in the second sentence again tends to reverse the onus of proof.

12. Throughout the Respondent's Submissions,[33] expressions such as "*capable* of establishing beyond reasonable doubt" and "*open* to the jury" are used. Such expressions are apt to mislead because they implicitly build in deference to the verdict of the jury. The verdict in relation to the Appellant did not depend substantially upon an assessment of the credit of any witness. This Court is in as good a position to assess the evidence as were the jury and the court below, and to draw its own conclusion as to whether it entertains a doubt. Generally "a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced".[34] No deference to the verdict is warranted in these circumstances.

13. The Respondent's submissions at [18]-[27] proceed from an assumption that the unquantified "improbability" of the Appellant's DNA being deposited onto the DNA by secondary transfer was, by itself, capable of producing proof of guilt beyond a

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27 AB520-1, Tx906-7.
28 AB492-7-, Tx878-83.
29 AB497-511, Tx883-97; AB515, Tx901.7-38.
30 AB516, Tx902.13-30.
31 AB488-92, Tx874-8; AB517-9, Tx903-5; AB548, Tx934.3-10.
32 As shown in AB864-5, Exhibit P1, photos 21 and 22.
33 At each of [17], [17.2.4], [19], [28] and [31].
34 *M v The Queen* (1994) 181 CLR 487 at 494.

reasonable doubt in circumstances where it was accepted that secondary transfer was possible.

14. The evidence of Dr Henry was that secondary transfer of DNA was "possible",[35] although "unlikely"[36] or "very unlikely"[37] and "less likely" or "much less likely" than primary transfer.[38] Dr Henry applied that expression of probability to particular scenarios which were not excluded by the evidence in the present case.[39] On a fair reading of Dr Henry's evidence, it left open (and could not exclude) as *an actual possibility*, that DNA could have been transferred secondarily, including as a result of a handshake[40] or contact up to eight hours earlier between the Appellant and a person who had touched the didgeridoo.[41] Moreover, the likelihood of secondary transfer in any particular case depends upon variables which were unknown in the present case (eg, the presence of saliva[42]). Finally, Dr Henry's estimates themselves are subject to considerable doubt as the science of DNA is still in its infancy.[43]

15. As to [27], the Respondent's Submissions do not grapple at all with the hypothesis consistent with innocence identified in [45.1] of the Appellant's Submissions, namely that secondary transfer occurred through a person other than Mr Sumner.

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35 AB483-6, Tx869-72; AB529, Tx915.7; AB532, Tx918.18-38.
36 A533, Tx919.30-4.
37 AB485, Tx871.31; A533, Tx919.19.
38 AB485, Tx871.37; AB527-8, Tx913-4; AB542, Tx928-9. This was quantified at AB526, Tx912.36.
39 AB52-4, Tx909-10; AB 525-6, Tx911; AB532, 918.23-33.
40 AB484, Tx870.1-10.
41 AB533, Tx919.15-19; see also AB485, Tx871.21-28.
42 AB524-5; Tx910-12.
43 AB522-3; Tx908-9; AB538-9; Tx924-925.