IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B20 of 2019

BETWEEN:

STEVEN MARK JOHN FENNELL
Appellant

and

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 sole ground of appeal is that the Court of Appeal erred in failing to find that the verdict was unreasonable or cannot be supported having regard to the evidence, in part because it made significant errors of fact. The arguments in support of this ground raise associated issues including the identification of a generic objects, the use of the forensic accounting analysis at trial, and the use of alleged omissions in the appellant's unusual record of interview.

Part III:

I certify that the appellant has considered whether any notice should be given in compliance with section 78B of the Judiciary Act 1903. No notice has been given.

Part IV:

R v Fennell [2017] QCA 154

Part V:

1. On 21 March 2016, Mr Fennell was convicted of murder of Liselotte Watson and sentenced to life imprisonment.

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2. The deceased was murdered on 12 or 13 November 2012 at Macleay Island, a small community in Moreton Bay with some 2,500 residents. The forensic evidence regarding the time of death was inconclusive – the forensic pathologist preferred the death occurring on 12 rather than 13 November but could not be more specific.[1]

3. Mr Fennell and the deceased had been close friends for about two years prior to her death.[2] He would drop by for a cup of tea almost every day and helped her around the house by doing her grocery shopping, changing lightbulbs and the like.[3] He was not paid for this help.[4]

4. The deceased's body was discovered on the evening of 13 November 2012 when Mr Fennell, who had been trying to contact her, asked local police to do a welfare check.

5. On the face of the scene, the deceased had been killed during a burglary. It was common knowledge on Macleay Island that she kept large sums of cash in her home.[5] Her house had been disturbed in a manner consistent with burglary,[6] and that was the immediate impression of the police officer who discovered the body.[7]

6. The deceased had what were described as defensive injuries on her hands and wrists.[8] There was no evidence of any reciprocal injuries on Mr Fennell.[9]

7. The sole issue at trial was whether Mr Fennell killed the deceased.

8. The Crown case was based around opportunity and motive. The evidence of opportunity was based on claimed sightings of Mr Fennell at or near the deceased's home on 12 November 2012 which were either normal for him, highly unreliable or inconsistent with the Crown's case theory. The evidence of motive was based on a claim that Mr Fennell had stolen money from the deceased and there was a risk that would be discovered.

9. The Crown case critically relied upon evidence said to link Mr Fennell to the alleged murder weapon, a hammer located in mangroves at Thompson's Point on 15 November

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1 See Appellant's Further Material (**AFM**) 103 ll 4-46. See also AFM 105 l 6 – 109 l 22. Dr Olumbe's opinion was based upon the stage of decomposition and evidence about the time the deceased was last seen alive, noting that decomposition could have been accelerated by the trauma to the head and the temperature.

2 MFI B, 44 l 18 – 45 l 11, 46 ll 41-48.

3 See, e.g., MFI A at AFM 1122 l 53 – 1124 l 36; MFI B, 73 ll 24-38, 80 ll 8-58.

4 MFI A at AFM 1125 ll 56 – 1126 l 26.

5 See, e.g., AFM 249 ll 39-45; 250 ll 9-19; 380 ll 3-7. See also MFI B, 62 l 32 – 64 l 7.

6 NB: Detective Senior Constable Strang noted that the house was "very neat" and that although drawers had been pulled out, "there was nothing rummaged in the drawers": AFM 121 ll 11-26. This was relied upon by the Crown to rebut the alternative hypothesis of a burglary: AFM 769 ll 13-26. It is not accepted that his experience as a police officer elevated that evidence to expert opinion. The photographs speak for themselves. See AFM 923-945. The deceased kept her house very tidy, with "nothing out of place": AFM 183 ll 22-23; 202 ll 43-45.

7 AFM 42 ll 11-23.

8 AFM 96 ll 23-41.

9 The evidence in this regard was the subject of extended discussion between trial counsel and the learned trial judge: T13-4 l 41 – T13-17 l 6.

2012.[10] On 10 November 2012, prior to the death, Pauline Jenson found a toiletries bag containing some of the deceased's banking documents at that location.[11] On 15 November 2012 police found a black purse and the deceased's Translink wallet and, 15 metres away, the hammer.[12] The evidence could not establish whether these other items were there prior to death or not. Mr Fennell was only charged after Robert and Susan Matheson saw photographs of the hammer on the news. They claimed to recognise it as their own, which they had lent to Mr Fennell some years prior but he had not returned. Their evidence was problematic, raises significant questions about contamination of memory, and is the key reason as to why the verdict was unreasonable.

10. A DNA profile was obtained from the toiletries bag. Mr Fennell was positively excluded as a contributor but there was "slight support" for contribution from Pauline Jenson, Evette Uzzell or Scott Cornell.[13] Mrs Uzzell lived three doors down from the deceased and her husband knew where the deceased kept cash in her home.[14] She was not asked about the toiletries bag. Scott Cornell delivered post around Macleay Island and rode a red postie bike like Mr Fennell.[15] He lived around the corner from the deceased but died prior to trial.[16]

Part VI:

11. The case against Mr Fennell was based on profoundly weak circumstantial evidence and premised on little more than opportunity and claimed motive. Significant factual errors by the Court of Appeal made the case appear stronger than it was. Critical parts of the evidence were the highly problematic identification of a mass-produced hammer and a claimed intentional omission by Mr Fennell in an interview in circumstances where there was evidence he has an acquired brain injury that affects his short-term memory. The Crown also relied upon convoluted and largely irrelevant forensic accounting evidence, which cast prejudicial suspicion over Mr Fennell's finances but was not truly probative.

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10 The forensic pathologist, Dr Olumbe, gave evidence that a hammer or similar object was likely to have caused the injuries: AFM 92 ll 19-29; 101 ll 10-14; 102 ll 14-15.

11 AFM 528 l 12; 530 l 35; 533 ll 26-28.

12 AFM 539 l 27-31; 540 ll 26-37.

13 Exhibit 70, 4. Pauline Jenson found and opened the bag before giving it to police.

14 AFM 413 ll 46-47; 416 ll 4-24.

15 As to which, see *R v Fennell* [2017] QCA, [36]-[37]. This is significant to the evidence of Loretta McKie at AFM 204 l 7 – 206 l 9. Ms McKie gave evidence that she saw the defendant attend the deceased's property on his red postie bike at around 2:00pm on 12 November 2019, the time at which the Crown alleged Mr Fennell killed the deceased. Ms McKie had never met Mr Fennell personally and saw the person entering the deceased's property from a distance and at an unusual angle: AFM 201 l 35 – 202 l 13; 205 l 27 – 209 l 13. See also exhibits 1 and 43.

16 AFM 280 ll 17-31; 445 ll 24-27.

12. This obviously inadequate Crown case has resulted in a conviction for murder. Mr Fennell is, on the evidence, likely to be innocent. To date, he has served more than six years in custody in relation to this offence.[17]

Legal principles

13. The relevant test on an unreasonable verdict ground is whether, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.[18]

14. The starting point is that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, and the jury has had the benefit of having seen and heard the witnesses.[19] However, the joint judgment in *M v The Queen*[20] observed:

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred."[21]

15. This qualification is of limited relevance in the present matter. Mr Fennell's record of interview is before the Court. Otherwise, the arguments do not hinge upon the assessment of particular witnesses, but upon an assessment of the circumstantial case as a whole. The issues with the hammer identification evidence, which are addressed in detail below, cannot be resolved by reference to the demeanour of the relevant witnesses given that the heart of the risks associated with identification evidence is the convincing but mistaken witness.

Identification of the hammer

16. The of identification of the hammer was so weak that an application should have been made to exclude evidence of it. In any event, that weakness rendered it incapable of providing the required support to an otherwise untenable prosecution case. The hammer was mass-produced and generic.

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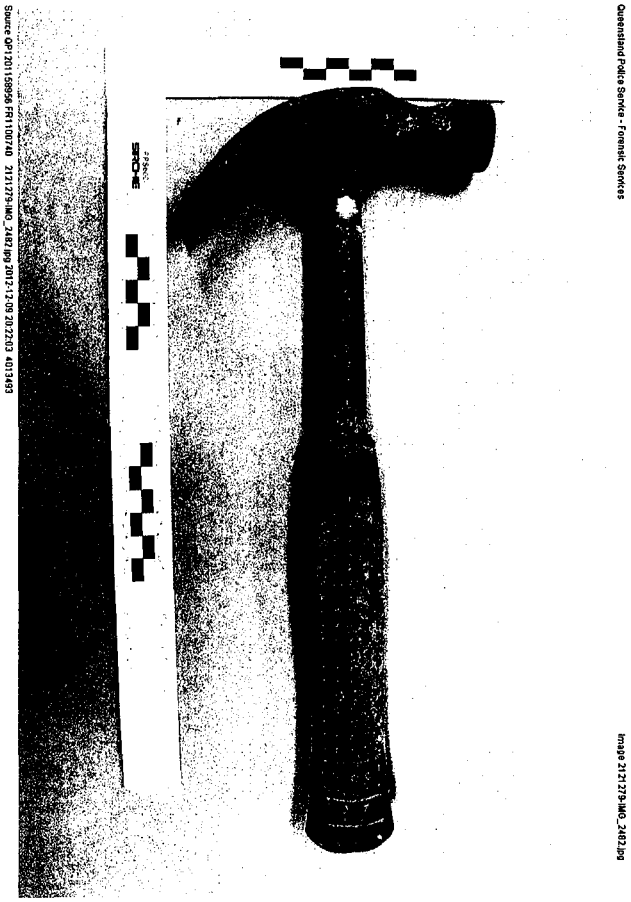
17 *R v Fennell* [2017] QCA 154, [2] 3. I.e. since 15 March 2013.

18 *SKA v The Queen* (2011) 243 CLR 400, [13] per French, Gummow and Kiefell JJ citing *M v The Queen* (1994) 181 CLR 487, 493.

19 *M v The Queen* (1994) 181 CLR 487, 493 per Mason CJ, Deane, Dawson and Toohey JJ

20 (1994) 181 CLR 487.

21 Ibid 494.



17. The Mathesons first saw this hammer when a photo of it "flashed up" on the news on the evening of 21 January 2013.[22] At trial, Mr Matheson said he recognised the hammer immediately, although the news bulletin did not place it in the context of the Macleay Island murder.[23] However, his wife said the bulletin associated the hammer with the murder and that it was she who first suggested the hammer was his.[24] There is no suggestion that the Mathesons were able to see the small marks they later identified.

18. Mr Matheson claimed he lent to hammer to Mr Fennell "the year before the murder or a year before that",[25] while his wife estimated this was in around 2008 or 2009.[26]

19. There were indications that the Mathesons had tainted one another's evidence. Mrs Matheson said she last saw the hammer when her husband was "getting some tools ready to go around to help fix a trailer" for Mr Fennell.[27] She described the tools in unusual

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22 AFM 582 ll 11-12.
23 AFM 582 ll 8-16; 591 l 37 – 592 l 5.
24 AFM 606 ll 4-15.
25 AFM 588 l 14-16.
26 AFM 609 ll 29-30.
27 AFM 609 ll 17-21.

detail: "the hammer and some cold chisels and some Tek screws"[28] – it seems unlikely she would have an independent recollection of those details some eight years later at trial. Mrs Matheson did not go to Mr Fennell's house that day or claim she otherwise had any personal knowledge of what happened to the hammer, so had clearly discussed this with her husband at some stage.

20. The Mathesons did not give statements about this until 12 days after the news bulletin. Their interviews involved identifying markings on the hammer, such as dints and chips, by reference to photographs of the hammer itself.[29] The Mathesons supported the identification of these generic marks with narratives, e.g. "I got really, really angry and I belted the nail".[30] At first blush, those narratives made their evidence more compelling, however they each gave different stories in relation to the same marks.[31] In closing, the learned Crown Prosecutor inaccurately submitted that Mrs Matheson "certainly doesn't say anything to contradict or detract from Robert Matheson's identification."[32]

21. The Mathesons were not asked to identify the hammer out of a line-up[33] but by reference to the photographs and the object itself, which made their recollection susceptible to suggestion. Mr Matheson stated that "a tradesman knows his tools" and claimed "[y]ou can lay out 100 hammers, and a tradesman will walk straight up to his own hammer and pick it up."[34] However, when police conducted line-ups of screwdrivers and chisels, Mr Matheson was unable to identify his own tools.[35] Mr Matheson could not recall the brand of the hammer at the committal hearing.[36]

22. These factors created a risk of confirmation bias. Nonetheless, Gotterson JA considered Mr Matheson's evidence to be "detailed and consistent" and that "it had an appealing practicality to it."[37] His Honour did not address the inconsistencies with Mrs Matheson's evidence.

23. The jury were warned generally about issues with the identification evidence, however those directions did not comply with the requirements in *R v Clout*.[38] That decision makes clear that the same sort of dangers as exist with the identification of people exist

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28 AFM 609 ll 29-31.
29 AFM 582 ll 21-28; 606 l 45 – 607 l 4; 612 ll 36-45.
30 AFM 609 ll 9-12.
31 See the summary table in the Outline of Submissions on behalf of the Appellant, [66].
32 AFM 804 ll 7-10.
33 AFM 594 ll 25-33; 612 ll 36-45.
34 AFM 594 ll 16-18.
35 AFM 594 ll 35-46.
36 AFM 592 ll 10-16; 593 ll 1-13.
37 *R v Fennell* [2017] QCA, [84].
38 (1995) 41 NSWLR 312.

in relation to the identification of objects. Had the Court of Appeal properly considered those issues, it could not rationally have concluded that the hammer "stood as strong circumstantial evidence against the appellant."[39] The issues that were raised in *Clout* all stood against any meaningful weight being given to this identification, including matters not directed on:

a. the danger of contamination of memory, which was significant in this case;[40]

b. the high importance of securing an early record of the uncontaminated recall of the witness.[41] This was particularly dangerous where a period of 12 days passed before statements were taken, and where the witnesses were a married couple, knew the deceased personally and had likely discussed the matter in the interim;

c. the specific danger that memory may sometimes be enlarged to include matters which the observer expects, or is expected to recall.[42] Again, this feature was a serious risk where the witnesses were identifying features of the hammer by reference to photographs, rather than recalling them unprompted; or

d. the particular danger in identifying a mass-produced, generic object.[43]

24. The critical importance of the hammer identification in the case against Mr Fennell is illustrated by the fact that he was not charged until after the Mathesons came forward.[44] The learned trial judge recognised its importance when directing the jury in the following terms: "The case against the defendant depends to a significant degree on the correctness of the identification of this hammer by each of Mr and Mrs Matheson."[45]

25. Further, the Crown closing invited the jury to engage in an odd form of propensity reasoning regarding the rusty state of the hammer:

> "It was in a rusty state. Again, the salt water would account for some of that. But also, if it was a hammer in the possession of the defendant for some time, you might think that's consistent. Because you heard Detective Suffolk say yesterday, when he went [to the defendant's home], he found ultimately five, I think, four hammers and then one other one, all of which seemed to be in fairly poor condition, rusty heads, and which didn't appear to have been used. So that hammer, if it's the one which was with Mr Fennell, probably was in a poor

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39 *R v Fennell* [2017] QCA, [84].
40 As in *R v Clout*, this feature warranted both a general and specific warning: Ibid 321-322.
41 Ibid 321.
42 Ibid.
43 In *R v Clout*, Kirby A-CJ noted the danger arising from "the virtual identity of semi-trailers of the same brand and year of manufacture": 322
44 See also AFM 803 ll 7-22.
45 CAB 21 ll 23-24.

condition before it went into the drink, and bring [sic] in the water wouldn't have helped, of course."[46]

26. The hammer as the murder weapon theory was itself not strong. The hammer was found submerged in salt water, 15 metres from other items of interest and corroded. There was no forensic evidence linking that item with the murder. Rather the evidence was that the injuries sustained suggested an object such as a hammer.[47]

Forensic evidence

27. There was no forensic evidence linking Mr Funnell to the murder of the deceased.

28. The Crown closing address included internal logical inconsistencies in the treatment of the absence of forensic evidence. The learned Crown Prosecutor stated "Somehow, despite the frequency of his visits to 5 Alistair Court, no DNA and only one fingerprint belonging to the defendant was found",[48] implying that was somehow suspicious. Shortly thereafter he made the following comment about the possibility of an alternative killer: "No DNA, no fingerprints, nothing else which indicates some other identified individual was responsible for this crime."[49]

Opportunity

29. The evidence of opportunity was premised on Mr Fennell's close relationship with the deceased, gaps in his alibi and eye witness accounts. Mr Fennell's movements on 12 and 13 November 2012 are summarised in the Appellant's Chronology.

30. The gaps in his alibi are readily explained by Mr Fennell's acquired brain injury. Various eye witnesses placed Mr Fennell at the deceased's home at various times of the day,[50] some of which fitted neatly into the Crown case theory and some of which did not. Where he visited her at least once a day, including on 11 November 2012, the eye witnesses could easily have been mistaken. It is noted again that the time of death was uncertain.

31. Further, Mr Fennell did not have exclusive opportunity. Other people with access to the deceased's home who knew she kept cash around the house were not excluded by DNA.

32. The Crown case theory was that the murder was committed between around 2:00pm and 2:20pm on 12 November 2012 and that Mr Fennell returned from 6:00pm to 7:30pm that

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46 AFM 803 ll 13-20.

47 AFM 96 l 24 – 97 l 38.

48 AFM 756 ll 41-44.

49 AFM 757 ll 3-4. See also AFM 804 ll 31-37. Subsequently, he observed that "Ms Watson was found beside the bed, as you might think she would have been if she had been killed on the bed and rolled off when someone lifted the mattress", inviting the jury to relate that to the photograph in the web article.[49] That argument suggests Mr Fennell searched under the mattress for cash and is inconsistent with the theory that he constructed a burglary scene, ignoring $290 cash in an envelope, to cover up other misdeeds: see AFM 769 l 4 – 771 l 43.

50 See the Appellant's Chronology.

evening to stage a burglary inside the deceased's home. There was no forensic evidence to support this theory, which relied upon the extraordinarily weak evidence of Loretta McKie and Ulla Doolan.[51] Although there the evidence about Mr Fennell's movements that afternoon was not concrete, other witnesses placed him elsewhere on Macleay Island from 12:30pm onwards.[52]

33. A witness who lived nearby, John Cooper, gave evidence that on either 12 or 13 November 2012 he heard a woman screaming and the dogs next door to the deceased's property "go off" barking, which he had never heard before.[53] Although he was unsure of the day, the witness was firm that this occurred late morning, before midday. The Crown did not suggest that Mr Fennell attend the deceased's residence at this time.[54] As noted above, the deceased had significant defensive injuries on her hands and wrists. These included abrasions, crescent-shaped bruising to the forearms that suggested impact by a hammer, and multiple lacerations on the hands.[55] A 40mm by 10mm laceration on her right index finger was associated with a fractured phalange underneath.[56] In closing, the Crown suggested that as a result of the blows to the head, "the opportunity for [the deceased] to call out, to scream or to struggle were very limited, and that, you might think, accounts for the absence of anyone overhearing, in the course of the day, shouts or screams."[57] It then invited the jury to disregard John Cooper's evidence, suggesting that "you would think her opportunity to raise any kind of hue and cry was very, very limited indeed."[58] The nature of her defensive injuries, however, suggest a violent struggle lasting at least some seconds.

34. The confusion regarding the Crown case on opportunity is exemplified by the reasons of Gotterson JA. In finding that the jury verdict was supported by the evidence, his Honour observed: "There was evidence that the appellant's vehicle was sighted at about 11.00 am [on 12 November 2012] outside the deceased's house. This evidence had its imperfections."[59] At trial, neither party sought to rely upon that evidence and for good

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51 Ms McKie identified Mr Fennell as arriving on a red postie bike. However, as noted above at [10], the postman Scott Cornell also rode a red postie bike and his DNA was linked to the toiletries bag found at Thompson Point. Ms McKie had never met Mr Fennell personally and saw the person entering the deceased's property from a distance and at an unusual angle: see fn 15 above.

52 See the Appellant's Chronology.

53 AFM 157 ll 4-29.

54 AFM 775 ll 1-25.

55 AFM 96 l 24 – 97 l 38.

56 AFM 96 ll 24-31.

57 AFM 767 ll 6-9.

58 AFM 767 11-23.

59 *R v Fennell* [2017] QCA 154, [83].

reason.[60] In relation to Mr Fennell's alibi during the evening, his Honour observed: "... for the appellant to have begun using the computer at 6.20 pm would not have contradicted Ms Doolan's evidence of sighting the appellant at the deceased's house at about 6 pm."[61] However, the reasons earlier summarise Ms Doolan's evidence that Mr Fennell was at the property from 6:00pm until 7:30pm.[62]

Motive

35. The prosecution claimed that the motive for murder was that Mr Fennell had stolen a sum of money from deceased. The evidence to support this claim was palpably weak.

36. On five occasions in late 2012 Mr Fennell attended a Westpac branch on the mainland and collected funds from the deceased's account using withdrawal slips signed by her.[63] By that time the deceased required a walking stick and rarely, if ever, left her home.[64] Some of the handwriting on the withdrawal slips was attributed to Mr Fennell, which he freely volunteered during his interview with police.[65] The Crown accepted that the first four transactions were legitimate and authorised by the deceased[66] but alleged that on 2 November 2012 Mr Fennell had stolen $5,000. The Crown argued that this alleged theft provided motive for murder.

37. The jury were asked to infer a theft on the basis of circumstantial evidence. At its highest, the supporting evidence was as follows:

    a. Mr Fennell was a regular punter at the Macleay Island TAB;[67]

    b. His wife was not aware of the extent his gambling[68] and a witness testified that Mr Fennell was worried she would find out;[69]

    c. Mr Fennell visited the TAB on the afternoon of 12 November 2012 and did not disclose that during his interview with police;[70]

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60 AFM 775 ll 1-25; AFM 846 ll 5-43; Core Appeal Book (**CAB**) 12 l 38 – T6 l 6. His Honour relied upon this evidence to support the Crown case on opportunity even though it is noted earlier the reasons that Mr Robinson conceded his recognition of Mr Fennell's vehicle in March 2014 "could have been a reconstruction": *R v Fennell* [2017] QCA 154, [38]. Helen Fennell's evidence was that she had the vehicle until around 12:30pm: AFM 308 ll 32-44.

61 *R v Fennell* [2017] QCA 154, [130].

62 Ibid [37].

63 Being $3,000 on 22 August 2012, $7,000 on 17 September 2012, $3,000 on 28 September 2012, $3,000 on 5 October 2012, and $8,000 on 2 November 2012. See exhibits 59-63; MFI A at AFM 1121 l 43 – 1122 l 8; MFI B AFM 1189 l 56 – 1192 l 58.

64 MFI B AFM 1189 l 54 – 1190 l 21.

65 Mr Fennell's said the deceased had arthritis and sometimes asked him to complete the slip: MFI B AFM 1194 ll 31-34. The handwriting expert attributed each signature to the deceased: AFM 461 l 44 – 462 l 3.

66 AFM 782 ll 15-18. However, the Crown's position in relation to the 5 October 2012 withdrawal of $3,000 and theft of other cash seemed to shift: see e.g. AFM 783 ll 1-43.

67 AFM 422 l 43 – 423 l 37.

68 AFM 297 ll 4-14.

69 AFM 288 ll 19-24.

70 See MFI A from AFM 1119; MFI B from AFM 1137, Exhibits 38-39.

d. He had recently lost a contract delivering pamphlets for the Russell Island IGA;[71]

e. Shortly prior to her death, the deceased told her daughter and a neighbour that some money had gone missing[72] – notably, this could not have been a reference to the $5,000 allegedly stolen by Mr Fennell;[73] and

f. A handwriting expert attributed parts of the withdrawal slips to the deceased and Mr Fennell[74] and gave evidence that the figure "3" on the 2 November 2012 withdrawal slip had been changed to "8", though he could not say by whom;[75]

g. On 5 October 2012, Mr Fennell asked Westpac staff about becoming a signing authority for the deceased's bank account – a measure the bank manager had suggested as a more permanent solution to authorising each withdrawal slip;[76]

h. On 12 November 2012, before her death, he dropped by the deceased's home to return a biscuit tin she had previously used to store receipts and some cash.[77] He knocked but there was no answer and he left it on the patio; and

i. At 7:47am on 12 November 2012, Mr Fennell's home computer clicked a link on the Yahoo homepage that led to an article titled "Weird Places People Hide Money Around the Home" (there is no suggestion this term was searched for).[78]

38. Against that, the deceased had previously entrusted Mr Fennell with large sums of cash to transport to her family on nearby Lamb Island, with no suggestion of theft.[79] There had been no increase in Mr Fennell's long-term betting habits[80] and the Fennells were

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71 AFM 661 ll 1-24. The reasons of Gotterson JA observe, under the heading "Motive", "In early November 2012, he lost a part-time job delivering catalogues for the Russell Island IGA.": *R v Fennell* [2017] QCA, [22]. Mr Fennell had other contracts on Russell Island: MFI B AFM 1157 ll 5-10.

72 Exhibit 70, 1; AFM 408 l 47 – 409 l 8. In closing, the Crown used the evidence of Helen Watson to support a theory that the deceased intended to confront Mr Fennell about the missing funds and that this confrontation potentially led to her death: AFM 801 ll 26-30; 802 ll 19-25; 814 l 40 – 815 l 14. Helen Watson died prior to trial, however her statement speaks for itself and does not support this argument.

73 The evidence was that the deceased checked her bank statements once they were delivered via post, however the statement for the relevant period had not arrived prior to her death. The Crown argued that the imminent bank statement created a risk the alleged theft would be discovered and provided Mr Fennell with a motive to kill the deceased. If Mr Fennell had defrauded her of $5,000 in the way suggested, she would not have discovered this prior to the conversations about missing funds.

74 AFM 456 l 12 – 459 l 41.

75 AFM 459 l 25 – 461 l 9. The words "EIGHT THOUSAND DOLLARS ONLY" were unaltered. The evidence was that these words were written by Mr Fennell: AFM 459 ll 25-34. At trial, it was not acknowledged that the Crown case theory relied upon Mrs Watson having signed a partially blank withdrawal slip.

76 AFM 385.14 l 40 – 385.15 l 8; 387 ll 8-18.

77 AFM 403 ll 1-11; AFM 649 ll 29-33. That is, prior to the death on the Crown case.

78 Exhibit 68. The user returned to the Yahoo homepage less than one second later, but the expert could not exclude the possibility that the article remained open in another window or tab: AFM 489 l 46 – 490 l 17.

79 Exhibit 70 [2]; MFI B AFM 1180 l 50 – 1181 l 26. *Cf* the evidence of the deceased's granddaughter at AFM 399 ll 13-23.

80 AFM 427 ll 21-36.

not in financial distress. Although their savings were minimal, as at 30 June 2012 they were ahead on their mortgage and had been meeting their repayments.[81]

39. While discussing the missing funds with her daughter, the deceased "stated that there had been a person working around her house doing jobs" but "she was going to speak to [Mr Fennell] about it, because ... she was sure he would sort it out".[82] There was evidence that John Jackson had been working in the deceased's yard for around 12 months,[83] and that Mark Robinson had previously done work at her home.[84] Each man gave evidence at trial and was aware the deceased kept large sums of cash around the house.[85] DNA samples were taken from Mr Fennell, the deceased and 17 other persons known to have had contact with the deceased, her home or various items of real evidence. There was no DNA or other forensic evidence linking Mr Fennell to the deceased's death. A sample was not taken from Mark Robinson who, as a result, was never excluded as a possible contributor.[86] Although a sample was taken from John Jackson, it is not clear whether the sample was compared with the forensic evidence.[87]

40. The Crown case theory presented in closing on motive shifted throughout to account for different aspects of the evidence. For example, the Crown Prosecutor conceded that:

> "... the evidence as a whole is that Ms Watson was aware of and authorised those early transactions, to the extent where there were even phone calls made by bank staff to her on the first occasion to make sure that everything was okay."[88]

41. However, by the end of the closing address it is not clear whether the alleged theft by Mr Fennell was limited to $5,000 from the 2 November 2012 withdrawal or was much broader.[89] For example, the jury were invited to find significance in the total turnover of the Macleay Island TAB (rather than Mr Fennell's gambling expenditure) on the day of the $7,000 withdrawal from the deceased's account, although that withdrawal was accepted as legitimate and there was no evidence he attended the TAB on that date.[90]

42. The Crown case relied upon the forensic accounting evidence of Joanne McKinnon to support the Crown case on motive, together with significant focus on Mr Fennell's

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81 Exhibit 103; AFM 689 ll 29-42.
82 Exhibit 70, [2]. As Helen Watson died prior to the hearing, the statement was admissible under s 93B *Evidence Act* 1977 (Qld).
83 AFM 380 ll 4-13. He worked on her property each "month to six weeks": AFM 380 l 26.
84 AFM 245 ll 24-36; 250 ll 1-7, 21-22.
85 AFM 249 ll 39-45; 250 ll 9-19; 381 ll 3-7.
86 See Exhibit 70, [3].
87 See AFM 570 l 11 – 571 l 19; Exhibit 70, [3].
88 AFM 782 ll 15-18.
89 See e.g. AFM 802 ll 1-43.
90 AFM 801 ll 5-9. The submission then invites the jury to consider any connections regarding *all* of the withdrawals between August and November 2012: AFM 801 ll 10-13.

gambling.[91] The forensic accounting evidence was convoluted, confusing and largely irrelevant. The effect of this evidence was to muddy the waters surrounding the Crown case on motive, by casting broad suspicion over Mr Fennell's finances.

43. During her evidence, Ms McKinnon explained the various graphs and tables but did not draw any conclusions or provide an overarching opinion about Mr Fennell's financial circumstances. The jury were apparently left to draw any conclusions for themselves.

44. Upon analysis, the following conclusions can be drawn from the accounting evidence:

    a. The Fennell family had limited savings;[92]

    b. They spent in accordance with their income in any given month;[93]

    c. Their only debts were a mortgage and car loan totalling approximately $130,000 as at 12 November 2012. There was no evidence that they were struggling to meet these liabilities. To the contrary, at 30 June 2012, the Fennells were ahead on their mortgage by $4,578.65;[94]

    d. Mr Fennell's business income in the preceding months had exceeded his weekly income in the previous two tax years;[95]

    e. There had been no increase Mr Fennell's long-term betting habits.[96]

45. The only other evidence of any change in Mr Fennell's financial circumstances were that he had recently lost the Russell Island IGA contract worth "about $347 per week"[97] and that, in August 2012, he repaid a modest loan from his sister, who indicated she would not be in position to lend him more money.[98] The IGA was not his only customer.

46. The forensic accounting analysis could only have been relevant to the following issues:

    a. Whether Mr Fennell was in financial distress at the time of the death;

    b. Whether Mr Fennell had unexplained expenditure following the disputed transaction on 2 November 2012 or, taking the Crown allegations at their broadest, in the few months leading up to her death; or

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91 See AFM 796 l 25 – 797 l 19.

92 Their savings had not, for example, sharply declined around the time of the death.[92]

93 Exhibits 90, 92, 95, 98.

94 AFM 707 ll 10-37. It was noted those funds could not be redrawn: Exhibit 103. There was, however, no evidence of a need to withdraw those funds.

95 See AFM 672 l 44 – 673 l 14. Between 1 July 2012 and 19 November 2012 (a period of 20 weeks), Mr Fennell had deposited $19,531.09 into his business account (an average of approximately $956 per week). Ms McKinnon accepted this as business income for the purposes of the analysis: 672 ll 15-27. During the 2010-2011 tax year, gross deposits totaled $35,069.27 (approximately $674 per week). During the 2011-2012 tax year, gross deposits totaled $47,705.10 (approximately $917 per week).

96 AFM 427 ll 21-36.

97 AFM 661 ll 23-24.

98 The questioning of Ms Slater encompassed Mr Fennell's history of borrowing money from her and confirmed that as at 2012 this loan was "in the hundreds rather than thousands" of dollars. She was aware he "would have a bet". She said "he always paid back. … He never gave me any grief and I never ever asked for any money.": AFM 283 l 26 – 285 l 11.

c. Whether there was any pattern in the deceased's bank withdrawals to indicate the disputed transaction of $8,000 was unusual to the point of being suspicious.

47. Despite the limited potential relevance, the scope of the financial analysis was broad, covering the Fennells' finances for the period 1 July 2010 to 19 November 2012. The bulk of that period was irrelevant to the Crown case but was, nonetheless, the subject of lengthy and detailed questioning during examination-in-chief.

48. In summing-up and during closing addresses, the jury were given little guidance in how to treat this evidence or how it may have been relevant to the issues at trial.[99]

49. A summary table of income and expenditure included the figure of $10,833.50, being "Funds from Unknown Sources". On its face, that figure appears suspicious. However, it incorporated all unexplained expenditure total over the period 1 July 2010 to 19 November 2012.[100] Only $859.70, including gambling expenditure, related to the period from 22 August 2012 during which Mr Fennell was assisting the deceased with her banking.[101] Given that Mr Fennell operated various businesses with a significant cash component (e.g. lawn mowing), that is hardly compelling. Further, Ms McKinnon did not consider all business records, which may have explained the source of those funds.[102]

50. Various graphs plotted the monthly closing balance of accounts operated by Mr Fennell and his immediate family members.[103] These graphs show a decrease in closing balance from around September 2012 which, on its face, seems to indicate a decline in their financial position. However, plotting the closing balance of an account without reference to deposits and withdrawals throughout the period is meaningless.

51. The graphs plotting monthly deposits and withdrawals demonstrate that, in any given month, the Fennells' expenditure closely matched their income.[104] In characterising their financial circumstances, the learned Crown Prosecutor stated that "the Fennell family spent as much as they earned."[105] Where their income, and proportionately their expenditure, fluctuated month to month, this could also be described as living within their means and adjusting their spending accordingly.[106]

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99 AFM 796 ll 25-43; 799 l 14 – 801 l 13; AFM 866 ll 1-9; 867 l 18 – 868 l 2; 868 l 33 – 873 l 23: CAB 27 ll 18-20; 32 ll 6-14; 32 l 24 – 34 l 20. The directions on expert evidence did not refer to McKinnon's evidence: CAB 18 l 4 – 19 l 18.

100 Exhibit 87.

101 Exhibit 88.

102 This can be inferred from the limited documents included in Exhibit 86 compared to, e.g., deposits into the business account and Mr Fennell's tax returns.

103 Exhibits 89, 91, 94, 97.

104 Exhibits 90, 92, 95, 98.

105 AFM 785 l 21.

106 The same graphs indicated a peak in during in August 2012, which represented purchase of flights for a family trip to New Zealand: See AFM 675 l 38 – 676 l 5; Exhibit 89, 92. Some of these funds were paid

52. Further evidence summarised the bank statements for the deceased's sole account for the period 2 November 2007 to 2 November 2012.[107] This summary does not demonstrate a pattern of withdrawals that suggest the $8,000 withdrawal of 2 November 2012 was anomalous. The deceased did not use the account for day to day expenditure but withdrew lump sums, usually in amounts of no more than $5,000, at irregular intervals. For example, there were no withdrawals between 1 June 2012 and 20 August 2012.[108]

53. Evidently, the deceased was withdrawing larger than usual amounts shortly prior to her death. However, the majority of those withdrawals ($24,000) were not impugned by the Crown.[109] This additional cash was likely related to work that was being done to her home around the time of her death.

54. Another graph plots the deceased's withdrawals and deposits in each calendar month and arbitrarily truncates that data to the period July 2010 to November 2012.[110] This graph does not include withdrawals totalling $11,000 in May 2010,[111] and makes the spike in withdrawals prior to her death seem more unusual.

55. The table titled "Correlation Analysis"[112] was an attempt to demonstrate some correlation between the deceased's withdrawals and activity in the various Fennell accounts.[113] A column entitled "Macleay Island TAB Turnover" encompassed TAB turnover for the entire island, not just Mr Fennell.[114] Ms McKinnon did not draw any conclusions from that document, which ultimately did not demonstrate anything of probative value but was potentially dangerous in the hands of the jury. The closing submissions on this document were vague, speculative and invited the jury to make "odd connections" between the total TAB turnover and withdrawals from the deceased's account.[115]

56. The closing address invited the jury to speculate about Ms McKinnon's evidence. For example, "what became of ... the $16,000 that had come out of the account from August through until this point in early November? Why would [the deceased] suddenly need another $8000?" It was suggested that this was "extraordinary" and that the only

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from the childrens' "piggy bank" accounts. This peak may have appeared unusual to the jury and therefore probative, but was innocuous upon explanation.

107 Exhibit 99. These bank statements were issued monthly but do not reflect the calendar month.

108 Exhibit 104.

109 See also Exhibit 101, which plots the closing balance of the deceased's bank account for the period July 2010 to November 2012.

110 Exhibit 100.

111 Exhibit 104.

112 Exhibit 102.

113 See AFM 693 l 23 – 695 l 29; 712 ll 4-7. This document was the subject of comment and questioning by the learned trial judge: AFM 708 l 40 – 709 l 39; 711 l 40 – 713 l 14.

114 AFM 702 ll 24-33.

115 AFM 801 l 5. See also AFM 800 l 1 – 801 l 13.

"reasonable conclusion" was that Mr Fennell was "engaged in shady operations".[116] To the contrary, there was evidence that the deceased was having work done on her house and had arranged for tradesman to build a pergola in the back yard.[117]

57. The closing address observed that it would be wrong to assess Mr Fennell's gambling losses by extrapolating on the basis of his losses at the TAB on 12 November 2012. However, it then invites the jury to speculate on the basis of their own experience of gambling that he relied upon family bank accounts to meet his gambling losses.[118]

Alleged omissions in the record of interview

58. An unusual feature of this case is Mr Fennell's acquired brain injury. He suffers from short-term memory loss as the result of an accident in about 1980. Inexplicably, Mr Fennell's legal representatives did not adduce expert evidence about the nature of his brain injury and resultant memory loss. However, during his interview with police, Mr Fennell spoke about his impairment at some length.[119] Although the fact of his acquired brain injury was not disputed, in closing the learned Crown Prosecutor referred to specific details Mr Fennell could recall and said:

> "I mean, I don't know how short-term memory loss works in a pathological sense, but when you look at this conversation overall, he doesn't seem to be a man, you might think, who's really struggling to recall events ..."[120]

59. Mr Fennell, however, described his recall as "fractured parts of information"[121] Where there was no evidence to the contrary, the Crown submission was speculative.

60. On 14 November 2012, the day after the body was discovered, Mr Fennell was questioned by police for seven hours. Although he was told he was not a suspect,[122] the nature and depth of the questioning suggests otherwise. He was questioned in detail about his movements from Saturday onwards and about his relationship with the deceased. The interview was covertly recorded.[123] Because he was said not to be a suspect, Mr Fennell did not receive the mandatory warnings, the officers did not comply

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116 AFM 784 ll 5-16; 785 ll 4-27.
117 AFM 210 ll 24-39; 211 ll 10-14; Exhibit 70, 1.
118 AFM 796 l 45 – 797 l 19; 798 ll 3-25.
119 His account was supported by the evidence of his wife: AFM 306 l 42 – 307 l 15. See also the evidence of Timothy Barker: AFM 317 l 23 – 318 l 10.
120 AFM 809 ll 17-30.
121 MFI B at AFM 1167 ll 1-2. See also MFI B at AFM 1167 ll 1-52; 1168 ll 25-53.
122 MFI B at AFM 1142 l 21.
123 When Mr Fennell asked whether he was being recorded, the officers denied it: MFI B at AFM 1141 ll 43-46.

with safeguards for questioning a suspect with impaired capacity,[124] and the interview far exceeded the usual time limit.[125]

61. Police had told Mr Fennell he would be questioned about his movements. At the start of the interview, he produced a typed timeline and explained his impairment, saying he said he had very little recollection of the previous days.[126] He explained, "I'll recall this much better in three or six months ... But I can't tell you what I had for lunch."[127] The timeline had been compiled with the help of his wife and by reference to a daily diary he kept at home. In that respect, this document was hearsay.[128] During his record of interview, police insisted that Mr Fennell handwrite a direct copy of the typed timeline,[129] which was ultimately provided to the handwriting expert to analyse the withdrawal slips.[130]

62. The timeline did not include his visit to the TAB on the afternoon of 12 November 2012.

63. During discussions regarding directions the Crown Prosecutor sought a direction that "if the jury find that it is, in effect, a lie by omission, then that is something to which they can have regard in assessing the credibility and reliability of the versions given by the defendant." He added, "I don't suggest it goes so far as to imply guilt for the killing of Mrs Watson."[131]

64. The jury were given the standard direction about matters of credibility and reliability,[132] and a further direction on the use of lies going only to credit, listing various innocent explanations for the omission of the defendant's TAB visit.[133]

65. The Crown closing address used the word "reliability" to refer to matters of both reliability and credit but urged the jury to regard this as a deliberate omission.[134] The assertion that this was an intentional omission is problematic. During the interview he repeatedly explained that the timeline was not his independent recollection.[135] It is hardly surprising that neither his wife nor the freely accessible diary kept in his home recorded the TAB visit, as he was hiding his gambling from her.

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124 *Police Powers and Responsibilities Act* 2000 (Qld), ss 415 and 422, Sch 6 meaning of "*person with impaired capacity*".

125 *Police Powers and Responsibilities Act* 2000 (Qld), s 403.

126 Exhibit 38; MFI B at AFM 1140 l 15 – 1141 l 12. See also MFI B at AFM 1154 ll 9-51; 1158 l 46-56; 1162 l 56 – 1170 l 35.

127 MFI B at AFM 1147 ll 32-38. See also MFI B at AFM 1147 ll 50-56.

128 Nonetheless, in summing up the trial judge referred to it as "the defendant's evidence of his movements in the days surrounding the death": CAB 14 ll 31-40.

129 See MFI B at AFM 1148 ll 20-44.

130 See Exhibit 39 and AFM 455 ll 1-17.

131 AFM 726 ll 22-33.

132 CAB 11 ll 44-46. See Supreme and District Courts Benchbook, 23.6.

133 CAB 15 l 4 – 16 l 20.

134 AFM 758 l 20 – 759 l 30; 776 ll 20-24; 813 l 28 – 814 l 3.

135 See, e.g., MFI B at AFM 1122 l 50 – 1123 l 12; 1148 ll 20-45; 1233 l 39 – 98 l 13; 1235 l 48 – 56; 1237 l 40 – 1238 l 10.

66. Despite the concession made while seeking directions, the effect of those submissions was to invite the jury to rely upon the alleged omissions as evidence of consciousness of guilt. For example, when referring to Mr Fennell's losses at the TAB at afternoon:

> "One thousand three hundred and fifty-seven dollars and 10 cents bet, and $1207.59 lost. The one successful bet is number 6, which you see returned a dividend of $149.51. And this is all happening, mind, on that Monday afternoon after it seems likely on the evidence Mrs Watson has been killed, and something that he neglects to mention to the police."[136]

Prejudicial material in the record of interview

67. In addition, the interview included material which would necessarily have indicated to the jury that Mr Fennell had previous contact with the police.[137] This may help to explain why the jury convicted on such an obviously weak case.

68. The jury was initially given a transcript of the interview which included references to the fact that Mr Fennell had previously been in prison.[138] That transcript was withdrawn from the jury before those parts of the interview were played.[139] However, the withdrawal occurred after an hour of silence in the recording during which each member of the jury had a transcript that included four explicit references to his time in prison, each towards the beginning of that document.[140] It is likely that members of the jury perused this document during the lengthy silence.[141] Oddly, defence counsel agreed with the prosecutor's submission that there was "no reason to suspect that anyone jumped ahead" and did not apply to discharge the jury.[142]

The Court of Appeal decision

69. The Court of Appeal decision on the unreasonableness ground is partly based upon the following significant errors of fact:

    a. "*The appellant claimed that he had taken some of the amount withdrawn on 2 November 2012 to the deceased's daughter who resided on Lamb Island. This was*

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136 AFM 778 ll 20-28. See also AFM 791 ll 9-17.

137 Mr Fennell's prejudicial statements in the redacted interview (MFI B), which were not the subject of editing, were raised in the Queensland Court of Appeal. Those statements are extracted and considered in the reasons of Gotterson JA: *R v Fennell* [2017] QCA, [92]-[107]. The jury had access to copies of transcript MFI B during their deliberations: AFM 743 l 16 – 744 l 3; 746 ll 9 – 11.

138 "I had to have it um, reassessed in prison.": MFI C, 24 l 37. "... was diagnosed in prison prior to that.": MFI C, 35 l 47. "It's, it's um, only mild I'm told, although when in prison I think they stuck me with things like Lithium, you know, I was like a experimental case. ... Given this, that, I'm just a prisoner, what does it matter.": MFI C, 37 ll 9-11, 15-16.

139 However, not before other prejudicial statements were heard by the jury: see the summary at *R v Fennell* [2017] QCA, [92]-[99].

140 See fn 138 and AFM 145 ll 26-43.

141 *Cf.* Submissions of the learned prosecutor: AFM 149 ll 39-44.

142 AFM 150 l 1.

denied by the deceased's granddaughter."[143] – In fact, Mr Fennell told police he did not take any cash to Lamb Island on that occasion.[144]

b. "*[The forensic accounting analysis] indicated an absence of commensurate withdrawals from the appellant's modest bank accounts which might have otherwise funded his punting at the time.*"[145] – Between 21 August and 12 November 2012, approximately $15,280.00 in cash was withdrawn from Mr Fennell's personal and business accounts.[146]

70. These errors were highly relevant to motive. Further, the Court seems to have relied upon the first error as a lie demonstrating consciousness of guilt. In rejecting ground 1 of the appeal, the reasons observe:

> "There was evidence of motive on the appellant's part. ... There was evidential basis for concluding that he had stolen at least $5,000 from the deceased and was at risk that his theft would soon be discovered. ...
>
> It is true that this was not a case of evidential perfection. However, that it was not does not mean that the evidence, overall, was insufficiently sound to support the major strands in the Crown's circumstantial case. In my assessment, it was."[147]

71. The second error goes to the alleged financial motive and compounds the danger of the first error. These errors of fact go to critical aspects of the Crown case and must have contributed to the finding that the verdict was reasonable.

72. The reasons of Gotterson JA also demonstrate the type of flawed reasoning that was likely engaged in by the jury. For example, confusion regarding which withdrawals were allegedly suspicious and which were not.[148] In relation to the forensic accounting evidence, his Honour observed:

> "Ms McKinnon's evidence had a further relevance in demonstrating that the appellant did not have financial resources, which, had he had them, would have negatived any need to steal from the deceased to make ends meet. In this way, the evidence supported the Crown theory as to motive."[149]

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143 *R v Fennell* [2017] QCA, [19]. The first error appeared in the written outline filed by the respondent Crown on appeal. At the hearing, senior counsel for Mr Fennell handed up a document correcting this and other factual errors in that document. That document was received but not admitted as an exhibit.

144 MFI A at AFM 1122 ll 46-51; MFI B 98 l 20 – 99 l 16.

145 *R v Fennell* [2017] QCA, [24]. The error was repeated in the consideration of ground 2: [111].

146 Exhibit 102; AFM 693 l 11 – 694 l 29. See also Exhibit 92. The figure $15,280.00 is the sum of columns H and K in Exhibit 102.

147 *R v Fennell* [2017] QCA, [86]-[88].

148 Ibid [23].

149 Ibid [112].

73. The underlying logic is that the alleged motive was supported by a general absence of financial resources, rather than the presence of some financial distress. It was a matter for the Crown to put on evidence going to motive, not for the defence to negative it by demonstrating surplus funds.

The evidence does not support a conviction

74. Mr Fennell was convicted on a palpably weak circumstantial case. When the matters above are taken into account, the case against him disintegrates. The Court of Appeal was wrong to conclude that the verdict was not unreasonable.

75. The evidence of motive was speculative. The most that can be said is that the Fennells were not well off but lived within their means. The deceased had entrusted Mr Fennell with large sums of cash in the past without the suggestion of theft, and there had since been no increase in his gambling habits. The evidence does not support the finding of a motive to steal from, and then murder, a close friend.

76. The evidence of opportunity was either innocuous or inconsistent with the Crown theory.

77. The only evidence directly associating Mr Fennell to the murder was the identification of the hammer. Notably, police did not have enough evidence to charge Mr Fennell until after the Mathesons came forwards. The identification evidence was profoundly weak.

78. On the whole of the circumstantial evidence in this case, it was not open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. There is a genuine likelihood that an innocent person has been convicted of murder.

Part VII:

The appellant seeks orders that:

1. The appeal be allowed;
2. The verdict of guilty be set aside; and
3. A verdict of acquittal be entered.

Part VIII:

It is estimated that 1 ½ hours are required for the presentation of the appellant's argument.

Dated: 10 May 2019

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