IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A9 of 2014

BETWEEN:

DANIEL GLENN FITZGERALD
Appellant

and

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. Was the DNA evidence in this case, namely the DNA on the didgeridoo at sample 3.B, sufficient to prove beyond reasonable doubt that the Appellant was present at the crime scene at the relevant time? In particular, was the evidence capable of excluding beyond reasonable doubt that it was deposited at some other time?

3. If so, did the evidence allow for a finding beyond reasonable doubt that the Appellant was not only present at the relevant time, but part of a common plan to cause grievous bodily harm?

4. Upon a finding that the Appellant was part of a common plan to cause grievous bodily harm, did the evidence as a whole allow for a finding beyond reasonable doubt that the Appellant therefore participated in that plan?

Filed on behalf of the Respondent
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Part III: Section 78B of the *Judiciary Act 1903* (Cth)

5. The Respondent has considered whether any notice is necessary pursuant to s 78B of the *Judiciary Act 1903* (Cth). No notice should be given.

Part IV: Factual Matters

6. The Respondent agrees with the Appellant's summary of the facts, subject to the following matters which warrant clarification or elaboration.

7. At [11], the Appellant provides some history regarding ownership of the didgeridoo. After Mr Goldsmith passed away, the didgeridoo was kept in the laundry at Nardene Wanganeen's house at 127 Hogarth Road.[1] Ms Wanganeen did not touch the didgeridoo, because it was "man's business". If people came to the house, they would not touch or play the didgeridoo, because it belonged to Mr Goldsmith, and Ms Wanganeen would not allow them to do so.[2] It was last seen by her in the laundry, next to the washing machine.[3] She had never heard of Daniel Fitzgerald. She did not know anyone called Daniel or Danny. She was not aware of anybody called Daniel or Danny or Fitzy ever visiting her house.[4]

8. At [12], the Appellant asserts that no witness saw the didgeridoo being used in the attack. That is correct insofar as it goes. The didgeridoo was found by the crime scene examiner in the lounge room, close to where the deceased was found.[5] The didgeridoo had large areas of blood-like staining across its surface. DNA profiles were obtained from several of those blood like stains. Those profiles matched the DNA profiles of both victims.[6] This suggests that the didgeridoo was used in the attack. Leticia Webb was the only witness to see the didgeridoo during the course of the attack. She picked up the didgeridoo as the attackers entered through the rear door of the house. She held it in a defensive manner before being ordered to put it down. She left the didgeridoo standing against the dining room wall.[7] No witness saw the didgeridoo being taken to the lounge room. However, eye witnesses saw the attackers using a variety of weapons to strike the victims, in particular:

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[1] TX194.
[2] TX194-196.
[3] TX195.
[4] TX195-6.
[5] TX105,188,1017.
[6] TX854.
[7] TX590-2,597-8,618-9.

8.1. Nardene Wanganeen observed Kym Bruce Drover being hit by "wood planks".[8]

8.2. Kristy Oates saw Grant Sumner holding what looked like a wooden plank from a bed as Kym Bruce Drover was hit with an axe.[9]

8.3. Steven Drover saw more than one person carrying poles inside the house, and was himself hit by a pole.[10]

8.4. One offender obtained a pitchfork from the laundry and used it to attack Mr Karpany.[11]

8.5. There was evidence to suggest that some of the attackers opportunistically grabbed weapons when they entered the house, including wooden bed slats from the kitchen and a pitchfork from the laundry.[12]

9. At [13.4], the Appellant asserts that Leticia Webb did not see any of the intruders take the didgeridoo into the lounge room. The fact remains, the didgeridoo was found in the lounge room, in close proximity to where the deceased was left post attack. Leticia Webb conceded in cross examination that it was possible one of the intruders picked up the didgeridoo and took it into the lounge room.[13] None of the prosecution witnesses spoke of taking the didgeridoo into the lounge room.

10. At [14.3], the Respondent adds that Mr Sumner and both victims could be excluded as the donor of the minor DNA profiles obtained from sample 3.B.[14]

11. At [15.1] and [15.5], the Appellant correctly asserts that Dr Henry said it was possible that the DNA in sample 3.B derived from a source other than blood. However, Dr Henry also gave evidence that there was "every indication" that the DNA came from blood.[15] The stains had the appearance of blood, were the colour of blood and gave a positive reaction to the screening test for blood. Blood is a rich source of DNA and is likely to yield a DNA profile. In this case, the stained area did yield a DNA profile.[16]

12. At [15.3], the Appellant asserts that the Appellant's DNA could have been transferred to the didgeridoo via secondary transfer. However, Dr Henry gave further evidence

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[8] TX184, 188.
[9] TX324.
[10] TX508.
[11] TX189,460,519,521.
[12] Exhibit P18; TX136-137,192-193,189.
[13] TX621.
[14] TX865.
[15] TX868.
[16] TX867,868.

about the likelihood of primary and secondary transfer of contact DNA. That issue is dealt with below in the Respondent's argument at [22]-[24].

13. At [20], the Appellant asserts that Mr Sumner was a regular visitor to Nardene Wanganeen's house. The evidence of Nardene Wanganeen was that the night of the alleged offences was the first night Mr Sumner ever sat down and associated with her. She did not see him often.[17]

14. At [30-31], the Appellant asserts that the hypothesis consistent with innocence postulated by the court below did not reflect the facts about which Dr Henry had been asked to speculate. Dr Henry commented upon the likelihood of primary and secondary transfer in a general sense. To comment upon the likelihood of primary and secondary transfer in a particular scenario would require the scenario to be re-created exactly in a laboratory environment.[18] However, it was open to conclude, based upon the evidence of primary and secondary transfer generally, that a hypothesis consistent with innocence did require a sequence of unlikely events, namely:

    14.1. That a primary transfer by handshake was made between the Appellant and Mr Sumner, or another attendee at the boxing. The chance of a primary transfer generally is possibly less than 10%.[19]

    14.2. That Mr Sumner or another attendee at the boxing retained the Appellant's skin cells on their hand for some period of time, possibly for up to eight hours.

    14.3. That Mr Sumner or another attendee at the boxing then deposited the Appellant's DNA onto the didgeridoo during the commission of the offence. The probability of *that* primary transfer of DNA through touching (namely the transfer from Sumner or the attendee at the boxing's hand to the didgeridoo) is once again possibly less than 10%.[20]

    14.4. And that either:

        (a) Mr Sumner deposited none of his own DNA onto the didgeridoo, but did transfer some of the Appellant's. Such a scenario has only been seen in one of many hundreds of experiments.[21]

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[17] TX222.
[18] TX926,929.
[19] TX839.
[20] TX839.
[21] TX912,930.

(b) The other attendee at the boxing transferred the Appellant's DNA in a greater quantity than their own, despite it being more likely the primary transferor would deposit the major component in a mixed profile.[22]

15. This step by step analysis of the series of events required for a hypothesis consistent with innocence demonstrates the unlikely series of events that would be required. That this is an unlikely series of events is supported by the general evidence of Dr Henry that primary transfer is rare, and that secondary transfer is very unlikely.[23]

Part V: Applicable Legislation

10 16. The Respondent accepts the Appellant's statement of the applicable legislative provisions.

Part VI: Argument

17. The Respondent submits that the verdict was not "unreasonable or cannot be supported having regard to the evidence". It was open to the jury to be satisfied of the following facts beyond reasonable doubt:

17.1. The Appellant had not come into direct contact with the didgeridoo prior the attack.

17.1.1. The didgeridoo had been kept in the laundry at 127 Hogarth Road.[24]

17.1.2. After Wayne Goldsmith passed away, no one would touch the
20 didgeridoo.[25]

17.1.3. There was no evidence that the Appellant had ever been to 127 Hogarth Road prior to the incident. Had he done so, he would not have been permitted to touch the didgeridoo.[26] There was no cross-examination by counsel for the Appellant at trial suggesting that he had been to the house or come into contact with the didgeridoo, or that the didgeridoo had left the house.[27]

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[22] TX912,914.
[23] TX871,914
[24] TX195-6.
[25] TX195-6.
[26] TX196.
[27] TX227.

17.1.4. There was no evidential basis for concluding the Appellant had ever used or touched the didgeridoo on any earlier occasion. The possibility that the Appellant had been in contact with the didgeridoo at some point in time prior to the attack could be excluded beyond reasonable doubt.

17.2. That the didgeridoo was used in the offence.

17.2.1. Eye witnesses saw a variety of weapons being used to attack the victims, some of which were opportunistically grabbed as the intruders entered the house. Nardene Wanganeen saw Grant Sumner enter the house through the front door. He wasn't holding anything at that time.[28] She saw Kym Bruce Drover being hit by more than four people holding "wood planks".[29] Kristy Oates saw a man strike Kym Bruce Drover with an axe.[30] She saw Grant Sumner holding what looked like a "wooden plank off a bed".[31] Steven Drover saw more than one person carrying "poles" as they ran from the house. Grant Sumner struck him with a "pole".[32]

17.2.2. The fact that one of the offenders obtained a pitchfork from the laundry and used it in the attack on Leon Karpany[33] shows that some of the weapons used were sourced from inside the house. That suggestion is strengthened by the presence of pieces of timber in the lounge room that had blood-like stains on them. Those pieces of wood were consistent in appearance with pieces of wood that had been in the kitchen immediately before the attack.[34]

17.2.3. The existence of the didgeridoo had become clear to at least one of the offenders who entered the house via the back door. Leticia Webb was standing in the kitchen/dining room, holding the didgeridoo when the attackers entered through that door. She was told to put the didgeridoo down. She complied. The didgeridoo was later found in the lounge room where the victim Kym Bruce Drover was located, giving rise to the inference that one of the intruders picked it up and took it into the lounge room.

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[28] TX186.
[29] TX184,188.
[30] TX324.
[31] TX325-326.
[32] TX508.
[33] TX189. Natasha Fidler also observed the pitchfork: TX460, as did Steven Drover: TX519,521.
[34] TX193.

17.2.4. DNA from both victims was found on the didgeridoo. The DNA profiles came from stains 3.A, 3.C, 3.F and 3.H. Those stains had the visual appearance of blood and gave a positive reaction to the presumptive test for blood.[35] Both victims bled as a result of the attack. In those circumstances, a finding that the DNA profiles at samples 3.A, 3.C, 3.F and 3.H came from blood was open, as was the conclusion that the blood was deposited on the didgeridoo during the course of the attack.

17.3. That the DNA found at sample 3.B originated from blood.

17.3.1. It was open to the jury to conclude beyond reasonable doubt that the stains at area 3.B were blood stains. The forensic scientist gave evidence that she could not say for certain, but there was "every indication"[36] the stains at 3.B were blood. The stains had the visual appearance of blood.[37] The stains gave a positive reaction to the screening test for blood.[38] Blood is a rich source of DNA and is likely to yield a DNA profile. In this case, the stains did yield a DNA profile.[39] By way of contrast, contact DNA is a very poor source of DNA.[40]

17.4. That it was the Appellant's blood at sample 3.B.

17.4.1. Having come to the conclusion that the red brown stain at sample 3.B was blood, the fact that the Appellant provided the major component of the DNA profile obtained from it was indicative of the blood being his. Blood is a rich source of DNA. By comparison, contact DNA is a poor source of DNA.[41]

17.4.2. The Appellant provided the major component of the DNA profile with a likelihood ratio of 200 million: 1.

17.5. That the Appellant's DNA was deposited there during the incident.

17.5.1. The Appellant had not previously come into contact with the didgeridoo before the incident (see [17.1] - [17.1.4] above).

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[35] TX855, 874-877.
[36] TX867-8.
[37] TX868.
[38] TX868.
[39] TX867.
[40] TX867.
[41] TX867-868.

17.5.2. Although DNA cannot be aged,[42] upon a finding that the stains at sample 3.B were blood, there was no suggestion that blood could have found its way onto the didgeridoo by secondary transfer. The two blood like stains at sample 3.B were small. The larger stain was approximately 2mm x 1mm in area. The smaller of the two stains was less than 1mm in diameter.[43]

17.5.3. If it was blood, the blood could only have been deposited on the didgeridoo by the Appellant coming into direct contact with this item. Secondary transfer could therefore be excluded.

10 18. If the evidence proved beyond reasonable doubt that the major DNA profile extracted from sample 3.B came from blood, that fact was capable of establishing, beyond reasonable doubt, that the Appellant was in close proximity to the didgeridoo at the time of the attack. This inference is supported by the absence of any evidence of prior association between the Appellant and the Hogarth Road house or its occupant Nardene Wanganeen, or the didgeridoo itself (see above at [7], [17.1] - [17.1.4]).

19. However, if the red brown stain at sample 3.B was not blood, it was necessary to consider whether the major DNA profile from sample 3.B came from *primary* transfer (contact DNA). If so, that too was capable of proving contact between the Appellant and the didgeridoo.

20 20. To prove this, the prosecution had to exclude, as a reasonable possibility, that the major profile at sample 3.B was contact DNA deposited by either a primary or a secondary transfer at a time prior to the offence, or that it was a secondary transfer deposited at the time of the offence. That requires consideration of the likelihood of the major DNA profile coming from cellular material, other than blood, that had been trapped under the red/brown stain at sample 3.B.[44]

21. Dr Henry agreed that it was "possible" that the major component of the DNA profile originated from a source other than blood, for instance skin cells, known as contact DNA. This assumed that the red brown stain was not actually blood, and the contact DNA had been trapped under the red brown stain.[45]

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[42] TX913.
[43] TX859.
[44] TX917.
[45] TX869,910,917-918.

22. Contact DNA, although a very poor source of DNA,[46] can be deposited by:

    22.1. Touching (primary transfer); or

    22.2. Secondary transfer.[47] Secondary transfer involves contact DNA being deposited onto an item through an intermediary person or object. For example, a hand shake between person A and B can lead to B's contact DNA being deposited on person A's hand. Person A may later touch an object and transfer person B's DNA to that object.

23. The chance of primary transfer through touching is low, possibly less than 10%.[48] The likelihood of a primary transfer is affected by factors such as the surface that is contacted, the length of the contact[49] and whether a person is a "good shedder" or "poor shedder".[50] Saliva is a "richer" source of DNA, so the likelihood of secondary transfer may be affected by a person wiping their mouth before touching an object.[51]

24. The chance of secondary transfer in a general sense is very unlikely, and is much less likely than primary transfer.[52] Secondary transfer occurs 1-5% of the time and occurs very infrequently.[53] Even with a secondary transfer scenario involving saliva, the chance of secondary transfer, whilst higher than with skin cells alone, is still minimal.[54] Generally speaking when secondary transfer of DNA occurs, there will also be primary transfer of DNA from the carrier of the secondary transfer DNA. The primary transferor will normally be the major component and the secondary transferor the minor component of the DNA profile.[55] At sample 3.B, the Appellant provided the major component of the DNA profile. In only one example of many hundreds of experiments known to Dr Henry did a primary transferor not leave behind any of their own DNA, and made a secondary transfer only.[56]

25. At trial, Dr Henry gave evidence regarding a scenario in which the Appellant shook hands with an unknown person prior to the incident. She was asked to comment on the likelihood of the Appellant's skin cells being retained by that person for a period of

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[46] TX867.
[47] TX870-1.
[48] TX839.
[49] TX910.
[50] TX909.
[51] TX911,912.
[52] TX871,913,918,919.
[53] TX912.
[54] TX912.
[55] TX912,914.
[56] TX912,930.

seven to eight hours before being deposited (by that other person) onto the didgeridoo. Dr Henry concluded that such a scenario was "one possibility".[57] She made the point on several occasions that secondary transfer was "very unlikely".[58] That was so even where the transfer may have been through saliva. In that situation, the chance of transfer was still "minimal".[59]

26. Transferred cells may be lost from a surface through a variety of processes, including brushing up against another surface, being removed by mechanical process, or by washing.[60]

27. The Respondent submits that secondary transfer could be excluded as a reasonable possibility, based on the following:

    27.1. Secondary transfer in a general sense is very unlikely or infrequent.[61]

    27.2. The Appellant contributed the major component of the DNA profile at sample 3.B, which would not be expected in a secondary transfer.[62]

    27.3. Mr Sumner was excluded as a contributor to the DNA profile at sample 3.B. Therefore, the reasonable possibility that he transferred the Appellant's DNA to the didgeridoo could be excluded.

28. Therefore, even if it was not open to the jury to conclude that the stains at sample 3.B were blood, it was open to the jury to exclude, as a reasonable possibility, that the Appellant's DNA was deposited by secondary transfer. If so, it then follows that the Appellant's DNA was deposited by a primary deposit of blood or a primary deposit of contact DNA - in either case proving the Appellant came into direct contact with the didgeridoo, at the relevant time (see above at [7], [17.1] - [17.1.4]).

29. Proof that the Appellant was present at the scene of the crime leads inevitably to the conclusion that he was part of a joint enterprise to inflict grievous bodily harm upon those inside the house. The attackers were seen to arrive in a number of cars, which were parked around the corner from the house where the attack occurred. After walking as a group to the house, they split into two groups, simultaneously smashing their way through the front and rear doors of the house using weapons including an

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[57] TX919.
[58] TX918,919.
[59] TX912.
[60] TX869-873.
[61] TX912,918,919.
[62] TX912,914.

axe. The existence of weapons, at that point in time, must have been obvious to all involved. The attack that followed happened quickly and purposefully, evidencing a degree of knowledge on the part of those involved. The scope of the joint enterprise can be inferred from all of the circumstances.

30. Similarly, proof of the Appellants participation in the joint enterprise can be inferred from his presence inside the house as the attack unfolded. As the Court below observed, there was no other reason to enter the property at that time of the morning.[63]

31. In light of the above, it was open to the jury to conclude beyond reasonable doubt that the Appellant was present at the crime scene at the relevant time, was part of a plan to cause grievous bodily harm, and participated in that plan.

Part VII: Argument on notice of contention or cross appeal

32. Not applicable.

Part VIII: Oral Submissions

33. The Respondent estimates that it will take one hour for the presentation of oral submissions.

Dated 13 May 2014

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[63] *R v Sumner & Fitzgerald* (2013) 117 SASR 271 at [62].