



EVERARD MILLER
Appellant
And
THE QUEEN
Respondent

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APPELLANT'S REPLY

Part I: Certification

The appellant certifies that the Reply submissions are in a form suitable for publication on the Internet.

Part II: Introduction

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1. The facts not in dispute are that, at the relevant time, Mr Miller:
 - was highly or 'extremely intoxicated'¹;
 - had drugs including diazepam, nordiazepam and cannabis in his blood;
 - was present during the attack, but it is not known how he got there;
 - neither his fingerprints, nor his DNA were found on any weapon; and
 - was not positively identified by any eye witness as being an assailant or carrying any weapon.

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2. The rest of the important facts and the inferences to be drawn from the facts are in dispute between the parties.
3. The relevant authorities are not in dispute between the parties, but the expression of the relevant test is a matter upon which the parties place different emphasis. As was stated by this court in *M v The Queen*² notwithstanding that there is evidence upon which a jury might convict, none the less if it would be dangerous in the circumstances to allow the verdict of guilty to stand, it cannot stand.

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The second confrontation RS [5]-[7]

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4. The evidence of Findlay-Smith when viewed as a whole does not implicate the appellant in the second confrontation. Rather, it suggests that, at some point in time, one of the persons present did not attack Findlay-Smith. It is not

¹ T1122L21-22

² (1994) 181 CLR 487

possible to ascertain with certainty which person that was because the evidence does not enable one to do so.

Weapons RS [8]-[17]

5. It is accepted that the evidence about the shovel is not definitive as to whether it belonged to Mr Hall or one of the attackers.
6. More important, is that all of the weapons including, the baseball bat, the concrete block, the knife, the passion pop bottle and the shovel were tested for fingerprints and DNA and neither Mr Miller's fingerprints, nor his DNA were found on any of the weapons.
7. The possibility that it was Smith who wielded the shovel (as fairly conceded by the respondent at RS [17]) lends support to the absence of evidence of connection to the shovel. It was not in dispute during the trial that it was Betts who wielded the knife and that Presley used the baseball bat; but it does not follow that Mr Miller must have used one of the other weapons (e.g. the passion pop bottle or the concrete block).
8. It is correct to say (RS [15]) that Willis' evidence was that four men left together, but Willis does not say that all four then journeyed together or arrived together. Moreover, it must be borne in mind that Willis was himself quite intoxicated at the time³.

Miller's presence at the scene RS [18]-[20]

9. Although the evidence about Mr Miller's presence may place him closer to the victim, there is no direct evidence that he engaged in any assault.

Return to Hayles Road RS [21]

10. Betts statement that he "... stabbed a bloke in the guts ..." being made after the second confrontation is irrelevant to the issues in this matter. It could not have a bearing on Miller's state of mind before the second confrontation.

Evidence of Mr Miller's intoxication RS [22]-[24]

11. At the trial, the prosecution counsel fairly stated that there was no evidence one way or another as to whether Miller drank after the second confrontation⁴.

The pharmacologist's evidence

12. The appellant takes issue with the respondent's description of the tenor of the Dr Majumder's evidence and submits that Dr Majumder was more emphatic

³ T763L35-36

⁴ T1706L33-34

than the respondent's submissions suggest. For example, at T1550L15-25, Dr Majumder stated:

“The estimated levels, as I said levels, are quite high. They are very high. At these levels the thinking process, decision making process *will be* significantly impaired, the person with these blood alcohol levels would not be able to engage in complex conversations and would not be able to – would only be able to understand some simple phrases and would be able to perform some very simple tasks. Also these levels would affect attention and concentration of the person intoxicated. At this level the person would have problems concentrating on things, and would have short attention span.” (italics added)

And, at T1551L11-15, Dr. Majumder stated:

“I think this high level of blood alcohol level would significantly impair decision making and also planning if it's a step wise process, so the person may not be able to foresee or predict the consequences of certain decisions”.

The Respondent's arguments RS [32] ff

13. The critical parts of the respondent's arguments can be found in RS [66] and forward. The respondent effectively starts with the conduct of the persons shortly before the second confrontation (RS [66]-[82]) and not with their conduct and mental state at an earlier point in time. The appellant submits that their conduct must be considered together with their mental state in order to give a true and fair picture of what occurred.

14. If one begins with Mr Miller's mental state *and* his conduct in chronological order then the following is a more likely picture of what might have occurred.

15. Miller came to Presley's house in the company of Willis, having been drinking with Willis for several days⁵. It is likely that Miller was already heavily intoxicated and under the influence of drugs as well⁶. His intoxication would have affected his capacity to understand and probably his foresight as well⁷.

Miller did not know Betts or Presley⁸.

16. Miller was not involved in the first confrontation with Hall. He would not have known what sparked it or how Betts or Presley felt about it. When Betts and Presley returned, he probably did not appreciate what state of mind they were in. It may be that he heard what Presley said about “seeing what the problem is”, but what he understood about what Presley said is unknown.

⁵ T824L23-825; T823L9

⁶ T824L34

⁷ T1550L15

⁸ The trial judge described Miller as a “blow-in” in his sentencing remarks (at pg 19).

17. According to Willis, Miller exited the home with the others and Presley had a baseball bat⁹. Such facts are entirely neutral for the reasons already given (in AS [63]). They do not necessarily suggest a plan to attack someone let alone cause grievous bodily harm to another. One can ask rhetorically, why is not his conduct, given his intoxicated state, just as consistent with being a follower and not a willing participant in an agreement?
18. Once he had exited Presley's house, it is not known how Miller got to the location; he may have walked there or he may have been driven there¹⁰. No one knows what was going through his mind but he would have been under the influence of alcohol and drugs. He may well have been staggering and dragging his feet.
19. There is no direct evidence as to when Betts came into possession of a knife, or whether he indicated that he intended to use it or whether it was even visible to Miller or others. The size of the knife may suggest that it would be difficult to conceal but there is just no evidence one way or another. There is no direct evidence as to when the group gathered up the passion pop bottle or the shovel or the concrete block.
20. At the scene the evidence is open to all sorts of interpretations. Some of the eyewitnesses had been drinking¹¹ and there is confusion about the number of aboriginal person present, one says four or five¹², another says five or six¹³ and yet another says about eight¹⁴. In short, the eyewitness accounts are not reliable enough to find a man guilty of murder.
21. What is clear is that Miller is not identified as an active assailant, nor are his fingerprints and DNA found on any weapon. Although he was in the vicinity of the crime, established by the presence of the blood spatter on his shoes, that is the only direct evidence that implicates him.
22. The respondent's argument overlays the appellant's intoxication on the confrontation and asserts (RS [87]) that the evidence of intoxication does not lead to the result that the verdicts are unreasonable or cannot be supported by the evidence. However, and with respect, the arguments then advanced by the

⁹ T823L10-12

¹⁰ T1533L23-34

¹¹ King T164L27-28; Bateman T277L34-36

¹² Turner T427, 474-475

¹³ Findlay-Smith T604

¹⁴ Turner T472L10-12

respondent (RS [88]-[94]) are more in the nature of assertions than evidence based arguments.

23. For example, the paucity of evidence does not enable one to assert with confidence that, Miller must have walked with the others as a group (RS [91]) given that there was some evidence that only three person were seen walking along the street¹⁵; or what he saw in terms of the weapons (RS [71], [106]) given that none of the eye witnesses for the prosecution saw the knife; or whether he had any appreciation of the retribution that Betts and Presley had in mind (RS [114]) given that he did not know them and was not present during the first confrontation.

24. Afterwards, it is clear that Miller was heavily intoxicated as the testimony of the police officer confirmed¹⁶. Betts and Presley's statements cannot be regarded as reliable given their involvement in the matter let alone could they shed any light on Miller's mental state.

25. Finally, the inferences drawn by a rational and sober jury person about a person's motivations are not likely to be the same inferences an intoxicated person would draw at the relevant time. It is a matter of ordinary human experience that very drunk persons can stand and/or stagger and/or walk, but it is also a matter of ordinary human experience that very drunk persons can say, and do, irrational things and think completely irrational things¹⁷.

Conclusion

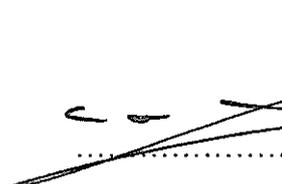
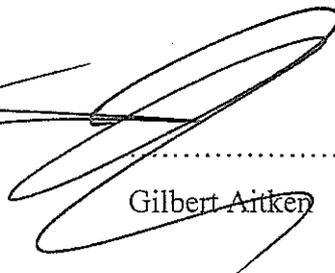
26. On the whole of the evidence the jury ought to have entertained a reasonable doubt about whether Miller had the capacity to enter into an agreement as alleged or could foresee the consequences of another's actions. It follows that, the convictions are unsafe, or unreasonable, and ought be set aside.

Dated 5 February 2016



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¹⁵ See footnote above n9: agreed fact 10, witness saw three males who were possibly Aboriginal walking past

¹⁶ Penn T1122L21-26; T1123L9-25

¹⁷ See e.g. the well known case of *Blomley v Ryan* (1956) 99 CLR 362