IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY

No: A28 of 2015

BETWEEN:

Everard John Miller

Appellant

10 **and**

The Queen

Respondent

Amended **RESPONDENT'S SUBMISSIONS**

20 **Part I**

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

Part II

2. The respondent agrees with the statement of the issues presented by the appeal in paragraphs 2 and 3 of the appellant's submissions.

Part III

3. The respondent has considered whether a notice should be given pursuant to section 78B of the *Judiciary Act 1903 (Cth)*. No such notice is required.

Part IV

30 4. The respondent adds the following matters to the appellant's narrative of facts and chronology.

The second confrontation

5. At [23] of his submissions the appellant sets out that the evidence of Findlay-Smith was that one of the men "did not take part in the attack and was without a weapon". In the respondent's submission, it depends what the appellant means by "attack". If the whole incident is properly regarded as a single "attack", that is not so.

6. As to the person described by Findlay-Smith to whom the appellant presumably refers, Findlay-Smith was "pretty sure" that he was armed with a pole[1] and then described this

[1] Findlay-Smith, 609.

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man as hitting his letterbox with the pole.[2] Findlay-Smith was "pretty sure" that this man had not assaulted the deceased.[3]

7. When this man saw and then chased Findlay-Smith, he was heard to say - "there's another one of those cunts".[4] That comment was, of itself, capable of being viewed as one consistent with the comment of a man acting with the others and as part of a plan to attack whomever was confronted.

Weapons

8. At [27] of his submissions the appellant refers to evidence that Mr Hall ("the deceased") was a concreter and had access to shovels at his home. For a number of reasons, it must be doubted the conclusion the appellant seeks to draw from this, that the shovel used as a weapon against the deceased probably belonged to the deceased, is open.

9. First, no witness gave evidence that such an item was held by anyone other than an Aboriginal male. Second, it was not put to any witness in cross-examination that they might have been in possession of such an item or might have seen anyone other than one of the Aboriginal males in possession of such an item. Third, immediately before the fatal confrontation, all Aboriginal males had been at 33 Hayles Rd ("Hayles Road") and had left through the back door. There were garden tools at the rear of Hayles Road.[5] That was the obvious location from which a shovel might have been obtained and taken as a weapon. Fourth, the shovel was taken from the scene after the incident. It was then hidden at the same premises as the knife that had been used to inflict fatal injury.[6] That might be more consistent with it belonging to the group that attended rather than to the deceased.

10. Fifth, and most significantly, there was evidence the shovel was being held as the Aboriginal males arrived.

11. Bateman described the group of Aboriginal males arriving through the laneway. She said the male at the front of the group was carrying a shovel.[7] If this were so, it cannot have been picked up at the fatal confrontation. It was being brought to it. It was not suggested to her in cross-examination that she might have been mistaken as to this observation. Bateman's evidence was consistent with that of Findlay-Smith. He described the deceased entering the alleyway as the group approached.[8] There was no suggestion in his evidence that the deceased was armed at that point. Indeed, moments after, Mr Hall came from the alleyway saying that he would get weapons,[9] a comment inconsistent with either he, or the deceased, being armed. He then saw the deceased again. He was coming out of the alleyway, held by two men and being struck with a shovel by one of the Aboriginal males.[10] It was not suggested to him in cross-examination that he might have been mistaken as to these observations.

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[2] Findlay-Smith, 611.
[3] Findlay-Smith, 609.
[4] Findlay-Smith, 611.
[5] Schuurmans, 1006-1007.
[6] McKenzie, 108.
[7] Bateman, 291 and 354.
[8] Findlay-Smith, 604-5.
[9] Findlay-Smith, 605.
[10] Findlay-Smith, 605-606, 608.

12. Insofar as the appellant asserts that it was "not clear" that a bottle was used as a weapon, the conclusion that it was so used was open. Not only was a bottle bearing blood matching the deceased found at the scene in close proximity to him,[11] Findlay-Smith stated that one of the males who struck the deceased while he was on the ground did so with a bottle.[12] It was not suggested to him in cross examination that he might have been mistaken as to that observation.

13. Beyond the weapons to which the appellant refers (the knife, baseball bat, shovel and bottle) a concrete block was also thrown from the direction from which the Aboriginal males came.[13] Such a block was then found in close proximity to the deceased. On that block was DNA matching that of the deceased.

14. As to [29] of the appellant's submissions and the contention there was no admissible evidence identifying the appellant as being armed with a weapon, it is the case there was no *direct* evidence. The absence of direct evidence did not mean that the conclusion that he was armed could not be drawn.

15. Willis said that four men had left together.[14] Those four men were the appellant, Betts, Presley and Miller. On the evidence, there were four weapons being held by that group during the fatal incident (the knife, the baseball bat, the shovel and the bottle). One inference open, but not the only one, was that all four men were armed. There was no dispute Betts had the knife, Presley had the baseball bat and the fingerprints of Smith were on the bottle. This left the appellant as the person with the shovel.

16. The shovel was later found by police at the rear of a house at Butterfield Road where the knife was also found. It was open to conclude Betts disposed of the knife there. He had taken the police to it.[15] Given the shovel was at the rear of the same premises, the logical conclusion was it had been disposed of there at the same time as the knife. A candidate for having done that was the appellant. He was with Betts at 1.30am,[16] after the knife must have already been disposed of at Butterfield Road.

17. It must be conceded that the inference the appellant was armed with the shovel was not the only inference open on the evidence. Another inference was that Smith had the shovel at the time of the attack. Pamela Turner stated the Aboriginal male holding "a long pole with a square bit on the top" had a much bigger build than the others.[17] Broadly, that description fitted Smith.

Miller's presence at the scene

18. In summarising the evidence with respect to the blood of the deceased that was on the shoes of the appellant, the appellant overlooks a number of matters.

19. First, what this evidence could show about the proximity of the appellant to the deceased during the fatal attack is not mentioned by the appellant. The expert evidence

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[11] McKenzie, 90, 110; Seccafien 662; Donnelly 1427.
[12] Findlay-Smith, 609.
[13] Bateman, 294, 310.
[14] Willis, 763.
[15] Shephard, 723 - 724.
[16] Roberts, 1108 - 1109.
[17] Turner, 422, 429. See also Bateman, 292.

was that the pattern of the blood was such that the maximum distance between the shoes and the blood source was no more than three meters.[18] On the whole of the expert evidence, the inference was open that the appellant was even closer. As the judgment of the court below records, the blood of the deceased on the shoes of the appellant was capable of placing him within one and a half meters of the deceased at the time of the fatal assault.[19] This conclusion was open as the blood spatter went no more than one and a half meters from the position of the deceased.[20]

20. Second, on the evidence there were a number of males who delivered blows to the deceased. Unsurprisingly, estimates varied as to how many did so[21] but given the absence of any dispute about Willis's evidence that only four left Hayles Road (other than himself and he did not go into the alleyway) it cannot have been any more than four. The evidence of the appellant's proximity to the deceased referred to above gave rise to an inference that he was one of the males seen to deliver blows to the deceased.

Return to Hayles Road after the fatal confrontation

21. The appellant makes no reference to the evidence of Willis that Betts stated back at the house - "I think I stabbed him, stabbed a bloke in the guts".[22]

Evidence of Miller's intoxication

22. The appellant is correct to state at [39] of his submissions there was no direct evidence the appellant had consumed any alcohol after the second confrontation. That is not to say that conclusion was not open.

23. At the very least, alcohol was available to him in the period after the fatal incident but before his blood was taken. Tamika Wanganeen said there was drinking while she was with the appellant, Betts and Smith after the incident.[23] Willis said that alcohol was available to the appellant and others after the fatal incident as he took it with him when he left the house with the appellant, Betts and Smith.[24]

24. There was no complaint about the Learned Trial Judge directing that, based on the evidence of Wanganeen and Willis the appellant drank beer and spirits after the fatal incident.[25]

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[18] Donnelly, 1450.
[19] *R v Presley, Miller and Smith* (2015) 122 SASR 476 at 483 [43].
[20] McKenzie, 117.
[21] Bateman said three males were kicking the deceased while he was on the ground and a fourth came at her with a shovel: 297-298. Turner gave evidence of four or 5 males kicking and hitting the deceased when he was on the ground:427 and in cross examination she said it was 4: 474 - 475. Oldenhampson said the deceased was being kicked by 5 or 6 males: 514. Finlay-Smith said the deceased was being struck by about four people while he was on the ground: 609, 613.
[22] Willis, 768.
[23] Wanganeen, 1027-29.
[24] Willis, 817-8.
[25] Summing Up, 235.

The pharmacologist's evidence

25. The appellant overlooks some important aspects of the evidence of Dr Majumder about the potential impacts of intoxication at the level estimated for the appellant at the time of the fatal incident.

26. The respondent adds the following matters:

26.1 The evidence of Dr Majumder went no higher than that a person with the possible blood alcohol level of the appellant *may* not be able to foresee or predict the consequences of certain decisions.[26]

26.2 Dr Majumder said that alcohol can increase aggressive behaviour, cause disinhibition and that a person may be more reckless and aggressive.[27] Dr Majumder did not put the deceased at a level that made him too intoxicated to be aggressive.[28]

26.3 The reference by the appellant at [44.6] of his submissions to a possible side effect of diazepam being confusion or impaired thinking was in the context of "usually very high doses".[29] The evidence of Dr Majumder was that the level of that drug in the blood of the appellant was "low".[30]

26.4 Dr Majumder said that the levels estimated for the appellant suggested a level of tolerance given that he was not unconscious.[31]

26.5 Dr Majumder said if a person was an "established" or "experienced" drinker there would be a degree of tolerance to the effects of alcohol[32] and that the experienced drinker might be slightly less effected.[33]

26.6 Dr Majumder stated that the possible impacts were influenced by factors individual to a person.[34]

26.7 Dr Majumder stated that one of the matters that might influence the effects of intoxication was the degree of stimulus to which they might be subject and that adrenaline might also heighten senses and make a person more alert.[35]

The trial judge's Summing Up

27. Given there is no complaint about the directions given in the Summing Up, it is unnecessary to scrutinise the directions. How the appellant could be guilty of murder

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[26] Dr Majumder 1551, although she prefaced this by saying that a blood alcohol level of the range being spoken of would significantly impair decision making and planning.
[27] Dr Majumder 1551, 1567 and 1581.
[28] Dr Majumder 1553.
[29] Dr Majumder 1555. See also toxicologist Heather Lindsay at 1190 who said the levels were near the lower end of the therapeutic range.
[30] Dr Majumder, 1555.
[31] Dr Majumder 1549.
[32] Dr Majumder 1548.
[33] Dr Majumder 1550, 1564, 1579 and 1580.
[34] Dr Majumder, 1566-7.
[35] Dr Majumder, 1579-80.

(count 1) on the basis of joint enterprise was set out in the Summing Up at 36-39 and on the basis of extended joint enterprise at 40-42. The jury also had written directions.

28. When dealing specifically with the case of the appellant, further directions were given on these issues.[36]

29. How the appellant could be guilty of manslaughter was set out in the Summing Up at 49-51 and 236-239.[37]

30. How the appellant could be guilty of count 2 on the basis of joint enterprise was set out in the Summing Up at 52-57 and 286-287. The jury also had written directions.

31. The jury were directed with respect to intoxication at more than one point. This was done with respect to the appellant on a number of occasions.[38]

Part V: APPLICABLE STATUTORY PROVISIONS

32. The appellant's statement of the applicable statutory provision, section 353(1) of the *Criminal Law Consolidation Act 1935* (SA), is correct.

Part VI: THE RESPONDENT'S ARGUMENTS

33. The appellant takes no issue with the evidence as summarised in the court below. The appellant also makes no complaint about the directions given at trial, nor the principles applied by the court below in rejecting the appellant's complaint the verdicts were unreasonable.

34. The appellant's only contention is that the convictions cannot be supported having regard to the evidence. The only basis on which that complaint is advanced is the appellant's intoxication and the expert evidence of Dr Majumder about its potential impacts.

35. It is necessary to consider the appellant's contention in the context of at least the following matters. The basis upon which liability was said to attach to the appellant, the evidence, the inferences available with respect to that evidence, the approach of the appellant at trial and the test to be applied by this court.

The basis upon which liability attached - the doctrine of joint enterprise

36. The appellant was not the principal with respect to count 1 or count 2.

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[36] Summing Up, 226, 236.

[37] There are aspects of these directions that are favourable to the appellant. At some points the jury were directed that the agreement needed to be to "expose the deceased to an appreciable risk of serious harm" (50, 237, 238) and that the prosecution needed to establish that the appellant realised that the assault was dangerous (238). As the jury were directed at other points, an agreement to assault was enough (49, 237-238) and the issue of dangerousness was an objective, not subjective, requirement (238). It is not necessary to consider this further. No complaint was made by the appellant in the court below and none is made in this appeal. Any errors were favourable.

[38] With respect to the appellant, Summing Up, 39-40, 43, 173-4, 175-182, 234-6, 239.

37. With respect to count 1, there was, and is, no dispute the principal was Betts.

38. Betts did not give evidence. However, Betts had been interviewed by police and admitted he was armed with a knife and used it against the deceased. That interview was led in the case against him and while, as the jury were directed, that interview was not admissible against the appellant, the case was conducted on the basis that Betts was the principal. The Summing Up reinforced this.[39] There was no complaint about that approach by the appellant or any of his co-accused.

39. With respect to count 2, there was, and is, no dispute that Presley was the principal.

40. Presley did not give evidence. However, Presley had been interviewed by police and admitted striking Mr King with a baseball bat. It was that act that must have broken his arm. That interview was led in the case against Presley. In addition, Presley had pleaded guilty to count 2. While the jury were directed the interview and the plea were not admissible against the appellant, the case was conducted on the basis that Presley was the principal. The Summing Up reinforced this.[40] There was no complaint about that approach by the appellant or any of his co-accused.

41. As the appellant was not the principal, on the prosecution case liability arose as a consequence of the doctrine of joint enterprise. There is no complaint about the directions. This being so, it is unnecessary to consider those directions in detail, to set out every aspect of that doctrine or everything that had to be proved. It is enough to set out only the key aspects that were relevant.

42. With respect to count 1, liability as a consequence of the doctrine of joint enterprise had two alternate limbs. First, that the appellant was part of an agreement with at least Betts to kill or to cause grievous bodily harm and participated in that agreement.[41] In the alternative, that the appellant was part of an agreement with at least Betts to assault but foresaw that another party to that agreement might act with intent to kill or to cause grievous bodily harm and that the appellant acted in some way to implement the agreement (extended joint enterprise).[42]

43. With respect to count 2, no issue of extended joint enterprise arose. The prosecution case was that the appellant was part of an agreement with at least Presley to cause harm to the men in Grant Street and participated in that agreement.[43]

44. Properly understood, if it was established that the appellant was part of a relevant agreement (and if needed, for the second limb in count 1, had the necessary foresight), then no real question of participation arose. The circumstantial case that the appellant was present at the time of the fatal confrontation was a compelling one. In his closing address at trial the appellant's counsel conceded presence.[44] Although there was much

[39] See for example, Summing Up 26, 186.
[40] Summing Up, 20 and 51.
[41] Summing Up 36-37; written directions.
[42] Summing Up 40-42; written directions.
[43] Summing Up, 51-52, 56; written directions
[44] Closing address, 1933.

that established the prosecution case beyond the appellant's presence, if a relevant agreement was established, presence was sufficient evidence of participation.[45]

45. There being no dispute about presence, the real issues in the trial were proof of the appellant being a party to a relevant agreement and, if necessary to rely upon extended joint enterprise, whether he had the necessary foresight that another might act with intent to kill or to cause grievous bodily harm.

46. For count 1 the relevant issues might be distilled in the following way:

    46.1 Was it open to conclude that the appellant was a party to an agreement with at least Betts to kill or to cause grievous bodily harm?

    46.2 If not, was he party to an agreement with at least Betts to assault?

    46.3 If so, did the appellant foresee that another member of the agreement might act with intent to kill or to cause grievous bodily harm?

47. The relevant issue in count 2 might be distilled simply:

    47.1 Was it open to conclude that the appellant was a party with at least Presley to cause harm?

All evidence, other than the out of court statements of Betts and Presley was admissible and relevant to all issues

48. The evidence available to prove the above issues was the same. Putting to one side the out of court statements given by Betts and Presley with respect to which the necessary directions were given,[46] it was the whole of the evidence given in the case.

The approach of the appellant at trial - no dispute he was present

49. The appellant did not give evidence. However, his counsel conceded in his closing address that he was present at the time of the fatal confrontation. For example, his counsel submitted to the jury:

> I don't say Miller was not there ladies and gentleman ... that is proven beyond doubt by virtue of the DNA, that was not challenged[47].
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> ....
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> If you were to find, which you will, that Miller was present there's DNA on his shoes. [48]

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[45] *Huynh & Ors v The Queen* (2013) 87 ALJR 434 at 442 [37].
[46] Summing Up, 20.
[47] Closing address, 1933. At one point it was submitted - "don't think that I am leading to some submission whereby Miller was there". In context either counsel misspoke or there is an error in the transcript. Counsel was plainly conceding that the appellant was there. This is reinforced not only by other passages in the appellant's closing address but also by the absence of complaint about the learned trial judge's description in the Summing Up of the appellant's submission being that the jury should entertain a doubt about Miller's conduct in Grant Street and that there were innocent explanations for his presence there (Summing Up, 231). That is, the submission of the appellant was that he was in Grant Street.
[48] Closing address, 1936.

50. The appellant's approach at trial was to submit the evidence did not establish he was physically involved while present at the fatal confrontation and was not part of any relevant joint enterprise.

51. In part, the appellant relied upon the evidence of his level of intoxication and the expert evidence with respect to it. It was submitted by the appellant's counsel at trial that intoxication gave rise to a doubt as to whether he joined in any joint enterprise and, if extended joint enterprise was relevant, a doubt existed as to whether he had the necessary foresight to be guilty of murder.[49]

52. The relevance of intoxication was a matter about which directions were given in the Summing Up on more than one occasion. It was part of the directions as to all accused and then again when dealing with the appellant more specifically.[50]

The approach in the court below

53. The appellant does not submit the court below misunderstood the doctrine of joint enterprise or the principles with respect to the task of an appeal court in determining whether a verdict is unreasonable or cannot be supported by the evidence.

54. As to the doctrine of joint enterprise, those principles are set out in the judgment of the court below at [61]-[64] and accord with the judgments of this Court in *McAuliffe v The Queen*[51], *Gillard v The Queen*[52] and *Clayton v The Queen.*[53]

55. As to the principles with respect to the task of an appeal court in determining whether a verdict is unreasonable or cannot be supported by the evidence, the court below applied this Court's judgments in *M v The Queen*[54] and *Libke v The Queen*[55] and stated:

> To establish that a verdict is unreasonable, or that it cannot be supported by the evidence, an appellant must do more than establish that the evidence is open to criticism.[56]
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> This Court must consider whether, on the whole of the evidence, it was open to the jury to be satisfied beyond a reasonable doubt of an appellant's guilt.[57] An appellant must establish that the jury must have entertained a doubt about guilt. It is not sufficient to establish that there was material before the jury which might have been taken by the jury to preclude satisfaction of guilt beyond a reasonable doubt.[58]

The court below concluded at [126]:

> The final submission advanced by Miller was that the verdicts was unreasonable or cannot be supported having regard to the evidence. In considering this submission, it is relevant to record that counsel at trial conceded that Miller was present at the time of the incident the subject of the charges. Earlier in these reasons, we have summarised the evidence said by the prosecution to

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[49] Closing address, 1942-9.
[50] Summing Up, 11, 29, 39-40, 43, 187-8, 220-1, 223-6, 234-6, 239.
[51] (1995) 183 CLR 108.
[52] (2003) 219 CLR 1.
[53] (2006) 81 ALJR 439.
[54] (1994) 181 CLR 487.
[55] (2007) 230 CLR 559.
[56] *The Queen v Shueard* (1972) 4 SASR 36 at 39.
[57] *M v The Queen* (1994) 181 CLR 487 at 492-3.
[58] *Libke v The Queen* (2007) 230 CLR 559 at 596-7 [113].

> establish Miller's presence, participation and state of mind. The facts as recorded were not challenged on the appeal by Miller's counsel. In our view, given the concession that Miller was present at the time of the incident, the other facts were capable of establishing that Miller was acting with the others and was either party to a plan to inflict grievous bodily harm or foresaw that possibility. With respect to the other charge, the other facts were capable of establishing that Miller was party to a plan to assault.

The failure to refer expressly to the intoxication of the appellant

56. It is accepted that in the passage immediately above, and in its summary of the facts of the case, the court below made no express reference to the intoxication of the appellant and how it might have impacted upon guilt. Care should be taken before it is concluded these matters were overlooked. It is open to conclude that the court below was cognisant of the appellant's intoxication and its potential impact upon the issues in the trial with respect to him.

57. Immediately before paragraph [126], the court made reference to the abandonment by the appellant of a separate ground with respect to intoxication and the directions with respect to that issue. It did so having discussed these same issues with respect to the co-accused Presley. Earlier in the judgment at [93], in dealing with a ground with respect to intoxication pursued by the co-accused Presley, the court set out some of the directions given in the Summing Up with respect to intoxication. As the court below noted, the first of the directions set out applied to the appellant and he was expressly referred to in the direction.

58. In light of the above, it is difficult to conceive the court below was not cognisant of the appellant's intoxication and its potential impact upon the issues with respect to him before coming to its view at [126] that the verdicts were not unreasonable.

59. It is unnecessary to consider this further. The appellant's complaint is not about adequacy of reasons. It is that it was not open to find that the verdict was supported by the evidence. This Court will need to review the evidence itself.

The test to be applied by this Court

60. In this appeal, the appellant calls into aid section 353(1) of the *Criminal Law Consolidation Act, 1935 (SA)*. That section relevantly sets out:

> The Full Court on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence ...

61. Before turning to how the evidence permitted the jury to convict, it is necessary to set out what the appellant must establish to succeed. The question this Court must ask itself is set out by the plurality in *M v The Queen*:

> Where notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence,

> or the consideration that the jury has had the benefit of having seen and heard those witnesses. On the contrary, the court must pay full regard to those considerations.
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> ...
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> ... The ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty (footnotes omitted).[59]

62. As Hayne J (Gleeson CJ and Heydon J agreeing) set out in *Libke v The Queen*:

> ... The question for an appellant court is whether it was *open* to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *must*, as distinct from *might*, have entertained a doubt about the appellant's guilt. It is not sufficient to show that there was material which might have been taken by the jury to be sufficient to preclude satisfaction of guilty to the requisite standard. (Footnotes omitted, emphasis in the original).[60]

Consideration of the issues in light of the evidence in the trial

63. Given the appellant did not dispute being present at the fatal confrontation, at their most simple the issues in the trial were: First, whether the appellant was part of an agreement with others to at least assault. Second, whether he had the necessary state of mind. For count 1, the agreement needed to be at least to inflict grievous bodily harm (or was foreseen). For count 2, the agreement needed to be to inflict harm.

64. This is not to overlook the appellant also had to participate in the relevant agreement and the jury were so directed.[61] However, as set out above, a person participates by being present when the crime is committed pursuant to the agreement[62] and there was no dispute at trial the appellant was present at the time of the fatal altercation. The issue in the trial was whether that presence, coupled with the balance of the evidence in the case, established the appellant was a party to the relevant agreements with the necessary state of mind.

65. In this case, the evidence capable of establishing the agreements and the evidence capable of establishing the state of mind cannot be separated. It is the same. All evidence admissible against the appellant shed light on all issues.

66. There is no single way in which it is appropriate to approach the evidence. Nonetheless, it is convenient to begin with the fact the appellant was present at the time of the fatal confrontation and to ask what the evidence permitted to be drawn from that.

67. In order to have been present, the appellant must have attended in the company of Betts, Presley and Smith. The evidence of Willis was that the appellant left the house at Hayles Road at the same time as the others[63] and the balance of the evidence was consistent with that conclusion. It is helpful to consider just some of what the evidence showed about what occurred at Hayles Road shortly before the fatal confrontation.

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[59] *M v The Queen* (1994) 181 CLR 487 at 493-5 per Mason CJ, Deane, Dawson & Toohey JJ.
[60] *Libke v The Queen* (2007) 230 CLR 559 at 596-7 [113].
[61] Summing Up, 226, 236.
[62] *Huynh & Ors v The Queen* (2013) 87 ALJR 434 at 442 [37].
[63] Willis, 763.

68. Betts and Presley had returned after the first confrontation. Betts said that his lip had been split open.[64] Betts said that he had been struck by three white fellas that jumped him in the alley way. He had a bloodied lip.[65]

69. Upon their return, Presley armed himself with a baseball bat. That was not a weapon that could be concealed. More importantly, it was seen by a number of people. First: by Willis at Hayles Road. Second: by eye-witnesses at the fatal confrontation. Given the size of the weapon, that it was seen by others and that the appellant left Hayles Road with Presley, it was open to conclude the appellant was aware Presley was armed. Further, it was also open to conclude that the intent of the group of which the appellant was a member was hostile. They were a group, leaving the house late at night, armed and obviously with the intention of confronting another or others.

70. In the context of just the above, the appellant's presence at the fatal confrontation was enough to establish that he was present as part of agreements with both Betts and Presley and with the necessary state of mind.

71. There was, nonetheless, much more to the evidence than just the above.

72. There was also no dispute Betts was armed with a knife. That knife was about 30 centimetres in length and could not have been easy to conceal. A few hours after the fatal confrontation, Betts was wearing a t-shirt and shorts.[66] It must be accepted that no witness saw the knife but that did not mean that the jury could not conclude the appellant was aware of it. Unlike Willis, the appellant travelled to the scene with Betts. The witnesses at the scene were caught by surprise by the nature of the attack and were making observations in poor lighting of what must have been a confusing set of events. In contrast, the appellant had travelled to the scene with Betts and the evidence permitted of the conclusion he was standing within about one and half meters of him during the attack on the deceased.

73. In addition, it might be doubted there was any reason for Betts to conceal his weapon from the others. Those armed with the baseball bat and the shovel took no apparent steps to do so. In such circumstances, and given it is open to conclude they were acting as a group, it is relevant to to ask why Betts would have done so. Further, Betts' comment on the return to Hayles Road after the fatal confrontation (ie - to the effect he had stabbed someone) can be viewed as contrary to any intent by him to conceal his possession of a knife from those with him.

74. There was, of course, even more than just the above from which the relevant inferences could be safely drawn.

75. There was no dispute that another of the appellant's group was armed with a shovel. Again, this was not a weapon that was able to be concealed. While the appellant identifies evidence that raised the possibility of the shovel being obtained from the scene of the fatal confrontation, that was not the only inference available. As set out at [8] - [11] above, it was not the most likely inference. It is perhaps enough to observe

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[64] Turner, 954.
[65] Willis, 762-3.
[66] Summing Up, 62.

that a witness described the person at the front as carrying a shovel as the group came to the fatal confrontation.[67]

76. There was more from which the necessary conclusions could be drawn.

77. To prove guilt, it was not necessary to establish the appellant delivered any blow/s at the scene. Nonetheless, such a conclusion was open and only strengthened the inferences already available as to the appellant's participation in the necessary agreements with the necessary state of mind.

78. For example, Turner described four or five Aboriginal men around the deceased while he was on the ground.[68] The deceased was being kicked and hit. Given that only four men (other than Willis) had left the house at Hayles Road and the DNA evidence placing him within no more than one and a half meters of the deceased, the conclusion the appellant was one of the men delivering blows was open.

79. Finlay-Smith[69] saw 5 or 6 people in the laneway.[70] He was in his front yard. The deceased was dragged by 2 males towards the middle of the road. One of those males had a shovel and one a silver pole (likely the baseball bat).[71] Finlay-Smith saw a male hit the deceased across the head with the shovel.[72] The deceased went to the ground and Finlay-Smith observed he was bashed by about 4 people.[73] One of them had a bottle and hit the deceased with it.[74]

80. The appellant's shoes had blood spatter on them and that spatter placed the appellant within one and a half meters of the deceased when blows were being delivered. Aspects of the evidence of Dr Donnelly were:

    a. Spatter stains were observed within the tread of the sole of the left shoe, as well as the upper surface and left side. Dr Donnelly estimated that given their size the maximum distance of travel from the source of the blood was approximately 3 metres.[75]
    b. There was more spatter on the right shoe than the left.[76] Approximately 200 spatter spots were observed on the right shoe.[77] Assuming they arose from an impact mechanism the source of the blood was again no more than 3 metres away.
    c. Had the right shoe stepped into a pool of blood Dr Donnelly said he would expect to see blood on the sole of the shoe.[78] No blood was observed on the sole of the right shoe.[79]

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[67] Bateman, 291: *R v Presley, Miller and Smith* (2015) 122 SASR 476 at 479 [14].
[68] Turner, 427, 474 - 475.
[69] Summary of evidence by the Learned Trial Judge found in Summing Up, 121-127.
[70] Finlay-Smith, 604.
[71] Finlay-Smith, 608.
[72] Finlay-Smith, 606.
[73] Finlay-Smith, 609.
[74] Finlay-Smith, 609.
[75] Donnelly, 1449-1450.
[76] Donnelly, 1450.
[77] Donnelly, 1451.
[78] Donnelly, 1451.
[79] Donnelly, 1450.

81. Brevet Sergeant McKenzie examined the crime scene. He observed that the blood spatter from the position the deceased was in on Grant Street extended no more than a metre and a half.[80]

82. It must be accepted that any blows delivered by the deceased might have been after the infliction of fatal injury. Turner described an action consistent with the fatal injury - a "hand coming at him at the back of him and hitting him" to the back just below the shoulder blade[81] - as being before she saw the deceased on the ground. That does not undermine the conclusions available from the appellant's proximity to the deceased and/or physical involvement.

83. On the whole of the evidence it is open to conclude that the appellant had attended the scene of the fatal confrontation as part of agreements with at least Betts (count 1) and Presley (count 2) and that those agreements encompassed the commission of the offences charged.

The evidence of intoxication - it does not prevent any necessary inference being drawn

84. It is helpful to consider the appellant's intoxication, and its potential impacts, against the background of the above.

85. There is no doubt the appellant was intoxicated.

86. There is no dispute that his intoxication is relevant to the inferences that can safely be drawn from the balance of the evidence and this Court's ultimate conclusion as to whether the verdicts are unreasonable. The level of intoxication, and the expert evidence about it, is relevant both to whether the prosecution could prove he was a party to relevant agreements and, if necessary for count 1, had the necessary foresight that another might act with at least intent to inflict grievous bodily harm.

87. There is no complaint about the directions given at trial with respect to the issue of intoxication.[82]

88. The evidence of intoxication does not lead to the conclusion the verdicts are unreasonable or cannot be supported by the evidence.

89. It is vital to bear in mind that the question for this Court is not whether the intoxication might have caused the jury to have a doubt about the guilt of the appellant but whether it was such that, on the whole of the evidence, it was not open to the jury to be satisfied the appellant was guilty.[83] That is that the jury must, as distinct from might, have entertained a doubt about guilt.[84]

90. It is helpful to commence consideration of the potential impact of intoxication with something that is no more than common sense. Joining in a relevant agreement and, if necessary, foreseeing that another might act with intent to inflict grievous bodily harm are not complex matters beyond even a grossly intoxicated person.

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[80] McKenzie, 117.
[81] Turner, 424.
[82] Summing Up, 234 - 239.
[83] *M v The Queen* (1994) 181 CLR 487 at 493-5.
[84] *Libke v The Queen* (2007) 230 CLR 559 at 596-7 [113].

91. Further, the evidence of intoxication is to be evaluated in light of the whole of the evidence in the case. The evidence permits the conclusion the appellant was capable of acting in a logical, purposeful and deliberate way. A way demonstrative of an understanding of, and agreement with, what was happening around him as well as an ability to knowingly act with others to achieve a common goal.

92. It is perhaps enough to observe the appellant left Hayles Road with the others, was able to walk with them as part of a group, at the very least placed himself in close proximity to the deceased as he was being attacked and then left along with the others and returned to Hayles Road. Even just some of these actions by the appellant reflect an ability to understand, and participate in, what was happening.

93. It is also important to understand the limits of the evidence upon which the appellant relies. The evidence of the level of the appellant's intoxication and the expert evidence of its potential impacts were just part of the evidence in the case and was not evidence to be evaluated in isolation. The evidence of Dr Majumder did not go so far as to suggest the appellant was experiencing the deficits upon which the appellant relies. That was a matter for the jury. However, even if the appellant was, that evidence did not, and could not, go so far of itself to suggest that the jury were compelled to find the appellant could not be a party to any relevant agreement nor, if necessary for count 1, not foresee that another might act with the necessary intent.

94. In addition, evaluation of the whole of the evidence mandates that those aspects of the evidence relevant to intoxication which did not assist the appellant not be overlooked. As set out at [26.2] above, alcohol can increase recklessness, aggressiveness and disinhibition. Dr Majumder did not put the appellant's intoxication at a level that prevented aggression.[85]

95. In light of the above, it is unnecessary to form a view as to whether the appellant consumed alcohol after the fatal confrontation and, if he did, what impact it might have had upon the extent of his intoxication. Taken at the highest for the appellant, intoxication did not prevent verdicts of guilt.

The specific matters raised by the appellant

96. In his summary of argument the appellant raises a number of aspects of the evidence that he submits permitted of more than one conclusion. The appellant submits that inferences short of a conclusion consistent with guilt were open.

97. The respondent will deal with each in turn but it is important to observe that what might be drawn from a particular aspect of the evidence has to be evaluated in light of the whole of the evidence. It is inappropriate to look at just part of the evidence and posit explanations that fall short of guilt. Indeed, as the appellant fairly observes, each aspect of the evidence he highlights permits of a conclusion consistent with guilt. In all of the circumstances, it was open to the jury to prefer those conclusions over those falling short of proof of guilt.

98. That a particular aspect of the evidence might be interpreted in a way falling short of proof of guilt is in any event, with respect to the appellant, not to the point. The jury

[85] Dr Majumder, 1551, 1552, 1567 and 1581.

was not compelled to take any one, or more, of the innocent approaches for which the appellant contends.

99. It is helpful to repeat the guidance provided by Hayne J in *Libke v The Queen*:

> It is clear that the evidence that was adduced at the trial did not all point to the appellant's guilt on this first count. But the question for an appellate court is whether it was *open* to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *must*, as distinct from *might*, have entertained a doubt about the appellant's guilt. It is not sufficient to show that there was material which might have been taken by the jury to be sufficient to preclude satisfaction of guilt to the requisite standard. In the present case, the critical question for the jury was what assessment they made of the whole of the evidence that the complainant and the appellant gave that was relevant to the issue of consent to the digital penetration that had occurred in the park. That evidence did not require the conclusion that the jury should necessarily have entertained a doubt about the appellant's guilt (footnotes omitted, emphasis in the original).[86]

100. The respondent addresses each of the matters raised by the appellant against the above background.

101. As for the appellant's submissions at paragraphs [59]-[60] as to what Presley said before the group went to the fatal confrontation:

> Let's go back and see what these people - go and see what the problem is.[87]

As the appellant concedes two of the inferences open were that it evinced an intention to inflict harm or really serious harm.

102. If the appellant agreed to even at least the former and left the house for that purpose, then that was enough to establish count 2 and enough to establish a relevant agreement for count 1 (subject to the accused then having the relevant foresight). It cannot be said that these conclusions were not open to the jury based even solely on the comment (if heard) and the appellant's attendance at the scene.

103. However, it is not appropriate to approach the case in such a narrow fashion. In deciding the relevant issue, the jury had the whole of the case to consider. Even if the appellant heard the comment, and even if he did not that time join in any relevant unlawful agreement or possess the necessary state of mind, the relevant point of time at which these things had to be proven to exist was not when the comment was made, but later. As the jury were directed, the appellant had to be a party to the relevant agreement at the time the fatal act was committed.[88] The evidence demonstrates that much took place between the above comment of Presley at Hayles Road and that time.

104. At paragraph [75] of his submissions the appellant goes so far as to submit that not only could the jury not conclude that the appellant knew that Betts was armed with a knife and proposed to use it with the necessary intent, but that if the jury could not so conclude it was not open to convict on the basis of extended joint enterprise. It is respectfully submitted that is a large submission. It overstates what the prosecution was obliged to prove.

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[86] (2007) 230 CLR 559 at 596-7 [113].
[87] Willis, 763.
[88] Summing Up 36 - 37, 40-41, 226, 236.

105. The appellant's submission pre-supposes: First, that the evidence does not permit of a finding that the appellant knew of the knife. Second: that such knowledge by the appellant was essential for guilt.

106. As for the first of the matters pre-supposed above, it is the case that Willis's evidence was that he only saw a baseball bat and no witness saw the knife. However, this did not mean that it was not open to the jury to conclude the appellant knew of more than the baseball bat.

107. The knife was large. Given others were carrying weapons (at least a baseball bat and a shovel), that Betts successfully hid the knife from his co-accused was not the only inference open. It might be doubted that Betts was of a mind to conceal the weapon. Certainly such an approach was not favoured by those carrying the baseball bat and the shovel. Even if he was of a mind to attempt to conceal it from others in his group, given its size and the way he was dressed, the conclusion he had not succeeded was open.

108. It can be further observed that upon the return to the house at Hayles Road after the fatal confrontation, Betts was heard to say:

> I think I stabbed him, stabbed a bloke in the guts.[89]

109. Such a comment is arguably inconsistent with a desire to conceal his possession of a knife from those with whom he had travelled to the fatal confrontation.

110. As for the second of the matters pre-supposed as part of the appellant's submission, the prosecution was not obliged to prove the appellant knew of the knife or, indeed, of any other weapon. Knowledge of a weapon/s held by another/s strengthened the inference the appellant was part of a relevant plan and was possessed of the necessary state of mind, but that does not mean it was essential to establish knowledge of a weapon/s before verdicts of guilty could be returned.

111. As the jury were properly directed, whether there was knowledge or contemplation of a knife was not an essential matter to be proved. It was a factual matter which could inform the jury as to the extent of the agreement and what was foreseen.[90]

112. As for the appellant's submission at [77] that there was no "direct" evidence as to the source of the shovel, who held it or that the appellant was aware of its presence or use, the absence of direct evidence does not mean it was not open to conclude that it had been brought to the fatal confrontation by the group of which the appellant was a part, that he would have been at least aware of it being carried and that it was to be used as a weapon (as in fact occurred at the scene). The respondent repeats the matters set out at [8]-[11] above. In any event, for the same reasons as set out above with respect to the knife, it was not essential that the prosecution establish knowledge of the shovel being carried as a weapon.

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[89] Willis, 768.

[90] Summing Up, 218-9, 232-3, 277-8. As this Court set out in *Huynh & Ors v The Queen* (2013) 87 ALJR 434 at 436-7 [4]-[7], to require an agreement as to *how* an intentional act with intent to kill or to cause grievous bodily harm is to be done is more than the law requires.

113. As for the appellant's submission at [65] that there was no direct evidence the appellant was "a direct participant (as contrasted with his mere presence)", at least two things must be remembered. First, there was no obligation to prove the appellant was a "direct participant". His presence at the scene was, in all of the circumstances, an act of participation.[91] Second, and although not necessary to establish guilt, for the reasons set out above at [19] - [20] it was open to infer that he had directly assaulted at least the deceased.

114. As for the appellant's submission at [66] that he had no motive to attack either victim, there was no obligation to establish he did. Proof of motive was not essential for guilt.[92]

115. In any event, in all of the circumstances, it was open to conclude that the appellant's motive was the same of that of at least Presley and Betts. Presley and Betts were plainly motivated by what had occurred at the first confrontation. It was the only logical reason from them to return. The appellant had been back at Hayles Road when both returned and then left with them. From this alone, let alone from all that followed, it was open to conclude the appellant shared the motive of Betts and Presley. In short, to seek retribution for what had occurred during the first confrontation.

PART VII

116. Not applicable.

PART VIII: ESTIMATE OF LENGTH OF ORAL ARGUMENT

117. 1 - 1.5 hours for the respondent.

Dated the 25th day of January 2016

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[*Senior legal practitioner presenting the case in Court, or respondent if unrepresented*]

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[91] *Huynh & Ors v The Queen* 87 ALJR 434 at 442 [37]: Summing Up, 232.
[92] *De Gruchy v The Queen* (2002) 211 CLR 85 at 93 [29]-[31], 99 [53].