SUPREME COURT OF QUEENSLAND

CITATION:	*R v Fennell* [2017] QCA 154
PARTIES:	**R** **v** **FENNELL, Steven Mark John** (appellant)
FILE NO/S:	CA No 83 of 2016 SC No 308 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 21 March 2016
DELIVERED ON:	21 July 2017
DELIVERED AT:	Brisbane
HEARING DATE:	24 May 2017
JUDGES:	Gotterson and Philippides JJA and Byrne SJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted by a jury of murder – where the appellant contends that the verdict is unreasonable because the jury could not have excluded, beyond a reasonable doubt, the possibility that someone other than the appellant killed the deceased – where the appellant argues that a reasonably open hypothesis was that the deceased had been killed during a burglary – where there was no complaint at trial with respect to the learned trial judge's summing up on matters of evidence – whether there was a reasonable hypothesis consistent with the appellant's innocence open on the evidence – whether the verdict was unreasonable CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where the appellant argues that evidence before the jury included unfairly prejudicial evidence relating to the appellant's criminal history, emotional volatility, finances and internet usage – where there was no application to exclude any of this evidence at trial – where the respondent contends that defence

counsel either made a rational forensic decision not to object to this evidence, or otherwise dealt with it appropriately during the course of the trial – whether the appellant was unfairly prejudiced by the admission of the evidence – whether there was a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF DEFENCE COUNSEL – where the appellant argues defence counsel at trial failed to object to the admission of irrelevant and unfairly prejudicial evidence – where the appellant further argues defence counsel at trial failed to obtain a report from a forensic pathologist to counter the Crown's evidence on the time of death, to ask questions of the appellant's wife about the appellant's computer usage on the date of the murder and to establish the habits of the deceased – whether the failures were explicable on the basis that they could have achieved a forensic advantage for the appellant – whether the failures deprived the appellant of a real chance of acquittal – whether there was a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – CONTROL OF PROCEEDINGS – DISCHARGE OF JURY – where, on the sixth day of trial, a witness made reference to the appellant's 'form' in the context of his history as a gambler – where the learned trial judge rejected a submission that the word 'form' impermissibly informed the jury that the appellant had a criminal history and refused an application for discharge of the jury – whether the learned trial judge erred in refusing the application

Barca v The Queen (1975) 133 CLR 82; [1975] HCA 42, cited
BCM v The Queen (2013) 88 ALJR 101; (2013) 303 ALR 387; [2013] HCA 48, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Plomp v The Queen (1963) 110 CLR 234; [1963] HCA 44, cited
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, applied
R v McPartland [2017] QCA 35, applied

COUNSEL: S M Ryan QC, with J B Horne, for the appellant
G J Cummings for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** The appellant, Steven Mark John Fennell, was convicted of murder on 21 March 2016 at the conclusion of a trial over 15 days in the Supreme Court at Brisbane. The count on which the appellant had been charged alleged an offence against s 302(1) of the *Criminal Code* (Qld) in that on or about 12 November 2012 at Macleay Island he murdered Liselotte Klara Helene Watson ("the deceased").

[2] Following his conviction, the appellant was sentenced to life imprisonment. Some 1,103 days between 15 March 2013 and 21 March 2016 were declared to be time served under the sentence.

[3] On 29 March 2016, the appellant filed a notice of appeal against his conviction. That document was ultimately superseded by a further amended notice of appeal filed on 26 April 2017 for which leave was granted at the hearing of the appeal on 24 May 2017.

The death of the deceased and discovery of her body

[4] The deceased was an 85 year old resident of Macleay Island. She lived alone in a two-storey house in Alistair Court. She was killed in her bed by four to six blows to the head with a blunt instrument. The time of death could not be conclusively fixed. Expert evidence favoured Monday, 12 November 2012, but could not exclude the day following.

[5] At a little after 3.30 pm on Tuesday, 13 November 2012, the appellant called at the police station at Macleay Island. He expressed concern about an "86 year old lady who he had had a lot to do with".[1] He told Sergeant D A McDougall that he would normally visit her on a Tuesday during his paper run and call in for a coffee, that at about 6 am that day he had left a note in her letterbox to let her know that he was going to the mainland, and that in the early afternoon he had called at her house and noticed that the door was locked and the note was still in the letterbox.[2]

[6] The appellant and Sergeant McDougall drove to the house in separate vehicles. They walked up the steps onto the front verandah. The appellant opened a screen door, knocked on the wooden front door and tried to open it. Sergeant McDougall noticed that some casement windows were slightly open. He opened them further but then realised that there were bottles lined up inside that would have to be removed for him to enter via that window.[3]

[7] The appellant then led Sergeant McDougall to the side of the house and into the carport. Sergeant McDougall noticed a side door.[4] He turned the knob of that door and it opened. They entered the lower floor of the house, passing through a laundry area, a dining area, the kitchen and then the lounge room. Sergeant McDougall saw cupboards and drawers in the lounge room open and an unplugged flat screen television set on the floor.[5] He thought that there had been a break in. He was anxious to find the occupant of the house.

[8] Sergeant McDougall checked other downstairs rooms and approached the main bedroom. First, he noticed that some drawers in a chest of drawers were open and one had been removed. He saw a single bed along the western wall. As he got closer, he saw the body of an elderly woman in a nightdress on the floor alongside the bed. She was lying on her stomach with her head towards a bedside table and tilted to the left.[6] There was dried blood on her head and in her hair. Her face was covered by a

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1 AB33 Tr1-19 ll9-10.
2 AB45 Tr1-31 l47 – AB46 Tr1-32 l7.
3 AB47 Tr1-33 ll34-41.
4 AB51 Tr1-37 ll31-38.
5 Ibid l38 – AB52 Tr1-38 l23.
6 Exhibits 8, 9.

doona and a lamb's wool rug from the bed. There was no sign of breathing or other movement.[7]

[9] According to Sergeant McDougall, a sliding glass door on the southern wall of the bedroom was open about 30 centimetres and the screen door across it was open about a centimetre.[8] There appeared to be blood splatters on the bedroom wall behind a round side table and on a tissue box.[9] An AM radio was playing. Sergeant McDougall and the appellant left the house via the side door and the former reported the discovery to the District Duty Officer.

The nature of the respective cases

[10] It was evident that the deceased had been killed intentionally. The Crown case against the appellant was wholly circumstantial. It drew together numerous strands of evidence from which the jury were invited to be satisfied beyond reasonable doubt that it was the appellant who murdered the deceased.

[11] The appellant did not give or call evidence. However, the case put on his behalf proposed as a reasonable hypothesis consistent with innocence that a person other than the appellant had broken into the deceased's house and that it was during the break-in that the deceased had been killed. The hypothesis was grounded in evidence that it was common knowledge on Macleay Island that the deceased kept sizable amounts of cash at home; that she had been receiving nuisance phone calls; that Sergeant McDougall had found items in her house which had been disturbed; and that there had been an increase in unlawful entries to properties on Macleay Island in 2012.

The Crown case

[12] Over 60 witnesses were called in the Crown case. They included Sergeant McDougall and other investigative police officers, forensic accounting, medical and handwriting expert witnesses, relatives, neighbours and acquaintances of the deceased, the appellant's wife and employees of the Westpac Bank branch at Victoria Point on the mainland and of the TAB agency at the Pub Paradise hotel on Macleay Island. Many exhibits were tendered. Amongst them were recorded interviews of the appellant with police on 13 and 14 November 2012, a timeline produced by the appellant for police, banking and betting records, and photographic evidence of the exterior and interior of the deceased's house, certain possessions of the deceased found before and after the presumed time of death at Thompson Point on Macleay Island and a hammer found at the same location after the presumed time of death.

[13] The following summary of the major strands in the Crown case is drawn from both the oral testimony of the witnesses and the exhibits. The latter includes statements made by the appellant to police in interviews on 13 and 14 November 2012 and a signed witness statement dated 14 November 2012 concerning his relationship with the deceased.[10]

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7 AB54 Tr1-40 ll28-34.
8 AB55 Tr1-41 ll5-6.
9 Ibid ll28-32.
10 Exhibits 37, 41. Transcripts are MFI "A" and MFI "B". MF1 "B" was revised and replaced by MFI "C": AB145 Tr3-4 ll42-43. The witness statement is Exhibit 40.

[14] **The appellant's relationship with the deceased**: The appellant was also a resident of Macleay Island. He became acquainted with the deceased when he began mowing her lawn. She had been a customer of a mowing business that he had purchased. A friendship developed, he took her rubbish to the tip, picked up medicines for her from the chemist, paid her telephone bills from funds she provided to him, collected her groceries, ran shopping errands for her when she would run out of items, got her hot meals and checked on her. He would see her "on almost a daily basis".

[15] According to the appellant, he would stop by to have a cup of tea or coffee and a chocolate biscuit with the appellant first thing in the morning, more frequently on a Tuesday than any other day of the week. He would also do household chores for her such as adjusting the tilt position on the television set, changing light bulbs, changing batteries in her transistor radio, sweeping the floors and taking the washing down to the clothesline. She would not pay him for the help he provided to her, but she would give him cash to cover outlays.

[16] The appellant was acquainted with the deceased's habits. He told police that she would repeat herself, that she was forgetful at times and would break down in tears, that she would leave the front door open and that she used a walking stick. The appellant had been present on two occasions when the deceased's doctor had made house calls and he knew that she had recently stopped taking her prescribed medicine. He said that he was aware that the deceased kept cash in the house but did not know where it was. So far as he knew, she had no enemies.

[17] Significantly, the appellant had attended to banking for the deceased. He had made withdrawals at the Westpac branch at Victoria Point using withdrawal slips signed by the deceased as follows:[11]

Date	**Amount $**
22 August 2012	3,000
17 September 2012	7,000
28 September 2012	3,000
5 October 2012	3,000
2 November 2012	8,000

[18] The amount of the withdrawal in words and figures in the withdrawal slips for 22 August 2012 and 17 September 2012 appeared to be in a style of handwriting different from the deceased's as illustrated in her signatures on the slips. Expert evidence attributed the different handwriting to the appellant.[12] In the case of the withdrawal slip for 2 November 2012, the expert evidence was that the appellant had written the date and the words "Eight Thousand Dollars Only". The evidence was inconclusive as to who had written the numerals "8000 00". However, the curves on the right-hand side of the numeral "8" appeared to have been written in a continuous script as for the numeral "3", whereas the curves on the left-hand side of

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11 Exhibits 59, 60, 61, 62, 63.

12 AB480 Tr7-62 l12 – AB481Tr7-63 l27.

the numeral "8" appeared to have been written by "two separated strokes". The expert opinion was that a "3" had been changed to an "8".[13]

[19] 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 denied by the deceased's granddaughter.[14] At that time, she lived there with her mother who had died by the time of the trial.

[20] Westpac bank officers gave evidence that on one occasion in October or November 2012, the appellant asked about authorities and said that he wanted to be "a signing authority" for the deceased's account. He was told that the deceased would have to come into the branch to sign such an authority. At that point he became "a little bit aggressive and started closing his fists".[15]

[21] The Crown contended that the high level of contact and intimate association between the appellant and the deceased raised a very strong inference that he was able to enter her house without arousing suspicion, knew where she would be, and had the opportunity to kill her without leaving a trace.

[22] **Motive**: The Crown alleged that the appellant had a motive to kill the deceased from the following circumstances. The appellant had no substantial savings. In early November 2012, he lost a part-time job delivering catalogues for the Russell Island IGA. He was a regular TAB punter. His wife did not know that he had a TAB account or that he would regularly go to the Pub Paradise TAB agency to bet.[16] An agency employee, Robert Papps, testified that the appellant had said that he was worried about his wife finding out.[17]

[23] The Crown case was that the appellant had been stealing money from the deceased's Westpac Bank account to fund his gambling. Notably, the withdrawal amounts of $7,000 and $8,000 in September and November 2012 respectively far exceeded the average monthly withdrawals made by the deceased from her Westpac account since November 2007.[18] Furthermore, the total withdrawals of $24,000 in the period 22 August to 2 November 2012 far exceeded the total withdrawals for any preceding three calendar month period.[19]

[24] Forensic accounting evidence[20] sought to draw a correlation between the five Westpac withdrawals to which I have referred and the appellant's betting at the TAB agency. This evidence indicated an absence of commensurate withdrawals from the appellant's modest bank accounts which might have otherwise funded his punting at the time.

[25] Furthermore, there was evidence that the deceased had expressed concern about missing money in the weeks leading up to her death. Before her own death, the deceased's daughter provided a statement to police recollecting her last conversation with her mother. The deceased told her that about $200 or $300 had gone missing from her house, and that "she was going to speak to [the appellant]

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13 AB483 Tr7-65 l25 – AB485 Tr7-67 l9.
14 AB423 Tr7-5 ll10-23.
15 AB410 Tr6-96 l42 – AB411Tr6-97 l16.
16 AB291Tr5-56 ll11-14.
17 AB281Tr5-47 ll19-24.
18 Exhibit 99. Monthly withdrawals rarely exceeded $4,000. A notable exception was a withdrawal of $11,000 in May 2010 which was for personal use by the deceased.
19 Ibid.
20 Exhibit 102.

about it".[21] The deceased's neighbour, Evan Dallas, testified that the deceased had raised the matter with him about a week before her death, but for an amount of $4,000.[22]

[26] The most recent bank statement found at the deceased's house during the police investigation was for the period 3 August 2012 to 3 September 2012.[23] The appellant was at a heightening risk that the deceased would soon discover from subsequent bank statements that he had been stealing from her. This risk, it was argued, provided a motive for him to dispose of her.

[27] **The non-disclosure to police**: Evidence adduced in the Crown case revealed that the appellant had attended the TAB agency at the hotel on Macleay Island during the afternoon of Monday, 12 November 2012. Between 3.51 pm and 4.35 pm, he engaged in 11 betting transactions with only one win. His net loss for these transactions was a little over $1,200.[24]

[28] At the beginning of the appellant's interview at the Macleay Island police station on 14 November 2012, he was asked to handwrite a summary of what he had done from the preceding Saturday (10 November) onwards. He responded by producing a typed timeline document which he had already prepared.[25] During the interview, he handwrote a separate timeline as requested.[26] In neither did he disclose his visit to the TAB agency on the afternoon of Monday, 12 November.

[29] The Crown contended that the omission to refer to the visit on two occasions raised an inference of a consciousness on the appellant's part that his gambling habit might have implicated him at some level in the deceased's death.

[30] **The injuries to the deceased and the time of death**: The specialist pathologist called in the Crown case, Dr A O K Olumbe, gave evidence of his examination of the deceased's body. He observed a number of bruises on both forearms and the back of each hand, and lacerations to fingers, all of which he characterised as "defensive injuries". He described lacerations to the deceased's chin and neck. All the lacerations had the appearance of having been caused by a blunt object.[27] Many of the bruises were crescent shaped suggesting that a blunt instrument with a round shape "such as a head of a hammer" had caused them.[28] Dr Olumbe noticed that the deceased's dentures were intact in both her jaws.[29]

[31] A CT scan revealed complex depressed fractures to the back of the deceased's skull which were partially visible upon examination. The fractures underlay lacerations to the back of the head. Beneath the fractures, the brain was bruised or abraded. Dr Olumbe favoured a conclusion that a blunt instrument, "such as a hammer", used repeatedly with "a severe amount of force" had caused the fatal injuries to the back of the skull and the brain.[30] As to the time of death, Dr Olumbe said that decompositional changes in the brain suggested that death occurred on 12, rather

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21 Exhibit 70 p 1.
22 AB433 Tr7-15 ll1-2.
23 Exhibit 104.
24 AB581 Tr8-86 l5 – AB582 Tr8-87 l34.
25 Exhibit 38.
26 Exhibit 39.
27 AB87 Tr2-10 ll17-23; AB93 Tr2-16 ll1-3.
28 AB91 Tr2-14 ll8-27.
29 AB83 Tr2-6 ll7-9.
30 AB93 Tr2-16 l19 – AB96 Tr2-19 l9.

than 13, November 2012. He could not be precise as to when on the 12th death occurred.[31]

[32] Other evidence supported an inference that the deceased was dead by the afternoon of 12 November 2012. A local taxi driver, Carol Bowen, used to collect and deliver newspapers for the deceased. According to Ms Bowen, she delivered the paper to the deceased's house at 6.45 am that morning. The kitchen blinds were not open and the front door was closed. She assumed that the deceased was still asleep and left the paper on the floor or a chair.[32] The following morning, around 7 am, Ms Bowen noticed that the Monday paper had been removed and the front door was shut. However, the flyscreen in front of the door was open, which, to her observation, was unusual.[33]

[33] A neighbour, Evette Uzzell, saw the deceased in the front yard of the latter's property at about 9.30 am on the Monday morning. She herself was in her driveway waiting for her employer to pick her up. In all, she observed the deceased over five to 10 minutes. The deceased was wearing "a grey house dress and shoes".[34]

[34] The appellant admitted that telephone records showed that calls to the deceased's landline at her house made by a third party at 2.53 pm and 4.14 pm on the Monday afternoon were unanswered.[35] A neighbour, Mary Roberts, said that at about 9.30 pm that day she looked towards the deceased's house from her house as she was setting up a television set. She noticed that there were no lights on. To her, that was unusual because, to her observation, since 2004 the deceased had always had two lights on in the evening. She could see them from her house through two windows on the western side of the deceased's house.[36]

[35] **The presence of the appellant at the deceased's house**: In both of his typed timeline documents provided to police, the appellant stated that on the morning of Monday 12 November 2012, he tried to telephone the deceased. There was no answer. He went to her house and knocked on the door. Again, there was no answer. He left the deceased's biscuit tin at the front door. Neither timeline referred to a subsequent visit to the house by the appellant that day. They did, however, state that after 3 pm he returned a DVD to the rental shop and that between 3.30 pm and 5.45 pm he was with Wally and Linda Crook at their house.

[36] Two witnesses gave evidence of sighting the appellant at the deceased's house at other times on the Monday in question. Loretta McKie, a resident in Alistair Court, testified that about 2 pm, she saw a man whose name she later learned was "Mr Fennell", come up the street on "a little postie bike". She had seen him frequently visit the deceased's house over the preceding 12 months. The bike was parked near the deceased's letterbox. Ms McKie heard the bike start up about 20 minutes later.[37]

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31 AB97 Tr2-20 ll4-38.
32 AB191 Tr4-33 ll24-32.
33 AB192 Tr4-34 ll7-35.
34 AB178 Tr4-20 l29 – AB179 Tr4-21 l16.
35 Exhibit 70, p 8.
36 AB269 Tr5-34 ll5-47. Ms Roberts also testified that between 1 and 1.30 pm on the Monday afternoon she was driven past Alistair Court. She saw a woman and two teenagers walking in a diagonal line across a vacant block of land on the corner of Alistair Court: AB273 Tr5-38 ll13-40. Her evidence did not associate these individuals with the deceased or her house.
37 AB198 Tr4-40 l7 – AB200 Tr4-42 l7.

[37] Ulla Doolan, also a resident of Alistair Court, gave evidence that she knew the appellant as a regular visitor to the deceased's house. She was used to seeing him in the street delivering pamphlets. She said that about 6 pm on Monday 12 November 2012, she saw the appellant's white utility drive to the deceased's house. She was cooking dinner in the kitchen at the time. She saw the appellant go inside the deceased's gate. The utility left her street at about 7.30 pm that evening.[38] Ms Doolan also said that she had seen the appellant at the deceased's house on the Monday morning when he "only stayed for a little while".[39] I mention at this point that Ms Doolan also gave evidence that she saw the appellant in her street on the morning of Sunday 11 November 2012. He was delivering pamphlets on his postie bike.[40] She conceded that she had told police that at that time he was driving his utility. That, she said in cross-examination, was a mistake.[41]

[38] Mark Robinson, who had done occasional carpentry odd jobs for the deceased, was working in the street next to Alistair Court on the morning of 12 November 2012. He testified that at about 11 am he saw a four-wheel drive utility of a "whitey-colour" parked outside the deceased's house facing "the wrong way". It had a rough edged tray with a bar over the back of it.[42] There was a "reddy-brown" area on the back right hand corner of the utility. Mr Robinson did not know the owner of the vehicle at that time but he later saw it parked in the street where he lived. He went up to it and saw the name "Steven Fennell" and the words "pamphlet delivery" written on the back right hand corner area.[43] Initially, in evidence-in-chief, Mr Robinson said that he reported the sighting to police in March 2013, but, in cross-examination, he agreed that it was in March 2014 that he reported it that after Mr Fennell had been charged.[44] He conceded that his recognition could have been a reconstruction.[45]

[39] **The biscuit tin**: The appellant told police that the deceased had given him a biscuit tin with some biscuits in it on Sunday, 11 November 2012. This was the tin he returned to her house on the following morning.[46] The appellant said that he and his wife took biscuits out of the tin and put them in a plastic container.[47] His wife gave evidence that the tin had contained a "creamy-coloured cake".[48] Ms McKie testified that the deceased had ceased baking for at least 12 months as she had become less mobile.[49]

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38 AB211 Tr4-53 l34 – AB213 Tr4-55 l17. Evidence that the appellant visited the deceased's house during this timeframe would have been consistent with the Crown theory insofar as it proposed that, after killing the deceased, the appellant returned to her house to create the appearance of a robbery by opening cupboard drawers and moving their contents.

39 AB211 Tr4-53 ll33-34.

40 Ibid l21; AB216 Tr4-58 l9.

41 AB241 Tr4-58 ll15-33: The learned trial judge cited this to the jury as an example of different accounts given by a witness relevant to their assessment of witness reliability: Summing Up p 5 ll19-20; AB834.

42 AB241 Tr5-6 ll24-40.

43 AB242 Tr5-7 ll12-40.

44 AB263 Tr5-28 ll22-41.

45 Ibid ll43-44. That and other inconsistencies in Mr Robinson's evidence prompted the learned trial judge to warn the jury that they might have concerns about the reliability of his evidence: Summing Up p 5 l38 – p 6 l6; AB834 – AB835.

46 MFI"C" pp 102-3.

47 Ibid.

48 AB296 Tr5-61 ll34-37.

49 AB197 Tr4-39 ll17-21.

[40] Furthermore, there was evidence that the tin had not been used for storing biscuits for some time. The deceased's granddaughter testified that she was familiar with the tin and had seen it used for storing "lots of receipts and stuff rolled up inside" and some rubber bands.[50] A friend of the deceased, Walter Crook, gave evidence that a month or two before her death, he was having a cup of tea with the deceased at her house. She asked him for some assistance in accessing cash using her bankcard. She produced the biscuit tin and told him that was where she kept her money. She said that there was "only about 600 in there at the present". He saw paper and some money inside the tin.[51]

[41] **The toiletries bag**: Pauline Jensen, a resident of Macleay Island, gave evidence that in the early afternoon of Saturday, 10 November 2012, she took her dogs for a walk to Thompson Point. When she reached the sandy beach, she went to a mangrove area to relieve herself. It was low tide. As she squatted down, she saw a "blue object" in the water. She described it as a "shaving bag".[52] She picked it up and opened it. She noticed that there was a rock inside it and also some bank documents in a rubber band. She took the bag home, put it in the laundry tub and washed the mud off it.[53] On the Sunday evening, she looked into the bag and saw "Westpac bank booklets" with "L Watson" and "something about Bribie Island on them".[54] Ms Jensen reported her discovery to Sergeant McDougall on Thursday, 15 November 2012. She gave him what he described as a "small dark zipped-up… nylon-type toilet bag".[55] Further police evidence identified the contents as a Westpac plastic folder containing a book of deposit slips and a book of withdrawal slips, each for the deceased's account, and printed customer receipts for the withdrawals of $3,000 on 22 August 2012, $7,000 on 17 September 2012 and $3,000 on 28 September 2012.[56]

[42] **Other findings at Thompson Point**: The report of the finding by Ms Jensen prompted a search by police divers of the mangrove and tidal area of Thompson Point on the afternoon of 15 November 2012. They located a green TransLink wallet in the mud[57] and a black purse.[58] The TransLink wallet belonged to the deceased.

[43] A hammer was found about 15 metres away from the wallet and the purse. It was submerged in the water.[59] The hammer was photographed and bagged.

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50 AB427 Tr7-9 ll7-11.

51 AB673 Tr10-7 ll29-33. There was no issue that the tin identified by Mr Crook matched the tin about which the appellant had spoken to police. The appellant's wife, the deceased's granddaughter and Mr Crook each positively identified the same tin in their testimonies: see, respectively, Exhibit 44; AB297 Tr5-62 l4 – AB298 Tr5-63 l5, Exhibit 64; AB427 Tr7-9 ll1-13, Exhibit 85; AB 674 Tr10-7 l21 – AB675 Tr10-8 l2. The same tin was found out the front of the deceased's house: Exhibit 52; AB354.

52 AB552 Tr8-57 l12 – AB553 Tr8-58 l31.

53 AB555 Tr8-60 ll42-47.

54 AB557Tr8-62 ll26-39.

55 AB63 Tr1-43 ll20-24. The appellant told police that the deceased had a small "white bluey grey'ish" bag with a zip in which she would keep money and her bankbooks. He called it a "shaving bag": MFI "C" pp 64-68.

56 Exhibit 57.

57 AB563 Tr8-68 ll30-31.

58 AB566 Tr8-71 ll21-22.

59 AB564 Tr8-69 ll33-37.

[44] **Identification of the hammer**: Robert Matheson, a resident of Macleay Island, gave evidence that on Monday, 21 January 2013 he had been watching the 6 pm news. A photograph of a hammer flashed on the screen. He recognised it immediately as a hammer that used to be his. He reported this to police on 2 February 2013.[60] At the police station, he was shown photographs of a hammer. He positively identified it as the one that had belonged to him.[61]

[45] In evidence, Mr Matheson referred to particular characteristics of the photographed hammer that enabled him to identify it as having been his. There were dag marks from a welding job on farm machinery; there was a slight dent in the hammer head from when he dropped it; the claw was marked from where it had jammed with a large nail; and the handle had signs of damage from when he dropped the hammer and it hit a steel bar.[62] He noticed that a plastic band that had been at the junction of the handle and the head when it had been in his possession, was missing.[63]

[46] According to Mr Matheson's evidence, he last saw the hammer when he was helping out the appellant with repairs to a trailer. That was about a year before the deceased was killed. The appellant asked if he could borrow the hammer for a week. Mr Matheson agreed so long as it was returned. The following week he asked the appellant if he could have the hammer back. The appellant told him that he had lost it and did not know where it was.[64]

[47] **Inferences from the Thompson Point discoveries**: The items discovered at Thompson Point were a basis for an inference suggested by the Crown that it was the same person who had put them there. The toiletries bag and its contents and the TransLink wallet were taken at different times from the deceased's house by someone who could access it without raising suspicion. That person was concerned about information contained in the banking documents taken since, in themselves, those documents were valueless. A hammer was a likely murder weapon. The Thompson Point hammer was linked to the appellant. A further inference arose that the appellant was the person who was concerned with what the contents of the documents taken might reveal and that he had used the hammer to strike the blows to the back of the deceased's head.

[48] **Internet access**: Evidence tendered indicated that at 7.45 am on Monday, 12 November 2012, a person using the name "Steven" logged into Yahoo Mail on the computer at the appellant's residence. At 7.47 am, the user had clicked a link on the homepage to an article called "Weird Places People Hide Money Around The Home". It was unclear for how long the link was activated.[65] The Crown suggested an inference that the user was the appellant and that the article accessed indicated an interest on his part in where the appellant might have hidden money in her house.

The Defence case

[49] I have outlined the alternative hypothesis consistent with innocence that the defence argued was reasonably available on the evidence. The defence also submitted that there were deficiencies in proof of the strands in the Crown case that weakened their

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60 AB606 Tr9-19 ll8-22.
61 Ibid l24 – AB607 Tr9-20 l3.
62 AB607 Tr9-20 l23 – AB609 Tr9-22 l30.
63 AB611 Tr9-24 ll10-24.
64 AB612 Tr9-25 ll6-30.
65 Exhibit 68; AB510 Tr8-15 l44 – AB511 Tr8-16 l41.

evidential value. It is convenient to consider these matters in the context of the first ground of appeal to which they relate.

Ground 1

[50] This ground of appeal is that the verdict is unreasonable and cannot be supported having regard to the evidence.

Appellant's submissions

[51] The appellant filed detailed written submissions in support of this ground of appeal. Supplemented by the oral submissions, they are to the following effect.

[52] **Alternative hypothesis**: The evidence cited by the appellant in support of the alternative hypothesis falls into a number of categories. The first is common knowledge that the appellant had substantial amounts of cash at her house. A number of witnesses gave evidence which supported a conclusion that, against advice, the deceased kept large amounts of cash in her house, that others knew about it, and that she was open to lending money to others, including those she did not know well. For example, she told Ms McKie that she was "comfortably off".[66] In cross-examination, Ms McKie agreed that the deceased had told her that she (the deceased) kept money in the house and that that was common knowledge.[67]

[53] Also, the deceased had complained to Ms Doolan that she had lent a builder $11,000 and that he did not pay her back.[68] On one occasion, Ms Doolan saw 10 or more bundles of $50 notes on the deceased's kitchen bench. She advised the deceased against leaving money around the house. The deceased responded that she did not believe in banks.[69] Mr Robinson stated that the deceased had paid him for odd jobs in lots of $300 or $400 in cash which she took from her wallet or purse.[70] He told her several times that she should keep her money in the bank but she said that she did not trust banks.[71] Other witnesses who delivered groceries or mowed the lawn, gave evidence of being paid in cash. As well, there was the evidence of Mr Crook to which I have referred.

[54] A second category of evidence was that of Sergeant McDougall as to the state of the deceased's house when he visited it with the appellant, which I have detailed. During the visit, Sergeant McDougall first told the appellant that it "looks like a break".[72] After the deceased's body had been found, he told the appellant that he suspected a murder. He added that the house would be finger printed, at which the appellant became agitated, stating that his finger prints would be there from previous visits.[73]

[55] Thirdly, Mr Matheson gave evidence that their dog had been unusually unsettled at about 1.30 or 2.00 am on Tuesday 13 November 2012. Sometime later, between 2.00 am and 3.00 am, he had heard a vehicle coming out of Alistair Court at great speed.[74]

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66 AB197 Tr4-39 ll27-29.
67 AB265 Tr4-47 ll15-19.
68 AB232 Tr4-74 ll5-25.
69 AB219 Tr4-61 ll8-28.
70 AB243 Tr5-8 l39 – AB244 Tr5-9 l19.
71 AB257 Tr5-22 ll29-32.
72 AB52 Tr1-38 l13.
73 AB61 Tr1-47 ll11-45.
74 AB604 Tr9-17 l38 – AB605 Tr9-18 l24.

He said that, from its exhaust note, he thought that it was a six cylinder vehicle, either a Ford or a Holden. It did not have the "tinny exhaust note" of a Japanese car.[75] The appellant's utility was a Mitsubishi.[76]

[56] A fourth category of evidence was that in cross-examination, Sergeant McDougall acknowledged that there had been an increase in unlawful entries on Macleay Island from 2008 to 2012. He thought it probably correct that the number of entries had increased from 11 in 2008 to 48 in 2012.[77]

[57] As well, the appellant submitted that the theft of the toiletries bag containing only banking records and not cash, suggested that the thief did not know the appellant well and that the disposal of the stolen articles at Thompson Point indicated a hurried theft or thefts of them in order to search them elsewhere.[78]

[58] It is appropriate to observe at this point that the evidence of Mrs Roberts as to the sighting of three individuals in Alistair Court[79] did not, as I have noted, associate them with the deceased or her house. Similarly, the evidence that the deceased had received some nuisance phone calls[80] did not attribute them to a particular individual. In my view, neither offered significant support to a hypothesis of burglary by a person other than the appellant.

[59] **Dubious linkage of appellant's movements to time of death**: The appellant acknowledged that his movements on 12 November 2012 as set out in his timelines were not all corroborated by the observations of others who testified. Between about 8.30 am and about 12.30 pm, his wife was absent from home at craft and shopping.[81] She said that he left home at about 2.30 pm to return a DVD. The interval between then and the sighting of him at 3.49 pm at the TAB agency was also uncorroborated. It was submitted for the appellant that Dr Olumbe could not fix the time of death to either of these periods of time on 12 November. Nor, for that matter, could he say with certainty that the death occurred on that day rather than on the following day.

[60] That the phone was not answered when a third party called at 2.53 pm was not, it was argued, conclusive that the deceased was dead by then. She may have missed the call. She was known to sometimes sleep during the morning and miss out on placing her grocery orders.[82]

[61] Further, it was submitted that the deceased had been seen around 9.30 am on Monday 12th, that when her body was found, the kitchen blinds were down (and were seen to be down by Ms Bowen on the morning of Tuesday 13th) and the bird cage inside the house was covered, and that Ms Bowen did not see a biscuit tin at the front door on the Tuesday morning. Taken together, this evidence left open a reasonable possibility that the deceased was killed late on Monday afternoon or early Monday evening when the appellant was at the TAB agency or at the Crooks or had returned home.[83]

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75 AB613 Tr9-26 l46 – AB615 Tr9-28 l6.
76 Exhibit 2.
77 AB67 Tr1-53 ll24-37.
78 Appellant's Outline of Submissions, para 43, 44.
79 AB273 Tr5-38 ll13-40.
80 AB382 Tr6-68 ll8-10; AB205 Tr4-47 ll34-43.
81 AB295 Tr5-60 l35 – AB296 Tr5-61 l12; AB303 Tr5-68 ll29-30.
82 AB441 Tr7-23 ll29-34.
83 Appellant's Outline of Submissions, paras 52-54.

[62] Lastly on this topic, the appellant drew attention to an apparent inconsistency between Ms Doolan's evidence that the appellant arrived at the deceased's house at about 6.00 pm on Monday 12th November 2012 and evidence that a person with the user name "Steven" logged onto Yahoo Mail via the computer at the appellant's house at 6.20 pm that evening. The last activity recorded for the user was at 7.25 pm.[84]

[63] **The Thompson Point hammer:** For the appellant, it was submitted that Mr Matheson's identification of the hammer found at Thompson Point as the one he had lent to the appellant "was difficult to accept". It was just a tool, it was said, of no particular value; he had not seen it for years; the features he relied on to identify it were "non-descript"; and corrosion complicated identification.[85] The appellant noted that Mr Matheson had not been able to identify his chisels in a tool "line-up"[86] but that there had not been a tool "line-up" for the hammer. However, Mr Matheson explained that he used cold chisels "by the dozen" and would throw them away when they broke.[87]

[64] Further, it was submitted for the appellant that the distinguishing marks identified by Mr Matheson were "very small". They were, it was suggested, the types of marks that an often-used hammer would acquire and that an owner could not credibly purport to identify the origin of them.[88] It is appropriate to note that no evidentiary basis for this submission was cited. Moreover, it was ventured against Mr Matheson's evidence that he had owned the hammer for 11 years and that the marks were "very distinct"[89] as well as his adherence in cross-examination to the proposition that he was able to identify the bumps and marks on it.[90] He said:[91]

> "Yes, but all hammers have different weak spots in them, like anything made out of metal. Also, a tradesman knows his tools. You can lay out 100 hammers, and a tradesman will walk straight up to his own hammer and pick it up."

[65] In cross-examination, Mr Matheson was asked about a paint mark on the hammer. He said he that he had used the hammer to open a tin of paint after finishing the welding job on the farm machinery.[92] The appellant has ventured that the mark to which Mr Matheson was referring "is not obviously paint" and observed that the scientist who examined the hammer was not questioned whether the mark was, in fact, paint; nor was Mr Matheson questioned about the origin of the mark.[93]

[66] Mr Matheson's wife also testified. She was questioned about the hammer. The appellant submitted that there were discrepancies in their respective evidence as to the source of some of the hammer marks. One dent that Mr Matheson had said was sustained when the hammer was dropped 40ft.[94] Mrs Matheson said she caused it

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84 Exhibit 68.
85 Appellant's Outline of Submissions, para 61.
86 AB618 Tr9-31 ll35-42.
87 Ibid ll44-46.
88 Appellant's Outline of Submissions, para 64.
89 AB608 Tr9-21 ll19-26.
90 AB618 Tr9-31 ll11-13; AB21 Tr9-34 ll20-26.
91 AB618 Tr9-31 ll15-18. Mr Matheson had earlier said that "any person who uses hand tools all the time can recognise different things on their hand tools to anyone else's".
92 AB619 Tr9-32 ll4-9.
93 Appellant's Outline of Submissions, para 65.
94 AB607 Tr9-20 ll30-34.

when she caught it on a nail and belted it in anger.[95] Damage to the claw identified by Mr Matheson as having been caused when he was pulling out big nails,[96] Mrs Matheson said was caused when their daughter's boyfriend was using the hammer.[97]

[67] For the appellant it was also submitted that corrosion of different colours on the hammer "was likely to have distorted, if not created, the appearance of marks and imperfections on the hammer".[98] Notwithstanding, the Mathesons were not asked about the state of any corrosion on the hammer when it was in their possession.

[68] Also, the appellant submitted, the Mathesons' evidence was affected by suggestibility. Mrs Matheson had said to her husband "that's your hammer" when she first saw it on the television news.[99] The absence of a hammer "line-up" would have prompted identification of the only hammer shown to them as having been theirs.[100]

[69] For the appellant, it was submitted that, overall, the identification of the Thompson Point hammer as the hammer lent to the appellant by the Mathesons "was so poor that an application ought to have been made to exclude it".[101]

[70] **The $8,000 withdrawal:** The appellant suggested that a withdrawal of $8,000 was not especially out of the ordinary. It had been preceded by the withdrawal of $7,000 on 17 September 2012. It was unlikely, it was submitted, that the appellant had stolen $5,000 of it. He was not to have known that a Westpac employee would not telephone the deceased to verify the withdrawal when he presented the withdrawal slip at the branch. Phone calls had been made to the deceased before; once when he presented a cheque drawn on the deceased's account for cashing[102] and once when he presented a withdrawal slip to withdraw cash from the deceased's account.[103]

[71] The appellant contended that in all likelihood, the deceased would have asked the appellant for a customer receipt for the withdrawal made on 2 November 2012 when the appellant returned the white plastic folder containing withdrawal slips to her after that transaction. Mr Dallas' evidence concerning the appellant's complaint of a missing $4,000 was, it was submitted, inconclusive as to timing.[104]

[72] The appellant argued that it was noteworthy that the white folder was found in the toiletries bag at Thompson Point. Moreover, the appellant had been excluded as a possible contributor to DNA detected in a tapelift along fabric adjacent to the zip on the toiletries bag.[105]

[73] **The deceased's practice in accounting for expenses:** The appellant has referred to evidence of an employee at the SPAR supermarket on Macleay Island that the deceased would check receipts to ensure all groceries she had paid for had been

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95 AB633 Tr9-46 ll8-12. The learned trial judge referred to this discrepancy in the summing up: p 15 ll6-9: AB844.

96 AB609 Tr9-22 ll6-8.

97 AB634 Tr9-45 ll6-10. His Honour also referred to this discrepancy in summing up: p 15 ll9-11: AB844.

98 The Appellant's Outline of Submissions, para 68.

99 AB632 Tr9-43 ll8-9.

100 The Appellant's Outline of Submissions, para 70.

101 Ibid para 72.

102 AB383 Tr6-69 ll33-37.

103 AB683 Tr10-17 ll41-47.

104 Appellant's Outline of Submissions, para 77. Mr Dallas' evidence was that the conversation took place "about a week, maybe a week and a half" before the deceased's death: AB433 Tr7-15 l8.

105 Exhibit 70.

delivered.[106] However, it is acknowledged by the appellant that Ms Doolan testified that, to her knowledge, the deceased did not engage in such a practice and that she was "very trusting'.[107] The deceased would annotate her bank statements.[108]

[74] The deceased, it was submitted, was careful in accounting for her money. It would not have been easy for the appellant to steal from her. Had he stolen the $5,000, the deceased was bound to have discovered that when her bank statement for November 2012 arrived.[109]

[75] **The appellant's gambling from August 2012:** The appellant contended that there was no evidence of a change in his gambling habits after he began making bank withdrawals for the deceased in August 2012. According to the hotel manager at the Pub Paradise, the appellant had been "a big punter" there for at least five years.[110] An employee who had begun working at the TAB agency six months prior to the deceased's death, said that he would visit two or three times a week. His wagers were usually of the order of $50, $100 or $200.[111] He had the occasional win and if it was about $500 or more, he would have it credited to his EFTPOS card.[112] In about September 2015 that employee had seen the appellant at the agency with a large amount of money in an envelope "all fifties in rubber bands".[113] That, the appellant contended could have been the proceeds of a withdrawal from either of the appellant's Commonwealth Bank accounts.[114]

[76] **Other factors:** The appellant's admitted visit to the deceased's house on the morning of 12 November 2012 was, according to Ms Doolan, only for "a little while". The appellant submitted that he could not have killed the deceased and staged a break-in in so short a time.[115] Counsel for the appellant posed the following questions. If it was a premediated murder to conceal a theft on the 2 November 2012 why did he leave it so late as the risk of discovery mounted?[116] If the biscuit tin had been used to store money or paper records, why was it not disposed of at Thompson Point as the toiletries bag which contained banking records had been?[117] Was not the discovery of the toiletries bag on 10 November 2012 inconsistent with the Crown theory that the killing was to disguise a theft?[118]

[77] Further, the appellant suggested that a hammer which was found by police in a box on the deceased's kitchen table, could have been the murder weapon. There was a blood stain on the handle. The deceased's DNA was detected within the blood.[119]

The respondent's submissions

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106 AB445 Tr7-27 ll15-20.
107 AB215 Tr4-57 ll39-45.1720
108 Exhibit 104.
109 Appellant's Outline of Submissions, para 86.
110 AB451 Tr7-33 ll21-24.
111 AB455 Tr7-37 l43 – AB456 Tr7-38 l6.
112 AB456 Tr7-38 ll24-32.
113 Ibid ll10-12.
114 Appellant's Outline of Submissions, paras 97, 98. Close to $10,000, and a little over $6,000, were withdrawn from one of these accounts in August and September 2012 respectively, and $5,000 and $3,000 were withdrawn from another of these accounts in those two months respectively: Exhibits 92, 95.
115 Appellant's Outline of Submissions, paras 99, 100.
116 Ibid para 101.
117 Ibid para 103.
118 Ibid paras 104, 105.
119 Exhibit 70.

[78] The respondent submitted that this was a case in which the findings that the jury would be required to make in their deliberations towards a verdict were very much dependent upon their assessment of the reliability of the oral testimony given by the witnesses who testified. The advantage that the jury had in this regard was not to be overlooked.

[79] It was submitted that this was an impressive circumstantial case where a verdict of guilty was firmly supported by the strands of evidence on which the Crown had relied. On the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt.

[80] The alternative hypothesis proposed by the appellant was not reasonably open. If the killer had been a burglar, it was odd that he would steal twice from the deceased's house; first, on or before 10 November 2012, taking banking documents rather than cash, and then a second time on 12 November 2012 leaving $290 cash which was in an envelope in the top drawer in the deceased's bedroom.[120] There had been no forced entry and there were little, if any, characteristic signs of a burglary. With one exception, the drawers downstairs had not been upturned, nor the contents rummaged.[121] The cupboards and drawers in the upper floor showed no sign of having been opened.[122] It was not realistic to suppose that a burglar who had been disturbed by an 85 year old mobility-impaired woman would have been minded to kill her or, for that matter, have known to go to the kitchen to retrieve the hammer in the box for the purpose of using it to kill her.

Discussion

[81] The task for this Court when an "unreasonable verdict' ground of appeal is invoked is to make an independent assessment of the sufficiency and quality of the evidence at trial and to decide whether, upon the whole of the evidence, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence for which he was convicted.[123] In the recent decision of *R v Baden-Clay*,[124] the High Court emphasised that this task is to be undertaken with particular regard for the advantages enjoyed by the jury. Their Honours said:[125]

> "[65] It is fundamental to our system of criminal justice in relation to allegations of serious crimes tried by jury that the jury is "the constitutional tribunal for deciding issues of fact."[126] Given the central place of the jury trial in the administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community in

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120 AB121 Tr2-44 l45 – AB122 Tr2-45 l9.

121 AB115 Tr2-38 ll20-26.

122 Appeal Exhibit 2.

123 *BCM v The Queen* [2013] HCA 48; (2013) 303 ALR 387 per the Court at [31], referring to *SKA v The Queen* [2011] HCA 13; (2011) 243 CLR 400 per French CJ, Gummow and Kiefel JJ at [11]-[14].

124 [2016] HCA 35; (2016) 258 CLR 308.

125 Ibid at [65].

126 *Hocking v Bell* [1945] HCA 16; (1945) 71 CLR 430 at 440. See also *Brennan v The King* [1936] HCA 24; (1936) 55 CLR 253 at 266; *Sparre v The King* [1942] HCA 19; (1942) 66 CLR 149 at 154; *Keeley v Mr Justice Brooking* [1979] HCA 28; (1979) 143 CLR 162 at 188; *Chamberlain v The Queen [No 2]* [1984] HCA 7; (1984) 153 CLR 521 at 601; *MacKenzie v The Queen* [1996] HCA 35; (1996) 190 CLR 348 at 365; *MFA v The Queen* [2002] HCA 53; (2002) 213 CLR 606 at 621 [48].

> that respect[127], the setting aside of a jury's verdict on the ground that it is "unreasonable" within the meaning of s 668E(1) of the *Criminal Code* is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial[128]. Further, the boundaries of reasonableness within which the jury's function is to be performed should not be narrowed in a hard and fast way by the considerations expressed in the passages from the reasons of the Court of Appeal explaining its disposition of the appeal.
>
> [66] With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court "must always be whether the [appeal] 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."[129]

[82] The decision in *Baden-Clay* also has significance for this appeal with respect to hypothesis consistent with innocence in a circumstantial case. As to it, their Honours observed:

> "[46] The prosecution case against the respondent was circumstantial. The principles concerning cases that turn upon circumstantial evidence are well settled[130]. In *Barca v The Queen*[131], Gibbs, Stephen and Mason JJ said:
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> > "When the case against an accused person rests substantially upon circumstantial evidence the jury cannot return a verdict of guilty unless the circumstances are 'such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused': *Peacock v The King*[132]. To enable a jury to be satisfied beyond reasonable doubt of the guilt of the accused it is necessary not only that his guilt should be a rational inference but that it should be 'the only rational inference that the circumstances would enable them to draw': *Plomp v The Queen*[133]; see also *Thomas v The Queen.*[134]

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127 *Kingswell v The Queen* [1985] HCA 72; (1985) 159 CLR 264 at 301; *Brown v The Queen* [1986] HCA 11; (1986) 160 CLR 171 at 201; *Katsuno v The Queen* [1999] HCA 50; (1999) 199 CLR 40 at 63-64 [49]; *Cheng v The Queen* [2000] HCA 53; (2000) 203 CLR 248 at 277-278 [80]; *Alqudsi v The Queen* [2016] HCA 24; (2016) 90 ALJR 711 at 715 [2], 718 [16], 753 [195].

128 *M v The Queen* [1994] HCA 63; (1994) 181 CLR 487 at 494; *MFA v The Queen* [2002] HCA 53; (2002) 213 CLR 606 at 621-622 [49]-[51], 623 [56].

129 *M v The Queen* [1994] HCA 63; (1994) 181 CLR 487 at 494-495. See also *R v Hillier* [2007] HCA 13; (2007) 228 CLR 618 at 630 [20] and the authorities cited.

130 *Barca v The Queen* [1975] HCA 42; (1975) 133 CLR 82 at 104.

131 Ibid.

132 [1911] HCA 66; (1911) 13 CLR 619 at 634.

133 [1963] HCA 44; (1963) 110 CLR 234 at 252.

134 [1960] HCA 2; (1960) 102 CLR 584 at 605-606.

> [47] For an inference to be reasonable, it "must rest upon something more than *mere conjecture*. The bare possibility of innocence should not prevent a jury from finding the prisoner guilty, if the inference of guilt is the only inference open to reasonable men upon a consideration of all the facts in evidence"[135] (emphasis added). Further, "in considering a circumstantial case, *all of the circumstances* established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence"[136] (emphasis added). The evidence is not to be looked at in a piecemeal fashion, at trial or on appealhttps://jade.io/j/ - _ftn22.[137]
>
> [48] Further, a criminal trial is accusatorial but also adversarial. Subject to well-defined exceptions, "parties are bound by the conduct of their counsel, who exercise a wide discretion in deciding what issues to contest, what witnesses to call, what evidence to lead or to seek to have excluded, and what lines of argument to pursue."[138]"

It is unnecessary to refer to additional observations made on that subject for the circumstance where facts are within the knowledge of the accused only and he or her chooses to remain silent.[139] It was not common ground here that the appellant was a person who alone must have had knowledge of the circumstances in which the deceased was killed.

[83] I have reviewed the oral and documentary evidence adduced before the jury at the appellant's trial. The evidence of the sighting of the deceased by Ms Uzzell, of Dr Olumbe as to time of death and of unanswered telephone calls provided a basis for the jury to conclude that the deceased was killed by the hammer blows to the skull in the late morning or early afternoon of Monday 12 November 2012. There was evidence that the appellant's vehicle was sighted at about 11.00 am that day outside the deceased's house. This evidence had its imperfections. The jury were instructed about them. Nevertheless, it was open to them to accept it. That the appellant was otherwise occupied elsewhere during the late morning was not disclosed by any of the evidence.

[84] Of the objects found at Thompson Point, the hammer stood as strong circumstantial evidence against the appellant. The pathology evidence indicated that the fatal injuries were caused by a hammer. The evidence of identification of the Thompson Point hammer as was given by Mr Matheson was detailed and consistent. Moreover, it had an appealing practicality to it. His account that he lent it to the appellant who did not return it was quite credible. The jury could well have regarded it as convincing proof linking the appellant to that hammer.

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135 *Peacock v The King* (1911) CLR 619 at 661, quoted in *Barca v The Queen* (1975) 133 CLR 82 at 104.

136 *R v Hillier* [2007] HCA 13; (2007) 228 CLR 618 at 637 [46] (footnote omitted).

137 Ibid at 637 [48]. See also *Chamberlain v The Queen [No 2]* [1984] HCA 7; (1984) 153 CLR 521 at 535.

138 *Nudd v The Queen* [2006] HCA 9; 225 ALR 161 at 164 [9]. See also *Ratten v The Queen* [1974] HCA 35; (1974) 131 CLR 510 at 517; *Doggett v The Queen* [2001] HCA 46; (2001) 208 CLR 343 at 346 [1].

139 [2016] HCA 35; (2016) 258 CLR 308 at [50], [51].

[85] The other objects must have all been taken from the deceased's house. One of them contained a plastic folder which itself contained banking books and recent customer receipts for withdrawals the appellant had made on behalf of the deceased. The appellant was entrusted with the folder from time to time.[140] It is significant that the folder and the hammer, both linked to the appellant, were found in the same vicinity at Thompson Point. This suggested that they had been placed there by the same person, if not at same time, then within a few days of each other.

[86] There was evidence of motive on the appellant's part. He had attended to the deceased's banking and had made the suspicious withdrawal of $8,000 on 2 November 2012. 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.

[87] I acknowledge that the appellant has identified some instances where witnesses called in the Crown case were uncertain, or even inconsistent, in their evidence. The jury were well placed to form their own impression of the reliability of the respective witnesses. Significantly, there is no complaint with respect to the summing up by the learned trial judge on matters of evidence.

[88] 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.

[89] To my mind, the alternative hypothesis consistent with innocence proposed by the appellant is not a reasonable one. The absence of evidence of a forced entry or the rummaging of drawers or the disturbance of anything in the upper floor of the deceased's house tells against a burglary. That the $290 cash in the envelope in the opened drawer was not taken suggests that the killer did not have theft in mind. I agree that a telling contra-indicator is the improbability that a burglar, once disturbed by the deceased, would have set about to kill her and, to that end, would have known to go to the kitchen to fetch the deceased's hammer from the box on the kitchen table. Another is the high degree of unlikelihood that the same burglar would have robbed the deceased's house twice over the space of a few days – once, taking the toiletries bag which Ms Jensen discovered two days before the deceased was killed and then, later, on the day she was killed.

[90] For these reasons, I am quite satisfied that upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the appellant murdered the deceased. This ground of appeal has not been established.

Ground 2

[91] This ground of appeal contends that admission of unfairly prejudicial evidence at the appellant's trial caused a miscarriage of justice. This evidence falls into four categories. None of it was the subject of an exclusion application or objection by defence counsel. It is convenient to adopt the terms used by the appellant to identify the categories without accepting that they are necessarily accurate.

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[140] The appellant's wife gave evidence that the appellant had the white folder in his possession on the day that he made the $8,000 withdrawal; AB294 Tr5-59 ll24-46.

[92] **Evidence of the appellant's criminal history**: Early in the appellant's interview with police on 14 November 2012, he said that, "you're well aware that I'm known to the Police".[141] He then expressed his discomfort with the interview process saying:[142]

> "And I'm screwed either way here. I don't like these interviews. My attitude always comes off as either smart arse or whatever else and I, I've been screwed over any number of times by police. I don't know you gentlemen – But the last time I got screwed over in Tasmania, fifty thousand dollars went missing and the police officer involved was later dismissed because the contents of the safe went missing, including all the drugs and everything else."

[93] Later in the interview the appellant said:[143]

> "That's why I don't do well at interviews when police try to [elicit] an answer and ask the same question in nine different ways but it's the same question and you, you say, I just fucking, but what part of this don't you understand and it invokes a response that doesn't win you a -, ah, there's no way I can [indistinct]."

Towards the conclusion of the interview, the appellant remarked that "[m]y fingerprints are on file [indistinct]".[144]

[94] The appellant contended that the only reasonable inference arising from these statements taken together was that the appellant had a criminal history. That was unfairly prejudicial in itself. Here, the prejudice was heightened by the reference to the thefts in Tasmania in the context of the Crown case that the deceased was murdered by the appellant to conceal theft from her.[145]

[95] In oral submissions, senior counsel for the appellant conceded that the description given to this evidence was "not quite accurate".[146] Presumably this concession was made because some, at least, of these statements could not have grounded a reasonable inference that the appellant had a criminal history. A broader basis for the complaint, it was explained was that the statements were evidence of bad character and were not admissible as relevant to the question of whether or not the appellant killed the deceased.[147]

[96] The availability of the inferences for which the appellant has contended falls to be assessed by reference to their content and the context in which the statements were made. In my view, neither the statement concerning the Tasmanian incident nor the statement about the appellant's not doing well at interview is, by its content, capable of grounding an inference that the appellant had a history of criminal convictions. The first related to apparently dishonest conduct on the part of a police officer and not the appellant. The second reflected the appellant's frustration over how he was being dealt with by police in relation to this matter.

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141 MFI "C" p 4 ll35-36.
142 Ibid p 5 ll17-27.
143 Ibid p 38 ll16-20.
144 Ibid p 153 l13.
145 Appellant's Outline of Submissions, para 112.
146 Appeal Transcript ("AT") 1-40 l42.
147 AT 1-41 ll3-5.

[97] The context in which the appellant made the statement that he was known to police was that when he presented his typed timeline document at the beginning of the interview, the interviewing officer commented on how organised the appellant was. The appellant then explained that he had prepared the document for two reasons. One was that he was known to the police. The second was that he had been blown up in a house fire 30 years ago and that as a result he had no short term memory. Thus he looked through his diary and spoke to others to remind him of where he had been so that he could prepare the document.[148]

[98] As to the appellant's statement that his fingerprints were on file, it was made towards the end of the interview and after police had given the appellant a 12 page typed witness statement to sign.[149] It had been prepared during the interview. The concluding paragraph in the statement as typed was worded:[150]

> "I'm happy to assist with the death investigation. I have given permission for DNA and fingerprints to be taken as I understand I have regularly been in Mrs WATSON'S home."

It was as the interviewing officer read that paragraph aloud that the appellant made this statement.

[99] I accept that the two last mentioned statements and the statements about not liking or doing well at interview would give rise to an inference that the appellant was familiar from experience as an interviewee, if not as a suspect, with police procedures. In this way, they were apt to reflect poorly on his character. It is however, highly doubtful that a further inference of a criminal record on the appellant's part could arise from them. Even if it could, it is nevertheless relevant that defence counsel did not object to their inclusion in the record of interview heard by the jury.

[100] In *R v McPartland*,[151] Margaret McMurdo P (Morrison JA and Ann Lyons J agreeing) recently drew together the following well established propositions:

> "Ordinarily as a criminal trial is adversarial in nature, parties are bound by the conduct of their counsel.[152] Where counsel makes a forensic decision at trial which viewed objectively was rational, then an appeal ground gainsaying that decision would not ordinarily succeed.[153]"

[101] In this appeal, there is no evidence from defence counsel, who is an experienced criminal counsel, or his instructing solicitor on this issue. However, evidence was adduced of emailed correspondence between the prosecutor and the appellant's solicitor at trial.[154] This Court has been asked to infer from the correspondence that it was by oversight, rather than as a result of conscious forensic decisions, that there was no objection to the statements in question.

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148 MFI "C" p 4 l16 – p 5 l7.
149 Exhibit 40.
150 Ibid para 109.
151 [2017] QCA 35 at [31].
152 *Nudd v The Queen* [2006] HCA 9; (2006) 225 ALR 161 per Gleeson CJ at [9].
153 *TKWJ v The Queen* [2002] HCA 124; (2002) 212 CLR 124 per Gleeson CJ at [16], Gaudron J at [26], [27], McHugh J at [95] and Hayne J at [107].
154 Affidavit N C Larsen affirmed 26 April 2017; Exhibits "NCL – 1" to "NCL – 4".

[102] It is true that, with one exception, these statements were not mentioned as being the subject of objection by the appellant's solicitor at trial in the correspondence. However, in absence of evidence from defence counsel or his instructing solicitor concerning these statements, I am not prepared to draw any inference of oversight.

[103] For completeness, I note that part of one of the statements[155] was the subject of a request for deletion made by the appellant's solicitor to the prosecutor on the evening of 1 March 2016. The prosecutor replied, stating that he regarded that part of the statement as admissible and that he had no objection to the trial judge's associate being informed that the matter would be raised when the trial resumed. It was not raised by defence counsel. This sequence of events grounds an inference that a conscious decision was in fact made not to pursue deletion of it.

[104] In my view, a decision not to object to each of the statements in question can be rationally explained on an objective basis. First, the preparation of the typed time-line document might well have prompted the jury to suspect an overeagerness on the part of the appellant to try to exculpate himself. Counsel could have decided that the reasons that the appellant gave for taking that step would help allay such suspicion.

[105] Secondly, the statements that the appellant did not like or do well in interview were made in the context where the appellant was explaining to police the several "disabilities" that he had, including short term memory loss. Defence counsel may well have thought that it was to the appellant's advantage that that evidence, which was referred to in the summing up[156], be before the jury given the omission from the time-line documents of the appellant's visit to the TAB agency.

[106] Thirdly, the appellant's statement about his fingerprints was made within a context of assisting police investigations into the deceased's death. Defence counsel addressed the jury on the footing that the appellant was co-operative and that, after he was charged on 14 March 2013, he gave police samples of his fingerprints.[157] The appellant's statement might well have been regarded by defence counsel as bolstering the evidence of the appellant's willingness to co-operate at all times by reminding them at an early stage that they already had his fingerprints.

[107] I am therefore unpersuaded that a miscarriage of justice was occasioned by the reason of the admission of any or all of the statements in question.

[108] **Evidence of the appellant's volatile personality**: The subject of this complaint of unfairly prejudicial evidence concerns the appellant's statements in his record of interview about his frustration, aggression and outbursts of violence[158] and in his signed witness statement about his diagnosed long-term Obsessive Compulsive Disorder ("OCD") and it symptoms.[159] The appellant submitted that this evidence ought not to have been before the jury but conceded that there had been no application to exclude it.

[109] In my view, this complaint of unfair prejudice cannot be sustained. In the first place, the Crown did not rely on the content of the statements in its case against the

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155 At the hearing of the appeal, this Court was informed that neither had been approached to provide a statement about the matter: AT 1-46 l41.

156 Summing Up, p 9 l9: AB838.

157 AB164 Tr4-6 ll33-43.

158 MFI "C" pp 34-40.

159 Exhibit 40, paras [15]-[17].

appellant. Secondly, there was a rational basis for a forensic decision not to object to it. The evidence assisted in explaining the appellant's aggressive manner at times during interview. His long-term OCD was relied on by defence counsel to explain his movements and his demeanour.[160]

[110] **Financial analysis evidence**: This complaint concerns the forensic accounting evidence given by Joanne McKinnon. It is said it was irrelevant, or barely so, and that it was presented with the authority of an expert with charts, tables and summaries such that the jury might have accorded it weight well beyond its worth. Therein lay its unfair prejudice, the appellant submitted.[161]

[111] It is common ground that Ms McKinnon's evidence attributed some $10,633.50 received by the appellant over the period from 1 July 2010 to 19 November 2012 to "unknown sources". That evidence was relevant because it demonstrated that, over time, there was a likelihood that the appellant had resorted to an external source or sources to fund not only his living expenses but also his gambling habit. The correlation evidence to which I have referred focused upon the period of time over which the five Westpac withdrawals were made. It, too, was relevant in that it indicated an absence of commensurate withdrawals from the appellant's modest bank accounts which might have otherwise funded his gambling at the time.

[112] 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.

[113] It may be accepted that defence counsel made substantial inroads into the comprehensiveness of the analyses undertaken by Ms McKinnon. In his address, he dealt with her evidence at length.[162] He read numerous questions put in cross-examination and Ms McKinnon's answers to them.[163] Her evidence was also mentioned by the learned trial judge in the summing up.[164] In my view, this provided a satisfactory setting for the jury to assess the reliability of Ms McKinnon's evidence and the weight that they should put on it. I am unable to conclude that the admission of this evidence was unfairly prejudicial to the appellant.

[114] **The internet story**: The article accessed via the internet at 7.47 am on 12 November 2012 included, at the heading, a photograph of a woman standing next to a bed.[165] She was depicted storing bank notes under a raised mattress. In his closing address, the prosecutor referred to the article. He then mentioned the fact that the deceased had been found beside her bed. That, he said, was the position in which the jury might think that she would have been found if she had been killed on the bed and then rolled off so that the mattress could be lifted.[166]

[115] The appellant submitted that the admission of this evidence and the submission were unfair in the circumstances. It was noted that, assuming that the user at the

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160 Closing Addresses Transcript ("CAT") 12-23 ll5, 27.
161 Appellant's Outline of Submissions, para 117.
162 CAT12-41 l18 – CAT12-47 l23.
163 CAT12-43 l7 – CAT12-47 l21.
164 Summing Up, p 25 ll6-14.
165 Exhibit 69.
166 CAT 11-38 ll19-26.

time was the appellant, he may have accessed the article for only a second[167] and that he had not accessed it by way of a search.

[116] In my view, the evidence justified a possible inference that the deceased had been killed in bed and then, without any apparent reason, rolled to the floor. A possible reason was to access the mattress. It was relevant that the internet article with the photographic depiction had been accessed that morning. The evidence was therefore admissible. The risk of over-reliance by the jury on it was addressed by the prosecutor's concluding comment on the topic. He said:[168]

> "Perhaps that's a point of not great significance, but it's a matter for you what, if anything, you make out of that."

[117] In these circumstances, I am unable to regard either the admission of the evidence that the article was accessed or the prosecutor's reference to it in his address, as having been unfairly prejudicial to the appellant.

[118] In summary, I am not satisfied that this ground of appeal has been made out with respect to any of the four categories of evidence embraced by it.

Ground 3

[119] This ground of appeal contends that deficiencies in the preparation for, and conduct of, the trial by the appellant's legal representatives occasioned a miscarriage of justice. They deprived the appellant of a real chance of acquittal. None of them, it was submitted, is explicable on the basis that it could have achieved a forensic advantage for the appellant.[169] I now turn to consider each of the alleged deficiencies.

[120] **Failure to obtain a report from a forensic pathologist**: The appellant submitted that, given that the Crown case depended upon the deceased having been killed in the late morning or very early afternoon on Monday, 12 November 2012 when his presence elsewhere was not verified by the evidence of others, it was important to the appellant's defence that the possibility of challenging Dr Olumbe's opinion as to time of death have been investigated. The practicability of that course was demonstrated by a report prepared by Professor Duflou, consulting forensic pathologist, dated 5 December 2016, which was obtained by the appellant's legal representatives.[170]

[121] In advancing this point, the appellant has referred to two factors identified by Professor Duflou which were capable of indicating a later rather than earlier time of death, perhaps as late as Tuesday, 13 November 2012. Those factors were the absence of fly eggs or maggots on the body[171] and more rapid than usual decomposition of the body in one of the hotter months of the year.[172] It is argued that that information could have been useful for cross-examination of Dr Olumbe even if Professor Duflou was not called to testify in the defence case.

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167 AB511 Tr8-16 ll40-41.
168 CAT11-38 ll26-27.
169 Appellant's Outline of Submissions, para 126.
170 Affidavit N C Larsen Exhibit "NCL-5".
171 Ibid para 24. Professor Duflou said that flies would have been able to enter the deceased's bedroom if it had not been fully screened and deposited eggs or maggots on the body.
172 Ibid para 25.

[122] In my view, the appellant's submissions give an unwarranted degree of prominence to Dr Olumbe's evidence. In essence, it established that the Crown theory was consistent with other proved facts. However, it was the evidence of other witnesses and telephone records to which I have referred, that was relied upon to narrow the time of death to the time span on 12 November for which the Crown contended. As it was, Dr Olumbe did concede in cross-examination that it was possible that the time of death "might have been closer to" the early hours of 13 November.[173]

[123] A report from Professor Duflou would not have assisted in the cross-examination of these other witnesses. Moreover, in so far as it expressed opinion concerning fly eggs, it ventured beyond his expertise. The appellant has not suggested that, by the time of the trial, reliable etymological evidence on that topic would have been available.

[124] **Failure to raise objection to the admission of evidence of the appellant's criminal history**: For the reasons I have given, I am unpersuaded that any evidence that the appellant had a criminal history was in fact given. In so far as the more broadly based objection to the four statements made by the appellant in his interview is concerned, as I have explained, I am not prepared to find that it was by oversight, rather than as a result of conscious decision making, that there was no objection to these statements. Furthermore, there were sound forensic reasons for not objecting to them.

[125] **Failure to raise objection to the appellant's emotional volatility**: For the reasons I have given, I am of the view that there was forensic justification for not objecting to this evidence.

[126] **Failure to object to irrelevant or unfairly prejudicial evidence**: The appellant has characterised Ms McKinnon's evidence as irrelevant or unfairly prejudicial. As I have explained, I consider that it was neither. Evidence that the internet story was accessed and of the identification by Mr and Mrs Matheson identifying the Thompson Point hammer was, the appellant submitted, unfairly prejudicial. Again, for the reasons I have given, I do not accept that the evidence of the former was unfairly prejudicial.

[127] As to identification of the hammer, the evidence of Mr Matheson was, as I have noted, detailed, consistent and of practical appeal. Its credibility was not impaired to any significant degree by inconsistency with the evidence of Mrs Matheson as to the origin of several of the identifying features. The submission that this evidence was unfairly prejudicial must be rejected.

[128] Had defence counsel objected to any of this evidence on either of these grounds, the objection would have failed. In the face of that, defence counsel cross-examined these witnesses in detail and, in his closing address, referred at length to inroads that he considered that he had made into their evidence. In the circumstances, that was an appropriate course for him to take.

[129] **Failure to enquire of the appellant's wife or son about use of the computer**: This complaint concerns identity of the user of the computer at the appellant's house on the evening of Monday, 12th November. It will be recalled that Exhibit 68 implied that it was the appellant who was the user between 6.20 pm and 7.21 pm.

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[173] AB101 Tr2-24 ll11-13.

The appellant submitted that corroborative evidence from the appellant's wife or son ought to have been obtained by the appellant's defence team.

[130] In support of this argument, the appellant's legal representatives have acquired a signed but undated statement made by the appellant's son,[174] and an affidavit sworn by his wife on 16 March 2017.[175] I have perused both documents. It is noteworthy that neither the son nor the wife says that the appellant was the user at the time or, for that matter, that he or she was not the user then. In any event, 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.

[131] **Failure to question witnesses about the deceased's habits**: The appellant has identified several of the deceased's habits which, it was submitted, were "very relevant to determining time of death". The complaint is that they were not pursued with witnesses. The habits were that the deceased would open her kitchen blinds and take off the cover of her birdcage on waking up in the morning and that she would close the blinds and replace the cover at a certain time of the day.[176]

[132] Here, too, there was an objectively rational basis for not pursuing these matters in cross-examination. To have done so may have led the jury to think that the appellant was the source of instructions concerning the deceased's habits and impressed upon them the detail of his knowledge of her habits. But also, defence counsel would have no assurance as to the answers that would be given in response and, in those circumstances, could justifiably have regarded cross-examination on them as ill advised.

[133] **Failure to question witnesses concerning the blood stain on the deceased's hammer**: The appellant submitted that defence counsel was remiss in not cross-examining witnesses, including the deceased's general practitioner, Dr L P de Wytt, to establish that the deceased had not complained of any injury which could have provided an innocent explanation for the blood stain on the hammer that the deceased kept in her kitchen.[177]

[134] Scientific evidence led at the appellant's committal hearing in December 2014 was that the blood on the deceased's hammer could not be dated.[178] This evidence precluded defence counsel from pursuing a line of cross-examination to link the occurrence of the blood staining with the time of the deceased's death. Further, to have questioned Dr de Wytt as to whether the deceased had ever reported any injury which might have caused a blood stain risked an affirmative answer. In these circumstances, a forensic decision not to cross-examination on the topic was objectively explicable and rational.

[135] **Failure to question witnesses about the appellant washing the deceased's hair**: One of the Crown witnesses was the manager of the IGA store on Macleay Island, Mr T P Jones, who gave evidence that in a mobile phone conversation on 2 November 2012, the appellant told him that he could not speak because, at the time, he was with an old lady and he was washing her hair. He said that she was in the

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174 Affidavit N C Larsen Exhibit "NCL-6".
175 Ibid Exhibit "NCL-7".
176 Appellant's Outline of Submissions, para 138.
177 Appellant's Outline of Submissions, para 139.
178 Committal Transcript 2-56 ll4-10 (Affidavit N C Larsen Exhibit "NCL-9").

bath at the time.[179] The Crown relied on this as evidence of the degree of the appellant's access to, and familiarity with, the deceased.[180]

[136] The appellant's complaint is that defence counsel did not question witnesses to show that it was unlikely that the deceased was sufficiently mobile to be able to get in and out of a bath or that she would have permitted the appellant to have washed her hair. This complaint overlooks the fact that defence counsel did cross-examine Mr Jones on the topic. He put to the witness that the appellant had said that he was with an old lady and that **she** was washing her hair. He also put that there was no mention of a bath. Mr Jones rejected both propositions.[181] It is not suggested by the appellant that this did not accord with his instructions. To have cross-examined other witnesses on the topic would have been unlikely to have undermined the credibility of Mr Jones's consistent account of what the appellant had said to him.

[137] For these reasons, I am not at all satisfied that the appellant has established a miscarriage of justice arising from the preparation for, and conduct of, the defence case at trial. This ground of appeal cannot succeed.

Ground 4

[138] This ground of appeal concerns the refusal by the learned trial judge of an application for discharge of the jury made under s 60 of the *Jury Act* 1995 (Qld) at the commencement of the sixth day of the trial. The background to the application was that a long-term friend of the appellant and witness in the Crown case, Mr R J Papps, gave evidence on the fifth day of the trial. In evidence-in-chief, Mr Papps was directed to the topic of conversations that he had had with the appellant around the time of the deceased's death. The following course of questioning and answers then occurred:

> "At around that time, either before or after, did he speak to you about gambling and talking to Helen, his wife?---I just said he – I took it that that was what he was worried about – that his wife would find out how much he'd actually spent. And that's what I thought the problem was at the time. Like he – you know – I said to [indistinct] well, why don't you just tell her and be done with it. It's all over. That's what I thought he – he was worried about.
>
> Well, let's go back and in as much detail as you can recollect, can you tell us what that conversation was. And, if you can - - -?---Mmm.
>
> - - - can you tell us what he said and what you said?---Well, like I said, I – I just took it that he – he – he was worried because – like we all knew he had **a bit of form**. So – and because he'd gone and got the police, he knew - - -
>
> Well, can I - - -?--- - - - that the police would - - -
>
> - - - just interrupt?--- - - - **check up on his form**.
>
> [Can] I just interrupt - - -?---Go on. Yep.

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179 AB685 Tr10-19 ll20-41.
180 AB776 Tr11-15 ll40-47.
181 AB686 Tr10-20 ll34-41.

> - -- there for a minute. We're just talking about gambling - - -?---Yeah.
>
> - - - and - - -?---Well - - -
>
> - - - discussions you had. So can we go back. Don't tell us about impressions or thoughts you had. If you can't tell us, tell us you don't remember. But if you can tell us what words were actually said - - -?---I don't - - -
>
> - - - by Mr Fennell - - -?---Don't remember exactly.
>
> All right. But it was a conversation that related to gambling and you understood it to be about losses he had suffered while gambling?---Yes."[182] (emphasis supplied)

[139] In ruling against the application, his Honour rejected a submission that the witness's reference to "form" impermissibly informed the jury that the appellant had a criminal history. He accepted the Crown submission that, in context, the form referred to was the appellant's history as a gambler, as the prosecutor had clarified. It was that history which the appellant feared would be checked by police and result in his wife being informed about it. His Honour added that even if some jurors were unsure that the "form" referred to was the, appellant's gambling history, they would not necessarily have inferred from the witness's references to "form" that the appellant had a criminal history, let alone a criminal history involving fraud.[183]

[140] The finding made by his Honour was clearly open to him. It was not erroneous in fact. The appellant has not established on appeal that the exercise of the discretion under s 60 was vitiated by any error of the kind described in *House v The King*.[184] This ground of appeal has not been made out.

Disposition

[141] As none of the grounds of appeal has succeeded, this appeal must be dismissed.

Order

[142] I would propose the following order:

1. Appeal dismissed.

[143] **PHILIPPIDES JA:** I agree that the appeal should be dismissed for the reasons given by Gotterson JA.

[144] **BYRNE SJA:** I agree with Gotterson JA.

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182 Tr5-47 l19 – Tr5-48 l2.

183 For completeness, I note that the application was elaborated by reference to the appellant's statements in his record of interview which comprised the first category of evidence discussed in Ground 2 and which, as I have already explained, did not imply that the appellant had a criminal record.

184 (1936) 55 CLR 499 per Dixon, Evatt and McTiernan JJ at 505.