

Fitzgerald v The Queen - [2014] HCA 28

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Content retrieved: March 30, 2023

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date: February 27, 2024

HIGH COURT OF AUSTRALIA

HAYNE, CRENNAN, KIEFEL, BELL AND GAGELER JJ

DANIEL GLENN FITZGERALD APPELLANT

AND

THE QUEEN RESPONDENT

Fitzgerald v The Queen

[2014] HCA 28

Date of Order: 19 June 2014

Date of Publication of Reasons: 13 August 2014

A9/2014

ORDER

1. *Appeal allowed.*
2. *Set aside the orders of the Court of Criminal Appeal of the Supreme Court of South Australia made on 16 August 2013 and in their place:*

(a) *order that the appeal to that Court against conviction is allowed and the appellant's conviction is quashed; and*

(b) *direct that a judgment and verdict of acquittal is entered.*

On appeal from the Supreme Court of South Australia

Representation

D M J Bennett QC with A L Tokley SC and S A McDonald for the appellant (instructed by Iles Selley Lawyers)

J P Pearce QC with T J Ellison for the respondent (instructed by Director of Public Prosecutions (SA))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Fitzgerald v The Queen

Criminal law Evidence DNA evidence Where appellant's DNA obtained from object found at crime scene Whether DNA evidence sufficient to establish beyond reasonable doubt appellant's presence at, and participation in, crime committed.

Words and phrases "DNA evidence", "joint enterprise", "primary transfer", "secondary transfer".

Criminal Law Consolidation Act 1935 (SA), s 353(1) .

1. HAYNE, CRENNAN, KIEFEL, BELL AND GAGELER JJ. Shortly before 6:00am on 19 June 2011, a group of men forced their way into a house in Elizabeth South in South Australia and attacked two of the occupants with weapons including a gardening fork and a pole. One victim, Kym Bruce Drover, died four days after the attack and another, Leon Karpany, sustained serious brain injuries.
2. The appellant was charged on information with one count of murder and a second count of "aggravated causing serious harm with intent to cause serious harm" contrary to ss 11 and 23 (1) respectively of the *Criminal Law Consolidation Act 1935 (SA)* ("the CLCA") arising out of this incident. After a joint trial before a judge and jury in the Supreme Court of South Australia, the appellant and his co-accused, Grant Andrew Sumner, were convicted on both counts. Each is serving a term of life imprisonment subject to a nonparole period of 20 years consequent upon the convictions. The appellant appealed against his conviction to the Court of Criminal Appeal of the Supreme Court of South Australia.
3. The prosecution did not contend that either Sumner or the appellant inflicted the fatal blow on the deceased or the blows that occasioned serious injury to Leon Karpany. Shortly stated, it was the prosecution case that Sumner and the appellant were members of the group that forced entry into the house and that each member of the group was a party to a common plan to cause grievous bodily harm to persons inside the house. The real issue in the appellant's trial was the sufficiency of the evidence to establish that he was one of the group. The prosecution relied on DNA evidence obtained from a sample taken from a didgeridoo found at the crime scene to establish that fact. The appellant argued unsuccessfully before the Court of Criminal Appeal that the verdicts were unreasonable and could not be supported by the evidence.
4. Section 353(1) of the *CLCA* relevantly provides that the Court of Criminal Appeal:

"shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence".

5. **Following paragraph cited by:**

R v Mirotsos (13 May 2022) (Sofronoff P and Bond JA and Callaghan J)

The parties agreed that the applicable principles are to be found in *M v The Queen* [1], as explained in *MFA v The Queen* [2]. The question which an appellate court is required to consider to determine whether a verdict of guilty "is unreasonable, or cannot be supported, having regard to the evidence" [3] is whether upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.

[1] (1994) 181 CLR 487 at 493-494; [1994] HCA 63.

[2] (2002) 213 CLR 606 at 614 [25]; [2002] HCA 53; see also *Jones v The Queen* (1997) 191 CLR 439; [1997] HCA 56 and *Gipp v The Queen* (1998) 194 CLR 106 at 123 [49] per McHugh and Hayne JJ; [1998] HCA 21.

[3] *MFA v The Queen* (2002) 213 CLR 606 at 614 [25].

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6. The appellant's first ground of appeal, by special leave to this Court [4], contended that the Court of Criminal Appeal erred in failing to find that upon the whole of the evidence the verdicts could not be supported. The appellant's second and third grounds were different ways of stating that contention.

[4] [2014] HCATrans 048.

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7. At the conclusion of the hearing of the appeal in this Court orders were made allowing the appeal and directing that a judgment and verdict of acquittal be entered. What follows are the reasons for making those orders.

The facts

8. The appellant's co-accused, Sumner, visited the house in Elizabeth South twice on 19 June 2011. Approximately two hours before the attack, Sumner had been involved in several physical altercations at the house. One such altercation, described as a "play fight", resulted in Sumner splitting the lip of the deceased. At one stage during those altercations, Sumner sat on a freezer in the kitchen near where the didgeridoo was located. Events culminated in a fight at the front of the house between Sumner and his father, as a result of which Sumner suffered a fracture to his jaw and was chased away from the house by the deceased. Eyewitnesses at the scene gave evidence at the trial that Sumner, together with his mother, shouted threats of retaliation as they drove away. Sumner gave unchallenged evidence that before this first visit to the house he had attended a boxing match at which he had occasion to shake hands twice with the appellant, including at about 10:30pm. The significance of this evidence will be explained later.
9. Shortly before 6:00am, the intruders, including Sumner, arrived at the house in several motor vehicles. The men split into two groups and simultaneously attacked the property, forcing

their way in through the front and rear doors. Some men were armed with axes and gardening forks, while others armed themselves opportunistically upon entering the house. The group attacked the occupants as described at the outset of these reasons.

10. As mentioned above, at the trial of the appellant and Sumner the prosecution contended that both men were part of the group that had forced entry into the house armed with weapons for the purpose of inflicting grievous bodily harm on one or more of the occupants. There was no direct evidence that either man inflicted harm on the deceased or Leon Karpany.
11. It was an agreed fact read to the jury that six persons who were present during the attack, and were shown photographs of the appellant, failed to identify him.
12. The appellant was excluded from DNA results taken from a variety of objects found at the crime scene and from four out of five forensic samples taken from the didgeridoo. However, one forensic sample from the didgeridoo, Sample 3B, contained a mixed DNA profile of "major" and "minor" contributors. The appellant's DNA was the major contributor and an unknown source was the minor contributor.
13. The prosecution case was that the presence of the appellant's DNA on the didgeridoo, together with apparent blood stains containing the DNA of the deceased and Leon Karpany, sufficed to prove the appellant's presence at the scene as one of the intruders. That case depended upon satisfaction beyond reasonable doubt that the appellant's DNA was transferred by him to the didgeridoo at the time of the attack.
14. The appellant did not give evidence at the trial.

The evidence concerning the didgeridoo

15. Nardene Wanganeen, Sumner's aunt and the tenant of the house, gave evidence that the didgeridoo, normally kept beside the washing machine in the laundry, had been acquired in 2009 by her late partner. Although she stated that she did not allow people to play the didgeridoo, at around 5:00pm on the night before the attack the didgeridoo had been played by the deceased. Nardene Wanganeen did not know the appellant.
16. The deceased's sister, Leticia Webb, gave evidence that during the course of the attack at the house she had grabbed the didgeridoo defensively when it was next to the freezer in the kitchen. She gave evidence that she put the didgeridoo back next to the freezer when commanded to put it down by the intruders and that she did not take it into the lounge room.
17. The didgeridoo was found in the lounge room in close proximity to where the deceased was left after the attack. There was no evidence of how it came to be in the lounge room and no direct evidence that it was used in the attack.

The evidence concerning DNA

Sample 3B

18. That the appellant's DNA was contained in Sample 3B was not challenged by the appellant.

19. A qualified forensic expert, Dr Julianne Henry, gave evidence at the trial for the prosecution. She explained that Sample 3B came from an area on the didgeridoo showing "reddybrown stains" which had been removed using a scalpel. The sample consisted of two separate "bloodlike stains", one having a diameter of 2 millimetres by 1 millimetre and the other a diameter of less than 1 millimetre. Dr Henry said that even if the abovementioned "reddy-brown stains" were in fact blood (as indicated by a presumptive test), that circumstance did not prove that the DNA in Sample 3B derived from blood because the DNA may have been "under the stain", ie placed on the didgeridoo at an earlier time. She agreed with counsel for the prosecution that the "reddy-brown stains" may have "contributed nothing" to Sample 3B.

DNA and blood

20. Dr Henry explained that DNA, a molecule in cells from the human body, can be transferred to an object in biological fluid such as blood (or saliva) or through contact with a person's skin. She said the amount of DNA transferred through contact with a person's skin, called "contact" or "trace" DNA, is low compared to the amount of DNA transferred in a biological fluid. Finally, Dr Henry gave evidence that some people "shed" contact or trace DNA more readily than others.
21. Dr Henry stated that there were three possible ways in which blood may be transferred to an object: direct transfer (where contact occurs between a person and an object), airborne transfer (where blood travels through the air and then lands on an object) and passive transfer (where a person's blood drips onto an object). Dr Henry was unable to distinguish, from a photograph, whether the deceased's blood on the didgeridoo was transferred directly or by having been airborne.

Primary and secondary DNA transfer

22. Dr Henry explained the differences between "primary" and "secondary" DNA transfer. A primary transfer occurs as a result of direct contact between a particular person and an object. A secondary transfer occurs when contact or trace DNA is transferred onto an object by an intermediary as a result, for example, of a handshake. Dr Henry gave evidence that the most likely way to obtain contact or trace DNA on an object was through primary, rather than secondary, transfer. She also stated that a secondary transfer of DNA remains possible a few hours after contact between a person and an intermediary, and that an intermediary's DNA is not necessarily transferred at the same time, although she was only aware of one example of this in the relevant literature. She accepted as a possibility that the appellant's DNA in Sample 3B was the result of a secondary transfer.

Mixed DNA profiles

23. Dr Henry explained that where DNA of more than one person is identified in a sample, there will usually be one major contributor and one minor contributor to the DNA profile. In most (but not all) cases where a secondary transfer of DNA occurs, the major contributor to the DNA profile will likely be the person transferring the DNA and the minor contributor will be the person whose DNA is transferred. Dr Henry gave evidence that it was likely that a person who was the major contributor to a DNA profile would have left blood on an object because blood is a richer source of DNA than epithelial cells. However, she went on to state that it

was possible that the DNA in Sample 3B was derived from a source other than blood because "it was difficult to conclude from the yield of DNA that we obtained from those stains that the DNA did come from blood". After giving that evidence, she was cross-examined about the source of the DNA in Sample 3B. It is convenient to set out the passage transcribing her answers:

"A. It could have been blood, it could have been something other than blood.

Q. By 'something else' it could be saliva for example.

A. That's possible, yes.

Q. It could be the transference of cells.

A. That's possible, yes.

Q. And we will come back to the question of transfer, but primary or secondary transfer.

A. Yes."

24. Sumner's DNA was not found on the didgeridoo at all. That was relevant to the appellant's reliance upon an hypothesis of a transfer of DNA from the appellant's hand to Sumner's hand when the two men shook hands at the boxing match, and a subsequent secondary transfer of the appellant's DNA to the didgeridoo by Sumner on one or other of his two visits to the house on 19 June 2011.

DNA accumulation

25. Dr Henry stated that recovering DNA from an object does not indicate the time of its deposit on the object from which it is retrieved. With current technology, DNA cannot be "aged". She also stated that DNA could accumulate over a period of time, days or even weeks, and she accepted that contact or trace DNA could have been on the didgeridoo for some time before the attack.

The reasoning of the Court of Criminal Appeal

26. The Court of Criminal Appeal (Gray and Sulan JJ; Blue J agreeing) found that it was open to the jury to conclude beyond reasonable doubt that the appellant's DNA was deposited on the didgeridoo as a result of direct contact by the appellant at the time of the attack [5]. In their Honours' view, in light of Dr Henry's evidence, the alternative hypothesis of a secondary transfer of the appellant's DNA to the didgeridoo by Sumner was "extremely unlikely" [6]. In so concluding, the Court of Criminal Appeal confined its considerations to Sumner's second visit to the house at around 6:00am and did not refer to Dr Henry's evidence that an intermediary's DNA will not necessarily be deposited when the intermediary makes a secondary transfer of another's DNA. Further, the Court of Criminal Appeal referred neither to the possibility that the appellant's DNA may have been the subject of a primary transfer to the didgeridoo on an occasion earlier than the attack nor to Dr Henry's evidence about the accumulation of DNA and the impossibility of "dating" DNA. The Court of Criminal Appeal

concluded that the jury was entitled to reject any argument that there was an hypothesis consistent with the appellant's innocence and unanimously dismissed the appellant's appeal against conviction.

[5] *R v Sumner* (2013) 117 SASR 271 at 298 [108] .

[6] *R v Sumner* (2013) 117 SASR 271 at 298 [106] .

The questions

27. The appellant had no complaint about the trial judge's summing up to the jury regarding the DNA evidence. However, the appellant contended that this appeal raised two questions for consideration by this Court. The first was whether DNA evidence alone is sufficient to establish beyond reasonable doubt both presence and participation for the purposes of joint enterprise liability, in circumstances where the issue is not whether there is a match between the appellant's DNA and a DNA sample but when and how the DNA got there. The second question was whether it was unreasonable to convict the appellant in circumstances where the expert called by the prosecution to give evidence about DNA testified about secondary transfer of DNA, thereby raising a reasonable hypothesis on the evidence consistent with the appellant's innocence.

28. **Following paragraph cited by:**

R v Hunt & Becirovic (11 March 2016) (Reasons For The Verdicts Of Tilmouth J)

There was no dispute between the parties that it was an essential link in the prosecution's circumstantial case that the appellant's DNA was transferred by him to the didgeridoo during the attack. That circumstance was required to be proved beyond reasonable doubt [7] .

Arguments in this Court

[7] *Shepherd v The Queen* (1990) 170 CLR 573; [1990] HCA 56.

The appellant

29. It was submitted by the appellant that both elements of the statutory provision were satisfied. It was contended that the only evidence tending to establish the appellant's presence during the attack (Sample 3B) failed to establish that fact beyond reasonable doubt, and the jury should not have convicted. In particular, it was contended that the evidence failed to establish how, or when, the DNA of the appellant was transferred to the didgeridoo. In

amplifying these submissions, possibly beyond what had been put below, four aspects of the prosecution case against the appellant, based on Sample 3B, were contested.

30. The first and major contest was over whether the microscopic sample of the appellant's DNA in Sample 3B came from his blood. The second contested point was whether secondary transfer of DNA was "rare". The third contest was over whether the hypotheses raised on behalf of the appellant, as alternatives to the prosecution case, depended on a highly improbable chain of events. The final contested matter concerned the timing of the transfer of the appellant's DNA to the didgeridoo.
31. In relying on Dr Henry's evidence summarised above, the appellant submitted that the evidence did not make out, beyond reasonable doubt, that the appellant's DNA in Sample 3B was sourced from the appellant's blood. The appellant submitted that Dr Henry's evidence, that a primary transfer is the most likely way that contact or trace DNA is placed on an object, did not render a "rarity" the possibility, which she conceded, of a secondary transfer of DNA.
32. There were at least two occasions on which a secondary transfer of the appellant's DNA to the didgeridoo may have occurred – when Sumner first went to the house on the day in question, or two hours later when Sumner was present during the attack. As to whether the alternative hypothesis of a secondary transfer by Sumner was "extremely unlikely" (as concluded by the Court of Criminal Appeal), the appellant submitted that if Sumner were the intermediary, the likelihood was that a secondary transfer of the appellant's DNA to the didgeridoo occurred on his first visit to the house. That possibility was not referred to by the Court of Criminal Appeal. It was also contended that Nardene Wanganeen's lack of knowledge of the appellant did not exclude a second hypothesis, consistent with the appellant's innocence, that the appellant had come into contact with the didgeridoo at the house on an earlier occasion, a consideration put aside by the Court of Criminal Appeal. In regard to both points, the appellant relied on the expert evidence that DNA deposits can accumulate and that DNA cannot be "aged".
33. In summary, the appellant contended that the Crown had not proved its case against the appellant and reasonable hypotheses consistent with innocence could not be excluded by the jury, which should have resulted in the Court of Criminal Appeal applying s 353(1) of the CLCA in the appellant's favour.

The respondent

34. The respondent relied on *R v Hillier* [8] to support the proposition that evidence supporting inferences compatible with the appellant's innocence should not be considered in isolation from the rest of the evidence. So much may be accepted.

[8] (2007) 228 CLR 618 at 637-638 [46]-[48]; [2007] HCA 13.

35. The respondent contended that it was open to the jury to be satisfied beyond reasonable doubt that the appellant had not come into direct contact with the didgeridoo prior to the attack because of the circumstances in which the didgeridoo was kept and because there was no

evidence of the appellant's presence at the house prior to the incident. It was also contended that, notwithstanding an absence of direct evidence on the point, it could be inferred that one of the intruders picked up the didgeridoo and took it into the lounge room because it was found there, it contained DNA from both victims and there was evidence that the intruders armed themselves opportunistically after breaking into the house. More critically, the respondent urged the Court to reject the secondary transfer theory, whether applied to Sumner or another, essentially on the basis that the appellant's DNA was the major contributor to the DNA in Sample 3B and the likelihood that the appellant's DNA in Sample 3B derived from blood. It was also submitted that whether the DNA in the sample derived from blood could be assessed against the "unlikelihood" of a secondary transfer. A degree of circularity in those submissions reflected the dearth of evidence of what had been done with the didgeridoo before the attack.

Guilt beyond reasonable doubt?

36. Following paragraph cited by:

Nasaris v The Queen (02 December 2021)

6. In the context of a circumstantial case, the appellate court must be astute to assess and weigh all of the evidence in determining whether it was open to the jury to find the appellant guilty beyond reasonable doubt. While the court may scrutinise individual items or bodies of evidence to ensure they are properly understood, the court must not assess the significance and weight of the evidence in a piecemeal fashion. It is trite that, in a circumstantial case, the significance and weight of the various items of evidence relied upon can only be assessed in the context of the evidence as a whole. [5]

via

[5] *Coughlan v The Queen* [2020] HCA 15 at [55] ; *Fennell v The Queen* (2019) 93 ALJR 1219 at [82] ; *Fitzgerald v The Queen* [2014] HCA 28 at [36] ; *R v Hillier* (2007) 228 CLR 618 at [46] ; *Shepherd v The Queen* (1990) 170 CLR 573 at 579-580 .

Eastman v Director of Public Prosecutions (No 2) (22 August 2014) (Rares J, Wigney J, Cowdroy AJ)

On Dr Henry's evidence, including that extracted above, the prosecution's main contention, that the appellant's DNA in Sample 3B derived from the appellant's blood, was not made out beyond reasonable doubt. Secondly, Dr Henry's evidence was not that secondary transfer of DNA was "rare"; rather, she said that a primary transfer is a much more likely source of contact or trace DNA than a secondary transfer, but that nevertheless a secondary transfer of contact or trace DNA is possible. There was no conflict in the evidence that there were at least two distinct occasions, described above, on which a secondary transfer of the appellant's DNA to the didgeridoo may have occurred. Thirdly, the recovery of the appellant's DNA from the didgeridoo did not raise any inference about the time when or circumstances in

which the DNA was deposited there. For those reasons, it could not be accepted that the evidence relied on by the prosecution was sufficient to establish beyond reasonable doubt that the appellant was present at, and participated in, the attack. The jury, acting reasonably, should have entertained a reasonable doubt as to the appellant's guilt [9]. Alternative hypotheses consistent with the appellant's innocence, in particular the hypothesis that Sumner transferred the appellant's DNA to the didgeridoo on Sumner's first visit to the house on the day in question, were not unreasonable and the prosecution had not successfully excluded them. As the evidence was not capable of supporting the appellant's conviction for either offence, no question of an order for a new trial arose.

[9] *M v The Queen* (1994) 181 CLR 487 at 493-494.

Orders

37. The orders made were as follows:

1. Appeal allowed.
2. Set aside the orders of the Court of Criminal Appeal of the Supreme Court of South Australia made on 16 August 2013 and in their place:
 - (a) order that the appeal to that Court against conviction is allowed and the appellant's conviction is quashed; and
 - (b) direct that a judgment and verdict of acquittal is entered.

Cited by:

Heathcote v The King [2023] SASCA 68 (15 June 2023) (Bleby and David JJ; Mazza AJ)

97. The ultimate question for an appellate court must always be whether the appellate 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. [63]

via

[63] *M* (494 - 495); *R v Hillier* (2007) 228 CLR 618 [20]; *Fitzgerald v The Queen* (2014) 88 ALJR 779 [5]; *R v BadenClay* (2016) 258 CLR 308 [66].

Heathcote v The King [2023] SASCA 68 -

Wark v The State of Western Australia [2023] WASCA 66 (02 May 2023) (Buss P; Mazza and Vaughan JJ)

Fitzgerald v The Queen [2014] HCA 28 ; (2014) 88 ALJR 779 .

Wark v The State of Western Australia [No 2] [2023] WASCA 67 (02 May 2023) (Buss P)

38. The ultimate question for the appellate court must always be whether the appellate court thinks that upon the whole of the evidence it was open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty. See M (494 495); Hillier [20] ; Fitzgerald v The Queen ; [12] BadenClay [66] .

Wark v The State of Western Australia [No 2] [2023] WASCA 67 (02 May 2023) (Buss P)

Fitzgerald v The Queen [2014] HCA 28 ; (2014) 88 ALJR 779 .

Wark v The State of Western Australia [No 2] [2023] WASCA 67 (02 May 2023) (Buss P)

38. The ultimate question for the appellate court must always be whether the appellate court thinks that upon the whole of the evidence it was open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty. See M (494 495); Hillier [20] ; Fitzgerald v The Queen ; [12] BadenClay [66] .

via

[12] Fitzgerald v The Queen [2014] HCA 28; (2014) 88 ALJR 779 [5] (Hayne, Crennan, Kiefel, Bell & Gageler JJ).

Wark v The State of Western Australia [2023] WASCA 66 -

Wark v The State of Western Australia [2023] WASCA 66 -

Rodgers v The State of Western Australia [2023] WASCA 52 (12 April 2023) (BUSS P, MITCHELL JA, LIVESEY AJA)

The ultimate question for the appellate court must always be whether the appellate court thinks that upon the whole of the evidence it was open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty. See M (494 495); Hillier [20] ; Fitzgerald v The Queen ; [37] BadenClay [66] .

Rodgers v The State of Western Australia [2023] WASCA 52 (12 April 2023) (BUSS P, MITCHELL JA, LIVESEY AJA)

The ultimate question for the appellate court must always be whether the appellate court thinks that upon the whole of the evidence it was open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty. See M (494 495); Hillier [20] ; Fitzgerald v The Queen ; [37] BadenClay [66] .

via

[37] Fitzgerald v The Queen [2014] HCA 28; (2014) 88 ALJR 779 [5] (Hayne, Crennan, Kiefel, Bell & Gageler JJ).

Rodgers v The State of Western Australia [2023] WASCA 52 -

87 The circumstantial prosecution case is to be contrasted, in that respect, with that in *Fitzgerald v The Queen*,¹⁶ in which DNA evidence on a didgeridoo was the *only* evidence upon which the prosecution relied to prove the accused's presence at the scene of an alleged joint criminal enterprise, and it was therefore necessary to prove beyond reasonable doubt that it was placed there by the accused directly and not by secondary transfer. In the present case, however, the evidence of PG's DNA on the applicant's penis was accompanied by a number of other pieces of evidence, some uncontested, which supported the inference that penile-vaginal penetration occurred.¹⁷

25, followed; *Fitzgerald v The Queen* (2014) 88 ALJR 779, distinguished.

81. Defence counsel placed reliance on the asserted inability of the prosecution to disprove as a reasonable possibility that the DNA profile on the firearm got there by way of secondary transfer. In doing so, he referred to the decision of the High Court in *Fitzgerald v The Queen*. [128] which dealt with the question of whether DNA found on an object at the crime scene was sufficient to establish beyond reasonable doubt the appellant's presence during, and participation in, the alleged offence. In that matter, it was not. The distinction between the decision in that matter, which for obvious reasons was primarily concerned with the facts of the case, is that the prosecution relied on the presence of DNA on a single, readily transportable item. Accepting for the purpose of considering this submission, that the DNA came to be on the firearm by way of secondary transfer from the boxer shorts, there are still three locations in which DNA matching the profile of the defendant was located. They are the bum bag (boxer shorts and firearm), the Coke can (centre console) and the inner surface of the lip balm (in a separate compartment of the bum bag and covered by a cap). Further, even if the DNA profile matching that of the defendant came to be on the firearm by way of secondary transfer, that fact alone would not automatically exclude a finding that he was in possession of it.

via

[128] (2014) 311 ALR 158.

R v Lloyd [2022] SADC 89 -

R v Lloyd [2022] SADC 89 -

R v Lloyd [2022] SADC 89 -

R v Lloyd [2022] SADC 89 -

R v Mirotsos [2022] QCA 76 (13 May 2022) (Sofronoff P and Bond JA and Callaghan J)

Fitzgerald v The Queen (2014) 88 ALJR 779; [2014] cited

R v Mirotsos [2022] QCA 76 -

Clarke v The State of Western Australia [2022] WASCA 6 (01 February 2022) (Buss P, Mazza JA, Mitchell JA)

158. The ultimate question for the appellate court must always be whether the appellate court thinks that upon the whole of the evidence it was open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty. See *M* (494 495); *Hillier* [20]; *Fitzgerald v The Queen*; [20] *BadenClay* [66].

via

[20] *Fitzgerald v The Queen* [2014] HCA 28; (2014) 88 ALJR 779 [5] (Hayne, Crennan, Kiefel, Bell & Gageler JJ).

Clarke v The State of Western Australia [2022] WASCA 6 -

Clarke v The State of Western Australia [2022] WASCA 6 -

TSP v The State of Western Australia [2021] WASCA 224 (28 January 2022) (Buss P; Mazza and Beech JJA)

78. The ultimate question for the appellate court must always be whether the appellate court thinks that upon the whole of the evidence it was open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty: *M* (494-495). See also *R v Hillier*; [20] *Fitzgerald v The Queen*; [21] *R v BadenClay*; [22] ..

TSP v The State of Western Australia [2021] WASCA 224 -

TSP v The State of Western Australia [2021] WASCA 224 -

Liyanage v The State of Western Australia [2021] WASCA 220 -

Nasaris v The Queen [2021] SASCA 143 (02 December 2021)

6. In the context of a circumstantial case, the appellate court must be astute to assess and weigh all of the evidence in determining whether it was open to the jury to find the appellant guilty beyond reasonable doubt. While the court may scrutinise individual items or bodies of evidence to ensure they are properly understood, the court must not assess the significance and weight of the evidence in a piecemeal fashion. It is trite that, in a circumstantial case, the significance and weight of the various items of evidence relied upon can only be assessed in the context of the evidence as a whole. [5] ..

via

[5] *Coughlan v The Queen* [2020] HCA 15 at [55]; *Fennell v The Queen* (2019) 93 ALJR 1219 at [82]; *Fitzgerald v The Queen* [2014] HCA 28 at [36]; *R v Hillier* (2007) 228 CLR 618 at [46]; *Shepherd v The Queen* (1990) 170 CLR 573 at 579-580 .

Nasaris v The Queen [2021] SASCA 143 (02 December 2021)

M v The Queen (1994) 181 CLR 487; *Libke v R* (2007) 230 CLR 559; *R v Singh* [2019] SASCFC 51; *R v Tartaglia* (2011) 110 SASR 378; *SKA v The Queen* (2011) 243 CLR 400; *Pell v The Queen* (2020) 268 CLR 123; *Coughlan v The Queen* [2020] HCA 15; *Fennell v The Queen* (2019) 93 ALJR 1219; *Fitzgerald v The Queen* [2014] HCA 28; *R v Hillier* (2007) 228 CLR 618; *Shepherd v The Queen* (1990) 170 CLR 573; *Peacock v The King* (1911) 13 CLR 619; *Plomp v The Queen* (1963) 110 CLR 234; *Barca v The Queen* (1975) 133 CLR 82; *SPC v The Queen* [2020] SASCFC 43; *R v Serratore* (1999) 48 NSWLR 101, considered.

OTR v The State of Western Australia [2021] WASCA 200 (30 November 2021) (Buss P; Mazza and Vaughan JJA)

Fitzgerald v The Queen [2014] HCA 28; (2014) 88 ALJR 779 .

OTR v The State of Western Australia [2021] WASCA 200 -

OTR v The State of Western Australia [2021] WASCA 200 -

Noormets v The State of Western Australia [2021] WASCA 195 (22 November 2021) (Buss P, Mitchell JA, Beech JA)

74. The ultimate question for the appellate court must always be whether the appellate court thinks that upon the whole of the evidence it was open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty: *M* (494-495). See also *R v Hillier*; [8] *Fitzgerald v The Queen*; [9] *R v BadenClay*; [10] ..

Noormets v The State of Western Australia [2021] WASCA 195 -

Noormets v The State of Western Australia [2021] WASCA 195 -

Seifeddine v The Queen [2021] NSWCCA 214 (06 September 2021) (McCallum JA, Garling and Cavanagh JJ)

48. As explained above, the case went to the jury on the basis that the Crown had to eliminate the reasonable possibility that the applicant's DNA was on the firearm as a result of secondary transfer: cf Fitzgerald v The Queen (2014) 311 ALR 158; [2014] HCA 28 ; and Adams v R [2018] NSWCCA 303 at [128] per Campbell J.

Ward v Dillon [2021] VSC 541 (01 September 2021) (Ierodiconou AsJ)

25. When judgment was entered into on 29 March 2017, Ms Ward's rights under the terms of settlement were extinguished. Mr Dillon is proposing that after judgment was entered in favour of Ms Ward that she had two causes of action, one being enforcement of the judgment debt, and the other being Ms Ward's rights under the terms of settlement. Finality of proceedings is in the interests of justice. [9].

via

[9] Tomlinson v Ramsey Food Processing Pty Limited [2014] HCA 28 ; Zetta Jet Pte Ltd v The Ship "Dragon Pearl" (No 2) [2018] FCAFC 132.

Camara v The Queen [2021] NSWDC 317 -

Julien v The State of Western Australia [2021] WASCA 79 (06 May 2021) (Buss P, Mazza JA, Beech JA)

Fitzgerald v The Queen [2014] HCA 28 ; (2014) 88 ALJR 779 .

Julien v The State of Western Australia [2021] WASCA 79 (06 May 2021) (Buss P, Mazza JA, Beech JA)

42. The ultimate question for the appellate court must always be whether the appellate court thinks that upon the whole of the evidence it was open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty. See M (494 495); Hillier [20] ; Fitzgerald v The Queen ; [10] BadenClay [66] .

via

[10] Fitzgerald v The Queen [2014] HCA 28; (2014) 88 ALJR 779 [5] (Hayne, Crennan, Kiefel, Bell & Gageler JJ).

Julien v The State of Western Australia [2021] WASCA 79 -

DTN v The State of Western Australia [2021] WASCA 68 (22 April 2021) (Buss P, Mazza JA, Vaughan JA)

65. The ultimate question for the appellate court must always be whether the appellate court thinks that upon the whole of the evidence it was open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty: M (494 495). See also R v Hillier ; [9] Fitzgerald v The Queen ; [10] R v BadenClay . [11] .

DTN v The State of Western Australia [2021] WASCA 68 (22 April 2021) (Buss P, Mazza JA, Vaughan JA)

65. The ultimate question for the appellate court must always be whether the appellate court thinks that upon the whole of the evidence it was open to the tribunal of fact to be satisfied

beyond reasonable doubt that the accused was guilty: *M* (494 495). See also *R v Hillier*; [9] *Fitzgerald v The Queen*; [10] *R v BadenClay*; [11]

via

[10] *Fitzgerald v The Queen* [2014] HCA 28; (2014) 88 ALJR 779 [5] (Hayne, Crennan, Kiefel, Bell & Gageler JJ).

DTN v The State of Western Australia [2021] WASCA 68 -

Smith v The State of Western Australia [2021] WASCA 17 (05 February 2021) (Buss P, Mazza JA, Vaughan JA)

Fitzgerald v The Queen [2014] HCA 28; (2014) 88 ALJR 779

Smith v The State of Western Australia [2021] WASCA 17 (05 February 2021) (Buss P, Mazza JA, Vaughan JA)

40. The ultimate question for the appellate court must always be whether the appellate court thinks that upon the whole of the evidence it was open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty: *M* (494 495). See also *R v Hillier*; [8] *Fitzgerald v The Queen*; [9] *R v BadenClay*; [10]

Smith v The State of Western Australia [2021] WASCA 17 -

Dayananda v The State of Western Australia [2021] WASCA 11 (29 January 2021) (Buss P, Mazza JA, Vaughan JA)

50. The ultimate question for the appellate court must always be whether the appellate court thinks that upon the whole of the evidence it was open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty: *M* (494 495). See also *R v Hillier*; [8] *Fitzgerald v The Queen*; [9] *R v BadenClay*; [10]

via

[9] *Fitzgerald v The Queen* [2014] HCA 28; (2014) 88 ALJR 779 [5] (Hayne, Crennan, Kiefel, Bell & Gageler JJ).

Dayananda v The State of Western Australia [2021] WASCA 11 -

Dayananda v The State of Western Australia [2021] WASCA 11 -

R v McGeady [2020] QCA 267 (04 December 2020) (Philippides and Mullins JJA and Williams J)

Fitzgerald v The Queen (2014) 88 ALJR 779; [2014] HCA 28, considered
R v Richardson [2010] QCA 216, cited

R v McGeady [2020] QCA 267 (04 December 2020) (Philippides and Mullins JJA and Williams J)

13. Mr Hoare of counsel who appears pro bono for Mr McGeady, together with his instructing solicitors, submits the conclusions of the trial judge do not address the inherent frailty of the DNA evidence which stood alone and without any other support, as was illustrated by the successful appeal in *Fitzgerald v The Queen* (2014) 88 ALJR 779. As it was not a case where there was a combination of items linked to the robbery found with the DNA of an offender or there were other pieces of circumstantial evidence linking the offender to the offence, the DNA evidence by itself could not sustain a verdict of guilty.

R v McGeady [2020] QCA 267 (04 December 2020) (Philippides and Mullins JJA and Williams J)

17. As the outcome in *Fitzgerald* shows, the possibility of secondary transfer can undermine the probative value of DNA evidence. There was evidence in that case, however, of at least two occasions on which a secondary transfer of Mr Fitzgerald's DNA may have occurred that could have explained his DNA at the crime scene.

Byrne v The Queen [2020] NSWCCA 218 (28 August 2020) (Johnson, Wright and Wilson JJ)

145. In my view, unlike *Fitzgerald v The Queen*, this evidence does not provide a reasonable foundation for this hypothesis. The evidence rises no higher than the statement by the Applicant to police that he knew one or more of these persons and the police officer's opinion that, from time to time, persons share clothing.

Byrne v The Queen [2020] NSWCCA 218 (28 August 2020) (Johnson, Wright and Wilson JJ)

148. I have kept firmly in mind that the Applicant did not bear the onus of proof at trial. It was for the Crown to prove beyond reasonable doubt that the only reasonable explanation for the presence of the Applicant's DNA on nine items of clothing associated with the offences was that he was one of the robbers. However, a reasonable hypothesis consistent with innocence must be based upon more than guesswork, conjecture or speculation. Unlike *Fitzgerald v The Queen*, the evidence concerning clothes sharing in this case rose no higher than the belief of Detective Senior Constable Light that such a thing can occur. There was no evidence that these particular items of clothing may have been shared innocently. No such suggestion had been made by the Applicant to the police. Her Honour's twelfth finding (at [81] above) addressed this issue with her Honour, once again, emphasising the cumulative effect of the Applicant's DNA being located on nine items of clothing.

Byrne v The Queen [2020] NSWCCA 218 (28 August 2020) (Johnson, Wright and Wilson JJ)

94. Mr Fraser relied upon the decision of the High Court of Australia in *Fitzgerald v The Queen* (2014) 88 ALJR 779; [2014] HCA 28 which he submitted was analogous to the present case. The evidence in *Fitzgerald v The Queen* indicated that another person (Mr Sumner) who was linked to the appellant (and was his co-accused at trial) had been at the relevant premises on two occasions on the day of the murder. In allowing the appeal against conviction and directing the acquittal of the appellant, the Court (Hayne, Crennan, Kiefel, Bell and Gageler JJ) said at [36]:

"On Dr Henry's evidence, including that extracted above, the prosecution's main contention, that the appellant's DNA in Sample 3B derived from the appellant's blood, was not made out beyond reasonable doubt. Secondly, Dr Henry's evidence was not that secondary transfer of DNA was 'rare'; rather, she said that a primary transfer is a much more likely source of contact or trace DNA than a secondary transfer, but that nevertheless a secondary transfer of contact or trace DNA is possible. There was no conflict in the evidence that there were at least two distinct occasions, described above, on which a secondary transfer of the appellant's DNA to the didgeridoo may have occurred. Thirdly, the recovery of the appellant's DNA from the didgeridoo did not raise any inference about the time when or circumstances in which the DNA was deposited there. For those reasons, it could not be accepted that the evidence relied on by the prosecution was sufficient to establish beyond reasonable doubt that the appellant was present at, and participated in, the attack. The jury, acting reasonably, should have entertained a reasonable doubt as to the appellant's guilt: M v The Queen (1994) 181 CLR 487 at 493-494; 69 ALJR 83]. Alternative hypotheses consistent with the appellant's innocence, in particular the hypothesis that Sumner transferred the appellant's DNA to the didgeridoo on Sumner's first visit to the house on the

day in question, were not unreasonable and the prosecution had not successfully excluded them. As the evidence was not capable of supporting the appellant's conviction for either offence, no question of an order for a new trial arose."

Byrne v The Queen [2020] NSWCCA 218 (28 August 2020) (Johnson, Wright and Wilson JJ)

94. Mr Fraser relied upon the decision of the High Court of Australia in *Fitzgerald v The Queen* (2014) 88 ALJR 779; [2014] HCA 28 which he submitted was analogous to the present case. The evidence in *Fitzgerald v The Queen* indicated that another person (Mr Sumner) who was linked to the appellant (and was his co-accused at trial) had been at the relevant premises on two occasions on the day of the murder. In allowing the appeal against conviction and directing the acquittal of the appellant, the Court (Hayne, Crennan, Kiefel, Bell and Gageler JJ) said at [36]:

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Byrne v The Queen [2020] NSWCCA 218 (28 August 2020) (Johnson, Wright and Wilson JJ)

143. A similar outcome arose in *Sloan v R* [2015] NSWCCA 279, a case with some similarities to the present one. There, Beech-Jones J (Bathurst CJ and Price J agreeing) concluded that, unlike *Fitzgerald v The Queen*, there was no reasonable alternative hypothesis advanced to explain the presence of the appellant's DNA on discarded clothes found near the scene of a robbery. Beech-Jones J said (at [66]-[67]):

"66 The High Court [in *Fitzgerald v The Queen*] set aside the conviction on the statutory basis sought to be invoked by Mr Sloan in this case. The Court stated that the relevant issue was not whether it was the appellant's DNA on the didgeridoo but 'when and how the DNA got there' (at [27]). Given that in *Fitzgerald* it was accepted that secondary transfer was possible and that there was evidence of at least two distinct occasions in which a secondary transfer may have occurred the Court accepted that the presence of the appellant's DNA did not 'raise any inference about the time when or circumstances in which the DNA was deposited' (at [36]). It followed that an alternative hypothesis consistent with the appellant's innocence, namely secondary transfer, was not unreasonable and had not been excluded (at [36]).

67 However *Fitzgerald* does not assist Mr Sloan. As noted by the Crown, no possibility of secondary transfer arose in this case in relation to the stocking. There was no evidence proffered of any occasion when secondary transfer could have occurred. The possibility of secondary transfer onto the stocking was rightly disclaimed by Mr Sloan's Counsel during the trial. Otherwise for the reasons stated the totality of the evidence did not raise an alternative inference about the circumstances in which Mr Sloan's DNA was deposited onto the stocking to that contended for by the Crown."

109. Counsel submitted that this was a case like *Fitzgerald v The Queen*, where there was an evidentiary basis for several alternative hypotheses consistent with innocence. Unlike *Decision Restricted*, it was submitted that the totality of the evidence did not render those alternative hypotheses unreasonable or implausible. Even if the Crown theory could be seen as more likely, Mr Fraser emphasised that would not be sufficient. The existence of a reasonable available alternative theory constituted a doubt that should have resulted in a verdict of not guilty in respect of each count.

95. Reliance was placed, as well, upon *Decision Restricted* [2018] NSWCCA 217, an appeal from a case based almost exclusively on DNA evidence. The appellant in that case raised the possibility of secondary transfer as explaining the finding of DNA profiles of the appellant on vulval swabs taken from a four-year old child who had been sexually assaulted. The offence occurred in the appellant's house and there was some evidence that the appellant's DNA profile may have been present in trace amounts in various locations. Three possible scenarios explaining the DNA profile were considered in that case. Fullerton J (Bathurst CJ and Campbell J agreeing) observed (at [150]-[151]) that of these exculpatory scenarios, the first one was so implausible as to be rejected and the second and third "*whilst theoretically possible were equally as speculative, that is, not reasonably possible in all the circumstances*". The Court distinguished *Fitzgerald v The Queen* in these circumstances.

Byrne v The Queen [2020] NSWCCA 218 -

Byrne v The Queen [2020] NSWCCA 218 -

Byrne v The Queen [2020] NSWCCA 218 -

Byrne v The Queen [2020] NSWCCA 218 -

R v Hasrouny [2020] QCA 163 (11 August 2020) (Holmes CJ and Morrison JA and Wilson J)

74. An important issue in *Fitzgerald v The Queen*, as in this case, was not whether there was a match between the defendant's DNA and a DNA sample, but rather when and how the appellant's DNA was transferred to the didgeridoo. In *Fitzgerald v The Queen*, the prosecution did not contest that there were at least two distinct occasions on which a secondary transfer of the defendant's DNA to the didgeridoo may have occurred. The High Court, in allowing the appeal and quashing the conviction, stated:

"[36] [...] Alternative hypotheses consistent with the appellant's innocence, in particular the hypothesis that Sumner transferred the appellant's DNA to the didgeridoo on Sumner's first visit to the house on the day in question, were not unreasonable and the prosecution had not successfully excluded them." [4]

via

[4] *Fitzgerald v The Queen* (2014) 88 ALJR 779 at 785 [36].

R v Hasrouny [2020] QCA 163 (11 August 2020) (Holmes CJ and Morrison JA and Wilson J)

74. An important issue in *Fitzgerald v The Queen*, as in this case, was not whether there was a match between the defendant's DNA and a DNA sample, but rather when and how the

appellant's DNA was transferred to the didgeridoo. In *Fitzgerald v The Queen*, the prosecution did not contest that there were at least two distinct occasions on which a secondary transfer of the defendant's DNA to the didgeridoo may have occurred. The High Court, in allowing the appeal and quashing the conviction, stated:

"[36] [...] Alternative hypotheses consistent with the appellant's innocence, in particular the hypothesis that Sumner transferred the appellant's DNA to the didgeridoo on Sumner's first visit to the house on the day in question, were not unreasonable and the prosecution had not successfully excluded them." [4]

R v Hasrouny [2020] QCA 163 -

R v Hasrouny [2020] QCA 163 -

R v Hasrouny [2020] QCA 163 -

R v Hasrouny [2020] QCA 163 -

R v Hasrouny [2020] QCA 163 -

R v Brown [2020] QCA 159 -

R v Brown [2020] QCA 159 -

McLaughlin v The Queen [2020] SASCFC 67 -

Austic v The State of Western Australia [2020] WASCA 75 (14 May 2020) (Buss P, Mazza JA, Sofronoff AJA)

Fitzgerald v The Queen [2014] HCA 28; (2014) 88 ALJR 779.

Austic v The State of Western Australia [2020] WASCA 75 (14 May 2020) (Buss P, Mazza JA, Sofronoff AJA)

41. The ultimate question for the appellate court must always be whether the appellate court thinks that upon the whole of the evidence it was open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty: *M* (494 495). See also *R v Hillier*; [17] *Fitzgerald v The Queen*; [18] *R v BadenClay*; [19].

Austic v The State of Western Australia [2020] WASCA 75 (14 May 2020) (Buss P, Mazza JA, Sofronoff AJA)

41. The ultimate question for the appellate court must always be whether the appellate court thinks that upon the whole of the evidence it was open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty: *M* (494 495). See also *R v Hillier*; [17] *Fitzgerald v The Queen*; [18] *R v BadenClay*; [19].

via

[18] *Fitzgerald v The Queen* [2014] HCA 28; (2014) 88 ALJR 779 [5] (Hayne, Crennan, Kiefel, Bell & Gageler JJ).

R v Oliver [2020] QCA 76 (21 April 2020) (Fraser JA and Bond and Callaghan JJ)

34. A recent summary of the law was set out in *R v Dalton* [2020] QCA 13 by Buss AJA (with whom Sofronoff P and Morrison JA agreed): [28]

"[173] It is a question of fact whether, having regard to the evidence, a verdict of guilty on which a conviction is based is unreasonable or cannot be supported. See *M v The Queen*; [29] *Zaburoni v The Queen*; [30] *GAX v The Queen*; [31].

[I74] An intermediate court of appeal (the appellate court) must decide that question by making its own independent assessment of the sufficiency and quality of the evidence, and determining whether, notwithstanding that there is evidence upon which a tribunal of fact might convict, nevertheless it would be dangerous in the circumstances to permit the verdict to stand. See *M* (492-493); *SKA v The Queen*, [32].

[I75] The appellate court, in making an independent assessment of the whole of the evidence to determine whether it was open to the tribunal of fact to be satisfied beyond reasonable doubt as to the guilt of the accused, must weigh the whole of the evidence (in particular, the competing evidence). See *SKA* [22], [24].

[I76] The appellate court's task is not to consider, as a question of law, merely whether there was sufficient evidence to sustain a conviction. See *Morris v The Queen*, [33].

[I77] The appellate court, in assessing whether it was open to the tribunal of fact to be satisfied beyond reasonable doubt as to the guilt of the accused, "must not disregard or discount either the consideration that the [tribunal of fact] is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the [tribunal of fact] has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations": *M* (493); *R v Nguyen*; [34] *SKA* [13].

[I78] The ultimate question for the appellate court must always be whether the appellate court thinks that upon the whole of the evidence it was open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty: *M* (494-495). See also *R v Hillier*; [35] *Fitzgerald v The Queen*; [36] *R v Baden-Clay*, [37].

[I79] The setting aside of a tribunal of fact's verdict of guilty because, having regard to the evidence, it is unreasonable or cannot be supported is a serious step. Trial by the appellate court is not to be substituted for trial by the tribunal of fact. See *Baden-Clay* [65]-[66].

[I80] The appellate court's reasons must disclose its assessment of the capacity of the evidence to support the verdict. See *SKA* [22]-[24]; *BCM v The Queen*; [38] *GAX* [25].

[I81] The nature and extent of the appellate court's task, in a particular case, will be informed by:

- (a) the elements of the offence;
- (b) the accused's defence;
- (c) the issues in contest at the trial;
- (d) the manner in which the trial was conducted;

- (e) the way in which the case was ultimately left to the tribunal of fact;
- (f) whether the tribunal of fact was a judge (who must state the principles of law that he or she has applied and the findings of fact on which he or she has relied) or a jury (which does not give reasons); and
- (g) the particulars of and the submissions made in support of the ground of appeal.”

[R v Oliver](#) [2020] QCA 76 -

[R v KAW](#) [2020] QCA 57 (31 March 2020) (Morrison JA and Bond and Callaghan JJ)

40. The applicable principles were recently summarised by this court in [R v Dalton](#) [2020] QCA 13 at paragraphs [173] – [181] :

“[173] It is a question of fact whether, having regard to the evidence, a verdict of guilty on which a conviction is based is unreasonable or cannot be supported. See [M v The Queen](#) ;[24] [Zaburoni v The Queen](#) ;[25] [GAX v The Queen](#). [26]

[174] An intermediate court of appeal (the appellate court) must decide that question by making its own independent assessment of the sufficiency and quality of the evidence, and determining whether, notwithstanding that there is evidence upon which a tribunal of fact might convict, nevertheless it would be dangerous in the circumstances to permit the verdict to stand. See [M](#) (492-493); [SKA v The Queen](#). [27]

[175] The appellate court, in making an independent assessment of the whole of the evidence to determine whether it was open to the tribunal of fact to be satisfied beyond reasonable doubt as to the guilt of the accused, must weigh the whole of the evidence (in particular, the competing evidence). See [SKA](#) [22], [24].

[176] The appellate court’s task is not to consider, as a question of law, merely whether there was sufficient evidence to sustain a conviction. See [Morris v The Queen](#). [28]

[177] The appellate court, in assessing whether it was open to the tribunal of fact to be satisfied beyond reasonable doubt as to the guilt of the accused, “must not disregard or discount either the consideration that the [tribunal of fact] is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the [tribunal of fact] has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations”: [M](#) (493); [R v Nguyen](#) ;[29] [SKA](#) [13].

[178] The ultimate question for the appellate court must always be whether the appellate court thinks that upon the whole of the evidence it was open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty: [M](#) (494-495). See also [R v Hillier](#) ;[30] [Fitzgerald v The Queen](#) ; [31] [R v Baden-Clay](#). [32]

[179] The setting aside of a tribunal of fact's verdict of guilty because, having regard to the evidence, it is unreasonable or cannot be supported is a serious step. Trial by the appellate court is not to be substituted for trial by the tribunal of fact. See *Baden-Clay* [65]-[66].

[180] The appellate court's reasons must disclose its assessment of the capacity of the evidence to support the verdict. See *SKA* [22]-[24]; *BCM v The Queen*; [33] GAX [25],

[181] The nature and extent of the appellate court's task, in a particular case, will be informed by:

- (a) the elements of the offence;
- (b) the accused's defence;
- (c) the issues in contest at the trial;
- (d) the manner in which the trial was conducted;
- (e) the way in which the case was ultimately left to the tribunal of fact;
- (f) whether the tribunal of fact was a judge (who must state the principles of law that he or she has applied and the findings of fact on which he or she has relied) or a jury (which does not give reasons); and
- (g) the particulars of and the submissions made in support of the ground of appeal."

R v KAW [2020] QCA 57 -

R v GJERGJI [2020] SADC 51 (14 February 2020) (Fuller J)

R v Bilick & Starke (1984) 36 SASR 321; *Questions of Law on Acquittal (No.2 of 1993)* (1993) 61 SASR 1; *R v Brady and Smythe* (2005) 92 SASR 135; *R v Fitzgerald* [2014] HCA 28; *R v Arrol* [1999] SASC 293; *R v Tartaglia* [2011] SASCFC 88; *R v Anderson* [2004] SASC 201; *R v Dimitropolous* Unreported CCA 18 September 1992, considered.

R v GJERGJI [2020] SADC 51 (14 February 2020) (Fuller J)

29. I have had regard to cases such as *R v Fitzgerald* [2014] HCA 28, *R v Arrol* [1999] SASC 293, *R v Tartaglia* [2011] SASCFC 88, *R v Anderson* [2004] SASC 201 and *R v Dimitropolous* unreported CCA 18 September 1992, noting that all turn on the application of established principle to a close appreciation of the evidence that was before the trier of fact in each case.

R v Dalton [2020] QCA 13 (07 February 2020) (Sofronoff P and Morrison JA and Buss AJA)

178. The ultimate question for the appellate court must always be whether the appellate court thinks that upon the whole of the evidence it was open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty: *M* (494-495). See also *R v Hillier*; [24] *Fitzgerald v The Queen*; [25] *R v Baden-Clay*; [26].

R v Dalton [2020] QCA 13 -

R v Dalton [2020] QCA 13 -

A v Rigby [2019] WASC 466 (19 December 2019) (Smith J)

69. However, it is an error in principle to consider the significance of circumstantial evidence consistent with the innocence of the appellant in isolation from other evidence. [53].

Is an error of law established so as to establish a miscarriage of justice and is the verdict of guilt unreasonable?

via

[53] *R v Hillier* [2007] HCA 13; (2007) 228 CLR 618 [48] (Gummow, Hayne & Crennan JJ); *Fitzgerald v The Queen* [2014] HCA 28; (2014) 311 ALR 158 [34] (Hayne, Crennan, Kiefel, Bell & Gageler JJ).

A v Rigby [2019] WASC 466 (19 December 2019) (Smith J)

68. A reasonable hypothesis consistent with innocence should not be excluded, or not be considered, in isolation from the rest of the evidence. [52]. A magistrate cannot be criticised for not considering a hypothesis that is consistent with innocence if that hypothesis is speculative or if it is not a reasonable hypothesis. To be so reasonable there must be some evidence before the court upon which such a hypothesis could be said to be reasonable.

via

[52] *Fitzgerald v The Queen* [2014] HCA 28; (2014) 311 ALR 158 [33] [34] (Hayne, Crennan, Kiefel, Bell & Gageler JJ) applying *R v Hillier* [2007] HCA 13; (2007) 228 CLR 618 [46] [48] (Gummow, Hayne & Crennan JJ).

A v Rigby [2019] WASC 466 -

Pell v The Queen [2019] VSCA 186 (21 August 2019) (Ferguson CJ; Maxwell P; Weinberg JA)

- 64I. In *Fitzgerald v The Queen*, [178] the High Court quashed a conviction for murder, and ordered that there be a verdict of acquittal. The only evidence linking the appellant to the crime was his DNA, which was found on a didgeridoo located at the crime scene. The defence, at trial, was that the presence of the DNA may have been the result of 'secondary transfer.' It seems that the appellant had, at an earlier stage, shaken the hand of one of the co-accused.

via

[178] (2014) 88 ALJR 779 .

Pell v The Queen [2019] VSCA 186 -

Couzens v The State of Western Australia [2019] WASCA 54 (05 April 2019) (Buss P, Mazza JA, Hall J)

51. The ultimate question for the appellate court must always be whether the appellate court thinks that upon the whole of the evidence it was open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty: *M* (494 - 495). See also *R v Hillier*; [12] *Fitzgerald v The Queen*; [13] *R v BadenClay*; [14] ..

Couzens v The State of Western Australia [2019] WASCA 54 (05 April 2019) (Buss P, Mazza JA, Hall J)

51. The ultimate question for the appellate court must always be whether the appellate court thinks that upon the whole of the evidence it was open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty: *M* (494 - 495). See also *R v Hillier*; [12] *Fitzgerald v The Queen*; [13] *R v BadenClay*; [14] ..

[13] *Fitzgerald v The Queen* [2014] HCA 28; (2014) 88 ALJR 779 [5] (Hayne, Crennan, Kiefel, Bell & Gageler JJ).

Couzens v The State of Western Australia [2019] WASCA 54 -
Davies v The Queen [2019] VSCA 66 (28 March 2019) (Kaye, McLeish and T Forrest JJA)

EVIDENCE – Admissibility – DNA evidence – No evidence of innocent transference – *Fitzgerald v The Queen* (2014) 88 ALJR 779, distinguished – Whether DNA evidence inadmissible due to failure to call every member of forensics team – *R v Sing* (2002) 54 NSWLR 31, distinguished.

Davies v The Queen [2019] VSCA 66 (28 March 2019) (Kaye, McLeish and T Forrest JJA)

185. The judge rejected these arguments. He considered that the possibility of innocent transference had to be considered in the light of the evidence of the applicant and his car both having been in the vicinity of the church at the relevant time. In contrast, there was no evidence that gave rise to a real risk of transference. In that regard, the judge distinguished *Fitzgerald v The Queen*, [42], in which the possibility of transference by shaking hands was raised on the evidence and held not to have been excluded by the prosecution. The judge also accepted that the low amount of DNA found on the bottle (between one and three human cells) did not mean that it could not yield a profile or partial profile. This was recognised by this Court in *Tuite v The Queen*, [43], which also upheld the admission into evidence of likelihood ratios calculated in accordance with the STRmix analytical method which was also used in the present case. The judge concluded that the probative value of the DNA evidence, if accepted, was very significant and outweighed the risk of unfair prejudice, which could be ameliorated by directions.

Davies v The Queen [2019] VSCA 66 -
Adams v R [2018] NSWCCA 303 -
R v Sullivan (No 2) [2018] ACTSC 300 (30 October 2018) (Elkaim J)

108. I can reach no conclusion about the time when the DNA was deposited on the knife nor can I reach any conclusion as to whether or not it was deposited there directly by the accused or whether it had travelled to the knife through one or more intermediary sources. The police did not ask the accused's parents if the knife was from their household. If it had been then both the accused's and his brother's DNA might have been deposited on it in either a primary or secondary transfer. There are clearly alternative hypotheses consistent with the accused's innocence. The situation here is not dissimilar to that which existed in *Fitzgerald v The Queen* [2014] HCA 28; 88 ALJR 779 (*Fitzgerald*). It is worth quoting from [36]:

On Dr Henry's evidence, including that extracted above, the prosecution's main contention, that the appellant's DNA in Sample 3B derived from the appellant's blood, was not made out beyond reasonable doubt. Secondly, Dr Henry's evidence was not that secondary transfer of DNA was "rare"; rather, she said that a primary transfer is a much more likely source of contact or trace DNA than a secondary transfer, but that nevertheless a secondary transfer of contact or trace DNA is possible. There was no conflict in the evidence that there were at least two distinct occasions, described above, on which a secondary transfer of the appellant's DNA to the didgeridoo may have occurred. Thirdly, the recovery of the appellant's DNA from the didgeridoo did not raise any inference about the time when or circumstances in which the DNA was deposited there. For those reasons, it could not be accepted that the evidence relied on by the prosecution was sufficient to establish beyond reasonable doubt that the appellant was present at, and participated in, the attack. The jury, acting reasonably, should have entertained a reasonable doubt as to the appellant's guilt.⁹ Alternative hypotheses consistent with the appellant's innocence, in particular the hypothesis that Sumner transferred the appellant's DNA to the didgeridoo on Sumner's first visit to the house on the day in question, were not unreasonable and the prosecution had not successfully excluded them. As the evidence was not capable of supporting the appellant's conviction for either offence, no question of an order for a new trial arose.

R v Sullivan (No 2) [2018] ACTSC 300 (30 October 2018) (Elkaim J)

110. The Crown said that *Fitzgerald* was readily distinguishable from the present case because in *Fitzgerald* the Crown had relied on DNA evidence only and there was positive evidence of secondary transfer.

R v Sullivan (No 2) [2018] ACTSC 300 (30 October 2018) (Elkaim J)

Fitzgerald v The Queen [2014] HCA 28; 88 ALJR 779
R v Baden-Clay

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R v Sullivan (No 2) [2018] ACTSC 300 -

R v Jarrod Craig Hussey [2018] NSWDC 266 (21 September 2018) (Mahony SC DCJ)

64. Further, there was no direct contact between Detective Senior Constable Seymour and the accused, which distinguishes this case from that referred to in *Fitzgerald v R* [2014] HCA 28. If Detective Senior Constable Seymour's shoe became contaminated with the accused's DNA, that DNA must have come from within the premises. The manifold other factors which are outlined above, do lead me, consistent with the direction in respect of circumstantial evidence that I have given myself, to a conclusion that the accused was in occupation of the premises. I further find that there is no other reasonable conclusion arising from those facts that is inconsistent with that conclusion.

Arico v The Queen [2018] VSCA 135 (24 May 2018) (Maxwell ACJ, Weinberg and Priest JJA)

308. When developing his submissions, counsel submitted that the formulation of Hayne J in *Libke* [126] had not been repeated in more recent decisions of the High Court, although the Court had not 'expressly' cast doubt upon the accuracy of that formulation. [127] Counsel warned against the approach in some cases which suggested that the appellate court should look to see if there is 'a fundamental block or a fundamental hurdle to a conviction', [128] but was content with the formulation in *Klamo*: was it reasonably open to the jury to be satisfied beyond reasonable doubt of the accused's guilt? [129]

via

[127] For example, see *SKA v The Queen* (2011) 243 CLR 400; *GAX v The Queen* (2017) 344 ALR 489; *R v Baden-Clay* (2016) 258 CLR 308; *Fitzgerald v The Queen* (2014) 311 ALR 158; *BCM v The Queen* (2013) 303 ALR 387.

Arico v The Queen [2018] VSCA 135 (24 May 2018) (Maxwell ACJ, Weinberg and Priest JJA)

310. The correctness of the test propounded by Mason CJ, Deane, Dawson and Toohey JJ in *M v The Queen* [130] is not in doubt. It has consistently been endorsed by the High Court. [131] Thus, whether a verdict is unsafe or unsatisfactory is a question of fact that the appellate court must decide by making its own independent assessment of the evidence. The appellate court must determine whether, notwithstanding that there is evidence upon which a jury might convict, nonetheless it would be dangerous in all the circumstances to allow a verdict of guilty to stand. [132] *M v The Queen* makes clear that where, notwithstanding that as a matter

of law there is evidence to sustain a verdict, the question which the appellate court must ask itself is whether it thinks that upon the whole of the evidence it was *open* to the jury to be satisfied beyond reasonable doubt that the accused was guilty. [133]. In answering that question the court must pay full regard to the considerations, first, that the jury is the body entrusted with the primary responsibility of determining guilt or non-guilt, and, secondly, that the jury has had the benefit of having seen and heard the witnesses. [134]. In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced, unless the jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by the appellate court. [135].

via

[131] For example, *Jones v The Queen* (1997) 191 CLR 439; *Gipp v The Queen* (1998) 194 CLR 106; *MF A v The Queen* (2002) 213 CLR 606; *R v Hillier* (2007) 228 CLR 618; *SKA v The Queen* (2011) 243 CLR 400; *BCM v The Queen* (2013) 303 ALR 387; *Fitzgerald v The Queen* (2014) 311 ALR 158; *GAX v The Queen* (2017) 344 ALR 489.

R v Pfennig [2018] SASCFC 27 (01 May 2018) (Kourakis CJ; Peek and Stanley JJ)

67. The appellant sought to place some reliance upon the judgment of the High Court in *Fitzgerald v The Queen*. [48]. In my view *Fitzgerald* is distinguishable from this case. In *Fitzgerald* a group of men forced their way into a house and, using weapons including a gardening fork and a pole, attacked two men, the first of whom subsequently died, and the second of whom sustained serious brain injuries. The appellant was convicted by a jury of one count of murder and a second count of aggravated causing serious harm with intent. It was the prosecution case that the appellant and his co-accused were members of the group that forced entry into a house in circumstances where each member of the group was a party to a joint enterprise to cause grievous bodily harm to persons inside the house. The real issue at the trial was the sufficiency of the evidence to establish that the appellant was one of the group. To establish that fact the prosecution relied on DNA evidence obtained from a sample taken from a didgeridoo found at the crime scene. A forensic expert gave evidence explaining the differences between primary and secondary DNA transfer. The expert accepted the possibility that the appellant's DNA in a sample taken from the didgeridoo was the result of secondary transfer.

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R v Pfennig [2018] SASCFC 27 (01 May 2018) (Kourakis CJ; Peek and Stanley JJ)

Fitzgerald v The Queen (2014) 88 ALJR 779, distinguished.

69. However, in *Fitzgerald* there was no other evidence linking the appellant to the crimes while in this case there is a substantial body of circumstantial evidence which implicates the appellant. In *Fitzgerald* six eyewitnesses at the scene failed to identify the appellant as being present, while there are no eyewitnesses in this case. Further, and importantly, *Fitzgerald* was a case of secondary transfer while this is a case of at least tertiary transfer and the hypothetical secondary transfer in *Fitzgerald* occurred over a period of less than eight hours whereas in this case the hypothetical tertiary transfer occurred over a period of weeks if not months.

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69. However, in *Fitzgerald* there was no other evidence linking the appellant to the crimes while in this case there is a substantial body of circumstantial evidence which implicates the appellant. In *Fitzgerald* six eyewitnesses at the scene failed to identify the appellant as being present, while there are no eyewitnesses in this case. Further, and importantly, *Fitzgerald* was a case of secondary transfer while this is a case of at least tertiary transfer and the hypothetical secondary transfer in *Fitzgerald* occurred over a period of less than eight hours whereas in this case the hypothetical tertiary transfer occurred over a period of weeks if not months.

128. The error of the DFM in misconstruing that part of SQNLDR Cave's evidence does not render the appellant's conviction unsafe or unsatisfactory. Having reconsidered the evidence we are of the view that it was open to the DFM to be satisfied of the appellant's guilt beyond reasonable doubt: cf *M v The Queen* (1994) 181 CLR 487 at 493 (Mason CJ, Deane, Dawson, Toohey JJ); *MFA v The Queen* (2002) 213 CLR 606 at 614-615, 623; [2002] HCA 53 at [25] (Gleeson CJ, Hayne and Callinan JJ), [55] (McHugh, Gummow and Kirby JJ); *SKA v The Queen* (2011) 243 CLR 400 at 405, 406; [2011] HCA 13 at [11], [14] (French CJ, Gummow and Kiefel JJ); *Fi*

Fitzgerald v The Queen (2014) 311 ALR 158 at 160 ; [2014] HCA 28 at [5] (Hayne, Crennan, Kiefel, Bell and Gageler JJ) ; *Filippou v The Queen* (2015) 256 CLR 47 at 53-54, 75-76; [2015] HCA 29 at [11]-[12] (French CJ, Bell, Keane and Nettle JJ), [82]-[83] (Gageler JJ),

Williams v The State of Western Australia [2017] WASCA 206 (08 November 2017) (Buss P; Mazza JA; Hall J)

89. By contrast, in *Fitzgerald*, the recovery of the appellant's DNA from the didgeridoo did not raise any inference about the time when or circumstances in which his DNA was deposited on the instrument. A critical factor in the prosecution's circumstantial case was that the appellant's DNA had been transferred by him to the didgeridoo during the attack on the man who died and the other man who sustained serious brain injuries. The High Court concluded that, on the facts of *Fitzgerald*, it could not be accepted that the evidence relied on by the prosecution was sufficient to establish beyond reasonable doubt that the appellant was present at, and participated in, the attack. The jury, acting reasonably, should have entertained a doubt as to the appellant's guilt.

Williams v The State of Western Australia [2017] WASCA 206 (08 November 2017) (Buss P; Mazza JA; Hall J)

21. *Fitzgerald* was decided on its particular facts. The present case is different in nature. Here, the State's case as to the appellant's presence at the Armadale house did not rely exclusively on the DNA evidence. Other evidence established his presence at the Armadale house, his propensity to manufacture methylamphetamine and his connection with the attempted manufacture of methylamphetamine at the Armadale house. Further, although he had no onus of proof, the appellant's case as to secondary

transfer or contamination in respect of all six pieces of tape and both pieces of equipment was largely, if not completely, speculative, and involved an improbable degree of coincidence. Finally, unlike the appellant in *Fitzgerald*, the appellant did not rely on a ground that the verdict was unreasonable or could not be supported on the evidence. I do not regard *Fitzgerald* and the present case as being truly comparable.

Williams v The State of Western Australia [2017] WASCA 206 (08 November 2017) (Buss P; Mazza JA; Hall J)

82. The appellant places some reliance on *Fitzgerald v The Queen* [2014] HCA 28; (2014) 88 ALJR 779 [28]. In that case the appellant's DNA was matched to DNA on a didgeridoo at the scene of a home invasion where a murder and a serious assault were committed. It was an essential link in the prosecution's circumstantial case that the appellant's DNA was transferred by him to the didgeridoo during the attack on the victims. The High Court held that this circumstance was required to be proven beyond reasonable doubt.

Williams v The State of Western Australia [2017] WASCA 206 -

Williams v The State of Western Australia [2017] WASCA 206 -

Williams v The State of Western Australia [2017] WASCA 206 -

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Williams v The State of Western Australia [2017] WASCA 206 -

Adams v R [2017] NSWCCA 215 -

Donnelly v Richardson [2017] WASC 194 (17 July 2017) (Fiannaca J)

74. After the attack that resulted in the death of the deceased, the didgeridoo was found in the lounge room in close proximity to where the deceased was left. There was no direct evidence of how it came to be there or that it was used in the attack. [22].

via

[22] *Fitzgerald v The Queen* [2014] HCA 28; (2014) 311 ALR 158 [17].

Donnelly v Richardson [2017] WASC 194 (17 July 2017) (Fiannaca J)

80. Further, unlike the circumstances of *Fitzgerald v The Queen*, the evidence in this case was capable of establishing that the pickaxe was used in the commission of the offence, in that it was used in an attempt to open the safe. That inference was open beyond reasonable doubt from the evidence of the damage to the safe and the fact the pickaxe was found lying on top of the safe. The appellant does not dispute that proposition.

Donnelly v Richardson [2017] WASC 194 (17 July 2017) (Fiannaca J)

73. In *Fitzgerald v The Queen*, the appellant was convicted of murder on the basis that he was a member of a group that forced entry into a house where the victim was an occupant and assaulted the victim, causing his death. The prosecution case was that each member of the group, which included a man named Sumner, was a party to a common plan to cause grievous bodily harm to persons inside the house. The real issue in the appellant's trial was the sufficiency of the evidence to establish that the appellant was one of the group. The prosecution relied on DNA evidence obtained from a sample taken from a didgeridoo found at the crime scene to establish that fact. The offence occurred shortly before 6.00 am on 19 June 2011. Sumner had visited the house on two occasions that morning. One of the occasions was approximately two hours before the attack. He was involved in several physical altercations at the house. At one stage he sat on a freezer next to which the didgeridoo was located. He gave unchallenged evidence that before his first visit to the house, he had occasion to shake hands twice with the appellant, including at 10.30 pm the previous night. [21].

Donnelly v Richardson [2017] WASC 194 (17 July 2017) (Fiannaca J)

72. The appellant submitted, relying on *Fitzgerald v The Queen*, that the recovery of the appellant's DNA from the pickaxe did not raise any inference about the time when or circumstances in which the DNA was deposited there. [20] However, that proposition in *Fitzgerald v The Queen* depended on the circumstances of that case, which can be distinguished from the facts of this case.

Fitzgerald v The Queen

Donnelly v Richardson [2017] WASC 194 (17 July 2017) (Fiannaca J)

83. Finally, unlike the circumstances of *Fitzgerald v The Queen*, the pickaxe was not, at a time proximate to the commission of the offence, in an area where a number of people could have come into contact with it, whether deliberately or inadvertently. Mr Thompson's evidence was that he had put the pickaxe in the garage sometime in 2013. There was no evidence that the pickaxe had been removed from the garage in the period between Mr Thompson placing it there and the pickaxe being taken on the morning of the offence to be used on the safe.

Donnelly v Richardson [2017] WASC 194 (17 July 2017) (Fiannaca J)

70. It may be, as the respondent submitted, that the idea of physical contact as an explanation is something that is 'so obvious that it really goes without saying'. Indeed, the defence case at first instance appears to have assumed that the DNA was deposited by direct contact, but relied on the argument that a temporal connection could not be established with the commission of the offence. However, on the appeal, the appellant's response is that if one is to rely on what is supposedly an obvious explanation, in the absence of specific evidence about it, where does one draw the line? Would it not also go without saying that secondary transfer is a possible explanation? Secondary transfer of DNA is a topic that has been the subject of appellate consideration, most notably and relevantly for present purposes in *Fitzgerald v The Queen*, [19]. It does not follow, however, that it is an obvious possible explanation. As the reasons in *Fitzgerald v The Queen* reveal, the expert evidence that may be given about secondary transfer can involve a degree of complexity that is not intuitive.

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Donnelly v Richardson [2017] WASC 194 (17 July 2017) (Fiannaca J)

76. It was in the context of the evidence in that case, which I have outlined, that the High Court decided in *Fitzgerald v The Queen* that the recovery of the appellant's DNA from the didgeridoo did not raise any inference about the time when or circumstances in which the DNA was deposited there. The Court was of the view that, on the evidence, there were at least two distinct occasions on which a secondary transfer of the appellant's DNA to the didgeridoo may have occurred. There were alternative hypotheses consistent with innocence that were not unreasonable, in particular that Sumner had transferred the appellant's DNA to the didgeridoo on his first visit to the house. The prosecution had not successfully excluded such hypotheses, and the evidence was not capable of supporting the appellant's conviction. [24].

Donnelly v Richardson [2017] WASC 194 (17 July 2017) (Fiannaca J)

75. The DNA expert called by the prosecution gave evidence about 'primary' and 'secondary' transfer. She said secondary transfer occurs when contact or trace DNA is transferred onto an object by an intermediary as a result, for example, of a handshake. She said that the most likely way to obtain contact or trace DNA on an object was through primary, rather than secondary, transfer, but secondary transfer was possible in that case. She said that secondary transfer remains possible a few hours after contact between a person and an intermediary, and that an intermediary's DNA is not necessarily transferred at the same time, although she was only aware of one example of that in the relevant literature. [23].

via

[23] *Fitzgerald v The Queen* [2014] HCA 28; (2014) 311 ALR 158 [22].

Donnelly v Richardson [2017] WASC 194 (17 July 2017) (Fiannaca J)

72. The appellant submitted, relying on *Fitzgerald v The Queen*, that the recovery of the appellant's DNA from the pickaxe did not raise any inference about the time when or circumstances in which the DNA was deposited there. [20] However, that proposition in *Fitzgerald v The Queen* depended on the circumstances of that case, which can be distinguished from the facts of this case.

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Donnelly v Richardson [2017] WASC 194 (17 July 2017) (Fiannaca J)

Fitzgerald v The Queen [2014] HCA 28 ; (2014) 311 ALR 158

Donnelly v Richardson [2017] WASC 194 -

Donnelly v Richardson [2017] WASC 194 -

Donnelly v Richardson [2017] WASC 194 -

Donnelly v Richardson [2017] WASC 194 -

Miller v Be [2017] ACTMC 12 (23 June 2017) (Magistrate Campbell)

93. Even if this was a remote possibility on the evidence it would be unlikely that KB's direct contact with the underpants transferred a 'good amount' of the defendant's DNA, from that unknown source, such that he was able to be identified as the major contributor (see *Fitzgerald v The Queen* (2014) 88 ALJR 779) and yet she did not leave a sufficient amount of her own DNA for her profile to be identified. In this regard I note again the evidence of Ms Schenk that although various factors and variables can have an effect, she 'would expect the person who has touched the object would leave the most DNA' (T2, p. 5).

Miller v Be [2017] ACTMC 12 -

R v Pfennig [2017] SASCF 26 (11 April 2017) (Blue J)

130. There are points of distinction between the facts in *Fitzgerald* and the case at hand. There was no other evidence linking Fitzgerald to the crimes whereas in the present case the prosecution relied on the other items of circumstantial evidence summarised at [5] above. Six eyewitnesses at the scene failed to identify Fitzgerald whereas in the present case there were no eyewitnesses. The posited secondary transfer in *Fitzgerald* involved only two stages and a period of less than eight hours whereas in the present case the posited secondary transfer involved four stages over at least three months.

R v Pfennig [2017] SASCF 26 (11 April 2017) (Blue J)

129. In *Fitzgerald v The Queen*, [110] Sumner and Fitzgerald were charged with joint enterprise murder and aggravated causing serious harm with intent to cause serious harm. There was no direct evidence that Fitzgerald was present at the house at which the two victims were

attacked at about 6 am. Six eyewitnesses were shown his photograph and failed to identify him. However, his DNA was found on a didgeridoo at the house, on which were also found apparent bloodstains containing the DNA of the two victims. Evidence was adduced that Sumner had attended a boxing match at which he twice shook hands with Fitzgerald at about 10.30 pm earlier that night. Sumner's DNA was not found on the didgeridoo. The High Court concluded that the possibility that Fitzgerald's DNA was transferred via Sumner to the didgeridoo or had been deposited directly by Fitzgerald onto the didgeridoo on a prior occasion had not been excluded beyond reasonable doubt and acquitted Fitzgerald.

[R v Pfennig](#) [2017] SASCFC 26 (11 April 2017) (Blue J)

130. There are points of distinction between the facts in [Fitzgerald](#) and the case at hand. There was no other evidence linking Fitzgerald to the crimes whereas in the present case the prosecution relied on the other items of circumstantial evidence summarised at [5] above. Six eyewitnesses at the scene failed to identify Fitzgerald whereas in the present case there were no eyewitnesses. The posited secondary transfer in [Fitzgerald](#) involved only two stages and a period of less than eight hours whereas in the present case the posited secondary transfer involved four stages over at least three months.

[R v Pfennig](#) [2017] SASCFC 26 -

[R v Pfennig](#) [2017] SASCFC 26 -

[R v Pfennig](#) [2017] SASCFC 26 -

[R v Doolan](#); [R v Lebois-Agius](#); [R v Shaw](#) [2016] SASCFC 111 (27 September 2016) (Kelly, Peek and Lovell JJ)

54. In addition to being a passenger in the Holden before the offending began, Shaw is linked to the Holden by DNA evidence on the interior of the Holden and on a toothbrush found inside the Holden. The Judge accepted counsel for Shaw's submissions that, given Shaw's innocent links to the Holden, this evidence did not connect Shaw with the commission of the offences. Shaw's DNA was, however, on the screwdriver left at the scene of the Adelaide offending. The Judge acknowledged expert evidence given regarding secondary transfer of DNA and also counsel's submissions in relation to [Fitzgerald v The Queen](#), [2] but considered the DNA evidence to be of some weight in the prosecution's circumstantial case against Shaw.

via

[2] (2014) 88 ALJR 779 .

[R v Doolan](#); [R v Lebois-Agius](#); [R v Shaw](#) [2016] SASCFC 111 -

[R v Doolan](#); [R v Lebois-Agius](#); [R v Shaw](#) [2016] SASCFC 111 -

[DPP v Wise](#) [2016] VSCA 173 (21 July 2016) (Warren CJ, Weinberg and Priest JJA)

65. For the sake of completeness, we note that the High Court dealt with the possibility of the transference of DNA in [Fitzgerald](#), [44] which, although not concerned with the admissibility of DNA evidence, is nonetheless instructive. In that case, a group of men forced their way into a house and, using weapons including a gardening fork and a pole, attacked two men, the first of whom died four days later, and the second of whom sustained serious brain injuries. The appellant was convicted by a jury of one count of murder and a second count of causing serious harm. It was the prosecution case that a co-accused and the appellant were members of the group that forced entry into a house and that each member of the group was a party to a common plan to cause grievous bodily harm to persons inside the house. The real issue in the trial was the sufficiency of the evidence to establish that the appellant was one of the group. To establish that fact, the prosecution relied on DNA evidence obtained from a sample taken from a didgeridoo found at the crime scene.

[44] [Fitzgerald v The Queen](#) (2014) 311 ALR 158 (Hayne, Crennan, Kiefel, Bell and Gageler JJ) .

[DPP v Wise](#) [2016] VSCA 173 -

[DPP v Wise](#) [2016] VSCA 173 -

[R v King \(No 2\)](#) [2016] ACTSC 121 (09 June 2016) (Murrell CJ)

75. In [Fitzgerald](#) , the appellant had been convicted on DNA evidence. The case against the appellant was that his DNA was found on a didgeridoo located at the crime scene, close to the body of the deceased. The DNA sample contained profiles of major and minor contributors. The appellant's DNA was the major contributor and an unknown source was the minor contributor. A critical issue was when and how the appellant's DNA came to be on the didgeridoo. It was an essential link in the prosecution's circumstantial case that the appellant's DNA was transferred directly by him to the didgeridoo during the attack on the deceased. Consequently, that circumstance had to be proved beyond reasonable doubt. Two unlikely alternative hypotheses were discussed: that there had been a secondary transfer through a co-offender, and that the appellant had come into contact with the didgeridoo on an earlier and unknown occasion.

[R v King \(No 2\)](#) [2016] ACTSC 121 (09 June 2016) (Murrell CJ)

65. I note that, in [Fitzgerald v The Queen](#) (2014) 311 ALR 158 ([Fitzgerald](#)) (for further discussion, see below), the High Court formulated the "intermediate fact" concerning DNA in a different way (whether the evidence was capable of establishing beyond reasonable doubt that the appellant's DNA was deposited at the time that the crime was committed), but in my view that formulation was dictated by the issues in that case. Even if I am wrong to take a more restrictive view of the critical "intermediate fact" in this case, my erroneous view will not change the outcome, as will be seen below.

[R v King \(No 2\)](#) [2016] ACTSC 121 -

[R v King \(No 2\)](#) [2016] ACTSC 121 -

[R v Hunt & Becirovic](#) [2016] SADC 22 -

[R v Doolan, Le BOIS-AGIUS and Shaw](#) [2016] SADC 5 (29 January 2016) (Reasons For The Verdicts Of Barrett J)

189. Important as those pieces of evidence are, I think that the DNA evidence connecting Shaw with the screwdriver is of some weight in the circumstantial case against him. Mr Barklay drew my attention to the case of [R v Fitzgerald](#). [48] That case gives support to the proposition that DNA evidence will rarely be sufficient, of itself, to establish guilt. The case acknowledges the frailties of DNA evidence, particularly the inability to separate primary from secondary contact, and to determine when a DNA sample was deposited. The case is not authority for the proposition that DNA evidence cannot be a piece of circumstantial evidence implicating an accused.

[R v Doolan, Le BOIS-AGIUS and Shaw](#) [2016] SADC 5 -

[R v Doolan, Le BOIS-AGIUS and Shaw](#) [2016] SADC 5 -

[Sloan v The Queen](#) [2015] NSWCCA 279 (04 November 2015) (Bathurst CJ, Price and Beech-Jones JJ)

65. Otherwise I note that on behalf of Mr Sloan reliance was placed on [Fitzgerald v The Queen](#) [2014] HCA 28; 88 ALJR 779 (" [Fitzgerald](#) "). In [Fitzgerald](#) the appellant and his co-accused were convicted of murder and another offence. The Crown alleged that the appellant and his co-accused were members of a group that had a common purpose to inflict grievous bodily harm upon the occupants of a house, and that in pursuit of that common purpose the victim was killed. The only evidence relied on by the Crown against the appellant was the presence of his DNA in one of five samples taken from the didgeridoo found at the scene. The

didgeridoo also contained blood stains with the DNA of the victims. The appellant contended that he had earlier shaken hands with the co-accused and that the co-accused could have transferred DNA when he attended the scene two hours prior to the attack and during the attack itself (at [32]). The Crown's expert stated that primary transfer was the more likely source of the appellant's DNA being present on the didgeridoo, but accepted that secondary transfer was possible (at [36]).

[Sloan v The Queen](#) [2015] NSWCCA 279 -

[Sloan v The Queen](#) [2015] NSWCCA 279 -

[Sloan v The Queen](#) [2015] NSWCCA 279 -

[Filippou v The Queen](#) [2015] HCA 29 -

[R v Hillier & Reilly](#) [2015] SADC 77 (20 May 2015) (Reasons For The Verdicts Of Millstead J)

66. Mr Brown and Ms Pickert testified that they had never met the accused prior to the night of the offences. However, defence counsel emphasized that Mr Brown had worked on secondhand motorcycles and motor vehicles at his home for friends and others. Defence counsel suggested that the accused may have come into contact with those items before their delivery to Mr Brown's home and that by a series of secondary transfers the accused's DNA found its way onto the incriminating items. I reject that argument. There is not a jot of evidence to support that theory and it is one which I find to be utterly implausible. [16]

via

[16] cf [Fitzgerald v The Queen](#) (2014) 88 ALJR 779 .

[R v Hillier & Reilly](#) [2015] SADC 77 -

[WS v Gardin](#) [2015] WASC 97 (20 March 2015) (Mitchell J)

192. Ground 8 alleges that:

The learned magistrate erred in law in interpreting the High Court's judgment in [Fitzgerald v The Queen](#) (2014 HCA 28) as cautioning the court 'against placing too much, if any, reliance on DNA evidence' and as a consequence 'largely ignoring' and placing 'no weight' on the DNA evidence.

Evidence

[WS v Gardin](#) [2015] WASC 97 (20 March 2015) (Mitchell J)

210. Counsel for the appellant criticises the magistrate's summary of the effect of [Fitzgerald v The Queen](#), [28] which the magistrate regarded as, 'in essence, caution[ing] a court against placing too much, if any, reliance on DNA evidence'. [Fitzgerald](#) was a murder case in which the critical issue was whether Fitzgerald was part of a group that forced entry into a house while armed with weapons. Fitzgerald's DNA was detected on a didgeridoo, on which the victim's and another's blood was located. This was the evidence relied on by the prosecution to prove Fitzgerald's presence at the scene as one of the intruders. In that manner the prosecution case depended on satisfying the jury beyond reasonable doubt that Fitzgerald's DNA was transferred by him to the didgeridoo at the time of the attack. However the evidence in that case did not exclude the possibility of secondary transfer of Fitzgerald's DNA to the didgeridoo on some other occasion. The High Court concluded, in those circumstances, that the DNA evidence was not capable of supporting the conviction. This was because the prosecution had failed to exclude a reasonable alternative hypothesis consistent with Fitzgerald's innocence.

[WS v Gardin](#) [2015] WASC 97 (20 March 2015) (Mitchell J)

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WS v Gardin [2015] WASC 97 (20 March 2015) (Mitchell J)

Fitzgerald v The Queen [2014] HCA 28 ; (2014) 88 ALJR 779

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WS v Gardin [2015] WASC 97 -

WS v Gardin [2015] WASC 97 -

Murrell v The Queen [2014] VSCA 334 (18 December 2014) (Maxwell P, Redlich and Priest JJA)

168. Once it is understood that the evidence of the possession of the guns and the balaclavas should not have been admitted, there is nothing left in the prosecution case that would permit a jury to be satisfied to the criminal standard that the applicant was part of the joint criminal enterprise that involved the aggravated burglary and armed robbery. Presence at, and participation in, the conversation at Stacey Watson's home proved nothing other than that James and Dianne Frangos were identified as targets of possible criminal activity. Moreover, the applicant's possession of Mr Scanlon's laptop computer ten weeks or thereabouts after the offences is insufficient to show that the applicant was a robber as opposed to, say, a receiver of stolen property. Moreover, the two together would not justify the applicant's conviction. Putting to one side whether the DNA evidence could have justified a finding that the applicant had touched the firearm, [103] since it could not be connected to the charged offences, it had no legal relevance.

via

[103] See *Fitzgerald*, above n 94.

Murrell v The Queen [2014] VSCA 334 -

R v WILTON [2014] SASCF 96 (10 September 2014) (Vanstone, Nicholson and Bampton JJ)

63. The cases referred to in argument, such as *R v Fitzgerald*, [23] *R v Arrol*, [24] *R v Tartaglia* [25] and *R v Dimitropoulos*, [26] all turn on the application of established principle to a close appreciation of the evidence that was before the trier of fact in each case. As such, they can be of only limited assistance each time the question of whether or not a verdict is "unsafe or unsatisfactory" arises.

R v WILTON [2014] SASCF 96 (10 September 2014) (Vanstone, Nicholson and Bampton JJ)

27. In the present matter the appellant's answer to the charge grapples with many more than one print, and the innocent explanation proffered is much more complicated and improbable than in either *Dimitropoulos* or *Arrol*. In those cases contact with the relevant object was not proved to be more than fleeting. In *Fitzgerald* the timing of the deposit of Fitzgerald's DNA was critical. With or without the evidence of all three of those defendants, the cases against them were tenuous.

R v WILTON [2014] SASCFC 96 -

R v WILTON [2014] SASCFC 96 -

R v WILTON [2014] SASCFC 96 -

R v WILTON [2014] SASCFC 96 -

R v WILTON [2014] SASCFC 96 -

Eastman v Director of Public Prosecutions (No 2) [2014] ACTSCFC 2 (22 August 2014) (Rares J, Wigney J, Cowdroy AJ)

Fitzgerald v The Queen [2014] HCA 28 applied

Eastman v Director of Public Prosecutions (No 2) [2014] ACTSCFC 2 -