Inquiry into Convictions of Kathleen Folbigg

Submissions on behalf of Kathleen Folbigg

PART F

Summary

1. For the reasons set out in detail in these submissions, and contrary to the submissions of Counsel Assisting, the DPP and Craig Folbigg, it is submitted the evidence adduced at this Inquiry raises serious issues regarding:

   (a) The confusion in technical medical terminology at trial;

   (b) The use of coincidence evidence at trial;

   (c) The orders for a joint trial on all counts;

   (d) The use of tendency evidence at the trial;

   (e) The interpretation of the diaries at trial in a manner that focuses on commission such that it is only consistent with guilt;

   (f) The cause of death of Caleb;

   (g) The cause of death of Patrick;

   (h) The cause of death of Sarah; and

   (i) The cause of death of Laura.

2. In this regard, the Crown case was highly dependent on each factual element being soundly based in the evidence to deploy coincidence evidence and tendency evidence.

3. In this regard, if one or more of those factual assumptions is undermined, then the Crown case collapses. The points of coincidence are lost and the trial

process itself comes under scrutiny. It is submitted this Inquiry has successfully demonstrated the errors that occurred at trial. Some of those errors have been shown to be wholly incorrect. Others have involved significant qualification or clarification of evidence at trial. Either alone or in combination they demonstrate a reasonable doubt about the guilt of Kathleen Folbigg.

4. At the trial of Ms Folbigg, in many instances, the Crown reversed the onus of proof or individual facts and in Crown Prosecutor's address. In this regard, the most serious was the "*pigs might fly*" submission which relevantly was:[1]

> *I would like you to briefly consider what I anticipate will be submissions made by my learned friend, Mr Zahra. As I said, I don't know exactly what he is going to say, but I anticipate it a little bit, and I have to anticipate.*
>
> *I think that essentially he will say that the Crown must prove that these children did not die from natural causes; the Crown can't prove, in relation to each individual child, that they didn't die from four incidental findings, therefore the Crown had failed to prove its case beyond the reasonable doubt.*
>
> *Caleb may have died from a floppy larynx or SIDS. Patrick may have had an ALTE, which was a first epileptic attack or encephalitis. His death may have been caused by an epileptic attack, an epileptic seizure. Sarah may have had a displaced uvula or SIDS. Laura may have died of myocarditis. Well, yes, ladies and gentlemen, I can't disprove any of that, but one day some piglets might be born from a sow, and the piglets might come out of the sow with wings on their back, and the next morning Farmer Joe might look out the kitchen window and see these piglets flying out of his farm. I can't disprove that either. I can't disprove that one day some piglets might be born with wings and that they might fly. Is that a reasonable doubt? No. Is the hypothesis that the defence advances a reasonable doubt? No. Why not? Because if you look at what they are suggesting, not in isolation, but in totality: There has never ever been before in the history of medicine that our experts have been able to find any case like this. It is preposterous. It is not a reasonable doubt. It is a fantasy, and of course the Crown does not have to disprove a fanciful idea. As I said, you can die from a splinter in your finger. If one of these children were to have been found to have a splinter in their finger: Yes - my friend would say - the Crown can't prove that they didn't have septicaemia and die from that. Yes, that's true. But that is not a reasonable doubt. You don't just look at the medical evidence in isolation. You look at all of the evidence.*
>
> *My learned friend, Mr Zahra, will probably also say that there was no signs of any physical abuse to these children during their lifetimes. Well, that's true. That is quite true. But you have heard evidence that suffocation is very easy to do on a young child, on a baby, without leaving any signs. This accused snapped when she wanted sleep*

[1] Exh F T 1335.04 – T 1376.01.

and couldn't cope with their crying or whinging. My friend will also make submissions to you, I anticipate, that there are no definitive signs of smothering on these children. It is true. There is none of them that has bruising around the face, or tooth marks on their lips or on their tongue, that are consistent only with smothering. If they did have those marks my friend will probably say it is consistent with a fit anyway.

5. This submission (and others in the Crown address) would now fall foul of the NSW Court of Criminal Appeal. It has been held that a Crown address that reverses the onus of proof leads to error when it is the Crown's obligation to prove its case beyond reasonable doubt.[2] That decision was handed down after Ms Folbigg's appeal rights were exhausted and she had no residual rights to appeal notwithstanding the decision in *Wood*.

6. If her appeal was heard after *Wood's* case, she would have had a strongly arguable appeal point which would likely be successful.

7. The right to appeal against conviction is based only on statute. There is no other right of appeal after an appeal has been heard and determined.[3] The only route is via the Inquiry process. This remains the same regardless of whether fresh evidence comes to light or there is a change in the law.[4] This is because there is no jurisdiction after an appeal has been determined.[5]

8. If there had been a decision handed down with respect to sentence only, she would have had rights with respect to a fresh appeal on sentence with the leave of the Court under s. 5(1)(b) of the *Criminal Appeals Act* 1912 (NSW).

9. By way of example, *Muldrock v R*[6] was an appeal against sentence which was handed down by the High Court. After that decision was handed down, there was a spate of appeals to the New South Wales Court of Criminal Appeal in cases where the accused had already been sentenced and their appeals

[2] *Wood v R* [2012] NSWCCA 21.
[3] *Grierson v R* {1938) 60 CLR 431; [1938] ALR 460.
[4] *R v Elliot* (2006) 68 NSWLR 1.
[5] *Milat v R* 92004) 205 ALR 338.
[6] *Muldrock v the Queen* [2011] HCA 39.

dismissed. The legislation made provision for the capacity to have a second appeal with respect to sentence with the leave of the Court.[7]

10. However, there is no statutory provision to facilitate an appeal from a finding of guilt after a change or clarification in the law.[8] This of itself should cause this Inquiry to have regard to the reversal of onus in the Crown address and form a view about a reasonable doubt about the guilt of the accused in the light of *Wood's* case.

11. However, this single submission by the Crown Prosecutor also demonstrates the risk of a monocular view infecting the assessment of the evidence in this case. The evidence at this Inquiry has established far greater factual complexity with the inevitable consequences that many of the central planks of the Crown case at trial have been eroded.

12. Further there were a number of matters that should have been put to Ms Folbigg as a matter of procedural fairness during cross examination in this Inquiry. If some evidence was to be challenged, then as a matter of procedural fairness, it should have been put to her and it was not. In these circumstances, many of the submissions put against Ms Folbigg with respect to her diaries cannot be accepted[9]. These have been addressed at length.

13. The evidence has established a reasonable doubt about the guilt of Ms Folbigg and we submit a finding should be made to that effect.

[7] *Criminal Appeal Act* 1912 (NSW) s. 5(1)(b).
[8] See s. 5*1)(a) *Criminal Appeal Act* which does not carry the option to seek leave of the Court.
[9] *Kioa v West* (1985) 159 CLR 550; [1985] HCA 81, *Bhusal v Catholic Health Care Ltd* [2018] NSWCA 56 at [57].

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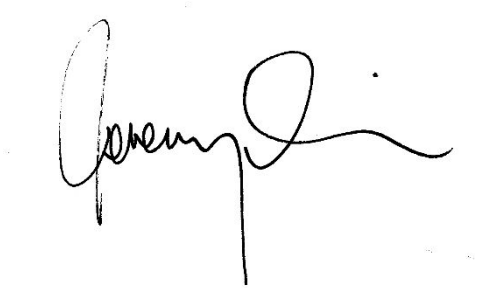

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