HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **THE KING**
Appellant

and

ZT
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Concise statement of issues

2. The respondent was convicted of murder following a 13-day trial before a jury. He sought leave to appeal against his conviction on the ground that the verdict was unreasonable and could not be supported by the evidence. A majority of the Court of Criminal Appeal of New South Wales (**CCA**) upheld the appeal and entered a verdict of acquittal (*ZT v R* [2023] NSWCCA 241 (**J**) [7], [131]-[132], [266]-[267]).

3. The Crown case against the respondent was circumstantial. It involved a series of admissions made by the respondent in telephone intercepts and police interviews. Recordings of the telephone intercepts and police interviews were in evidence at trial. The admissions made by the respondent varied and a number of his statements were clearly untrue.

4. Justice Kirk, with whom Sweeney J agreed, did not listen to or watch the exhibits comprising the recordings of the telephone intercepts and police interviews (J [128]). His Honour experienced a doubt as to the respondent's guilt and held that such doubt could not be resolved by the "natural advantages of the jury" because (relevantly) seeing and hearing the evidence of the admissions did not give the jury "any significant advantage in assessing their significance to the case" (J [124]-[125], [130]-[131]). Justice Fagan, in dissent, "listened to

short passages" of the first police interview and the telephone intercepts played during that interview (J [256]). His Honour identified that there was a "very marked difference" in the respondent's "tone and manner" between the telephone intercepts and the interview. In concluding that the verdict of guilty was open to the jury, Fagan J reasoned that it was "within the jury's province" to evaluate the "significantly different qualities" of the telephone intercepts and police interviews "when determining the weight to be given to the [respondent's] various admissions and assertions" (J [252], [255]-[257]).

5. The appeal to this Court raises the following issues:

   a. whether, by not listening to the telephone intercepts and not watching the police interviews, the majority of the CCA failed to conduct an independent assessment of the whole of the evidence in the manner and to the extent necessary to apply the test articulated in *M v The Queen* (1994) 181 CLR 487 (***M***);

   b. whether the majority of the CCA erred in concluding that the jury enjoyed no relevant or significant advantage in having seen and heard the evidence; and

   c. whether the majority of the CCA erred in its assessment of the circumstantial case against the respondent by proceeding on the basis that it was necessary for the respondent's admissions to be "reliable" to a particular standard before it would be open to the jury to view those admissions as a basis for drawing the ultimate inference of guilt beyond reasonable doubt.

Part III: Section 78B

6. The appellant does not consider that notices under s 78B of the *Judiciary Act 1903* (Cth) are required.

Part IV: Citation

7. The citation of the judgment of the CCA is *ZT v R* [2023] NSWCCA 241.

Part V: Statement of facts

8. In 2010, William Chaplin (**Chaplin**) was murdered by PW (PW) at PW's property in Gerogery, north of Albury. At the time of the murder, the respondent lived with PW and PW's wife, SW. PW, SW and the respondent disposed of Chaplin's body by placing it in a shallow grave in the property's "round yard" and burning it.

Chaplin's skeletal remains were found in 2019, following admissions made by PW to a fellow inmate while PW was incarcerated for unrelated offences (J [41], [51]).

9. The respondent was present with PW at the property at the time of the murder, and there was no dispute that he assisted PW to dispose of Chaplin's body (J [6], [148]). The issue was whether the respondent was a party to a joint criminal enterprise with PW to murder Chaplin (J [135], [157]).

10. The evidence established that the respondent, who was 16 years old at the time of Chaplin's murder, had a close relationship with PW and was under PW 's "thrall" (J [3], [17]-[18], [30]). There was evidence that the respondent had assisted PW in threatening violence against a friend of the respondent (J [29]). There was also an "entirely plausible" suggestion that PW maintained a sexual relationship with the respondent (J [36]). Justice Kirk accepted that the "unbalanced, probably abusive and fearful relationship between the [respondent] and PW renders plausible the allegation that the [respondent] was prepared to act under the direction of PW " (J [40]). Consistently with that position, the Crown case was that PW was the orchestrator of the murder (J [14]).

11. SW was not present on the night of the murder, having left the property after an argument with PW (J [19]). When she returned the following day, PW joked, in the presence of the respondent, about Chaplin's body "sunbaking". PW , in the presence of the respondent, showed SW Chaplin's body lying in the round yard (J [20], [23], [27], [161]-[162]). PW told SW that he had killed Chaplin because Chaplin had sexually interfered with their infant daughter (J [24], [163]).

12. The forensic evidence did not permit a conclusion as to the cause of Chaplin's death, but was consistent with Chaplin having been stabbed or hit (J [47], [48(5)]). SW gave evidence that, when she was shown Chaplin's body, she did not observe any damage or cutting to his neck or throat (J [22], [108]).

13. Accordingly, the witness and forensic evidence did not establish how Chaplin was murdered and did not directly implicate the respondent in the murder. There is no dispute that there would have been insufficient evidence to convict the respondent of Chaplin's murder in the absence of the respondent's admissions (J [50], [164]).

14. In 2019, after the police began an investigation into Chaplin's death, the respondent made a series of admissions in the course of telephone conversations with his family members and

with SW . The conversations were lawfully intercepted and recorded. It is useful to refer to four of those conversations.[1]

a. When discussing the police investigation with his mother, the respondent said: "yeah I killed him … [W]e found him one night touching [PW 's infant daughter] … so I took him out to the round yard and cut his throat and then we burnt the body". The respondent and his mother spoke of "sticking to the story" that the respondent was in Queensland at the time.[2]

b. When asked by his father whether Chaplin "deserve[d] to go missing", the respondent initially denied knowing "if he went missing" and then said "[h]e might of, ah, yeah. … he might have touched a kid, I don't know". Later in the same conversation, the respondent's father asked, "why did they go missing" and the respondent said "ah may have touched the wrong little girl … [and] was caught in the act". After first answering "no comment", the respondent agreed that he and "someone else made this person disappear".[3]

c. In a separate conversation, the respondent's father asked what the respondent's "involvement" was and the respondent said he was "involved" in "[t]he whole thing". The respondent agreed that he had "take[n] him out" and said he "cut his throat". At other points in the conversation, the respondent said that he didn't "know anything".[4]

d. Four days before his first interview with police, the respondent and his father spoke about the respondent "com[ing] forward". The respondent's father asked "[w]hat was your involvement in it", to which the respondent replied "[n]othing". The respondent also recalled that PW "said that he [Chaplin] moved out. That's all we knew". At other points, they discussed that the respondent was given "two choices" by PW "either fight and kill or you die". The respondent's father said that the respondent would "have to tell the coppers this". The respondent described PW pulling "a nine mill Glock on" him and insisting that he "[k]ill or be killed".[5]

15. The respondent was interviewed by police twice. At first, the respondent denied knowing that the deceased was missing or had been murdered (J [85], [221]). When challenged about this,

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[1] See also J [54]-[81], [165]-[218].
[2] J [54], [167]; Appellant's book of further material (**ABFM**) 20-21.
[3] J [62]-[63], [179], [181]; ABFM 221-228.
[4] J [68], [189]-[190]; ABFM 300-302.
[5] J [74]-[75], [209]-[211]; ABFM 429-437.

including by reference to things he had said in the telephone intercepts, the respondent said that PW had persuaded him to falsely claim responsibility for the murder (J [224]-[226]). Later in the same interview, the respondent said that he witnessed Chaplin being shot, but "didn't take part it in" (J [235]). In the second interview, after he had been charged, the respondent claimed that he had been "forced" to be involved in the killing (J [244], [246]). The respondent's various admissions in the police interviews were often inconsistent with one another, and a number of his statements were demonstrably false (see J [86]-[88], [243]). The respondent "progressively abandoned his attempts to distance himself from the killing" and thereby "varied the details by which he sought to put himself in a minimally culpable light" (J [251]).

Cases at trial

16. The Crown's case was that PW had "elicited the aid of his friend [the respondent] to help him kill William Chaplin" and that the respondent had helped him "willingly". It was expressly accepted, in opening, that "[t]he Crown [did] not know precisely when or how William Chaplin was murdered" (J [134]-[135]).

17. The Crown advanced a circumstantial case which relied on the nature of PW relationship with the respondent; the observations of SW upon her return to the property the day after the murder; and the admissions made by the respondent in the telephone intercepts, police interviews and otherwise (including telling a friend that he had helped PW "take care of some business" (J [28])). The direct evidence of SW was that the respondent had (at least) been involved in disposing of Chaplin's body. SW also gave evidence about the respondent's "demeanour" when PW joked about Chaplin "sunbaking" and showed her his body (J [23], [161]).[6]

18. In closing, the Crown identified "seven versions" of events described by the respondent in the telephone intercepts and police interviews (J [95]). It was accepted that some versions involved lies or were unlikely (J [96]). The Crown prosecutor drew attention to the respondent's "attempts to manufacture an exculpatory version" of events and ultimately submitted that, despite their inconsistencies, the accounts given by the respondent were

[6] See also trial transcript 10/11/21 at p 62.3-62.17 (describing the respondent's "normal demeanour") and 104.26 (describing the respondent as appearing "scared").

"powerful evidence of [his] direct involvement in the intentional killing" of Chaplin.[7] This submission was repeated in the summing up.[8]

19. The respondent did not give evidence at trial. Senior counsel for the respondent argued that the accounts the respondent gave in the telephone intercepts and police interviews were "totally unreliable",[9] "internally inconsistent", "contradictory" and "off at tangents",[10] containing a "litany of lies"[11] The respondent's case was that those accounts could not stand as admissions.[12] The respondent did not dispute that he was present at the time of the murder or that he assisted with the disposal of the body.[13]

20. The jury returned a verdict of guilty of murder (J [3]). The respondent was sentenced to imprisonment for 12 years, with a non-parole period of 8 years expiring on 4 September 2027.[14]

Appeal against conviction

21. The respondent sought leave to appeal to the CCA on the sole ground that the conviction was unsafe and unsatisfactory in that it was unreasonable and could not be supported by the evidence. The respondent argued that the CCA was in the same position as the jury to assess the telephone intercepts and police interviews and urged their Honours to "listen to the tapes" (at least if "that might make a difference").[15] In exchange with senior counsel for the respondent, Kirk JA expressed the view that listening to the telephone intercepts or watching the police interviews would be contrary to this Court's decision in *Pell v The Queen* (2020) 268 CLR 123 (***Pell***).[16]

22. The Crown addressed the CCA in relation to the respondent's tone in the telephone intercepts and the police interviews and emphasised the jury's advantage in that regard.[17] It did not take

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[7] See trial transcript 6/12/21 at p 396.41-396.50; see also J [98].
[8] Summing up 9/12/21 at p 72.
[9] See, for example, trial transcript 6/12/21 at p 402.8.
[10] Trial transcript 6/12/21 at p 414.15-414.19.
[11] Trial transcript 6/12/21 at p 402.38.
[12] Summing up 9/12/21 at p 74-75.
[13] See trial transcript 23/11/21 at pp 32.41, 34.37.
[14] *R v ZT* [2022] NSWSC 511.
[15] See respondent's 'Outline of Submissions' in the CCA at [30]; appeal transcript 11/8/23 at pp 14.42-14.44 and 15.9-15.11.
[16] Appeal transcript 11/8/23 at pp 14.49–15.14.
[17] See J [129]; appeal transcript 11/8/23 at pp 18.36–18.40, 21.1–21.10, 26.11–27.8.

an express position on whether the CCA was obliged to listen to the telephone intercepts or watch the police interviews.

23. As described above, the appeal was upheld by Kirk JA and Sweeney J, with Fagan J dissenting.

Part VI: Argument

24. It is settled in the authorities of this Court that the question an appellate court must ask, when determining an appeal against conviction on a ground of unreasonable verdict, is whether the court "thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty".[18] That question was correctly identified by the CCA (J [5]).

25. Two aspects of how an appellate court performs its function are significant in the present appeal:

a. *First*, the appellant court must conduct an "independent assessment of the whole of the evidence" and thereby "determine for itself whether the evidence was sufficient in nature and quality to eliminate any reasonable doubt that the accused is guilty".[19]

b. *Second*, "in answering" the question identified above, the appellate court "must pay full regard" to the considerations that "the jury is the body entrusted with the primary responsibility of determining guilt or innocence" and "the jury has had the benefit of having seen and heard the witnesses".[20] As this Court explained in *Dansie*,[21] "how those considerations are to impact on the court's independent assessment of the evidence" may be understood by reference to the following passage from *M*:[22]

> "It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains

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[18] *M* (1994) 181 CLR 487 at 493 per Mason CJ, Deane, Dawson and Toohey JJ; *Dansie v The Queen* (2022) 274 CLR 651 (***Dansie***) at [7]-[8]
[19] *M* (1994) 181 CLR 487 at 492 per Mason CJ, Deane, Dawson and Toohey JJ, and 525 per McHugh J; *SKA v The Queen* (2011) 243 CLR 400 (***SKA***) at [14] per French CJ, Gummow and Kiefel JJ; *Dansie* (2022) 274 CLR 651 at [7], [15].
[20] *M* (1994) 181 CLR 487 at 493 per Mason CJ, Deane, Dawson and Toohey JJ.
[21] (2022) 274 CLR 651 at [9].
[22] (1994) 181 CLR 487 at 494-495 per Mason CJ, Deane, Dawson and Toohey JJ.

> discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence."

26. Understood in this way, the majority in the CCA concluded, in effect, that this was a case in which "the evidence, upon the record itself" was so lacking – due to the unreliability of the respondent's admissions – that the jury ought to have experienced the doubt experienced by the majority.[23] The appellant submits that this conclusion was wrong. The majority's independent assessment of the evidence miscarried in two respects: it necessarily did not involve consideration of matters seen and heard in the recordings of the admissions, and it involved a piecemeal assessment of the circumstantial case against the respondent. The doubt experienced by the majority was a product of those errors. Further, by concluding that the jury enjoyed no relevant or significant advantage, the majority failed to "mak[e] full allowance for the advantages enjoyed by the jury". As Fagan J concluded, the doubt experienced by the majority was capable of resolution by the jury's advantage (J [255]-[257]).

Assessment of evidence of admissions

27. The telephone intercepts in which the respondent made the various admissions described above spanned nearly four hours, while the respondent's interviews with police spanned more than five hours (J [255]). The recordings of the telephone intercepts and the police interviews were adduced in evidence and played at the trial.[24] Transcripts of the recordings were provided to the jury as aids with an instruction that it was the recordings, not the transcripts, that constituted the evidence.[25]

28. Of this evidence, Kirk JA reasoned (J [128]):

> "The jury listened to the telephone intercepts and watched the two police interviews. I have not done so. However, I do not consider that any part of my reasoning depends in any material way on what impression would have been conveyed by what the jury heard and saw in that regard."

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[23] See also *Dansie* (2022) 274 CLR 651 at [13], referring to *Pell* (2020) 268 CLR 123.
[24] The telephone intercepts formed part of Exhibit 2. The interview recordings (ERISPs) formed parts of Exhibits 6 and 7.
[25] See, for example, trial transcript 10/11/21 at p 75.5-75.11; summing up 8/12/21 at pp 20-21.

29. In the present case, an independent assessment of the whole of the evidence could not be conducted, in the manner and to the extent necessary to apply the test articulated in *M*,[26] without reference to the recordings themselves. Without that opportunity to identify and consider "what impression would have been conveyed by what the jury heard and saw", the majority was not fully equipped to answer "the question of fact whether … it was open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty".[27]

30. The position stated by this Court in *SKA*,[28] and confirmed in *Pell*,[29] that appellate courts should "generally" not view a recording of a witness' evidence, or should do so only in an "exceptional" case, did not prevent the CCA listening to the telephone intercepts or watching the police interviews.[30] In *SKA*, the relevant evidence was a video recording of part (only) of the complainant's examination in chief and it was not an error for the CCA to decline to watch it.[31] In *Pell*, the Victorian Court of Appeal watched video-recordings of witnesses giving evidence at an earlier trial; those recordings were admitted in a second trial.[32] It was not argued that this was an appealable error.[33] Both cases are distinguishable from the present. An appellate court's function in assessing an exhibit is qualitatively different from its function with respect to witness testimony. The latter may be affected by the context, atmosphere or "feeling" of the trial.[34] By contrast, listening to or viewing an exhibit conveys the actual and complete evidence available to the jury in the relevant respect. For the same reason, the concern that an "undue focus" or "imbalance" may result from an appellate court viewing a recording of a witness's evidence does not arise in the same way with respect to an exhibit.[35] Indeed, rather than a concern that one part of a witness's evidence will be assessed on a different basis from the remainder, it would be odd and unprincipled for an exhibit comprising telephone intercepts or police interviews to be assessed on a different basis from other exhibits (such as, for example, closed-circuit television footage); that is, for the former to be assessed on a partial or limited basis through use of a transcript only.

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[26] (1994) 181 CLR 487 at 493 per Mason CJ, Deane, Dawson and Toohey JJ.
[27] *Dansie* (2022) 274 CLR 651 at [15].
[28] (2011) 243 CLR 400 at [31] per French CJ, Gummow and Kiefel JJ.
[29] (2020) 268 CLR 123 at [36].
[30] Cf appeal transcript 11/8/23 at pp 14.41–15.14.
[31] *SKA* (2011) 243 CLR 400 at [6], [26] per French CJ, Gummow and Kiefel JJ, [117] per Crennan J.
[32] *Pell* (2020) 268 CLR 123 at [5], [32]. At least with respect to the evidence of A (a complainant), the video recording was admitted as if its contents were direct testimony in the second trial.
[33] *Pell* (2020) 268 CLR 123 at [35].
[34] See *Fox v Percy* (2003) 214 CLR 118 at [23] per Gleeson CJ, Gummow and Kirby JJ.
[35] See *SKA* (2011) 243 CLR 400 at [29] per French CJ, Gummow and Kiefel JJ, [116] per Crennan J.

31. In any event, there was a "real forensic purpose" to the examination of the recordings of the respondent's admissions in the present case.[36] Having listened to part of the exhibits, Fagan J made findings regarding the respondent's "tone and manner" and the "significantly different qualities" of the conversations in which the admissions were made (J [256]-[257]). His Honour's findings demonstrate that there were matters which could have affected the majority's view of the evidence that could "only be discerned visually or by sound".[37] Without having examined the evidence, the majority was not in a position to disagree with those findings. In the circumstances, Fagan J was correct to conclude that (J [255]):

> "it is a necessary part of the Court's obligation to consider the entire trial record that sufficient of the phone conversations and of the police interviews should be listened to for the purpose of discerning whether there were characteristics of the ways in which the [respondent] spoke on each occasion that the jury could reasonably have taken into account in deciding which, if any, of his statements were reliable."

32. The appellant does not argue that, in every case, an independent assessment of the whole of the evidence will require an appellate court to examine each exhibit. What is required will depend on the facts and forensic issues in the case and the submissions of the parties.[38] Here, the meaning of the respondent's admissions, and what should be drawn from them, was the critical issue in the appeal. Resolution of that issue required reference to, and close scrutiny of, the evidence of the admissions, namely, the recordings.

33. Justice Kirk identified two related reasons for not listening to the telephone intercepts or watching the police interviews: first, that his Honour's reasoning did not depend on things that might have been seen and heard; and, second, that the jury had no relevant advantage in that regard. To the contrary, however, the majority's reasoning did depend upon matters that could not be judged on the basis of the transcript alone and that were properly within the province of the jury. It is useful to refer to three aspects of that reasoning.

34. *First*, the intended meaning of a number of the respondent's admissions was contested (cf J [126]). Resolution of that contest was apt to be assisted by observing the respondent's tone and manner, as well as the atmosphere of the relevant conversation. For example, in one of

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[36] *Pell* (2020) 268 CLR 123 at [36]. See also *SKA* (2011) 243 CLR 400 at [30]-[31], [35] per French CJ, Gummow and Kiefel JJ, [116] per Crennan J.
[37] *SKA* (2011) 243 CLR 400 AT [31] per French CJ, Gummow and Kiefel JJ.
[38] See generally *Dansie* (2022) 274 CLR 651 at [16].

the conversations between the respondent and his father (see [14.b] above), the following exchanges occurred:[39]

"Father	Did this cunt deserve to go missing?
[Respondent]	I don't know if he went missing dad. I couldn't tell you.
Father	Oh righto, oh well … if he deserved to go missing, well you know some people go missing … 'cause they deserve to go missing.
[Respondent]	He might of, ah, yeah. He might … Well he might, he might have touched a kid, I don't know.
…	
Father	You didn't, you didn't make person disappear did you?
[Respondent]	Um, no comment at this point in time.
Father	Yeah, yeah well if you, if you did help, was there, was there more involved in making person disappear?
[Respondent]	Yeah
Father	Oh there was a few people.
[Respondent]	There was one.
Father	One other?
[Respondent]	Yeah
Father	Right, you and someone else made this person disappear?
[Respondent]	Yeah."

35. There was no dispute as to the words spoken. But to say that a person went "missing" or was "made [to] disappear" can have very different complexions depending on context and presentation. As Fagan J reasoned, this exchange could be understood as referring euphemistically to Chaplin's murder. It was open to the jury to understand the respondent's acceptance that he "made this person disappear" as a clear acknowledgement that he participated in the murder (J [184]). Justice Kirk accepted that "the calls indicate that the [respondent] was involved in making the deceased 'disappear'", but rejected this as a "compelling admission to murder" on the basis that acceptance of a role in making a person disappear is also consistent with an admission to disposing of their body (J [64], [81]). Whether the respondent and his father were referring to Chaplin "go[ing] missing" and "disappear[ing]" in a suggestive or euphemistic way was plainly something that listening to

[39] J [179], [183]; ABFM 220-228.

the telephone intercept could elucidate. It was erroneous to deny that there was reason to listen to the telephone intercept and to deny that the jury had an advantage by having done so.

36. It involves too narrow a conception of the jury's advantage to describe it as confined to "doubting witness testimony" or, more generally, evaluating witnesses in the witness-box (cf J [127]). As this Court observed in *Pell*,[40] "[j]udges of courts of criminal appeal do not perform the same function in the same way as the jury, or with the same advantages that the jury brings to the discharge of its function". That observation applies equally to the subjective assessment of the intended meaning of the respondent's admissions in the present case; for example, the assessment of what the respondent meant when he agreed that he and one other person made Chaplin disappear. Such an assessment goes beyond interpreting words on the pages of a transcript. As also explained in *Pell*, the jury's advantage is both practical and "constitutional" in terms of the "demarcation between the province of the jury and the province of the appellate court".[41] In the least, the practical advantage of the jury in the present case was entrenched as a result of the majority's decision not to listen to the telephone intercepts or watch the police interviews. The proposition that the jury had no relevant advantage in this case cannot be accepted.

37. *Second*, at various points in the telephone intercepts, the respondent can be understood to be strategising and rehearsing false accounts of Chaplin's death so as to diminish his involvement in it. Both Kirk JA and Fagan J acknowledged this (see J [72], [200]). A clear example of the respondent suggestively rehearsing and coordinating an exculpatory falsehood can be seen in the following conversation with [redacted]:[42]

> "[Respondent] … I don't even know if it happened. … I honestly don't know if it actually happened or he took off.
>
> [redacted] You do know what happened because you were there with us that following day.
>
> [Respondent] Yeah, but I don't know what happened. Do you?
>
> [redacted] No, I …
>
> [Respondent] Catch my drift?
>
> [redacted] Hey?
>
> [Respondent] Catch my drift?

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[40] (2020) 268 CLR 123 at [37]. See also *Orreal v The Queen* (2021) 274 CLR 630 at [22] per Kiefel CJ and Keane J.
[41] (2020) 268 CLR 123 at [38].
[42] J [175]; ABFM 112.

[SW] Yeah. Yeah.

[Respondent] Yeah. I'm going with it."

38. In the assessment of Fagan J, there was a discernible pattern in the telephone intercepts whereby the respondent would admit or imply his participation in Chaplin's murder, but then indicate "the line of ignorance or exculpation that he would take with police if asked" (J [172]; see also [139]). For example, "yeah I witnessed the lot … But I don't know anything" (J [181]-[182]).

39. The respondent's attempts to identify and rehearse a plausible basis on which he could exculpate himself explain the incoherent and inconsistent details he articulated at various times. This can be seen starkly in conversations between the respondent and his father, in which the latter "appeared to coach" the former on various (inconsistent) defences that he might proffer to police (see [14.d] above).[43]

"Father … no, you got to throw it back to him. You knew nothing about it.

[Respondent] All we knew….

Father You were inside.

[Respondent] That's right. All we knew that fuckin' he moved out.

Father Yeah, he'd just gone. Yeah. That's right.

[Respondent] … [PW] said that he moved out. That's all we knew.

Father All right. Well, you're going to have to tell them, [ZT]."

"Father It wasn't your fault, mate. … he beat you up. He used to bash ya. He forced you to do shit … You know? That's it, tell'em that. … You haven't done the wrong thing. If anything, if you were forced.

[Respondent] Yeah.

Father Right? You were forced to do it.

[Respondent] All right.

Father You know? It's self defence.

[Respondent] I know."

"Father … You got to clean up and start again, you know? Just clean up. You're only young still.

[Respondent] Yes

[43] J [210], [213], [218]; ABFM 433-454 and ABFM 549-553.

Father	You were forced to do it?
[Respondent]	Yes
Father	If you didn't do it, you were gonna die.
[Respondent]	That's it.
Father	You feared for your life.
[Respondent]	I had no choice, dad.
Father	You feared for your life."

40. Ultimately, the respondent did provide similar versions to police in "stages of retreat" as he tried, unsuccessfully, to exculpate himself in the course of the police interviews (J [87], [243]).

41. An assessment of which admissions were mere rehearsals of false denials and which involved a genuine acknowledgement of the respondent's participation in the murder was not a function able to be performed by the CCA "in the same way as the jury".[44] Certainly that was the case in circumstances where only the majority proceeded on the basis of the transcripts alone. As Fagan J observed, at times in the telephone intercepts, the respondent was "reluctan[t] to answer … requests for further detail" and was "oblique and guarded" (J [191], [253]). At times, he expressed "concern about what his family would think of him if they knew everything" and "displayed anxiety about the police enquiries" (J [199]-[200]). The exploration of possible alibis and grounds of exculpation gave "authenticity to the [respondent's] admissions to both parents that he took part in the murder" (J [253]). These qualities provided a basis on which to distinguish genuine acknowledgements of involvement from mere boasting and fantasising. The jury was not bound to find that nothing could be taken from the respondent's admissions because he was entirely incapable of belief as a compulsive liar (cf J [116], [121]). Further, it cannot be assumed that the majority would have maintained that assessment if their Honours had the benefit of hearing and seeing the applicant's tone and manner when making the admissions.

42. *Third,* although couched in the language of "reliability", the majority appears to have formed a view as to the respondent's general credibility, or believability, on the basis of the transcripts of the telephone intercepts and police interviews. That view underlies the reasoning as to the respondent's "clear propensity", "tendency" and compulsion to fabulise and to "tell lies and fantasies with no apparent reason to do so" (J [79], [81], [116], [120]-[121]). Because the respondent's versions of events were "replete with falsehoods and lies", many of which the

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[44] *Pell* (2020) 268 CLR 123 at [37].

Crown accepted as such, the majority considered that it was unnecessary to listen to the telephone intercepts and watch the police interviews (J [128]). But that approach failed to engage with the Crown case that, despite those lies and inconsistencies in describing how the murder occurred, there was a fundamental admission of involvement. As Fagan J described the point (J [138]):

> "there was an essential consistent vein of admissions against interest in a number of the applicant's statements on the phone and in his second police interview to the effect that he did assist PW in some manner to kill William Chaplin pursuant to an agreement between them that they would do so in concert. The question is whether it was reasonably open to the jury to have drawn that vein of admissions from the applicant's phone calls and from his second police interview and to rely upon it as a fundamental acknowledgement that proved the Crown case against him, notwithstanding that the applicant also asserted particulars of his involvement in terms that were so variable and mutually inconsistent that they could not be relied upon."

43. To the extent the majority concluded that no "reliable admission to involvement" could be drawn from all or any of the respondent's statements because of his "clear propensity … to tell lies and fantasies" (J [121]), that involved a global assessment of the respondent's credibility that could not safely or appropriately have been made on the basis of the transcripts of the telephone intercepts and police interviews alone. Further, it was an assessment that fell squarely within the province of the jury, as a clear analogue to the jury's assessment of witness testimony (cf J [127]).

44. The aspects of the majority's reasoning discussed above indicate:

    a. the majority's reasoning depended on things that were only properly able to be seen and heard in the recordings (cf J [128]), such that the independent assessment of the whole of the evidence could not be conducted by reference to the transcripts alone; and

    b. it was incorrect for the majority to conclude that the jury's advantage in having seen and heard the recordings was slight, not relevant, or insignificant (cf J [125]-[127], [130]).

45. It is not submitted that the assessment of the respondent's admissions was a jury question beyond the scope of the independent assessment to be conducted by the CCA.[45] Rather, the appellant submits that the majority ought to have examined the exhibits comprising those admissions before conclusively determining whether it experienced a doubt as to the

[45] Cf *Dansie* (2022) 274 CLR 651 at [12]; *SKA* (2011) 243 CLR 400 at [18], [23] per French CJ, Gummow and Kiefel JJ.

respondent's guilt. Examining the exhibits would also have enabled the majority to appreciate the full extent of the jury's advantage, noting that the advantage of a jury over a court of criminal appeal varies from case to case.[46] In this case, the extent to which the respondent's tone and manner, and the qualities of each conversation, could inform an understanding of the intended meaning of the respondent's various admissions constituted the jury's critical advantage over the appeal court. Without listening to and watching the recordings, the majority could not know the significance of those matters. The divergence in approach between the majority and Fagan J as to whether to watch and listen to at least some of the recordings produced the result that different members of the CCA determined the appeal on the basis of different evidence. This represents a fundamental miscarriage of the CCA's task on the appeal.

46. Notwithstanding the requirement for the CCA to make an independent assessment of the evidence, the purpose of that assessment is not simply to ascertain the view of the CCA. As made clear in *M*, and again in *Dansie*, the "ultimate question" pertains to the jury's satisfaction.[47] It is only by having full regard to the "consideration that the jury is the body entrusted with the primary responsibility of determining guilt" as well as "the consideration that the jury has had the benefit of having seen and heard the witnesses" that the appellate court avoids substituting "trial by a court of appeal for trial by jury".[48] Those considerations must be given full effect "*in answering*" the question posed by *M*.[49] The joint judgment in *SKA* described the jury's role and advantage as the "*starting point* in the application of s 6(1) of the *Criminal Appeal Act 1912* (NSW)."[50]

47. Where a jury has seen and heard important evidence that the appellate court has not – as was the case here by reason of the majority not having listened to the telephone intercepts or watched the police interviews – the jury has a distinct advantage, and it is a "serious step" for the jury's verdict to be set aside on an unreasonableness ground.[51]

48. In additional, there are certain matters, or forms of reasoning, that, because of the "demarcation between the province of the jury and the province of the appellate court", give rise to a

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[46] *Dansie* (2022) 274 CLR 651 at [17].
[47] *M* (1994) 181 CLR 487 at 494-495 per Mason CJ, Deane, Dawson and Toohey JJ; *Dansie* (2022) 274 CLR 651 at [9].
[48] *M* (1994) 181 CLR 487 at 494 per Mason CJ, Deane, Dawson and Toohey JJ; *R v Baden-Clay* (2016) 258 CLR 308 (***Baden-Clay***) at [65]-[66].
[49] (1994) 181 CLR 487 at 493 per Mason CJ, Deane, Dawson and Toohey JJ (emphasis added).
[50] (2011) 243 CLR 400 at [13] per French CJ, Gummow and Kiefel JJ (emphasis added).
[51] *Baden-Clay* (2016) 258 CLR 308 at [65]; *Dansie* (2022) 274 CLR 651 at [14].

significant advantage on the part of the jury.[52] Quintessentially, the "assessment of the weight to be accorded to a witness' evidence by reference to the manner in which it was given" is the province of the jury.[53] The same analysis applies to the weight to be given to recorded admissions by reference to the manner in which they were made. In the present case, there was no acknowledgement by the majority of the critical fact that the admissions were assessed by the jury to be credible and reliable evidence inculpating the respondent.[54]

49. As explained in *Pell*, the jury's advantage is capable of resolving a doubt experienced by an appellate court not only for the practical reason that the jury saw and heard all of the evidence, but also because of the jury's role within its province "as representative of the community".[55] The majority's assessment that the jury had no relevant or significant advantage erroneously underestimated the jury's advantage in both respects. It follows that the basis for the conclusion that the doubt experienced by the majority was "not capable of being explained away by the natural advantages of the jury" was flawed (J [7], [131]).

50. For completeness, it is noted that although Sweeney J agreed with the reasoning of Kirk JA, her Honour also expressly adverted to the "jury's advantage" (J [266]). It may be assumed that the reasonable doubt experienced by Sweeney J was not resolved by the jury's advantage to which her Honour referred. But why that is so –whether the advantage was only slight (as Kirk JA reasoned) or whether the evidence contained such discrepancies and inadequacies that the Court was bound to intervene despite a relevant advantage on the part of the jury – is not explained by her Honour. The appellant's submissions have proceeded on the basis that the reasoning of Kirk JA represents that of a majority of the CCA in relation to why it was unnecessary to have regard to the recordings and why the jury had no relevant advantage in that respect. But it may be that there was no clear majority position in relation to the significance or otherwise of the jury's advantage or in relation to the evidence on which the appeal was to be determined. That is also a problematic basis for the respondent's acquittal.

51. In light of the nature of the evidence and the parties' arguments, it ought to have been apparent that the CCA could not properly discharge its function of determining the appeal without examining the exhibits comprising the admissions. The same remains apparent in this Court and is further supported by Fagan J's findings about what may be "discerned visually or by

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[52] *Pell* (2020) 268 CLR 123 at [38].
[53] *Pell* (2020) 268 CLR 123 at [38].
[54] Cf *Pell* (2020) 268 CLR 123 at [39]; see also at [119].
[55] *Pell* (2020) 268 CLR 123 at [37]-[38].

sound" from the exhibits.[56] However, if this Court doubts that "what the jury heard and saw" of the admissions was capable of affecting the determination of the appeal (cf J [128]), the appellant submits that it would be necessary for this Court to make its own assessment of the exhibits to determine whether the majority in the CCA erred in concluding that the jury enjoyed no relevant or significant advantage over the appeal court.[57]

Assessment of circumstantial case

52. The approach of the majority was to consider whether each aspect of the evidence against the respondent besides his admissions "directly inculpate[d] [him] as having been involved in the murder", as opposed to having been involved in disposing of Chaplin's body (see J [27], [30], [32], [33], [40], [50]). Turning to assess the evidence of the admissions (on the basis of the transcripts), the majority then analysed whether particular statements were consistent with the other evidence in the case (see, for example, J [55]) and whether the words used by the respondent in particular admissions were consistent only with an admission of guilt as to murder (see, for example, J [64]). The majority took the view that it was "for the Crown to establish beyond reasonable doubt that the admissions made were sufficiently reliable to establish guilt beyond reasonable doubt" (J [122]).

53. This process of reasoning had the effect of wrongly elevating one aspect of the Crown's circumstantial case and of imposing an additional requirement of reliability in respect of the admissions. The Crown did not need to prove the reliability of particular admissions beyond reasonable doubt, or to some other standard of sufficiency, before it was open to the jury to find that guilt was proven beyond reasonable doubt as part of the circumstantial case against the respondent.

54. Much of the majority's analysis of the admissions invoked a standard of sufficient reliability (J [1], [7], [121]-[122]). It was accepted that "but for" the evidence of SW and the "questions about reliability of the admissions", the intercepted telephone calls provided "compelling evidence suggesting the [respondent] was involved in the murder" (J [82]). Yet there was no dispute that the evidence of the respondent's admissions was reliable; the admissions had been lawfully recorded and admitted into evidence, following which their weight and probative value were matters for the jury.[58] The approach of the majority in

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[56] *SKA* (2011) 243 CLR 400 at [31] per French CJ, Gummow and Kiefel JJ.
[57] The appellant has made the recordings available to the Court's Registry.
[58] *Burns v R* (1975) 132 CLR 258 at 261 per Barwick CJ, Gibbs and Mason JJ.

seeking to "choose between the numerous different accounts given" by the respondent on the basis of the reliability or factual accuracy of those accounts was not correct (J [6]). It was not necessary that the Crown prove how Chaplin was murdered or prove that the respondent had, in any one of his various accounts, truthfully admitted how he was involved in the murder. The Crown case required, merely, acceptance to the criminal standard that the respondent participated in the killing with PW whatever the lethal acts might have been.

55. To evaluate each "version" seriatim depreciated the force of the circumstantial Crown case (see, for example, J [107], [109]). That particular admissions were of "suspect reliability" in respect of exactly how the respondent participated in the murder did not answer the question posed in *M* because it did not necessitate the conclusion that it was not reasonably open to the jury to be satisfied of guilt (J [123]). To make the critical assessment of the whole of the evidence through the lens of the reliability of each individual admission overlooked that it was open to the jury to accept, as proof of his guilt, the fundamental (and repeated) acknowledgments by the respondent that he was involved in the murder (J [137]-[138]). All the Crown was required to prove beyond reasonable doubt was that the respondent participated in a joint criminal enterprise with PW to murder the deceased. That did not involve, as a necessary first or additional step, that the Crown "establish beyond reasonable doubt that the admissions made were sufficiently reliable" (J [121]). It is the elements of the offence, rather than the evidence in support of the elements, that require proof beyond reasonable doubt.[59] It was erroneous to treat each admission as if it were indispensable to proof of the respondent's guilt.

56. To the extent the majority in the CCA otherwise addressed whether it was open to the jury to be satisfied of the respondent's guilt by reference to a fundamental acknowledgement in his statements and conduct of his involvement in the murder, a "concern" was expressed about "drawing such a generalised inference, where it appears to involve consciousness of guilt reasoning without seeking to meet the standard of such reasoning" (J [110]). An admission of guilt is direct evidence of a consciousness of guilt. An inference derived from the respondent's repeated admissions of involvement and participation was a proper basis on which to reason to guilt in the context of a circumstantial Crown case. As Fagan J concluded, "it was open to the jury in this case to accept as reliable the applicant's generalised admissions of having

[59] See *Director of Public Prosecutions v Benjamin Roder (a pseudonym)* [2024] HCA 15 at [19].

participated in the crime while rejecting many of his statements as to the detail of that involvement" (J [258]-[260]; see also [137]).

57. The majority's analysis of each category of evidence and each admission in terms of its support for the ultimate inference urged by the Crown was contrary to the principles that, in a circumstantial case, "it is impermissible to consider any piece of evidence in isolation from the whole" and "[a]ll of the circumstances established by the evidence [must] be considered and weighed" in the result, "not just some".[60]

Part VII: Orders sought

58. The appellant acknowledges that the proper application of the test articulated in *M* to the evidence adduced at the trial is quintessentially a matter for the CCA.[61]

59. The appellant seeks the following orders:

a. Appeal allowed.

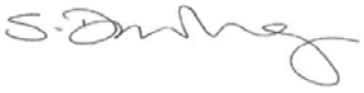
b. Set aside the orders made by the CCA on 29 September 2023.

c. Remit the matter to the CCA for determination according to law.

Part VIII: Estimate of oral argument

60. The appellant estimates that 2 hours will be required for the presentation of oral argument.

Dated: 2 May 2024



Sally Dowling SC
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Crown Chambers

The applicant is represented by the Solicitor for Public Prosecutions (NSW).

[60] See *Lang v The Queen* (2023) 413 ALR 389; 97 ALJR 758 at [251] per Jagot J (Kiefel CJ and Gageler J agreeing); *Baden-Clay* (2016) 258 CLR 308 at [77]; see also at [47].
[61] *Dansie* (2022) 274 CLR 651 at [39].