HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 21 Nov 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S38/2024
File Title:	The King v. ZT
Registry:	Sydney
Document filed:	Form 27E - Reply (Redacted for publication)
Filing party:	Appellant
Date filed:	21 Nov 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: THE KING
Appellant

and

ZT
Respondent

APPELLANT'S REPLY

Part I: Certification

1. This reply is in a form suitable for publication on the internet.

Part II: Reply to the argument of the respondent.

Assessment of evidence by appellate court

2. The respondent is critical of an argument which the appellant does not make. It is not the appellant's argument that appellate courts are, or should be, required, in every case, "to listen to and view all evidence in trial proceedings".[1]

3. Where, as here, the forensic issues and the submissions of the parties on an appeal against conviction on a ground of unreasonableness depend on consideration of an exhibit (or part thereof), an appellate court ought to assess the exhibit as part of its independent assessment of the whole of the evidence.[2] In this regard, the respondent does not distinguish between exhibits and witness testimony. The respondent does,

---

[1] Respondent's Submissions filed 30 May 2024 (**RS**) at [2]-[3], [21], [42]. See also Appellant's Submissions filed 2 May 2024 (**AS**) at [32].
[2] AS [30]; *SKA v The Queen* (2011) 243 CLR 400 (***SKA***) at [21], [31] per French CJ, Gummow and Kiefel JJ; *Dansie v The Queen* (2022) 274 CLR 651(***Dansie***) at [16]. See also *Fox v Percy* (2003) 214 CLR 118 at [23] per Gleeson CJ, Gummow and Kirby JJ.

however, accept that it may be appropriate for an appellate court to watch or listen to an exhibit where there is a real forensic purpose in doing so.[3] That was the case here.

4. The real forensic purpose of listening to and watching the exhibits that comprised the respondent's admissions was to permit the Court of Criminal Appeal (**CCA**) to assess:

   a. the intended meaning of the admissions by reference to the respondent's tone and manner and the atmosphere of the relevant conversation (AS [34]-[36]);

   b. whether, and which of, the admissions could be understood as the respondent rehearsing false denials and strategising exculpatory versions of events that could be recounted to police (AS [37]-[41]); and

   c. whether the respondent was so incredible as a compulsive liar and fantasist that nothing probative of a fact in issue could be drawn from his repeated admissions of involvement (AS [42]-[43]).

5. Having declined to consider the exhibits, the majority of the CCA was not fully equipped to discharge the appellate function as articulated in *M v The Queen* (1994) 181 CLR 487 (***M***) (AS [24]-[26]). By assessing the evidence of the respondent's admissions on a partial or limited basis through use of the transcripts only, the majority did not recognise, and could not "pay full regard" to, the jury's advantage,[4] and wrongly assumed that what could be seen and heard in the recordings of the admissions was incapable of impacting its reasoning.[5]

Jury's advantage

6. In this Court, the respondent supports the conclusion that the jury enjoyed "no advantage over the appeal court" (RS [2]).

7. The jury may not have undertaken a "tonal truth detection test" (RS [29]). But the assessment of the weight to be accorded to the respondent's various admissions by reference to the manner in which the admissions were made was properly a matter for the jury, including with the benefit of the jurors' subjective assessment of that evidence as representatives of the community.[6] The jury were directed, in the usual way, that

---

[3] RS [3]. See *Pell v The Queen* (2020) 268 CLR 123 (***Pell***) at [36].
[4] *M* (1994) 181 CLR 487 at 494 per Mason CJ, Deane, Dawson and Toohey JJ.
[5] See *ZT v R* [2023] NSWCCA 241 (**J**) at [128] per Kirk JA (Sweeney J agreeing).
[6] *Pell* (2020) 268 CLR 123 at [37]-[38]; see also at [49]; *Burns v R* (1975) 132 CLR 258 at 261 per Barwick CJ, Gibbs and Mason JJ. See AS [36].

they should bring to bear their "wisdom" as a "cross-section of the community", and their "individual qualities of reasoning… experience and … understanding of people and human affairs" when assessing the evidence.[7] The jury were further directed that drawing inferences from the evidence, ascribing weight to the evidence, and determining the honesty and reliability of things said in evidence, were matters for it as the tribunal of fact.[8] No specific instruction that the jury ought to consider tone and manner in the context of the respondent's admissions was required (cf RS [4]).[9]

8. Beyond this "constitutional" aspect of the jury's advantage,[10] the jury also had a practical advantage in the present case as a result of the majority's decision not to listen to the telephone intercepts or watch the police interviews (AS [36]). The natural limitations of an appellate court proceeding on the record are well-established. "[M]ere words … in cold type may have a different meaning and effect from that which they have when spoken in the witness box" or, here, on a recording, and "[a] look, a gesture, a tone or emphasis, or hesitation or an undue or unusual alacrity", when observed, may support "a signification in words actually used … that cannot be attributed to them as they appear in the mere reproduction in type".[11] Whether the respondent, through his admissions, was fantasising, "story telling" or "big noting" himself are the kinds of assessments that cannot safely be made on the basis of a transcript alone.[12] The respondent draws attention to statements made by the respondent's family about his truthfulness generally, and to the possibility that the respondent was affected by mental illness or drugs at the relevant time (RS [15]). Those points tend to highlight that questions were raised about the respondent's credibility and demeanour.

9. Plainly, the jury accepted that the respondent had admitted his participation in the murder, whatever the lethal acts as between him and PW [redacted] might have been.

---

[7] Summing-up Transcript 8/12/21 at 17-18 (Core Appeal Book (**CAB**) at 23-24); see also at 21 (CAB 27).
[8] Summing-up Transcript 8/12/21 at 9-12 (CAB 15-12).
[9] The trial judge did direct the jury that they should have regard to the recordings, rather than the transcripts, including, in respect of the police interviews, because "gestures or actions" by the respondent "or his appearance" "are not recorded in the written text": Summing-up Transcript 8/12/21 at 20-21 (CAB 26-27).
[10] *Pell* (2020) 268 CLR 123 at [38].
[11] *Fox v Percy* (2003) 214 CLR 118 at [68] per McHugh J, quoting *Dearman v Dearman* (1908) 7 CLR 549 at 561-562 per Isaacs J; see also at [23]-[25], [30]-[31] per Gleeson CJ, Gummow and Kirby JJ, cf at [131]-[132] per Callinan J. See generally *Baini v The Queen* (2012) 246 CLR 469 at [29] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; *Awad v The Queen* (2022) 275 CLR 421 at [28] per Kiefel CJ and Gleeson J, [78] per Gordon and Edelman JJ.
[12] See J [71] , [114], [116] per Kirk JA (Sweeney J agreeing) (CAB 172, 184-185), cf at [199], [253] per Fagan J (CAB 216, 239).

The majority failed to have regard to the jury's assessment of the exhibits as credible and reliable as an admission to murder.[13] Moreover, without listening to and watching the recorded admissions, the majority could not have known the significance to the jury's assessment of the respondent's tone and manner and the qualities of each conversation. Especially in the face of Fagan J's findings, by reference to the exhibits, that the jury's advantage in having seen and heard the recordings was capable of resolving any doubt felt by the appellate court,[14] it was erroneous for the majority to conclude, without reference to the exhibits, that the jury had no advantage.

Reliability of admissions

10. The respondent contends that the majority did not reason by applying "a particular standard of reliability to the admissions", but instead applied the criminal standard of proof (RS [8]). In the appellant's submission, the majority fell into error by requiring proof beyond reasonable doubt of the evidence in support of the elements of the offence, rather than proof beyond reasonable doubt of the elements themselves. This led the majority to reason that it was "for the Crown to establish beyond reasonable doubt that the admissions made were sufficiently reliable to establish guilt beyond reasonable doubt" (CAB 187 J [122]).

11. It may be accepted that many of the respondent's descriptions of the manner in which the murder occurred were likely to be untrue and, thus, those descriptions were of "suspect reliability".[15] But it was not necessary for the Crown to prove how the murder occurred or to prove that one of the admissions truthfully and accurately stated how the respondent was involved in the murder (AS [52]-[54]). Thus, the unreliability of particular admissions in that regard did not necessitate the conclusion that the verdict was unreasonable. It was open to the jury to be satisfied beyond reasonable doubt that the respondent was guilty on the basis that there no reasonable explanation for the respondent's repeated admissions of involvement other than that he participated in the killing with PW

12. Further, the majority, and the respondent, accepted that the admissions were reliable as evidence of the respondent's involvement in disposing of the deceased's body.[16]

---

[13] See *Pell* (2020) 268 CLR 123 at [39].
[14] See J [255] (CAB 240).
[15] J [123], [128]-[129] per Kirk JA (Sweeney J agreeing) (CAB 187-188); RS [25].
[16] J [64], [106], [123] (CAB 169, 182, 187); RS [15].

Put another way, despite the respondent's conflicting accounts and various falsehoods in the telephone intercepts and police interviews, there was no dispute that he truthfully admitted his involvement in the relevant events to the extent of his being an accessory after the fact. That being the position, it was a "short further step" for the jury to conclude that the admissions, as part of the circumstantial case against the respondent, were evidence of his participation in the murder.[17] The consistency of the respondent's fundamental acknowledgement of participation with uncontested facts – such as the respondent's actions in assisting to dispose of the body or his presence at the property at the time of the murder (AS [9]) – strongly supported the ultimate inference urged by the Crown.

13. The majority's focus on the reliability or accuracy of each version of events given by the respondent inflated the importance of the mechanism of death in circumstances where those details did not need to be established beyond reasonable doubt. That wrongly depreciated the force of the Crown case on the whole of the evidence (AS [56]-[57]).

Dated: 20 June 2024



Sally Dowling SC
Director of Public Prosecutions
EAODPP@odpp.nsw.gov.au
(02) 9285 8888

Eleanor Jones
Sixth Floor
ejones@sixthfloor.com.au
(02) 8915 2686

Jeremy Styles
Crown Chambers
JStyles@odpp.nsw.gov.au
(02) 9285 8606

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

[17] J [148], [258]-[260] (CAB 195, 241).