HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S38/2024
File Title:	The King v. ZT
Registry:	Sydney
Document filed:	Form 27F - Respondent's outline of oral argument (Redacted fc
Filing party:	Respondent
Date filed:	21 Nov 2024

Important Information

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **THE KING**

Appellant

and

ZT

Respondent

RESPONDENT'S

OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline of oral submissions is in a form suitable for publication on the internet. The identities of the Respondent ZT and of certain witnesses (who are identified only by initials) are protected by s 15A of the *Children (Criminal Proceedings) Act 1987* (NSW).

Part II: Propositions to be advanced in oral argument

2. The majority in the Court of Criminal Appeal per Kirk JA and Sweeney J applied themselves appropriately according to the test in *M v The Queen* (1994) 181 CLR 487 at [494] – [495] per Mason CJ, Deane, Dawson and Toohey JJ concluding they had a reasonable doubt about the guilt of the Respondent because after a comprehensive review of the evidence and in particular the alleged admissions in the telephone intercepts and the two police interviews, individually and collectively, and in light of all the other evidence, they determined "the evidence lacks credibility for reasons which were not explained by the manner in which it was given." As to which see also *Dansie v The Queen* (2022) 274 CLR 651 at [9]-[17].

3. The majority comprehensively examined the record of the evidence at trial, and notwithstanding the jury having heard and/or watched the telephone intercept and police interview material, that by reason of the unreliability demonstrated objectively in the transcripts of that material, because of various untruths, inconsistencies and other inadequacies, viewed individually and collectively in light of all the other evidence, determined that they were satisfied that the jury, acting rationally, ought

nonetheless to have entertained a reasonable doubt as to the proof of guilt: as per the exercise of the required function confirmed in *Pell v The Queen* (2020) 268 CLR 123 at [39]. Also refer to *Hofer v The Queen* [2021] 274 CLR 351 per Kiefel CJ, Keane and Gleeson JJ at [61], [62] and [71], Gageler J, as he then was, at [81] and [93] and Gordon J at [125], [133], [135] and [140] – [141].

4. The majority applied themselves by reference to the applicable test with respect to a wholly circumstantial case, which in the context of the subject case required a careful consideration of the elements of joint criminal enterprise, or at a minimum, extended joint criminal enterprise murder, and determined that the prosecution had failed to exclude an inference consistent with innocence that was reasonably open, being that the Respondent's admissions were otherwise consistent with him being guilty of an involvement in the murder as an accessory after the fact, which was a fact corroborated by the independent and reliable evidence of SW [redacted]. This was the correct approach in a circumstantial case as determined by this court in *Lang v The Queen* [2023] HCA 29 per Gordon and Edelman JJ at [142] – [143]; and per Jagot J (Kiefel CJ and Gageler, then J, now CJ agreeing) at [250] – [251]; and *Dansie v The Queen* (2022) 274 CLR 651 at [30] – [38].

5. The majority also applied itself to the relevant test to be applied to consciousness of guilt reasoning with respect to the lies in the admissions individually, collectively, and/or by the asserted deceitful course of conduct which allegedly involved a strategy of adopting the most effective false story of the Respondent's innocent involvement in the murder, or lack thereof, to be provided to the police, by reference to *Edwards v The Queen* (1993) 178 CLR 193 at [209] per Deane, Dawson and Gaudron JJ at [10], as cited in *Lang v The Queen* per Gordon and Edelman JJ at [166]. The majority again performed this analysis by reference to a careful consideration of the elements of joint criminal enterprise, or at a minimum, extended joint criminal enterprise murder.

6. It is submitted that the Appellant's approach to this appeal, consistent with the approach of Fagan J in the CCA, is to argue that an inference is available from the admissions that the Respondent, only alleged to be a minor participant, was admitting therein to being complicit in a joint criminal enterprise murder on a generalised (basal) basis, without any relevant analysis of the requisite elements or the application of the principles required to be applied in a circumstantial case.

7. Further, it is submitted, to approach such a task in the way argued in the circumstances of this case involves speculation as to what inferences are logically

available from the asserted admissions, lies individually, collectively, and/or the asserted deceitful course of conduct with respect to the necessary elements of joint criminal enterprise, or at a minimum extended joint criminal enterprise murder and which also excludes that the Respondent was only otherwise involved as an accessory after the fact.

8. This is not a "single - actor" type case, such as in *Lang* and *Dansie,* where the jury had to differentiate between the accused's culpability for murder when suicide or accident was an alternative hypothesis. The Crown case here was that PW murdered the deceased and that the Respondent was at least involved in an extended joint criminal enterprise to murder. The Crown had to exclude that the Respondent was speaking of his involvement in a lesser offence.

9. Neither the Appellant nor Fagan J identified any "natural advantage" of the jury, such as a particular tone that would assist in the interpretation of admissions over and above what was apparent from the written transcript. Fagan J's analysis involving discovering the "truth woven into them", arose from an analysis of the transcript rather than the way things were said. References to the Respondent speaking in a "guarded" or "restrained" way arise from the written transcript rather than analysis of tone or inflection. Equally a finding that a particular phraseology could euphemistically refer to murder arises from the written transcript rather than how the words were physically said.

10. The effect of the Appellant's argument will be to impose on intermediate appellate courts the obligation to regularly be required to listen and/or watch all electronic evidence and decide whether to do so for themselves as that was not a course urged upon the CCA by the Appellant.

Dated:15 November 2024

David Dalton SC
Maurice Byers Chambers
Counsel for the Respondent.

Paul Coady SC
Public Defender
Counsel for the Respondent.

The Respondent is represented by Nyman Gibson Miralis.