HIGH COURT OF AUSTRALIA

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Form 27D – Respondent's submissions

IN THE HIGH COURT OF AUSTRALIA
S38/2024
SYDNEY REGISTRY

BETWEEN:

THE KING
Appellant

and

ZT
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. These submissions are 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: Concise statement of issues

2. The majority of the NSW Court of Criminal Appeal did not err in concluding that the jury enjoyed no advantage over the appeal court. *M v The Queen* (1994) 181 CLR 487 and *Pell v The Queen* (2020) 268 CLR 123 do not *require* an appeal court to view or listen to evidence, which is implied by and the necessary endpoint to the Appellant's submissions.

3. There may be exceptional cases where there is a real forensic purpose behind doing so.[1] To require an appeal court to do so would be to duplicate the function of the jury.[2] This is not an appeal court's role.

4. There was no significant advantage enjoyed by the jury in the circumstances of this case. The Crown at trial did not argue any weight should be attached to the manner or tone of the Respondent's conversations in the intercepted telephone calls and in the

[1] *Pell* [36].
[2] *Pell* [37].

recorded police interviews. The trial judge did not mention this issue in the summing up as being part of the Crown case and no re-direction was sought by the Crown Prosecutor. The Crown on the appeal to the Court of Criminal Appeal did not submit that the Court should listen and/or watch this material to consider the appeal in the performance of the independent assessment in accordance with the test articulated in *M v The Queen.* Defence counsel suggested the material could be listened to "if there is a concern that that might make a difference in relation to the determination of this appeal…",[3] but did not otherwise pursue this.

5. Other than generalised references to the Respondent's "tone and manner" (Appellant's Submissions (AS) [34], [41][45]) the Appellant does not identify any real forensic purpose behind the asserted need for the majority of the Court of Criminal Appeal to have listened to the recordings.

6. Conversely to the Appellant's submissions, the majority of the New South Wales Court of Criminal Appeal (CCA) (J) per Kirk JA and Sweeney J, applied well established principles to the facts and circumstances of this case.

7. The Judgment of Kirk JA, with which Sweeney J agreed, logically demonstrated why the alleged admissions relied upon by the Crown in the telephone intercepts were unreliable and why the listening to and/or watching same would provide no relevant advantage.

8. The majority did not reason by applying a particular standard of reliability to the admissions before determining whether it was open to a jury to view those admissions as establishing guilt. Rather they reasoned in accordance with the requisite criminal onus and standard of proof and found that the admissions were not sufficiently reliable to prove beyond reasonable doubt that there was some agreement between the principal (PW [redacted]) and the Respondent that they would at least assault the deceased with the Respondent present which was the essential minimum pre-condition to the Crown's case regarding murder (CAB 166, J [50]; CAB 184, J [111]; and CAB 186, J [121]).

[3] Transcript of Court of Criminal Appeal hearing, 11 August 2023 T 14.39 – 15.10. Respondents Book of Further Material (RBFM) pg 127 – 128.

Part III: Section 78B

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

Part IV: A brief statement of the factual issues in contention

10. There was not a great deal of contention as to the factual scenario as opposed to what inferences and ultimately what findings beyond reasonable doubt could be drawn from the facts. It was not in contest that PW murdered the deceased and that he had previously admitted to three witnesses that he, without mention of the Respondent, was responsible for the deceased's murder (per Kirk JA at CAB 156-157, J [6]; and CAB 157-158, J [9]-[14]; per Fagan J at CAB 242, J [261]-[263]).

11. Further it was not in contest that the Respondent was recorded on telephone conversations with family members discussing his role in the murder, including, on one version, that he had cut the deceased's throat (CAB 167, J [54]). This was inconsistent with other evidence in the trial (CAB 160, J [22]).

12. For example, with respect to SW 's observations of the deceased's neck, her evidence in this regard was referred to by Kirk JA (CAB 160, J [22]) to the effect that SW :

"*confirmed in cross-examination that she had earlier told police she was positive she saw no cuts to the throat. She had told the police that she was sure that if the deceased's throat had been cut she would have seen it*." (also referred to at CAB 183, J [108]).

13. The evidence of SW indicated that the Respondent was involved in moving and then disposing of the body. Also, that the Respondent was present when she came home after the murder, and implicitly, seemed to know about it. Both she and the Respondent were threatened by PW to the effect that if either of them said anything about the murder PW was likely to kill them (per Kirk JA at CAB 156, J [6]; CAB 159-161, J [16]-[27]; and CAB 165-166, J [48]).

14. Further, it was uncontroversial that none of the witness evidence, including the forensic evidence, pointed in any material way to a conclusion that the Respondent was a party to the murder and the case against him with respect to murder was entirely

founded on admissions he made in the intercepted phone calls and in the two interviews conducted with the investigating police (per Kirk JA CAB 166, J [49]-[50]; and per Fagan J at CAB 200, J [164]).

Cases at trial

15. The Crown case was that PW [redacted] had a strong motive to kill the deceased and that the Respondent joined an agreement to injure or kill him. The Respondent was 16 years old at the time of the deceased's death, PW [redacted] was 39. The Respondent was, on both the Crown and Defence case, involved with the moving and burning of the deceased's body with SW [redacted]. The Respondent made several statements on recorded phone calls that inculpated him in the deceased's murder but many of those statements were inconsistent with other evidence in the trial and could not have been true. He made other statements both on telephone calls and to police that were later disproved. Both family members (on the telephone calls) and interviewing police (in recorded interviews) expressed their own doubts about the Respondent's various accounts that he gave as well as the comments by his family regarding his general practice of lying. Interviewing police expressed caution with the Respondent's answers in his recorded interviews to the extent he was asked whether he suffered from mental illnesses such as schizophrenia.[4] He admitted in the interview to taking ice just before the interview and not having slept for four days.[5] The officer in charge and the principal interviewing officer gave evidence that nothing the Respondent said could be believed without corroboration; this evidence was relied on by both Crown and Defence representatives during closing addresses.[6]

16. Kirk JA, after summarising statements made by the Respondent that appeared not to be true and where there was no apparent reason for him to have lied, stated this was "…suggestive of someone who is either or both a compulsive liar or a fantasist". (CAB 185, J [116]).

Appeal against conviction

17. The majority of the Court of Criminal Appeal (Kirk JA CAB 157, J [7]; Sweeney J CAB 243, J [266]) concluded that there was a reasonable doubt as to the

[4] Record of Interview between ZT and Police, 05/09/2019, Q.524 – Q.527 Appellant's Book of Further Materials (ABFM) pg 656.
[5] Record of interview between ZT and Police, 05/09/2019, Q.529 – Q.532 ABFM p.657
[6] Crown Closing, T 382.4, RBFM pg 22; Defence Closing T 436.43; RBFM pg 76.

Respondent's guilt of the murder charge and acquitted him. This was on the basis that outside of the listening device and recorded interview material, the evidence against the Respondent was either neutral or exculpatory as to his involvement. Further the recorded material was of such suspect reliability that the Crown case could not be made out (Kirk JA CAB 187, J [123]).

18. Kirk JA considered that "Consistently with the Crown case, I regard the versions of events given by the [Respondent] as replete with falsehoods and lies. I do not see how watching the interviews would be likely to alter that conclusion" (Kirk JA CAB 188, J [128]). In relation to the telephone intercepts his Honour stated: "…there is no dispute that much of what he said on those calls was probably not true including, critically, his core admissions to his parents of having cut the throat of the deceased." (Kirk JA CAB 188-189, J [130]).

Part V: Statement of Argument

19. The majority's approach complies with that of *M v The Queen*, that is, the majority undertook an independent assessment of the whole of the evidence and concluded that it was not open for the jury to be satisfied the Respondent was guilty beyond a reasonable doubt.

20. There is nothing exceptionable about the approach taken by the majority. It accords with this Court's approach in *M v The Queen*, *Pell*[7] and *Dansie*[8]. There is no advantage identified, in either the majority decision or Fagan J's decision, in the jury having seen or heard the electronic evidence, in the face of the Respondent's established unreliability. The majority's approach did not miscarry due to any failure to consider the recordings as, much like Fagan J's approach, the conclusion could be reached on transcripts. There was no "piecemeal assessment of the circumstantial case against the respondent" (cf Appellant's submissions (AS [26])). Fagan J did not set out what it was about the brief periods of material that he listened to that could have provided such an advantage to the jury, other than differences in the Respondent's "tone and manner" (CAB 240, J [256]) and that the recorded phone calls and the police interviews had "significantly different qualities." (CAB 240, J [257]).

[7] *Pell (2020)* 268 CLR 123
[8] *Dansie (2022)* 274 CLR 651

Certainly, Fagan J did not explain how the tone and manner of the Respondent's comments in the calls or interviews logically justified an interpretation demonstrating involvement or admission as to the elements of murder as opposed to being an accessory after the fact. Rather, it is submitted that Fagan J charted a course through the calls and interviews, accepting some statements of the Respondent and rejecting others, that his Honour held to be demonstrative of guilt.

21. The practical effect of upholding the Appellant's appeal, in remitting the matter to the Court of Criminal Appeal to listen to the electronic material, will be contrary to established authority relating to the role of appellate courts. Further it will cause all appeal courts to consider all electronic material in future matters, a matter that is again, contrary to this Court's approach in *Pell* and *Dansie*.

The majority's reasoned approach as to why there was no relevant advantage in listening and/or watching the electronic exhibits, per Kirk JA.

22. The Crown at trial identified seven variations of the Respondent's involvement as described by him in the telephone conversations and the police interviews, five of which, including those that stemmed from the telephone calls, the Crown contended were probably lies (CAB 178-179, J [95]-[96]). The Crown sought to arbitrarily rely, without any explained justification, upon the fourth and seventh variations repeated in (CAB 179-180, J [97]) as follows:

> *"*[redacted] *had told the accused that he had caught [the deceased] sexually interfering with ... his daughter.* [redacted] *told the accused that [the deceased] "had got to go".* [redacted] *must have told [the applicant] what he was going to do to [the deceased] because, although [the applicant] told police he had nothing to do with [the deceased]'s murder, he said, "I knew what was going to happen." That, the Crown says, is [the applicant] telling the police that he knew that [the deceased] was going to be killed.*
>
> [redacted] *offered him choices; leave, take part or end up with [the deceased]. [The applicant] had heard* [redacted] *and [the deceased] arguing in the house. [The applicant] chose to take part.* [redacted] *told [the applicant] to go to the shed, get some fishing line and then wait for him and [the deceased] in the round yard. He was to sit on the tyres and he was to wait. That's what he did. He went to the round yard, got on the tyres and waited.*

When PW [redacted] *and [the deceased] arrived, when he was told to do so [the applicant] jumped from where he'd been sitting and took [the deceased] to the ground so that* PW [redacted] *could stab him."*

23. In this regard Kirk JA observed at (CAB 180-181, J [100]-[103]):

100. " The applicant submitted to this Court that the Crown had arbitrarily, in the absence of evidentiary support, combined the fourth and seventh versions and presented it as accurately describing the applicant's involvement in the deceased's murder. There is force in this submission.

101. It is significant that the fourth and seventh versions arose out of the two police interviews. As explained above, what was said in those interviews would not readily be accepted as reliable. Senior counsel appearing for the Crown on appeal sought to put the case at a higher level of generality than focusing on these various versions, noting that it was not necessary to identify the manner in which the murder was carried out. Accepting that, it remains the case that the Crown case is founded on the admissions of the applicant. What must be found in those admissions is evidence sufficient to prove beyond reasonable doubt that there was some agreement between PW [redacted] *and the applicant that they would at the least assault the deceased, with the applicant being present during the murder.*

102. The Crown also put the following to the jury:

> *If you accept any of the versions that include [the applicant] being in the round yard with* PW [redacted]*, then you would find that there was an agreement between he and* PW [redacted] *to kill, to inflict grievous bodily harm or to seriously assault [the deceased]. After all, what was [the applicant] doing in the round yard if not going along with what* PW [redacted] *asked him to do?*

103. This submission, too, is problematic. There was certainly evidence that the applicant was potentially under the influence of PW [redacted]*. If it was found that the applicant was present when the deceased was killed, that gives some basis for arguing that there may have been an agreement between them. But it is certainly not conclusive of it. The applicant may have been directed by* PW [redacted] *to have been present. The applicant may have stood by whilst the brutal act was done. Those facts of themselves would not suffice to make him a party to the murder. They do not*

establish that he knew what was going to occur, let alone that he had agreement to participate in (at least) an assault."

24. Further, thereafter his Honour addressed the reliability of the admissions and observed at (CAB 183-184, J [110]-[111]):

110. "The Crown submitted both below and on appeal that it was open to the jury to find that the various accounts given by the applicant "taken as a whole, despite the inconsistencies, were 'powerful evidence of the accused's direct involvement in the intentional killing of [the deceased]'". This submission seems to invite the drawing of some generalised inference that taken together the various admissions manifest his participation in the murder. I have some concern about drawing such a generalised inference, which it appears to involve consciousness of guilt reasoning without seeking to meet the standard of such reasoning.

111. In any event, the argument still relies on the admissions of the applicant being reliable to the extent of indicating his involvement in the murder by indicating that there was some agreement between PW [redacted] *and the applicant that they would at the least assault the deceased with the applicant present. I have significant doubts about their reliability."*

25. His Honour detailed why various of the admissions were untrue by reference to the evidence (CAB 183, J [107]-[109] and CAB 184, J [112]) and the evidence that was suggestive of the Respondent being either or both a compulsive liar or a fantasist (CAB 184-186, J [113]-[120]) ultimately finding in this regard that the admissions were not reliable enough to found a solid conclusion that the Respondent was involved in the murder in the manner alleged (CAB 186-189, J [121]- [131]). His Honour's conclusion in this respect was based upon a logical analysis of things said by reference to the other available evidence. In particular, regard to the Appellant's argument that the majority should have found the jury had an advantage in listening to the audio material was dealt with by his Honour at (CAB 188-189, J [127]-[131]):

"127. None of my reasoning turns on doubting witness testimony in a manner inconsistent with the Crown case. The jury had no relevant advantage, thus, in that respect.

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. Consistently with the Crown case, I regard the versions of events given by the applicant in the ERISPs as replete with falsehoods and lies. I do not see how watching the interviews would be likely to alter that conclusion.

129. As regards the phone intercepts the Crown made the following submission to this Court:

> *[W]ith the benefit of considering all of the evidence of listening to the tone of his voice when he said certain things and he said other things. I mean, one of the things the mother says to him that's interesting is that she's almost sort of accused him of kind of being dramatic and so forth. And that would be a classic example of where the advantage that the jury had would come in. Because the tone of voice, for example, when he's talking about making somebody disappear and he's even being quite sort of restrained in the way that he's talking. It would be open for them to say, "Well look at times he gets into this sort of mode where he's bragging.*

130. Yet there is no dispute that much of what he said on those calls was probably not true including, critically, his core admissions to his parents of having cut the throat of the deceased. The Crown did not suggest to the jury that that claim should be regarded as bragging and it would be perverse to regard it as such. As to the point about the mother suggesting the applicant was being dramatic, to the extent that has any relevance to my conclusion it relates to the tendency of the applicant to tell stories and lies. I have set out a series of examples of that above. My examples are consistent with how the Crown put the case at trial. And the mother's evidence in cross-examination that the applicant had always been prone to making up stories, twisting the truth and telling lies was not challenged in re-examination. I do not consider that listening to the intercepts gave the jury any significant advantage in assessing their significant to the case.

131. In sum, the admissions made by the applicant – on which the Crown case depends – are not reliable enough to found a solid conclusion that he was involved in the murder in the manner alleged. My view is not capable of being explained away by the natural advantages of the jury. I do not think it was reasonably open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. There is a significant possibility that the applicant is innocent of the offence charged. Given that

conclusion, he is entitled to be acquitted of the murder charge."

The reasoning of Fagan J in dissent

26. The determination of the majority turned upon the lack of reliability of the admissions and the application of settled principles as to the proper approach to admissions and/or lies relied upon as consciousness of guilt of the charged offence (CAB 178-187, J [95]-[121]). While Fagan J in dissent found that, despite the Crown's position at trial that the Respondent's admission to his mother that he had cut the victim's throat was probably untrue because of SW [redacted]'s evidence that she had seen no injury to the deceased's throat, that the jury were in any event entitled to prefer the Respondent's admission to his mother in this regard (CAB 202, J [169]).

27. Further, Fagan J found that even if the jury were left with a doubt about the specifics of the Respondent claiming to have cut the deceased's throat, it was still open to them to rely upon what he told his mother as an admission of active participation in the killing (CAB 202, J [169]). Fagan J adopted this reasoning with respect to the various admissions which were otherwise found to be inconsistent and unreliable in their detail in the various recorded telephone conversations and the two interviews with the police to the effect that even though they may be unreliable in their detail they still could be used in a generalised way as constituting admissions to being involved in the murder of the deceased by way of a pre-agreement with PW [redacted] to kill the victim and/or at least to assault him and have the relevant foresight for extended joint criminal enterprise (CAB 202, J [169]; CAB 204, J [172]; CAB 208, J [180]; CAB 209-210, J [182] and [184]; CAB 211, J [187]; CAB 213, J [191]; CAB 214, J [194]; CAB 216-217, J [199]-[200]; CAB 222, J [212]; CAB 223, J [214]; CAB 225-226, J [219]-[220]; CAB 237-239, J [248]-[254]; and CAB 241, J [258]-[260]).

28. Clearly, the majority disagreed with Fagan J, and it is submitted Kirk JA and Sweeney J agreeing applied the well-established principles mandated in *M v The Queen*, *Pell v The Queen* and recently re-stated in *Dansie v The Queen*.

Argument

29. The Appellant complains the majority has erred in failing to listen to the tapes of the relevant recorded telephone calls and recorded police interviews. It is submitted, it is implausible to expect anyone to somehow determine that an accused, while accepted to be giving inconsistent, unreliable and/or false statements about the details of

relevant events, yet by their tone of voice can otherwise be reliably admitting to the necessary elements of murder. This would require something akin to a tonal truth detection test to be exercised upon a series of statements that were accepted by both parties to be inconsistent, unreliable and/or most likely false in their details, rather than a factual assessment of the evidence.

30. Relevantly, it was held in *Pell v The Queen* at [35]-[39]:

35. "In this Court, the applicant maintained the position that it was unnecessary and undesirable for the members of the Court of Appeal to have watched the recordings of any of the witnesses. Nevertheless, the applicant was not disposed to contend that the course taken by the Court of Appeal was itself an appealable error. The respondent maintained the position that the existence of the recordings was enough to make it "appropriate" for them to be watched by the Court of Appeal.

36. The position maintained by the respondent is not one that should generally be adopted by courts of criminal appeal. In SKA , French CJ, Gummow and Kiefel JJ rejected the suggestion that the mere availability of a video-recording of a witness' evidence at trial meant that the proper discharge of the function of the appellate court, to make its independent assessment of the evidence, necessitated a viewing of the recording. There may be cases where there is something particular in the video-recording that is apt to affect an appellate court's assessment of the evidence, which can only be discerned visually or by sound. In such cases, there will be a real forensic purpose to the appellate court's examination of the video-recording. But such cases will be exceptional, and ordinarily it would be expected that the forensic purpose that justifies such a course will be adopted by the parties, rather than upon independent scrutiny by the members of the court.

37. Secondly, the assessment of the credibility of a witness by the jury on the basis of what it has seen and heard of a witness in the context of the trial is within the province of the jury as representative of the community. Just as the performance by a court of criminal appeal of its functions does not involve the substitution of trial by an appeal court for trial by a jury, so, generally speaking, the appeal court should not seek to duplicate the function of the jury in its assessment of the credibility of the witnesses where that assessment is dependent upon the evaluation of the witnesses in the witness-box. The jury performs its function on the basis that its decisions are

made unanimously, and after the benefit of sharing the jurors' subjective assessments of the witnesses. Judges 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.

38. It should be understood that when the joint reasons in M v The Queen spoke of the jury's "advantage in seeing and hearing the witnesses" as being "capable of resolving a doubt experienced by a court of criminal appeal" as to the guilt of the accused, their Honours were not implying that it was only because there were, at that time, no practical means of enabling a court of criminal appeal to see and hear the evidence of the witnesses at trial that the jury's assessment of the credibility of the witnesses was of such potentially critical importance. The assessment of the weight to be accorded to a witness' evidence by reference to the manner in which it was given by the witness has always been, and remains, the province of the jury. Rather, their Honours in M were remarking upon the functional or "constitutional" demarcation between the province of the jury and the province of the appellate court. That demarcation has not been superseded by the improvements in technology that have made the video-recording of witnesses possible.

39. The function of the court of criminal appeal in determining a ground that contends that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, in a case such as the present, proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable. The court examines the record to see whether, notwithstanding that assessment – either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence – the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt."

31. It is submitted that the majority appropriately applied itself in this regard at (CAB 188-189, J [127]-[131]).

32. Further, the Appellant contends that the Respondent's recorded conversations with his father cited in those paragraphs provide evidence of admission of involvement in the deceased's murder. Fagan J when discounting why it may have been that PW [redacted], when admitting to three witnesses that he was responsible for the murder, but did not mention the involvement of the Respondent, said in part (at CAB 242, J [262])

"PW [redacted] is unlikely to have had any understanding of joint criminal enterprise liability and may not have considered that relatively minor participation by the applicant could render him liable." It is submitted such an assessment would be much more applicable to the Respondent in reverse. That is, a then 16 year old minor under the influence of and in fear of PW [redacted], may have considered that merely being present at the killing by PW [redacted] and thereafter helping PW [redacted] dispose of the body was sufficient to render him liable for involvement in the murder. This would otherwise explain a generalised consciousness of guilt which as argued by the Appellant may be inferred from his admissions in the recorded calls and the police interviews.

33. As Kirk JA observed (at CAB 181; J [103]):

"The applicant may have been directed by PW [redacted] *to have been present. The applicant may have stood by whilst the brutal act was done. Those facts would not suffice to make him a party to the murder. They do not establish that he knew what was going to occur, let alone that he had an agreement to participate in (at least) an assault."*

34. The conversations in the recorded telephone calls are equally consistent with a consciousness of guilt of the Respondent being an accessory after the fact. This would be particularly so if without any prior agreement he had been present when PW [redacted] killed the deceased. This was no basis for a finding beyond reasonable doubt that there was at least an agreement by the Respondent to assault the victim with the necessary foresight, which was the minimum requirement for him to be found guilty of murder (CAB 162, J [30]; CAB 164, J [40]; CAB 165-166, J [48]; CAB 169, J [64]; CAB 177-178, J [89]-[94]; CAB 179-182, J [97]-[106]; CAB 184, J [111] and CAB 189, J [131]).

35. The other complaint by the Appellant is that there was error in determining the necessity of finding admissions to be reliable before it would be open to a jury to view those admissions as establishing guilt beyond reasonable doubt. It is submitted that it was uncontroversial at trial and was found by all three justices in the CCA that the case against the Respondent with respect to murder was entirely founded on admissions he made in the intercepted phone call and in the two interviews conducted with by the investigating police (per Kirk JA CAB 166, J [49]-[50]; per Fagan J at

(CAB 200, J [164]). It is submitted it is a matter of logic therefore that those admissions would need to be reliable in establishing proof of the elements of murder before a jury properly instructed could convict upon the criminal burden of proof. As Kirk JA said (at CAB 183-184, J [110]-[111]):

"110. The Crown submitted both below and on appeal that it was open to the jury to find that the various accounts given by the applicant "taken as a whole, despite the inconsistencies, were 'powerful evidence of the accused's direct involvement in the intentional killing of [the deceased]'". This submission seems to invite the drawing of some generalised inference that taken together the various admissions manifest his participation in the murder. I have some concern about drawing such a generalised inference, which it appears to involve consciousness of guilt reasoning without seeking to meet the standard of such reasoning.

111. In any event, the argument still relies on the admissions of the applicant being reliable to the extent of indicating his involvement in the murder by indicating that there was some agreement between PW [redacted] *and the applicant that they would at the least assault the deceased with the applicant present. I have significant doubts about their reliability."*

36. Kirk JA, Sweeney J agreeing otherwise dealt with the reliability of the admissions at (CAB 184-187, J [112]-[124]).

37. This argument of a generalised inference, found to be available by Fagan J (at CAB 202, J [169]; CAB 204, J [172]; CAB 208, J [180]; CAB 209-210, J [182] and [184]; CAB 211, J [187]; CAB 213, [191]; CAB 214, J [194]; CAB 216-217, J [199]-[200], CAB 222 J [212], CAB 223, J [214], CAB 225-226, J [219]-[220]; CAB 237-239, J [248]-[254] and CAB 241, J [258]-[260]), and submitted to be an available approach by the Appellant, is seemingly a reference to the principles regarding post-offence concealment and lies which were outlined, in the particular circumstances of the Baden-Clay case, *The Queen v Baden-Clay* (2016) 258 CLR 308 at [72]–[79]:

72. The respondent's false denials to police about his ongoing affair, his suggestion to Ms McHugh that she should "lie low", and his enquiry of her as to whether she had revealed the affair to the police were all capable of being regarded by the jury as evidencing a strong anxiety to conceal from police the existence and true nature of his affair with Ms McHugh. This anxiety could reasonably be seen as

indicative that, in his mind, the affair and the killing were inter-related, and that the killing was not an unintended, tragic death of his wife, but an intentional killing.

73. In R v White [49], in the Supreme Court of Canada, Major J said:

> *"As a general rule, it will be for the jury to decide, on the basis of the evidence as a whole, whether the post-offence conduct of the accused is related to the crime before them rather than to some other culpable act. It is also within the province of the jury to consider how much weight, if any, such evidence should be accorded in the final determination of guilt or innocence. For the trial judge to interfere in that process will in most cases constitute a usurpation of the jury's exclusive fact-finding role."*

74. In R v White, Major J went on to say that there may be cases where post offence conduct, such as the accused's flight or concealment, is so out of proportion to the level of culpability involved in a lesser offence that it might be found by the jury to be more consistent with the more serious offence charged [50]. There may be cases where an accused goes to such lengths to conceal the death or to distance himself or herself from it as to provide a basis on which the jury might conclude that the accused had committed an extremely serious crime and so warrant a conclusion beyond reasonable doubt as to the responsibility of the accused for the death and the concurrent existence in the accused of the intent necessary for murder [51]. There is no hard and fast rule that evidence of post-offence concealment and lies is always intractably neutral as between murder and manslaughter. As Major J said [52]: "The result will always turn on the nature of the evidence in question and its relevance to the real issue in dispute."

75. In Lane v The Queen… the Court of Criminal Appeal of the Supreme Court of New South Wales rejected the contention that a count of manslaughter of the accused's child should have been left to the jury as an alternative to murder. The Court held that the jury were entitled to take the post-offence conduct of the accused as evidencing consciousness of guilt of murder. In particular, the Court held that the lies told by the accused "alone were sufficient to provide the evidentiary foundation for an inference that ... she acted with the intention of killing." [54] Their Honours went on to say that the false accounts given by the accused "provide no factual foundation for an inference that the manner in which she killed [her child]" would establish manslaughter by criminal negligence.

76. It was open to the jury, in this case, to regard the lengths to which the respondent went to conceal his wife's body and to conceal his part in her demise as beyond what was likely, as a matter of human experience, to have been engendered by a consciousness of having unintentionally killed his wife.

77. However, even if the evidence of post-offence conduct were neutral on the issue of intent, that alone would provide no basis to conclude that the reasonable hypothesis relied upon by the Court of Appeal was open on the evidence led at trial. To so conclude is to adopt an impermissible "piecemeal" approach to that evidence. All of the circumstances established by the evidence were to be considered and weighed, not just some of them.

78. Finally, the jury could take into account the absence of any signs that a weapon was used to cause the death of the deceased, and make their own judgment about the respondent's intention at the time, bearing in mind the difficulty involved in killing a human being without the use of a weapon unless the act of killing is driven by a real determination to cause death or grievous bodily harm.

79. In all the circumstances of this case, other than speculating about how things might have happened, it was open to the jury rationally to conclude that the respondent killed his wife and did so with intent, at least, to cause her grievous bodily harm. Upon the whole of the evidence led at trial, it was open to the jury to be satisfied beyond reasonable doubt that the respondent was guilty of murder."

38. That case involved a singular accused and not, as here, an accused who, at the highest, was alleged to be an accessory to the principal and orchestrator of the murder, PW [redacted]. It is this aspect of the case that required focus upon what inferences were properly available as to the elements of the crime argued on the basis of either being a joint criminal enterprise or at least an extended joint enterprise. It is on this basis the law with respect to lies (not dealt with by Fagan J as he found it was not necessary to consider same at (CAB 243, J [264]) requires that the lies are told out of a consciousness of guilt of the particular crime charged. In the circumstances that would, as observed by Kirk JA (at CAB 177, J [89]-[92]) at a minimum require an agreement to at least assault the victim and being present during the murder.

39. It is incorrect to suggest the majority rejected the effect of the admissions because they found the Respondent to be "either or both a compulsive liar or a fantasist" (CAB 116, J [116]) as this was only one of their considerations and in any event there

was ample evidence to support such a proposition (CAB 170, J [66]; CAB 171-172, J [69] and [70]; CAB 175, J [81]; CAB 184-185, J [112]-[116] and CAB 186-187, J [120]-[121]).

40. It is submitted that the majority, per Kirk JA, Sweeney J have applied themselves appropriately to the determination of what inferences could and could not be drawn as to the relevant elements for murder in the circumstances which would need to be found beyond reasonable doubt and concluded that the admissions and/or lies are equally explicable as manifesting a concern the truth would implicate him in a being an accessory after the fact (CAB 162, J [30]; CAB 164, J [40]; CAB 165-166, J [48]; CAB 169 J [64]; CAB 177-178 J [89]-[94]; CAB 179-182, J [97]-[106]; and CAB 189, J [131]).

41. It is submitted the fact Fagan J dissented was based on his disagreement as to what inferences could properly be drawn in this regard rather than any fundamental point of principle.

42. Finally, to accede to the Appellant's arguments would be to place appeal courts into the position of a jury. That is, to place an obligation on appeal courts to listen to and view all evidence in trial proceedings lest it be said that the jury had some forensic advantage not also enjoyed or appreciated by the appeal court, even in cases, like this one, where that forensic advantage cannot be identified. This would not only dissolve the demarcation between the role of jury and appeal court but involve appeal courts in demeanour-based judgments of a highly subjective nature.[9]

Orders sought

43. The appeal be dismissed.

Part VII: Estimate of respondent's oral argument

44. The respondent estimates that one hour will be required for the presentation of oral argument.

[9] See *Pell* [49].

Dated this the 30th day of May 2024

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