M102

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. ~~M35~~ of 2013

BETWEEN:

SAMUEL JAMES
~~Applicant~~
Appellant

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-and-

THE QUEEN
Respondent

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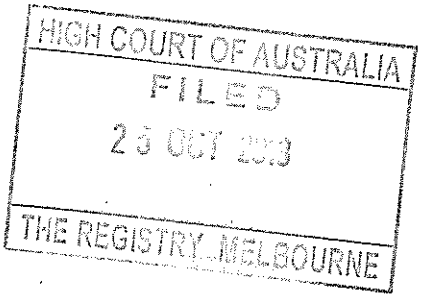
APPELLANT'S REPLY



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1. THE RESPONDENT'S CASE TO THIS COURT

1.1 The Respondent's case to this Court is predicated upon the acceptance of one or more of the following propositions:[1]

- *first*, that the forensic choices of counsel at trial are (and should be) relevant to determining whether, in trials other than murder trials, verdicts to lesser alternative offences, properly open on the evidence, are left to the jury to consider;
- *secondly*, that 'there is no compelling reason' to extend the 'rule in *Gilbert* and *Gillard*'[2] to trials in which the principal offence charged is not murder;
- *thirdly*, the considerations that obtain to a trial judge's duty to direct a jury on 'any defence fairly raised on the evidence' do not (or should not) apply to deciding whether to direct on lesser alternatives verdicts; and
- *fourthly*, there was, in any event, on the evidence adduced at the Appellant's trial, no viable case for the lesser alternative offences of intentionally causing injury and recklessly causing injury.

1.2 Those contentions do not, it is submitted, withstand scrutiny.

2 THE 'RULE IN *GILBERT* AND *GILLARD*'

2.1 The Respondent has characterised the rule in *Gilbert* and *Gillard* as an 'exception' to the general rule that juries are assumed to understand, and apply, the directions thay are given. It contends that there is no warrant for the 'further exception' said to be sought by the Appellant.

2.2 But properly analysed, the question is not (or should not be) whether 'the exception' underpinning *Gilbert* and *Gillard* ought further to be extended. Rather, it should be whether, if the principle is sound, its application can be justifiably confined to murder trials alone. The kind – and quality – of justice to which an accused person is entitled should not depend upon the nature of the offence with which he or she is charged.

2.3 Nor does the justification for the rule in *Gilbert* and *Gillard* necessarily entail a departure from the general common law rule that juries must be taken to understand and apply the directions they are given.[3] Properly viewed, it is no more than an acknowledgment that jurors are not logicians. Viable lesser alternative verdicts are

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1 See *Respondent's Submissions* at [2.1]-[2.9].

2 Or the 'rule in *Pemble*', whereby a judge is required to direct the jury about any defences and alternative offences open on the evidence even if not identified or relied upon by counsel at trial. See *Pemble v R* (1971) 124 CLR 107 at pp. 117-18 per Barwick, CJ; applied in *Gilbert v R* (2000) 201 CLR 414 and *Gillard v R* (2003) 219 CLR 1; and more recently affirmed in *R v Nguyen* (2010) 242 CLR 491.

3 Cf. *Gilbert v R* (2000) 201 CLR 414 at [27] per McHugh, J; and *Gillard v R* (2003) 219 CLR 1 at [107] per Hayne, J.

made available to juries in murder trials, not because jurors are taken to be prone to ignoring their oaths; rather, they are left because the Courts recognise that jurors 'are [not] unaffected by the variety of choices [or alternatives that are] offered' them.[4] Thus viewed, the Respondent's already questionable claims that, if the rule were to extend to trials other than murder trials, it would 'invariably result in the abolition of the important precept that juries act on the directions of a judge',[5] and it would 'undermine the modern development of the criminal law',[6] fall away altogether.

2.4 The same rationale founds the law's insistence that a jury be made to consider the possible impact upon its deliberations of any whole or partial defence which is properly raised by the evidence in a trial. True it is, as the Respondent points out, that in the case of defences, the Crown bears the onus of disproving any defence which may be relevant to its proof of the charges it lays. But so to say does not explain why the law as it pertains to defences should necessitate that the Crown disprove not only those defences upon which an accused person relies, but requires that – whatever the forensic choices at trial and however inconsistent a defence may be with the case advanced on an accused person's behalf – a judge is bound to direct a jury on the availability of any defence so long as it is properly raised on the evidence.

2.5 In fact, there is little or no reason to distinguish between a judge's duty to leave any defence properly raised by the evidence and the duty to leave lesser viable alternative verdicts that are likewise properly raised. Both are a manifestation of the fundamental principle that the law reposes in the jury the duty of assessing, scrutinizing and weighing the evidence. Where, 'upon one possible view of the facts, it would be open' to a jury to find an accused person guilty of a lesser offence, the lesser offence founds an available alternative verdict.[7] Similarly, when, 'by any possibility the jury might not unreasonably discover in the material before them' the existence of a defence, it too must be made available to them.[8] In both instances, the task of selecting and evaluating the facts is for the jury and only the jury to perform.[9]

3. LESSER ALTERNATIVES AT THE APPELLANT'S TRIAL VIABLE

3.1 The Respondent contends that, on the evidence adduced in the Appellant's trial, it would not have been open to the jury to return guilty verdicts on either of the lesser alternative offences of intentionally causing injury or recklessly causing injury.

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4 *Gilbert v R* (2000) 201 CLR 414 at [101]. Cf. *Gilbert* at [13] per Gleeson and Gummow, JJ; and *Dupas v R* (2010) 241 CLR 237.

5 *Respondent's Submissions* at [6.39].

6 *Ibid* at [6.64].

7 *R v Gill; R v Mitchell* (2005) 159 A Crim R 243 at p. 245 per curiam; cf *Gilbert v R* (2000) 201 CLR 414 at pp. 421-422 per Gleeson CJ and Gummow; *Gillard v R* (2003) 219 CLR 1 at p. 14 per Gleeson CJ and Callinan J; and at pp. 41-42 per Hayne J.

8 *Parker v R* (1963) 111 CLR 610 per Dixon, CJ.

9 *Ibid.*

3.2 Its analysis is, in a number of key respects, flawed.

3.3 *First*, this Court should not be asked to look behind or question the motives that founded an application made by counsel at trial.[10] When the prosecutor applied to the judge to have left to the jury the lesser 'injury' alternatives, he must be taken to have done so on the basis that those alternative verdicts were properly open to them; not on some merely 'theoretical', fanciful or otherwise improper basis.

3.4 *Similarly*, when counsel for the Appellant at trial responded by pointing out that, in the preceding week, the prosecutor 'disavow[ed] those alternatives... specifically disavowed them',[11] he was exercising a *forensic* choice. His objection was not framed by reference to what the evidence did or did not leave open by way of alternative verdicts; it was predicated upon the shift from the prosecutor's pre-trial position.

3.5 *Secondly*, and importantly, the remarks made by counsel in the running of a trial are at best instructive of the possibilities which a jury might properly have had available to them on the evidence as a whole. That is because they are almost bound to be influenced by the tactical choices which informed how each party chose to run its case.

3.6 The question for this Court is whether the lesser verdicts were properly viable. It calls for an objective assessment of the evidence, unfettered by considerations of how the parties advanced their cases at trial. The question is jury-focused. It concentrates attention on whether a jury could have lawfully acted upon the evidence and returned guilty verdicts on the lesser offences.

3.7 Instead, the Respondent has focused much of its attention on the way in which the parties at trial put their respective cases,[12] and on the manner in which the majority in the Court of Appeal[13] – extrapolating from the remarks and forensic choices made by defence counsel at trial – concluded that it was unnecessary to leave to the jury the lesser alternatives. Neither analysis is apposite. Indeed, both are prone to deflect attention from the principal, jury-focused inquiry by conflating an assessment of the evidence which the jury might legitimately have acted upon with issues relating to how the parties presented their respective cases.

3.8 The Respondent must do more than defend the jury's actual verdict.[14] It must show that there *was no one possible view of the facts* upon which it would have been open to return a guilty verdict on a lesser alternative. The onus is a heavy one.

3.9 The Appellant again commends to this Court the analysis of the evidence exposed in the Court of Appeal by Priest, JA.[15] There was, on the evidence adduced at trial and, in

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10 *Respondent's Submissions* at [6.20]-[6.22].

11 *T* at p. 722, lines 25-27.

12 *Respondent's Submissions* at [6.10]-[6.24] and [6.65]-[6.70]; cf. [6.71]-[6.86].

13 *Ibid* at [6.25]-[6.31].

14 Cf. *ibid* at [6.65]-[6.87].

particular, as a result of the cross-examination of the complainant (KS) and the witness Monica Woods, a sound evidentiary basis for rejecting (or declining to accept to the criminal standard) at least the more graphic features of the latter's evidence-in-chief. There was thus also a sound basis for calling into question the accuracy of her evidence more generally. Against that, the Appellant in his interview with police stated that he had tried to avoid KS and, to his knowledge, had succeeded.

3.10 Thus understood, neither Dr. Cunningham's opinion nor any other witness's testimony compelled the jury to the view that the Appellant deliberately struck KS with the intention to cause him serious injury or with the foresight that he would probably do so. Rather, it was open to the jury – and reasonably open to it – to conclude that the Appellant struck KS without the *mens rea* to cause him serious injury. At the least, the jury was entitled to have entertained a reasonable doubt about it.[16]

3.11 Absent the availability to them of verdicts on the lesser alterative offences, the risk that the jury in the Appellant's trial 'falsely chose' to return a guilty verdict on the more serious, intentionally-based offence was real. *Ex hypothesi*, it cannot be satisfied that the jury's verdict was inevitable.[17] The very serious injuries suffered by the victim served to heighten that risk. And the availability of the lesser 'reckless' alternative did little to ameliorate it.[18]

3.12 Indeed, the very matters relied upon by the Respondent to justify the confinement of the rule in *Gilbert* and *Gillard* to murder trials only,[19] operated *mutatis mutandis* in the Appellant's case to cause his trial to miscarry.

4. ALTERNATIVE VERDICTS IN VICTORIA AND ELSEWHERE

4.1 The Respondent's submissions underscore the divergent approaches taken by intermediate and ultimate appellate courts in Australia and in the United Kingdom to the question at the core of this proceeding. But to expose the scope of the problem, whilst perhaps necessary, does not solve it.[20] In fact, that which the Respondent's review of the authorities best illustrates is that any comfort it has sought to draw from its

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15 *James v R* [2013] VSCA 55 [178]-[181].

16 *Ibid* at [180].

17 See s. 276(1)(b) of the *Criminal Procedure* Act 2009; *Baini v R* (2012) 246 CLR 469 59 at [27]-[33].

18 Cf. *Respondent's Submissions* at [6.88].

19 *Ibid* at [6.62] and [6.88].

20 The Respondent has cited in support of its case this Court's decision in *R v Keenan* (2009) 236 CLR 397 and, in particular, Keifel, J's judgment at para [138]. Importantly, the issue addressed in that passage was peripheral (at best) to the determination of that appeal; the only authority cited in support of the principle exposed at [138] was the decision of the Queensland Court of Appeal in *R v Willersdorf* [2001] QCA 183; and, perhaps most importantly, the correctness of the principle appears not to have been the subject of any real debate before the Court.

observation that 'all appellate courts insist that an alternative offence is only to be left where it is in the "interests of justice" to do so'[21] is no comfort at all.

5. NO 'VERITABLE CASCADE OF OFFENCES'

5.1 The Respondent has attributed to the Appellant (incorrectly) the contention that the rule in *Gilbert* and *Gillard* be 'extended to include a blanket obligation upon a trial judge to leave *all* alternative offences to a jury as possible verdicts.'[22] In fact, the Appellant's contentions to this Court mirror the concluded view expressed by Priest, JA in the Court of Appeal, [23] and are subject to the same qualifications.

5.2 Thus confined and understood, there is no basis for the fear, expressed by some,[24] that the application of the rule to trials other than murder trials will require 'that a veritable cascade of lesser offences' be left to juries as alternative verdicts in most or all criminal trials. Nor does it appear to be the experience of jurisdictions in which the rule in *Gilbert* and *Gilbert* is applied more widely that judges and juries have relevantly been overburdened or that the complexities associated with running criminal trials are materially greater than in jurisdictions in which the rule is confined to trials where the principal offence charged is murder.

5.3 In the Appellant's case, all that is in issue is the 'relatively common situation of alternative verdicts predicated on injury where the offences charged predicate serious injury.'[25] Indeed, in most trials, the potentially viable lesser verdicts will be similarly obvious: 'extending' the rule so that it applies uniformly will ensure that counsel and trial judges turn their minds to whether and to what extent the jury must be instructed on the availability to them of alternative verdicts.[26] That can only be a good thing.

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21 *Respondent's Submissions* at [2.3].

22 *Ibid* at [2.5]. [Emphasis added.]

23 *James v R* [2013] VSCA 55 at [207].

24 See, eg, *R v Elfar* (2000) 115 A Crim R 64 at p. 73 per Sperling, J; cf. *R v Kane* (2001) 3 VR 542 at [36] per Ormiston, JA and [108] per Callaway, JA.

25 *R v Kane* (2001) 3 VR 542 at [108] per Callaway, JA.

26 In that respect, the result of extending the rule's application will likely be that in all Australian jurisdictions counsel and trial judges will be encouraged to turn their minds and debate the very matters addressed by s. 16 of the *Jury Directions Act* 2013 in Victoria.