IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. M30 of 2013

BETWEEN:

**DANG KHOA NGUYEN**

Appellant

and

**THE QUEEN**

Respondent



# RESPONDENT'S SUBMISSIONS

## Part I: Certification that the submission is in a form for publication on the internet

1.1 The respondent certifies that this submission is in a form suitable for publication on the internet.

## Part II: Concise statement of the issues the respondent contends that the appeal presents.

2.1 This appeal raises the following issues:

(a) Does the alternative of manslaughter arise on the facts of this case if the principal Ho is convicted of murder?

(b) In determining whether or not a substantial miscarriage of justice has occurred if manslaughter was not left when it was open on the facts, is the court required to consider the manner in which the parties conducted the case?

(c) If the appellant's conviction for murder is consistent with evidence and the proper directions given by the trial judge, can it be relied on to establish that manslaughter was not a viable option in this case?

## Part III: Certification that the respondent has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act* 1903 (Cth).

3.1 The Respondent has considered the provision of S.78B of the *Judiciary Act* 1903 and considers that no notice is required under that section as no constitutional issue arises for consideration in these proceedings.

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**Part IV: Facts**

4.1 For the determination of this appeal the following facts not referred to under Part V of the appellant's submissions must also be considered:

*Factual basis of Khoa's case*

4.2 The presentment before the jury in this matter involved three cases; one against Bill Ho, another against Dang Khoa Nguyen and a third against Dang Quang Nguyen. Within each of those cases there were two separate cases – one of attempted murder and another of murder.

4.3 The jury was required to separately consider the evidence in relation to each of those cases. The prosecution case at trial against Khoa was:

(i) The Applicant and Mau Duong were known to each other. The Applicant introduced Bill Ho to Mau Duong. The Applicant and Bill Ho were involved in two drug transactions with Mau Duong in the weeks before the offence.

(ii) The three accused went to the flat to collect a debt owed by Mau Duong to the Applicant and Bill Ho for drugs that had been supplied to Duong by Ho on behalf of the Applicant.

(iii) Mau Duong gave evidence that he was a drug dealer and had been a heroin addict. His evidence-in-chief was that he had agreed to purchase heroin from the Applicant on two occasions shortly before 8 November 2004, being the date of the shootings. Mau Duong said on each occasion, the agreement was that he would purchase the ounce on credit and pay the Applicant $4,500 after he had sold it. Mau Duong said the agreement was made on the telephone, and that he would contact the Applicant when he was ready to make payment.

(iv) Mau Duong said on one of the occasions, he arranged with the Applicant that the heroin would be delivered by Bill Ho to the flat where the shootings occurred. Mau Duong said he collected the heroin from the flat on Friday, 5 November 2004 and did not pay for it then. In cross-examination Mau Duong agreed that he had described this transaction as being the earlier of the two. This Court in *The Queen v Nguyen*, held that the order of the transactions did not take on any particular significance in the trial.[1]

(v) In cross-examination, Mau Duong agreed with Counsel for the Applicant that money was never handed to the Applicant, nor did the Applicant deliver the heroin. The face-to-face aspects of the arrangement (delivery of and payment for the heroin) were carried out by Bill Ho.[2] Records showed a number of telephone calls between mobile phones belonging to the Applicant and Mau Duong, which was not disputed by the Applicant.[3]

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[1] *The Queen v Nguyen* (2010) 242 CLR 491, at [14], [15] and [16]
[2] See Trial Transcript, at 72-80, 106-108, 112-113
[3] See Trial Transcript, at 79-80

(vi) On 8 November 2004, the three offenders entered the flat which was 6 metres long by 4 metres wide as depicted in Trial Exhibits A4, A5, A6 and B. It was occupied by the three accused and seven other people. They immediately, and insistently, demanded to see Duong. Shortly after entering, Dang Quang Nguyen produced a samurai sword, which he swung around and used to cut several of the occupants.[4] Witnesses did not observe Quang Nguyen enter the flat with the sword nor was it captured on CCTV footage depicting the three accused entering the building. The sword may have been obtained from within the flat.[5]

(vii) Bill Ho then produced a loaded gun from his pocket and "was spinning the barrel around". Ho gave evidence that he deliberately fiddled with the gun so that the occupants in the flat could see.

(viii) From the evidence regarding the position of the offenders, it is clear that the Applicant could see the gun in Bill Ho's hand.[6] Further, the Applicant was observed to be laughing just prior to Chau Ming Nguyen being shot.[7]

(ix) Chau Minh Nguyen gave evidence-in-chief that he awoke at this time, and observed all three accused in the room. He had not previously met any of the offenders.[8] Chau Minh Nguyen stated that he heard the offender now known to be Ho say to one of the occupants (Manh) "find Mau for me".[9] At this stage Ho was kneeling down opposite Chau Minh Nguyen, and next to the Applicant who was sitting on the stereo.[10] The stereo referred to is located at the end of the lounge from, opposite the kitchen, from which all occupants and persons entering the lounge are visible.[11]

(x) Chau Minh Nguyen said that the Applicant then said to Ho "get him off" or "fuck him off". Ho then pointed the gun directly at Chau Minh Nguyen, and said "that guy?" to which the Applicant nodded his head. Ho then shot him Chau Minh Nguyen in the head.[12]

(xi) Chau Minh Nguyen was by challenged by Applicant's Counsel in cross-examination about this exchange between the Applicant and Ho immediately prior to the shooting. Chau Minh Nguyen did not depart from his evidence-in-chief.[13]

(xii) Witness, Viet Tran was also present at the time of the shootings. He was cross-examined by Counsel for the Applicant about the position of the third man who was the Applicant. Viet Tran denied Counsel's proposition that evidence would be given that the Applicant was the male who from the time of entering, stood

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[4] See Trial Transcript, at 177, 180, 201, 205, 235-236, 256, 263
[5] See Trial Transcript, at 189, 200
[6] See Trial Transcript, at 121, 123, 130-131, 211, 220, 238
[7] See Trial Transcript, at 1570158
[8] See Trial Transcript, at 122, 157
[9] See Trial Transcript, at 123
[10] See Trial Transcript, at 121, 123-131
[11] See Trial Exhibits A4, A5, A6 and B.
[12] At T, 123-124, 125, 132-133, 135
[13] See Trial Transcript, at 135

near the kitchen door. He said the Applicant entered first, and the man with the sword (Dang Quang Nguyen) was nearest the kitchen door. Viet Tran did not depart from his evidence that the Applicant stood near the TV from the time the three offenders entered the flat.[14]

(xiii) Bill Ho gave evidence at his trial.[15] In his evidence–in-chief, Ho said he was a drug dealer at the time of the shootings. He said he had known the Applicant for nearly 10 years and had dealings with Mau Duong. He said a few days after meeting with the Applicant, at which the Applicant said he had a friend who wanted an ounce of heroin on credit, Mau Duong called him. Ho said that Mau Duong said "hello Khoa, can I see you" and that he just went along with it thereafter, pretending to be the Applicant.[16]

(xiv) Bill Ho stated that he went to the flat to collect the debt from Mau, and took a gun to scare Mau. He said he entered the flat and asked for Mau and pulled out the gun when he thought the occupants were hiding Mau. He said that the Applicant was in the doorway of the lounge and marked a plan to this effect which was tendered as Trial Exhibit D2.3. The exhibit does not elaborate on the whereabouts of Quang.[17] Bill Ho said he intended to shoot at the wall to scare the occupants. In his defence, Ho stated that both shootings were accidental and that he did not know why the gun discharged in relation to the shooting of Hieu Luu. Ho denied that there was any conversation between himself and the Applicant prior to the shooting of Chau Minh Nguyen.[18]

(xv) In cross-examination, Ho said he had been driving around the day before with the loaded weapon. He said he had put four or five bullets into the gun, which came with three or four shells when he purchased it.[19] Ho denied speaking to the Applicant and Dang Quang Nguyen prior to entering the flat about collecting the debt from Mau.[20] Despite this, both the Applicant and Quang enter the flat with Ho. Ho conceded that none of the occupants of the flat threatened him, and that he was capable of controlling the situation.[21] Ho agreed that he was upset when the occupants would not tell him where Mau was, and that he pulled out the gun to scare them. Ho agreed that he deliberately fiddled with the gun so the occupants could see it, and that this failed to prompt a response as to the whereabouts of Mau.[22] Ho further agreed that the Applicant and Quang did not ask any questions about the gun after it was produced.[23]

(xvi) Hieu Luu was shot in the head shortly after Chau Minh Nguyen, who was shot in the head also.

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[14] See Trial Transcript, at 214-222
[15] See Trial Transcript, at 510-531
[16] See Trial Transcript, at 511-512, 544
[17] See Trial Transcript, at 521-525
[18] See Trial Transcript, at 525, 533-534, 572
[19] See Trial Transcript, at 550-552, 573
[20] See Trial Transcript, at 558
[21] See Trial Transcript, at 564, 567
[22] See Trial Transcript, at 570, 572-574
[23] See Trial Transcript, at 573

(xvii) In cross-examination Ho agreed in that the Applicant and Dang Quang Nguyen did not challenge him at the scene as to why he had shot the two men.[24]

(xviii) The offenders fled the scene immediately after the shootings, taking care not to travel down by the lift in order to avoid being captured on security camera.[25]

(xix) Ho agreed that he telephoned Mau the next day looking for him and the money that he was owed.[26] Prior to leaving, one accused said "don't tell anyone".[27]

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**Part V: Constitutional Provisions, Statutes and Regulations.**

5.1 The respondent will make reference to:

(a) Crimes *(Criminal Trials) Act* 1999, sections 1, 5, 6, 7, 8, 10, 13, 15 and 19; and

(b) *Criminal Procedure Act* 2009 Section 1, 107-111, 118-119, 129, 132, 179-190, 223, 224, 225 and 231.

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**Part VI: Statement of argument**

The Appellant's complaint:

6.1 That initially the alternative of manslaughter for the appellant was foreshadowed before the jury even if Ho was convicted of murder (see T928 – 29 and 1026 – 1028, AB ), but that alternative was withdrawn from the jury's consideration by the trial judge (at T1145 – 1146, AB ). The effect of the re-direction was that the appellant could be convicted of murder if Ho was
30 convicted of murder, or manslaughter if Ho was convicted of manslaughter. No option of manslaughter was left if Ho was convicted of murder.

6.2 The appellant asserts that the latter option should have been left open and the failure of her Honour to do so constituted an error of law. That error, the appellant says, amounted to a substantial miscarriage of justice, entitling him to have <u>both</u> convictions quashed and to a re-trial on those charges.

6.3 It is noted that in the Court of Appeal, grounds 1 to 6 of the appellant's notice related to the charge of murder and included the matters in argument here: [14] AB . Ground 7 related to the charge of attempted murder and was
40 confined to the jury's verdict being "unreasonable/or cannot be supported by the evidence". Ground 8 was the same complaint in respect of the charge of murder. In [16] of the Court of Appeals judgment it is said "Although counsel for Khoa did not pursue these ... [7 and 8]... grounds at the hearing, they were not formally abandoned".

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[24] See Trial Transcript, at 576-577
[25] See Trial Transcript, at 576
[26] See Trial Transcript, at 578-579
[27] See Trial Transcript, at 178-179, 266

6.4 At [161] AB the judgment states "For these reasons I would dismiss grounds 1-6 of Khoa's grounds of appeal". In [163] AB the appeal is dismissed. There are no reasons for dismissing ground 8 and there is no argument in the appellant's submission in this case challenging the conviction for attempted murder. That conviction, it is submitted, is not under review in this appeal.

10 The Appellant's argument

6.5 The appellant contends that the following reasons given by the Court of Appeal in dismissing his appeal against grounds 1-6 are wrong at law:

(a) that the direction given was unduly favourable to the appellant (6.10 of Submission);

(b) [147] AB that even though the elements of the offence were mis-stated in the written directions, they had been correctly stated elsewhere
20 (6.11);

(c) [148] AB that manslaughter was still left open to the jury on aiding and abetting a unlawful and dangerous act manslaughter committed by Ho;

(d) [156] AB doubting that there was a viable case of manslaughter against the men based on acting in concert or extended common purpose.

Response

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6.6 Nowhere in the appellant's submission is there an identification of the facts upon which the jury could have found manslaughter in his favour if Ho was convicted of murder. The appellant tries to achieve that by relying on the findings of this court in the case of the co-accused Quang.

6.7 There is no analysis by the appellant comparing the evidentiary position of Quang with his position.

6.8 It is of critical importance that Ho gave sworn evidence which raised the issue of
40 his intention when firing the shots and that fairly and squarely raised dangerous and unlawful act manslaughter: see T522 – 23, 526 – 527, 570 – 576.

6.9 Quang gave a record of interview in which he contended that he did not know that Ho had a gun and had no memory of being present.

6.10 Her Honour directed the jury that they must consider each charge against each offender separately: T908.7 – 28, AB . The jury were also directed that they could not use the answers of Quang in his record of interview except in Quang's case: T916.30 – 918.20, AB .

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6.11 The appellant exercised his right to silence when interviewed by police. He stood mute at the trial. He was the only accused who did not have a personal account in evidence before the jury.

6.12 The appellant does not point to any evidence that establishes that he might have had a belief that something less than an intention to enforce the debt by intentionally killing someone if necessary was in his mind. Such an inference is not open of the evidence before the jury and the submission put that such an intention was open is pure speculation.

6.13 The Court of Appeal was right to hold that manslaughter by dangerous and unlawful act was not open in the circumstance where Ho was convicted of murder.

**Is the way the parties ran their respective cases relevant in determining whether or not there is a substantial miscarriage of justice?**

6.14 In *Pemble v. The Queen* (1971) 124 CLR 167, the majority (Barwick CJ, Menzies and Windeyer JJ) held that the course taken by the defence in the conduct of its case does not relieve the judge of the duty to put to the jury any matters upon which they might find for the accused. In the course of his judgment Barwick CJ made two observations. First, that the defence "actually made by the appellant was put by the judge to the jury" at 117. Second also at p.117:

> "If the trial had been a civil cause, it might properly be said that the trial judge had put to the jury the issues which had arisen between the parties. But this was not a civil trial."

6.15 In *Alford v. Magee* (1952) 85 CLR 437, a civil case, the court said at 466:

> "And it may be recalled that the late Sir *Leo Cussen* insisted always most strongly that it was of little use to explain the law to the jury in general terms and then leave it to them to apply the law to the case before them. He held that the law should be given to the jury not merely with reference to the facts of the particular case but with an explanation of how it applied to the facts of the particular case. He held that the only law which it was necessary for them to know was so much as must guide them to a decision on the real issue or issues in the case, and that the judge was charged with, and bound to accept, the responsibility (1) of deciding what are the real issues in the particular case, and (2) of telling the jury, in the light of the law, what those issues are. If the case were a criminal case, and the charge were of larceny, and the only real issue were as to the *asportavit*, probably no judge would dream of instructing the jury on the general law of larceny. He would simply tell them that if the accused did a particular act, he was guilty of larceny, and that, if he did not do that particular act, he was not guilty of larceny. It may be that the issues in a civil case tend, generally speaking, to be more complex than in a criminal case. But the

> same principle is applicable, and looking at the matter from a practical point of view, the *real* issues will generally narrow themselves down to an area readily dealt with in accordance with Sir *Leo Cussen's* great guiding role. These considerations lead to the conclusion that a judge should not put to the jury the qualification on the general rule as to contributory negligence unless he feels himself able to explain clearly to them exactly how the qualification can be fairly and reasonably applied by them to a view of the facts which it is open to them to entertain."

6.16 It is to be noted that the principle stated by Sir Leo Cussen was in a criminal case. The Court while acknowledging that civil cases may be more complex, confirmed that the criminal rule applied to civil cases also. That is inconsistent with the observations of Sir Garfield Barwick in *Pemble* (see above).

6.17 The second observation that can be made about the passage from *Alford v. Magee* is that a trial judge should not give a direction to the jury if he or she cannot explain clearly to them how such a matter "can be fairly and reasonably applied by them to a view of the facts which it is open to them to entertain".

6.18 This Court has on numerous occasions stated the principles as stated in *Alford v. Magee* apply to criminal cases: *The Queen v. Getachew* [2012] HCA 10; (2012) 286 ALR 196 [29] and the cases listed in footnote 30 to that paragraph.

6.19 There is a tension between the way *Pemble* has been interpreted and applied in practice, and *Alford v. Magee*. *Pemble* has been taken to exclude any consideration of the way parties run their case in determining whether or not a defence or alternative charge should be left. By contrast *Alford v. Magee* requires the judge to take that into account, when determining what the live issues are in a case.

6.20 This issue recently arose in the Court of Appeal in Victoria in *James v. The Queen* [2013] VSCA 55. The issue that arose was whether or not the trial judge should have directed the jury on the lesser alternative of a 'injury offence', when the trial was in respect of serious injury offences. The majority, Maxwell P and Whelan JA held that the alternative need not be left. Priest JA held to the contrary.

6.21 Maxwell P adopted the reasons of Whelan JA, but made additional observations including the need for the trial judge to consider the way in which the parties conducted their case. His Honour referred to *Patel v. The Queen* [2012] HCA 29; 86 ALJR 954, *Suresh v. The Queen* [1998] HCA 23; 72 ALJR 769 and *Ali v. The Queen* [2005] HCA 8; 79 ALJR 662, and concluded that outside of murder/manslaughter category of cases "rational forensic judgments made by defence counsel constitute an exercise, rather than an infringement, of the accused's right to a fair trial": see [13].

6.22 It will be submitted below that there is no longer a valid reason to distinguish murder/manslaughter cases from other cases, and therefore the manner in which defence ran the case is a relevant (although not necessarily determinative) consideration in those cases also.

6.23 In this case counsel appearing for the appellant at trial indicated to the judge that he did not want the alternative left to the jury, and that he would not be addressing the jury on it: see T683 – 686, AB . Later, he changed his position and said, he would not address the jury on the manslaughter option if Ho is convicted of murder, but that her Honour should direct the jury on that: T AB .

6.24 A considerable amount of transcript was then devoted to discussion between the trial judge and counsel to identify the facts on which such an option could be based: see T936.5 – 937.23, AB ; T972.11 – 20; AB ; T973.2 – 974.16, AB ; T975.18 – 979.24, AB ; T981.10 – 982.19, AB ; T983.20, AB ; T984.8 – 12, AB ; T988.10 – 990.23, AB ; T993.16 – 27, AB ; T997.15 – 1000.24, AB ; T1001.9 – 10002.15, AB ; T1007.23 – 1010.4, AB ; T1033.9 – 29, AB ; T1113.7 – 1117.26, AB ; and T1142.26 – 1143.23, AB .

6.23 It therefore became apparent to all that the manner in which prosecution put the agreement between the parties, left no scope for concert or extended common purpose manslaughter to be left if Ho was convicted of murder. The fact was if the prosecution could not make out the agreement as opened by the prosecutor the appellant had to be acquitted of all charges.

6.24 There was a clear forensic advantage to the appellant in the alternative not being left. Further, as the discussion on transcript discloses there was no factual basis identified that could be relied on to put the alternative. To suggest to the jury that the appellant might have agreed to an injury being caused while the debt was collected, would be pure speculation, not supported by any evidence.

6.25 The arguments advanced by the appellant at 6.19 – 6.23 and 6.26, are not the point. They are mere speculation as the appellant does not identify what evidence there could be that the lesser agreement existed in the appellant's mind. The fact is, in the way the case was running, it is clear that the facts that the appellant would found in his favour, must have been found proven beyond reasonable doubt by the jury.

6.26 To succeed on his argument, the appellant must, in the circumstances of this case, on the evidence applicable to him, as opposed to Quang, show facts that could have resulted in the findings being made by the jury being displaced. He has not done so.

6.27 Finally, her Honour properly formed the view that she could not sensibly explain the proposed alternative to the jury consistent with the evidence in the case.

6.28 For these reasons there was no viable alternative in this case that could or should have been left for the jury.

**If the appellant's conviction for murder was consistent with the evidence and proper directions given by the trial judge, can it be relied on to show manslaughter was not a viable option in this matter?**

6.29 In *Gilbert v. The Queen* (2000) 201 CLR 414, a majority of the court held that on a charge for murder if the jury was deprived of the opportunity to consider an alternative of manslaughter, it is not possible to say that no substantial miscarriage of justice occurred, even if the jury had been properly instructed on the elements of murder and they had convicted of murder.

6.30 *Ross v. The King* (1922) 30 CLR 246, 254 and *R. v. Evans and Lewis* [1969] VR 858, 871 were over ruled by *Gilbert*. In *Evans* the relevant proposition was stated as:

> "If the trial judge correctly instructs the jury on the essential elements of the crime of which the appellant is convicted and fully and fairly puts to the jury the defence set up by the appellant the verdict of guilty amounts to a finding by the jury of every essential element of the crime and if those findings negate a verdict of guilty of a lesser offence then the verdict cannot be disturbed by a suggestion that the jury might have found him guilty of that lesser offence if the judge had informed them they were at liberty to do so."

6.31 In *Gillard* the overruling of these principles in murder cases was based on authorities principally dealing with provocation or excessive manslaughter. It was also suggested that juries might be reluctant to acquit entirely and would therefore convict of murder. Such action of course would be contrary to the oath juries take and the directions judges give them.

6.32 Such a conclusion is at odds with the fundamental principle that under pins our criminal justice system, that in trial by jury, that the jury will base its verdict on the evidence and the directions of law given by the judge.

6.33 In *Gilbert* there was strong dissent from McHugh and Hayne JJ. The gist of the dissent was that it was contrary to basic principle not to uphold a properly arrived at verdict of murder by speculating the jury might have acted against their duty and introduced a compromise verdict of manslaughter: see McHugh J [25] – [31]; Hayne J [48] – [52].

6.34 What is essential to the principle set out by McHugh and Hayne JJ is that verdict of guilty of murder can be relied on as a correct verdict according to the law and the evidence. That is what is the rule in respect of every other charge where an alternative was not left.

6.35 This is distinguishable from the case of provocation or excessive self-defence. In those cases it is the duty of the prosecution to establish beyond reasonable doubt

that no excuse or lawful justification was present. If that is not done, then a verdict of not guilty is the correct one. Thus in such circumstances, where the matter is not left the verdict is not conclusive because that aspect has not been considered by the jury.

6.36 There are other policy reasons why the rule in *Gilbert* should be re-considered.

6.37 The law of criminal procedure has substantially changed since 1999. Legislation has been introduced to allow for close case management of criminal trials in an attempt to shorten them and to better use the resources of criminal courts.

6.38 The *Criminal Trials Act* 1999 provided in S.1 that:

> The purpose of this Act is to increase the capacity for judicial management of criminal trials and make other changes for the purpose of improving the efficiency of criminal trials.

6.39 To achieve that purpose the act provided for: Directions hearing – S.5; Summary prosecution openings and defence responses to the opening – S.5, 6 and 7; disclosure of questions of law – S.10; defence response before the jury to the prosecution opening – S.13; evidence that may be given at trial – S.15 and 16 and jury documents – S.19.

6.40 In 2010 the *Criminal Procedure* Act 2009 took over this area. The purposes are set in S.1. Section 107-111 deal with pre-hearing disclosure of the prosecution case. Section 118-119 deal with case directions; S.129 attendance of witnesses at committal; S.132 cross-examination of witnesses at committal. Section 179-190 deal with pre-trial procedures after committal. Section 223 deals with jury documents. Section 224-225 deal with opening addresses at trial. Section 231 deals with introduction of evidence not previously disclosed.

6.41 Prior to these legislative changes, committals and trials were quite rudimentary. The accused would be arraigned, the prosecutor would open and the evidence would be led. The issues would not crystallize until the evidence was closed.

6.42 By contrast now a large amount of judicial time is invested in discerning the true issues to be tried before the trial commences. That must be taken into account when considering the operations of the principles in *Alford v. Magee*, *Pemble* and *Gillard.* The need to efficiently use court resources is a factor to consider, though it should never defeat the attainment of justice in a particular case.

6.43 It is submitted the principle in *Gilbert* should be overruled. The rule should be as previously stated in *Ross v. The King*. Further, the manner in which the parties conduct the case should be considered in determining whether or not there has been a substantial miscarriage of justice in cases involving the charge of murder as well as all other offences.

6.44 In this case therefore, there has been no substantial miscarriage of justice.

**Part VII: Statement of Respondent's argument on notice of contention.**

7.1 The Respondent relies on paragraphs 6.14 to 6.44 as argument on the notice of contention.

**Part VIII: Estimate of Time**

10 8.1 The Respondent estimates 1 - 1½ hours as time to present oral argument.

Dated: 6 May, 2013

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