HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No A4 of 2022

BETWEEN:

PETER REX DANSIE
Appellant

and

THE QUEEN
Respondent

APPELLANT'S OUTLINE OF ORAL PROPOSITIONS

Part I: Certification for publication

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

Part II: Outline of the propositions to be advanced in oral argument

2. The appellant's central contention is that the Court of Criminal Appeal (the CCA) asked itself and applied the wrong test in determining whether the verdict could be supported by the evidence. If successful, the appellant seeks remittal to the CCA for determination of the appeal: Ground 2.1; Order 5, CAB306.

(1) The nature of the task of independent assessment

3. This appeal is governed by the "first limb" of the common form appeal provision, s158 *Criminal Procedure Act 1921* (SA): CAB13.

4. The decision of this Court in *M v The Queen* (1994) 181 CLR 487 resolved differences of approach concerning the "deference" to be accorded to fact finding at trial. The position remained unsettled as late as *Chidiac v The Queen* (1991) 171 CLR 432; JBA 38, see *M* at 494-495; JBA266-267.

5. The test settled in *M*, which applies equally to review of a verdict following a judge alone trial,[1] requires an appellate court (subject to a proviso) to conduct an independent examination of the evidence and determine for itself whether it has a doubt as to an accused's guilt.

6. The proviso to (or second limb of) *M* is limited: "it is only" where a court's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage has occurred.

7. It was made clear in *Morris v The Queen* (1987) 163 CLR 454 at 473-474; and *SKA v The Queen* (2011) 243 CLR 400 at 407,[18], 409,[23] (JBA196, 198) that there is not a separate category of jury questions immune from appellate review. Characterising issues as "jury questions" tends to detract from a proper discharge of the appellate function: see *SKA* at 409 [23], JBA 198, *Chidiac* per McHugh J at 463, JBA 69; *contra* Livesey J [494]; see Nicholson J at [380].

[1] *Filippou v The Queen* (2016) 256 CLR 47; JBA 223.

8. As this was a circumstantial case in which much of the evidence was undisputed, the principal contest between the parties at trial and on appeal concerned the inferences to be drawn from the evidence.

9. The CCA was therefore obliged to assess for itself the inferences to be drawn from the evidence and ultimately to determine whether the hypothesis of accidental drowning had been excluded: see Nicholson J at [357], [378]-[384], cf Livesey J at [495].

10. The respondent's central proposition "that assessment is not undertaken in order that the court of criminal appeal may determine for itself whether it is satisfied of an appellant's guilt" is a departure from the approach mandated by *M v The Queen*: RS [15], cf Nicholson J at [384]; CAB227.

11. This is not to suggest that the appeal is a retrial, or that the trial judge's reasons are simply put to one side. However, if the CCA concludes that it has a reasonable doubt as to guilt the verdict must be set aside "unless that tribunal's advantage … is capable of resolving that doubt": *Filippou v The Queen* per Gageler J at 75,[82]; see also plurality at 54,[12]; JBA 251, 230. The nature and extent of the advantage must be analysed in each case.

12. Accordingly, although this case involved some factual complexity, the statement of the test to be applied should have been relatively straight forward.

(2) <u>The approach of Livesey J</u>

13. Livesey J (with whom Parker J agreed) erroneously framed his approach around the judgment of Menzies J in *Plomp v The Queen* (1963) 110 CLR 234 leading him to state "…it is not for this Court to determine whether the only rational inference to be drawn from the circumstances was guilt beyond reasonable doubt. That was a matter for the trial court": Livesey J at [422]; *Plomp* per Menzies J at 247, Dixon CJ at 242, but cf 244; JBA 32, 27, 29.

14. This approach cannot stand with *M*; yet Livesey J confirms this approach at critical points in the judgment, especially at [422], [456], [495], [497] and [505].

15. It is against this background that [415], [416] and [426] are to be understood, that is, his Honour thought the "independent assessment" required by *M* was a heavily qualified exercise: cf RS [19]-[21]. This approach has now been followed in other SA CCA cases.[2]

16. Livesey J contrasted the existence of "solid obstacles" to guilt with asking whether a "path to a conviction" was open: [429]. The pathway approach bookended the reasons (at [429] and [493]) and came perilously close to asking whether there was a sufficiency of evidence to convict the accused: see *M* per McHugh J at 525 and the risk identified in *Pell v The Queen* (2020) 268 CLR 123 at [40]-[46], JBA 120-121.

17. The passages at [435], [441] emphasise a concept of appellate deference or "restraint" over and above the natural advantage of the fact finder in observing the manner of witnesses and the atmosphere of the trial.

[2] *Quist v The Queen* [2021] SASCA 106; *Trimboli v The Queen* [2021] SASCA 120.

18. This extended, explicitly, to disavowing a role in the drawing of inferences and engaging with "arguments for the defence": [495]-[496]. This was not in contemplation in *Pell* which addressed a different question at 145, [38]-[39], JBA 119; cf Livesey J [441]-[442], [495]-[496], [502].

19. The endorsement of the trial judge's intermediate conclusion that accident was "highly unlikely"[3] and finding that such a conclusion was not "indispensable to proof of murder", is of itself suggestive of error: [471].

20. The hypothesis consistent with innocence had to be considered as part of the ultimate inquiry and a preliminary finding to the effect that it was "highly unlikely" made rejection of that possibility all but inevitable: see Nicholson J at [240]-[243],[378].

3. Impact of the approach on the "independent assessment"

21. Livesey J's method demonstrates adherence to the restriction he drew from *Plomp*.

22. At [473], Livesey J summarised the evidence and certain findings made by the trial judge in 77 paragraphs. With rare exception, these paragraphs simply record non contentious matters or an endorsement of the prosecution case. There was no meaningful engagement with any of the defence counterpoints: contrast Nicholson J at [357]. The respondent accepts that, in isolation, the exercise to this point would be insufficient: RS [24e].

23. The analysis at [474]-[488] is a continuation of the adoption of findings and some inferences tending towards guilt as found by the trial judge.

24. The exercise which follows at [491]-[499], introduced by reference to the "inferences and reasoning available" (at [491]), discloses no independent consideration of hypotheses consistent with innocence. Rather, adverse inferences are drawn together to conclude there was a "pathway to proof of guilt": cf RS [27], [493].

25. At no stage did Livesey J himself ask the question whether accident was excluded as a reasonable possibility. Instead, his Honour remarks that "the trial Judge might reasonably have concluded that it put 'an incredible strain on human experience' to say Mrs Dansie died as a result of an accident": at [497]; once again invoking *Plomp:* at 243, JBA 28). Again, this was an abrogation of the appellate task.

26. The reason his Honour did not expressly examine that hypothesis was that he did not consider it to be the role of the appellate court to do so stating "[i]t is neither necessary nor appropriate for this Court to dwell upon what might be regarded as arguments for the defence about inferences.": at [495], confirmed at [505] (CAB 296-297, 298).

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[3] See also Parker J's incorrect statement that accident was found by the trial judge to be "extremely unlikely": at [392].