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 REPLY

Part I: Certification for publication

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

2. The appellant's reply addresses three key contentions advanced by the respondent, namely:

   a) That the principles that manage appellate review of a verdict said to be unreasonable are consistent with Livesey J's observations in CCA[494]-[496], [505]; CAB296-297, 298 to the effect that it is not for a court of appeal to decide whether inferences tending towards guilt should or should not have been drawn where proof depends on circumstantial evidence (RS[30], [37]-[38]).

   b) In any event, the reasons of Livesey J in fact expose an independent assessment of the evidence and inferences to be drawn from it in accordance with *M v The Queen* (1994) 181 CLR 487 (RS[18]-[30]).

   c) The reasons of Nicholson J reveal an erroneous approach to circumstantial reasoning (RS[40]-[49]).

Part II: The applicable principles

3. The respondent posits that an alternative way of expressing the relevant appellate test is for a court of appeal to ask whether the accused was proven guilty beyond reasonable doubt (RS[11]-[14]). With some care, this may be, with respect, a useful way to re-frame the objective of the appellate inquiry. It highlights the extent to which the appellate court must form a view about whether findings and inferences *could* and *should* have been made or drawn. Axiomatically, an appellate court cannot determine whether guilt was proved beyond reasonable doubt without descending to that level of analysis. If an appellate court does no more than identify the evidence and, having done so, concludes that the findings and inferences made or drawn by the trier of fact were *open*, the appellate court is doing no more than outlining a pathway to conviction. Correctly understood, the decisions of this Court require more.

4. Indeed, that more is required follows from the significance attributed to an appellate "doubt", as explained in *M v The Queen* (1994) 181 CLR 487 at 494. An appeal judge is required to give effect to any such doubt other than in limited circumstances. That proposition belies any unqualified suggestion that the appellate court is not to "substitute its view" of the guilt or innocence of the accused. Accordingly, the respondent's contention in those terms (RS[15]), which accommodates the remarks made by Livesey J at CCA [422], [494]-[496] and [505]; CAB256, 296-297 and 298, requires significant qualification. A court of appeal is in fact obliged to give effect to its view of an accused's guilt if, having conducted an independent assessment of the evidence, it is left with a doubt that cannot be explained away by the trial advantage. Here, the nature of the evidence and the issues in dispute neutralised any such advantage.

The judgment of Livesey J

5. In view of the matters canvassed above, the central question for the judges in the Court below was whether they entertained a reasonable doubt about the appellant's guilt. To answer that question, the Court of Appeal had to look beyond whether there was evidence favouring acceptance of the prosecution's hypothesis of murder. A rigorous consideration of the defence hypothesis consistent with innocence; the inferences on which it was based; and a determination as to whether that hypothesis had been excluded beyond reasonable doubt, was essential to the Court discharging its statutory responsibility under s 158(1)(a) of the *Criminal Procedure Act 1921* (SA).

6. Having undertaken that exercise, Nicholson J concluded that he had a doubt as to whether the appellant had been proved guilty of murder and gave effect to that doubt. His Honour arrived at that conclusion because, correctly, he saw the appellate task as extending to addressing afresh the evidence, inferences that he was prepared to draw and the persuasiveness of the parties' contentions.

7. Conversely, Livesey J bookended his reasons (see eg CCA[422]; CAB256 and CCA[505]; CAB298) with remarks apt to convey the existence of an injunction restraining the Court from grappling with disputed inferences and arguments.

8. Indeed, at CCA[422]; CAB256, Livesey J explains, relying on Menzies J in *Plomp v The Queen* (1963) 110 CLR 234 at 247, that "it is not for this Court to determine whether the only rational inference to be drawn from the circumstances was guilt beyond reasonable doubt". Whether this observation withstands scrutiny in light of the decisions of this Court since *M v The Queen* (1994) 181 CLR 487, must be seriously doubted. Respectfully, *M v The Queen* and its application to trials without jury in *Filippou v The Queen* (2015) 256 CLR 47, make it clear that it is for the appellate court to make an assessment of the sufficiency and quality of the evidence to prove the dispositive facts. Were that not the case, the appellate inquiry would turn on no more than identifying a pathway

to conviction.[1] This misunderstanding of the test appears to have shaped the way Livesey J thereafter approached the appellate task.

9. The respondent (RS[21]) defends CCA[422]; CAB256, arguing that Livesey J was not directing his remarks to an unreasonable verdict complaint. When CCA[422]; CAB 256 is read in conjunction with CCA[421], [423], [456]; CAB255-256, 267, that proposition cannot be sustained. It is sufficiently clear that Livesey J, whose judgment dealt solely with the unreasonable verdict complaint, was there framing what he considered to be the methodology to be applied in reviewing the reasonableness of the verdict.

10. In the subsequent discussion commencing at CCA[426]; CAB256, Livesey J remarks on the importance of acknowledging that primary responsibility for determining guilt is reposed in the trier of fact. That may be accepted insofar as it embraces jury verdicts in cases turning on disputed questions of credibility. However, in a case such as this, it speaks to unnecessary deference to fact finding at first instance and a distinct disengagement from evaluating inferences and any hypothesis consistent with innocence.

11. To this point in Livesey J's reasons, it may fairly be said that considerable emphasis is given to limitations on the role of the appellate court. The notion of appellate deference which emerges in CCA[422]; CAB256 thereafter crystallises in CCA[441]-[442]; CAB262 where Livesey J expressly adverts to the need for appellate "restraint". In CCA[495] and [505]; CAB 297-298, Livesey J reiterates his view that it is "neither necessary nor appropriate for this Court to dwell upon what might be regarded as arguments for the defence about inferences" and that the "Court of Criminal Appeal does not decide whether inferences tending towards guilt should or should not have been drawn…".

12. In this context, the respondent's acknowledgement [RS[24(e)] that had Livesey J's reasons gone no further than review of the evidence and findings made by the trial judge (CCA[473]; CAB272), "there may well be reason to complain that he did not adequately consider the competing inferences arising on the facts contended for by the parties", is important. Whilst the respondent thereafter advances the submission that subsequent passages in Livesey J's reasons demonstrate examination of the quality and sufficiency of the evidence, the difficulty lies in reconciling these passages with the injunction that Livesey J apparently considered applicable.

13. These observations in the reasons of Livesey J cannot be pushed aside as incidental. They appear at pivotal points and are repeated at different stages. They plainly indicate the way that Livesey J approached the appellate task. The problem then in fixing, as the respondent does (RS[19(d)], [20], [22], [24](f),(g)-[26]), on comments by Livesey J that he had independently reviewed the evidence

[1] Cf *M v The Queen* (1994) 181 CLR 487, 492-493.

and findings made by the trial judge in various respects and "agreed" with them is that the "review" and "agreement" must be predicated on what he considered to be limitations circumscribing the nature of the appellate inquiry. His Honour's "agreement" is likely to reflect no more than that he considered there was *a basis* upon which the trial judge might have drawn intermediate or ultimate conclusions.

14. Accordingly, CCA[491]-[499]; CAB294-298 do not, as the respondent contends (RS[27]), render the appellant's argument "untenable". Tellingly, at this point in his reasons, Livesey J was stating the "inferences and reasoning *available* on the whole of the circumstantial evidence" (CCA[491]; CAB294). His Honour refers to the existence of a "clear pathway" to guilt (CCA[493]; CAB296) before acknowledging that it was *not* the task of the appellate court to sift through the competing arguments or inferences for which the defence contended (CCA[495]; CAB296-297) – an exercise described by Livesey J as primarily and classically one for the trier of fact (CCA[496]; CAB297).

15. Throughout these passages, which the respondent places heavy emphasis on (RS[27]), Livesey J's focus appears to be identifying the trial judge's reasoning and whether inferences forming part of that process of reasoning were *open* to the trial judge. At CCA[497]; CAB297 for example, Livesey J remarks that "*the trial judge* (TJ[402]; CAB87) might reasonably have concluded" that accident was "highly unlikely". The question to be determined was not whether the trial judge might come to this view but whether Livesey J excluded accident as a reasonable possibility having reviewed the evidence and identified the inferences he was satisfied could and should be drawn. In fact, the endorsement (CCA[471], [483], [488]; CAB262, 293, 294) of the trial judge's intermediate finding to this effect is problematic for several reasons. First, and as Nicholson J remarked (CCA[153]-[154]; CAB157-158) the finding lacked precision and "the valid converse…is that a deliberately caused death was highly likely. Of course, this does not meet the prosecution's burden of proof".[2] Secondly, to the extent that Livesey J considered the finding "open" and "agreed" with it, the submissions advanced above at [13] remain apposite.

16. Livesey J appears to have seen the appellate function as eschewing determination of certain factual questions or the drawing of inferences, based at least in part on the *Libke* elucidation (RS[11], [13], [24(a)], [30]) to which his Honour referred at CCA[415]; CAB254 and CCA[494]; CAB296. In the appellant's respectful submission, the "might/must" dichotomy, which was in any event explained by this Court in *Pell v The Queen* (2020) 268 CLR 123, risks obfuscating the breadth of the role of the appellate court. The idea that intervention is not warranted unless the trier of fact "must" have had a doubt, might be thought to convey that even if an appellate judge has a doubt about guilt, he or she is not to give effect to that doubt because there remains some room for a contrary view. That, however, would deny the virtue of the ground as a safeguard against verdicts which an appellate

[2] See also CCA[244], [334], [338].

court considers to be unreasonable notwithstanding there was evidence capable of sustaining a conviction.

17. Although Livesey J from time to time adverted to correct statements of principle upon which the respondent seizes and stated he had undertaken an independent review, there are simply too many passages in his reasons, at critical points and made with apparent emphasis, that are incompatible with correct judicial method to safely permit the conclusion that any missteps were merely taxonomical.

The judgment of Nicholson J

18. The respondent's attack (RS[40]-[49]) on the asserted "piecemeal" approach taken by Nicholson J to the circumstantial evidence should be rejected. At CCA[295]; CAB198, Nicholson J referred to the well understood principles concerning circumstantial analysis set out in *R v Hillier* (2007) 228 CLR 618 at [46]-[48]. Later, at CCA[378]-[379]; CAB226, Nicholson J adverted to the importance of considering the "whole of the circumstantial evidence relied upon by the prosecution", resisting expressing a preliminary view whether accidental entry into the pond was "highly unlikely" for reasons he had earlier expressed (CCA[153]-[154]; CAB157-158).

19. Moreover, the respondent's challenge to Nicholson J's reasons tends to highlight the extent to which Nicholson J himself carefully assessed and weighed the intermediate findings and inferences that *he was prepared to draw* as part of his independent review of the evidence. His Honour did not demote the appellant's contentions as to inferences to mere "jury points" beyond the scope of the appellate inquiry, noting (CCA[380]; CAB226-227) that labelling issues this way can be "misleading" and invite attention on appeal to the wrong question: whether there was evidence to support the verdict.

20. In any event, it is, respectfully, unprofitable for the respondent to challenge the *persuasiveness* of Nicholson J's conclusions bearing in mind the relief sought by the appellant, namely remittal to the Court of Appeal for rehearing. The relevance of Nicholson J's analysis is it showcases a comprehensive re-examination of the record to independently gauge the sufficiency and quality of the evidence to sustain the verdict of guilty. Nicholson J's reasons disclose close adherence to the appellate task, unburdened by any *a priori* assumption that certain findings (other than those dependant on an advantage enjoyed by the trier of fact) or inferences made or drawn by the trial judge were to be accorded a special status.

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