HIGH COURT OF AUSTRALIA

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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

RESPONDENT'S SUBMISSIONS

Part I: Certification for Publication

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

Part II: Issues

2. The respondent agrees with the appellant's concise statement of the issues presented by this appeal.

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

3. The respondent considers that such notice is not required to be given.

Part IV: Material Facts

4. The appellant's summary of the evidence as set out in paragraphs [6]-[9] of the appellant's written submissions is not disputed. A more fulsome summary of the evidence is to be found at [473] of the judgment of Livesey J (CCA[473], CAB272-291).

Part V: Argument

In brief

5. The appellant was convicted of the murder of his wife, Ms Helen Dansie, after a trial before a judge sitting alone.[1] At trial, the defence case was that the deceased drowned

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1 *R v Dansie* [2019] SASC 215. As to the power vested in an accused to elect for trial by judge alone, see *Juries Act 1927* (SA), s 7.

accidentally, after her wheelchair unintentionally entered a pond in Adelaide's southern parklands. It was not in dispute that the appellant had hold of the wheelchair's handles at the time that it entered the pond (CCA [15]; CAB 114). Indeed, most of the evidence led by the prosecution in support of its circumstantial case was not in dispute. The issue at trial was what inferences could be drawn by the trial Judge from that evidence, and, in particular, whether the prosecution could exclude, as a reasonable possibility, that the deceased's wheelchair had entered the pond accidentally.

6. On appeal against his conviction the appellant contended, amongst other things, that the verdict was unreasonable and could not be supported having regard to the evidence, invoking the first limb of the common form appeal provision enacted in South Australia in s 158(1) of the *Criminal Procedure Act 1921* (SA) (***the unreasonableness ground***). As will be seen, and as is settled, consideration of the unreasonableness ground required the Court of Criminal Appeal to undertake an independent assessment of the sufficiency and quality of the evidence given at trial in order that the Court may determine whether it considered that upon the whole of the evidence it was open to the Judge to be satisfied beyond reasonable doubt of the appellant's guilt.

7. In this Court the appellant contends that the majority in the Court below (Livesey J, with whom Parker J agreed) erred in its conduct of the independent assessment required by the unreasonableness ground. In particular, it is said that the majority did not consider whether inferences arising on the evidence should have been drawn.[2]

8. The respondent submits that upon reading the judgment of Livesey J as a whole it is clear that his Honour understood the task he was required to undertake, and did undertake that task correctly. There is no irreconcilable tension in his Honour's judgment between his correct statement of principle and his application of such principle.[3] Livesey J's adoption of, or agreement with, inferences drawn by the trial Judge can only be read as a conclusion, arrived at by his Honour after necessarily evaluating the evidence, that such inferences were supported by the evidence, were reasonable, and, ultimately, were sufficient to exclude all hypotheses consistent with innocence. The appeal should be dismissed.

<u>The Court of Criminal Appeal's task where the unreasonableness ground is invoked</u>

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2 Appellant's Written Submissions at [34].
3 Appellant's Written Submissions at [53].

9. The approach to be taken by a court of criminal appeal in the application of the unreasonableness ground was "authoritatively stated"[4] by this Court in *M v The Queen* (***M***).[5] A court of criminal appeal must ask itself "whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty".[6] In *Pell v The Queen (**Pell**)* this Court further stated:[7]

> The Court of Appeal majority went on to note that in *Libke v The Queen*, Hayne J (with whom Gleeson CJ and Heydon J agreed) elucidated the *M* test in these terms:
>
> > But the question for an appellate court is whether it was *open* to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *must* as distinct from *might*, have entertained a doubt about the appellant's guilt.
> >
> > (Footnote omitted; emphasis in original.)
>
> As their Honours observed, to say that a jury "must have had a doubt" is another way of saying that it was "not reasonably open" to the jury to be satisfied beyond reasonable doubt of the commission of the offence. *Libke* did not depart from *M*.
>
> (Footnotes omitted)

10. An appellate court's approach to the unreasonableness ground is the same irrespective of whether the trier of fact was a judge or a jury.[8]

11. The approach in *M,* as elucidated in *Libke v The Queen*[9] (***the Libke elucidation***) and repeatedly reaffirmed by this Court,[10] requires a court of criminal appeal to independently assess the evidence, both as to its sufficiency and quality,[11] and, making due allowance for the natural limitations that exist in the case of an appellate court proceeding wholly or substantially on the record,[12] determine whether the jury must have had a doubt as to the guilt of the accused (or, put slightly differently, determine

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4 *Pell v The Queen* (2020) 268 CLR 123 at [43] (The Court).
5 (1994) 181 CLR 487.
6 *Pell v The Queen* (2020) 268 CLR 123 at [43] (The Court) quoting *M v The Queen* (1994) 181 CLR 487 at 493 (Mason CJ, Deane, Dawson and Toohey JJ) with approval.
7 (2020) 268 CLR 123 at [44] (The Court).
8 *SKA v The Queen* (2011) 243 CLR 400 at [12] (French CJ, Bell, Keane and Nettle JJ), [83] (Gageler J); perforce, relevantly, of s 7 of the *Juries Act 1927* (SA).
9 (2007) 230 CLR 559 at [113] (Hayne J). See also, *Chidiac v The Queen* (1991) 171 CLR 432 at 452 (Dawson J).
10 See, for example, *Pell v The Queen* (2020) 268 CLR 123 at [43]-[44] (The Court); *Coughlan v The Queen* (2020) 94 ALJR 455; *GAX v The Queen* (2017) 91 ALJR 698 at [25] (Bell, Gageler, Nettle and Gordon JJ); *The Queen v Baden-Clay* (2016) 258 CLR 308; *SKA v The Queen* (2011) 243 CLR 400 at[22] (French CJ, Gummow and Kiefel JJ) ; *Weiss v The Queen* (2005) 224 CLR 300 at [41] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ).
11 *Morris v The Queen* (1987) 163 CLR 454 at 473 (Deane, Toohey and Gaudron JJ); *SKA v The Queen* (2011) 243 CLR 400 at [14] (French CJ, Gummow and Kiefel JJ); *BCM v The Queen* (2013) 88 ALJR 101 at [31] (The Court).
12 *Weiss v The Queen* (2005) 224 CLR 300 at [41] (The Court).

whether the accused was proven guilty beyond reasonable doubt (***the Weiss formulation***).[13] The question is one of fact.[14]

12. It is not enough that there be evidence which, if accepted, had the capacity to prove each of the elements of the offence charged.[15] That would mean no more than that the verdict could be supported having regard to the evidence. The text of the common form appeal provision requires more - the verdict must also not be unreasonable. As Gibbs CJ and Mason J explained in *Chamberlain [No 2],* in a passage quoted with approval in *Morris v The Queen*[16]:

> In *Raspor v The Queen* and *Plomp v The Queen*, it was recognized that a court of criminal appeal may interfere with a verdict which is unsafe or unsatisfactory even if there is sufficient evidence to support it as a matter of law, and even though there has been no misdirection, erroneous reception or rejection of evidence, and no other complaint as to the course of the trial. In other words, even if there is some evidence on which a reasonable jury might be entitled to convict, a Court of Criminal Appeal has the responsibility to consider whether 'none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand': *Hayes v The Queen*.[17]

13. The *Libke elucidation,* as explained in *Pell*, and the *Weiss formulation* serve to emphasise the work to be done by the statutory requirement that the verdict not only be supportable, having regard to the evidence, but must also not be unreasonable. They also give meaning to the expression that the verdict must be one *open* to the jury. That is to say, the verdict will be *open* to the jury where the appellate court is satisfied, having undertaken an independent assessment of the evidence, that the jury should not have had a doubt as to the guilt of the accused, or, is satisfied that the accused was proven guilty beyond reasonable doubt.

14. Here it is important to note that a doubt experienced by a court of criminal appeal, which cannot be explained by the manner in which evidence was given, "will be a doubt which a jury ought also to have experienced".[18]

15. The unreasonableness ground does not empower a court of criminal appeal to undertake an independent assessment of the evidence, and, in the light thereof,

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13 *Weiss v The Queen* (2005) 224 CLR 300 at [41] (The Court). See also, *McKay v The King* (1935) 54 CLR 1 at 9-10 (Dixon J); *Chidiac v The Queen* (1991) 171 CLR 432 at 444 (Mason CJ).

14 *M v The Queen* (1994) 181 CLR 487 at 492 (Mason CJ, Deane, Dawson and Toohey JJ); *Morris v The Queen* (1987) 163 CLR 454 at 462 (Mason CJ).

15 *Morris v The Queen* (1987) 163 CLR 454 at 473 (Deane, Toohey and Gaudron JJ): *Chidiac v The Queen* (1991) 171 CLR 432 at 452 (Dawson J).

16 (1987) 163 CLR 454 at 473 (Deane, Toohey and Gaudron JJ).

17 (1984) 153 CLR 521 at 531.

18 *M v The Queen* (1994) 181 CLR 487 at 494 (Mason CJ, Deane, Dawson and Toohey JJ); *Morris v The Queen* (1987) 163 CLR 454 at 472 (Deane, Toohey and Gaudron JJ); *Pell v The Queen* (2020) 268 CLR 123 at [45] (The Court).

substitute its own view of guilt or innocence.[19] Rather, it requires the court to examine the record to determine whether "the jury acting rationally, ought … to have entertained a reasonable doubt as to proof of guilt".[20] That is to say, the unreasonableness ground takes as its subject the ultimate conclusion - the verdict of guilt returned by the trier of fact - and asks the court of criminal appeal to determine whether that verdict is unreasonable or cannot be supported by the evidence. To answer that question an independent assessment of the sufficiency and quality of the evidence is necessary, but 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. For a court of criminal appeal to proceed in that way would be to apply a different test to that statutorily prescribed; it would amount to the substitution of trial by a court of appeal for trial by jury.[21]

16. In a sense the unreasonableness ground does burden an appellate court with responsibility for the superintendence of the verdict.[22] There is nothing to be gained, however, by dwelling on the characterisation of the function as supervisory or otherwise.

17. Three related principles are worthy of mention:

a. first, the functional or constitutional demarcation between the roles of the trier of fact and the appellate court dictates that the weight to be afforded to a witness' evidence by reference to the manner in which it was given remains the province of the trier of fact.[23] The same must follow where the trier of fact relies upon demeanour displayed in any recording of a witness' evidence or recording of an out of court statement made by a witness played to the trial court.

b. second, in a circumstantial case, an assessment of the sufficiency and quality of the evidence requires the appellate court to weigh all the circumstances, including intermediate inferences, in deciding whether it was open to the jury to draw the ultimate inference.[24]

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19 *McKenzie v The Queen* (1996) 190 CLR 348 at 367 (Gaudron, Gummow and Kirby JJ).
20 *Pell v The Queen* (2020) 268 CLR 123 at [39] (The Court).
21 *M v The Queen* (1994) 181 CLR 487 at 494 (Mason CJ, Deane, Dawson and Toohey JJ).
22 *Darling Island Stevedoring & Lighterage Pty Ltd v Jacobsen* (1945) 70 CLR 635 at 643 (Dixon J); quoted with approval in *Morris v The Queen* (1987) 163 CLR 454 at 462 (Mason CJ).
23 *Pell v The Queen* (2020) 268 CLR 123 at [58] (The Court).
24 *Coughlan v The Queen* (2020) 94 ALJR 455 at [55] (The Court).

c. third, an appellate court's reasons must, where the unreasonableness ground is in play, disclose the independent assessment of the sufficiency and quality of the evidence undertaken.[25]

The Judgment of Livesey J

18. A central plank to the appellant's argument is the interpretation of paragraphs CCA [413]-[418]; CAB 253-255 of Livesey J's judgment. It is contended that the erroneous approach to the task required by the unreasonableness ground is detectable in these paragraphs and carried forward. The respondent contends that the appellant's interpretation of [413]-[418] should be rejected.

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19. After a very brief introduction in which his Honour indicates that his reasons deal solely with the unreasonableness ground, Livesey J provides a summary of his ultimate conclusion under the heading, "Disposition of the appeal"; CCA [413]-[418]; CAB 253-255. What follows in the succeeding sections of the judgment is an explication of the conclusions set out under that heading. In the course of the summary of his reasons for arriving at his ultimate conclusion Livesey J:

a. at CCA [413]; CAB 253-254 correctly articulates the test to be applied in addressing the unreasonableness ground by way of quoting from the joint reasons in *Filippou v The Queen* (***Filippou***),[26] such quote including, in turn, a

20 quotation from *M* containing the applicable test, adapted to address its application to trial by judge alone. Plainly, his Honour chose the passage from *Filippou* because it dealt directly with the application of the unreasonableness ground to a trial by judge alone and was, therefore, apposite.

b. at CCA [414]; CAB 254 Livesey J deals with the question of sufficiency and whether the verdict could be supported having regard to the evidence. He concluded that in his view the evidence was sufficient and could support the verdict.

30 c. next, at CCA [415]; CAB 254 Livesey J turns to the question of whether the verdict was unreasonable. Here his Honour correctly states the applicable test a second time, quoting on this occasion from the judgment of Hayne J in *Libke*

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25 *BCM v The Queen* (2013) 88 ALJR 101 at [31] (The Court); *SKA v The Queen* (2011) 243 CLR 400 at [22]-[24] (French CJ, Gummow and Kiefel JJ).

26 (2015) 256 CLR 47.

v The Queen ***(Libke)***.[27] What follows in the balance of [415] may be considered, respectfully, an attempt to paraphrase [65] of this Court's judgment in *R v Baden-Clay* ***(Baden-Clay)***, footnoted at the end of [415], and the sentiment of the authorities footnoted in [65] of *Baden-Clay*.[28] The statements made are not incorrect (that it is *primarily* for the trial court to determine whether inferences should or should not be drawn, acknowledges the fact that the verdict of the trier of fact is qualified by the possibility of appellate intervention)[29], nor do they necessarily take away from the Livesey J's embrace of the test in *M* as contained in the quotation from *Filippou* (at [413]), and the re-statement taken from *Libke* (at [414]).

d. Livesey J opens CCA [416]; CAB 254 with the words "Having reviewed the evidence before the trial judge, I do not doubt the guilt of the appellant". No reason arises to think that his Honour did otherwise than he has stated, and, having done so, that he independently satisfied himself that the guilt of the appellant was proved. Livesey J then states (at [416]):

> … It cannot be said that the various inferences suggestive of guilt should not have been drawn, or that it was wrong to conclude that the only rational inference is that the appellant is guilty of murder.

These conclusions naturally flow from that stated in the preceding sentence. It is because his review of the evidence before the trial Judge led him to be satisfied that the guilt of the appellant had been proved, that Livesey J can conclude that it cannot be said that the various inferences suggestive of guilt should not have been drawn, or that it was wrong to conclude that the only rational inference is that the appellant is guilty of murder. The conclusory statements that his Honour makes betray not only the fact of an independent assessment having been undertaken, but an assessment of the strength of the inferences drawn. Quality and sufficiency are thus both accounted for. Further, the language of CCA [416]; CAB 254 is redolent of the *Libke* elucidation, modified to fit a circumstantial case.

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27 (2007) 230 CLR 559 at [113].

28 (2016) 258 CLR 308.

29 *Weiss v The Queen* (2005) 224 CLR 300 at [30] (The Court). See also, *SKA v The Queen* (2011) 243 CLR 400 at [13] (French CJ, Gummow and Kiefel JJ); *M v The Queen* (1994)181 CLR 487 at 493 (Mason CJ, Deane, Dawson and Toohey JJ).

e. If there is any doubt arising from [416] that Livesey J conducted an independent assessment of the evidence and arrived at his own conclusion as to whether the appellant's guilt had been proved, it is dispelled by CCA [417] & [418]; CAB 255. The second sentence of CCA [417] in particular, and the first sentence of [418] make plain that the required assessment was undertaken. The conclusion that the evidence, taken as a whole, did not require that the Judge entertain a reasonable doubt about the appellant's guilt could not be reached unless the sufficiency and quality of the evidence was assessed, that assessment being manifest in the expressed opinion that it was a *strong* circumstantial case. The conclusion that the evidence, taken as a whole, *did not require* that the Judge entertain a reasonable doubt about the appellant's guilt is another way of saying that upon reviewing the evidence it cannot be said that the Judge must, should or ought to have had a reasonable doubt.

20. In his written submissions the appellant refers to CCA [415]-[417]; CAB 255 and contends that they reveal an understanding of the appellate task as being supervisory in nature, that nowhere does Livesey J refer to the need to conduct an independent assessment, and that his satisfaction of the appellant's guilt is only expressed after disavowing any role for the appellate court in drawing and assessing inferences.[30] Respectfully, these submissions, and the suggestions that the asserted errors are carried through the judgment, should be rejected. First, as indicated above, the task is in a sense supervisory, albeit not in the administrative law sense. If the appellant's intention is to contrast the function with the exercise of the supervisory jurisdiction, it is unhelpful. Second, at [414] the Judge, in embracing the approach set out in the quotation taken from *Filippou* avers to the need to undertake an independent assessment and the test as settled in *M* adapted for trial by judge alone. Third, Livesey J expressly states that he has reviewed the evidence and, having done so, does not doubt the guilt of the appellant. Fourth, properly understood Livesey J does not disavow any role for the appellate court in drawing and assessing inferences, rather, as explained above ([19(a)-(e)]), it is because of his review of the evidence before the trial Judge which led him to be satisfied that the guilt of the appellant had been proved, that Livesey J can conclude that it cannot be said that the various inferences suggestive of guilt should not have been drawn, or that it was wrong to conclude that the only rational inference is that the appellant is guilty of murder.

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30 Appellant's Written Submissions at [38].

21. Next the appellant points to CCA [422] and [426]; CAB 256 and 256-257 as further indicative of a misunderstanding on Livesey J's part of the task he was to undertake. Under the heading, "The role of the appeal court", Livesey J distills the principles applicable to the task to be undertaken by an appellate court in dealing with the unreasonableness ground. No issue is taken with CCA [421]; CAB 255 where his Honour refers to s 158(1)(a) of the *Criminal Procedure Act 1921* and the unreasonableness ground as arising where there has been "no wrong decision on any question of law" or otherwise no suggestion of a miscarriage of justice. Plainly Livesey J has commenced his treatment of the role of the court at the macro level having regard to the three bases upon which a conviction may be attacked on appeal. The opening four sentences of CCA [422] are correct. They observe the functional demarcation to which this Court referred in *M.*[31] In the balance of CCA [422] and including the passage quoted from *Filippou*, Livesey J continues to address the application of the common form appeal provision at the macro level. Importantly, in neither CCA [421] nor CCA [422] does Livesey J deal specifically with the unreasonableness ground for specific treatment. That occurs at CCA [423]-[441]. Respectfully, the appellant is incorrect in suggesting that in CCA [422]: CAB 256 Livesey J is concerned about the drawing of inferences in the context of the application of the unreasonableness ground.[32]

22. The appellant contends that at CCA [425]; CAB 256 Livesey J is correct in the principles stated. It should not be overlooked that in this paragraph Livesey J expressly states a second time that he has conducted his own assessment of the evidence both as to sufficiency and quality in determining whether the verdict can be supported or is unsafe and unsatisfactory.

23. The appellant attacks CCA [426]; CAB 256-257 as undermining the correct statement of principle in CCA [425]. Respectfully, it is wrong to attribute a particular meaning to CCA [426] without having regard to the authorities footnoted as supporting the propositions advanced, and the passages in those authorities expressly identified. In [426] Livesey J directs the reader to *Filippou* at [11]-[12] and *SKA v The Queen*[33] ***(SKA)*** at [13]. The reference to the "primary responsibility" of the trial Judge made by

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31 (1994) 181 CLR 487 at 494-495 (Mason CJ, Deane, Dawson and Toohey JJ).
32 Appellant's Written Submissions at [40].
33 (2011) 243 CLR 400.

Livesey J in [426] is taken from the joint reasons in *SKA*[34] which, in turn, was taken from the joint reasons in *M*.[35] The point being made is the conceptual difference between the task of the trier of fact on the one hand, and the appellate court on the other. The same point is made in *Filippou* at [11]-[12].[36] That Livesey J is concerned to explain the functional demarcation distinguishing the roles is made all the more clear at CCA [441]; CAB 262. Correctly understood, including by having regard to the authorities relied upon, the propositions stated in [426] do not undermine those stated in [425] and are not at odds with the conduct of an independent assessment of the sufficiency and quality of the evidence.

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24. The appellant then turns to that portion of Livesey J's judgment under the heading, "The evidence and findings in this case", highlighting sentences in paragraphs that are said to betray error in approach.[37] The risk of analysing Livesey J's judgment in a manner that quarantines particular paragraphs and sentences for individual treatment must be avoided. A consideration of the judgment read as a whole reveals:

a. Livesey J's frequent reference to *Libke* and the *Libke elucidation* does not betray error. As indicated above, in *Pell* this Court made clear that the *Libke elucidation* did not narrow or alter the test prescribed by *M*.[38] No error can be inferred from
20 Livesey J's reference to the elucidation.

b. Livesey J does not posit anything different from the test in *M*, or apply that test incorrectly, on any of the occasions his Honour makes express reference to it (CCA[414]; CAB254, CCA[422]; CAB256, CCA[493]; CAB296, CCA[494]; CAB296, CCA[495]; CAB296-7, CCA[496]; CAB297, CCA[505]; CAB298). Those paragraphs highlight that his Honour:

(a) was acutely aware of the functional demarcation between the task of the trial Judge and that of the appellate court and, therefore, that he was not retrying
30 the case, but rather determining whether the trial Judge had erred in concluding that guilt was the only rational inference open on the evidence.

(b) understood that if his review of the evidence had found error by the trial Judge so that the alternative hypothesis of accident was reasonably possible, then the appeal would be allowed, because his Honour would have found that the sufficiency and quality of the evidence did not support guilt as the only reasonable hypothesis available on the evidence.

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34 (2011) 243 CLR 400 at [13].
35 (1994)181 CLR 487 at 493.
36 (2015) 156 CLR 47 at [13] (French CJ, Gummow and Kiefel JJ).
37 Appellant's Written Submissions at [43]-[52].
38 *Pell v The Queen* (2020) 268 CLR 123 at [44] (The Court).

c. On seven occasions Livesey J indicates that he has conducted his own review of the evidence (CCA[416];CAB254, CCA[425];CAB256, CCA[473]; CAB272, CCA[476]; CAB291, CCA[488];CAB294, CCA[491];CAB294, CCA [506]-[508]; CAB 299). Justice Parker does the same on six occasions (CCA[387]; CAB249, CCA[393]; CAB249, CCA[394]; CAB250, CCA[400]; CAB251, CCA[404]; CAB252, CCA[407]; CAB252).

d. Contrary to the appellant's suggestion, the subject of CCA [472]; CAB 272 is not the independent assessment undertaken by Livesey J. It is a statement of the trial Judge's task. At CCA [473]; CAB 272 Livesey J commences his assessment of the evidence, undertaking the appellate task in contradistinction to the trial Judge's task. As much is made plain by the opening sentence of CCA [473] - "For the purposes of my own review … In order to assess the strength of the case …".

e. At CCA[473]; CAB272-291 Livesey J conducted a comprehensive review of the evidence at trial. If his Honour had stopped there, 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 and assess whether the evidence was of sufficient quality to sustain the ultimate inference drawn by the trial Judge. His Honour's reasons, however, progressed much further than a mere review of the evidence. The language and structure of his Honour's judgment in the passages that follow paragraph CCA[473]; CAB272-291 demonstrate that this is so.

f. At [474] Livesey J outlined the adverse credibility findings that were made by the trial Judge, and ultimately concluded that "there was a proper basis for these findings", that "they were open to the trial Judge", and, importantly, that he *agreed* with those findings (CCA[474]-[476]; CAB291). At [477]-[487]; CAB 291-294 his Honour considered the plausibility of the appellant's explanation about how the wheelchair ended up in the pond and the evidence of motive, concluding that there was a proper basis for the conclusions reached by the trial Judge and that those conclusions were open and that he agreed with them. Livesey J's agreement with the trial Judge's findings demonstrates that his Honour turned his mind to whether the evidence was sufficient and strong enough to support the findings of the trial Judge.

g. Similar expressions of approval and agreement with the trial Judge's findings are to be found at CCA[403]; CAB296, CCA[498]; CAB297, and CCA[499];

CAB297. Again, on each of these occasions his Honour's agreement with the inferences drawn by the trial Judge was not an abdication of the appellate function on his part. To the contrary, his Honour's agreement with those inferences reveals that his Honour had indeed considered the sufficiency and quality of the evidence at trial to support those findings.

25. The respondent submits that Livesey J's consideration of the credibility findings made by the trial Judge at CCA[474]; CAB291 is a clear demonstration that his Honour both conducted an independent review of the evidence pertaining to credibility, and then turned his mind to the inferences that could properly be drawn from that evidence. At CCA[474]; CAB291 Livesey J outlined the credibility findings of the trial Judge, and then at CCA[475]; CAB291 his Honour outlined the inferences the trial Judge had drawn from those findings. Livesey J immediately then made three interrelated findings (CCA[476]; CAB291); first, that his Honour was satisfied there was a *proper basis* for the trial Judge's findings; second, that the findings were indeed *open* to the trial Judge; and third, that his Honour *agreed* with the trial Judge's findings.

26. Again, these passages of the judgment must be seen in light of CCA[473]; CAB272-291. The respondent submits that Livesey J's indication that he *agreed* with the trial Judge's findings betrays the fact that his Honour had independently turned his mind to them. Then, from CCA [475]-[487]; CAB291-295 his Honour explained at length the ways in which those credit findings were deployed by the trial Judge to draw further inferences on the prosecution case, before, at CCA[488]; CAB294 agreeing with those conclusions. Again, the respondent submits that Livesey J's *agreement* with the trial Judge's findings necessarily implies that his Honour had conducted an independent review of them.

27. At CCA [491]-[499]; CAB 294-298 Livesey J deals with the inferences that may be drawn from the evidence, as assessed by him, under the heading, "Considering the inferences available on the evidence". The appellant's contention at paragraph [66] of his submissions that Livesey J did not undertake the process of weighing the evidence as is required, and considered that the appellate court could not determine itself the inferences to be drawn from that evidence, is untenable in light of his Honour's extensive discussion of those inferences at CCA[491]; CAB294-296. CCA [491(1)-(6)]) are littered with descriptors indicative of an independent assessment and evaluation of the inferences culminating in his Honour's conclusion that, having regard

to the inferences, "the circumstantial case becomes compelling" CCA [491(6); CAB 296.

a. At CCA[491.1]; CAB294-295 his Honour considered the inferences that could be drawn from the evidence that established that the Appellant would be in a better financial position after the death of his wife. Livesey J expressly considered the contentions that the sums of money involved in this case were not significant, and were "too small to warrant contemplating murder", but found that it was nonetheless open on the evidence to conclude that the financial motive to commit the offence was "comparatively important in circumstances where his own personal exertion and pension income was so modest".

b. At CCA[493]; CAB296 Livesey J went on to comment that this inference was "open to [the trial Judge] *because [it arose] on an independent review of the evidence*", indicating again that Livesey J had conducted the task required of him: his Honour had conducted an independent review of the evidence, had identified that this was an inference available on that evidence, and therefore that it was open to the trier of fact to draw that inference. This is a clear example of Livesey J weighing the evidence for himself.

c. In paragraphs CCA[491.2-5]; CAB295-296 Livesey J then undertook the same process of evaluation in relation to other aspects of the evidence. This involved his Honour weighing, for example, the evidence that the Appellant's relationship with his wife prior to her death was "amicable", against the other evidence that suggested the Appellant had come to consider the relationship as time consuming and burdensome (CCA[491.3];CAB295).

28. Importantly, Livesey J then considered these findings in conjunction with the appellant's "unconvincing explanations" about what had occurred at the pond (CCA[491.6]; CAB296), and noted that they needed to be considered in addition to other pieces of evidence, such as the evidence giving rise to the adverse credit findings made by the trial Judge (CCA[492]; CAB296). What Livesey J does in this passage of his reasons is in fact the process of weighing and evaluating the evidence that the appellant complains his Honour failed to do. Livesey J's conclusion at CCA[493]; CAB296 that these inferences arose on "an independent review of the evidence" and were therefore open to the trial Judge reveals that his Honour has adequately discharged the appellate task.

29. The concluding sentence of CCA [493]; CAB 296 viewed in isolation could be considered problematic, but it must be viewed in the light of what precedes it (dealt with above) and what follows. As to what follows at CCA [496]; CAB 297 Livesey J correctly states that if a piece of evidence is capable of being viewed in a manner consistent with innocence, the appellate court must intervene if "as part of the whole [it] necessarily raises scope for reasonable doubt". Then there is CCA[506]-[507]; CAB298-299 (see below).

10 30. Livesey J's subsequent comments in CCA[494]-[496]; CAB296-297, which are criticised by the appellant at [48]-[49] of his submissions, do not, in the respondent's submission, indicate error on his Honour's part. Nothing in the paragraphs complained of is inconsistent with the statements of principle drawn from the judgments of this Court referred to above and, in particular, the functional and constitutional demarcation referred to in *Pell*.[39] In this regard, Livesey J's approach is orthodox. Livesey J's appreciation of the approach to the independent assessment of a circumstantial case is also correct; a circumstantial case is not to be considered piecemeal, all of the evidence must be considered and in doing so one piece of evidence, and one intermediate inference, may resolve doubts arising from other
20 evidence and other intermediate inferences (this is borne out by Livesey J's illustration, analysed in CCA[497]-[499]; CAB297-298). Again, Livesey J's approach is consistent with authority. The final observation made in CCA[496]; CAB297 that a piece of evidence, considered along with all of the evidence, could give rise to intervention by a court of criminal appeal "if as part of the whole [it] necessarily raises scope for reasonable doubt" reflects the *Libke elucidation*.[40] It is by no means suggestive of an abandonment of an assessment of the quality and sufficiency of the evidence as part of the required independent assessment.

31. At paragraphs [68]-[72] of the appellant's submissions much is made of the comments
30 of this Court in *SKA*[41] about the need for an appellate court to weigh the competing evidence in performing its duty. What must be borne in mind, however, is that in *SKA*, the Court of Criminal Appeal failed to deal with an issue that was *fundamental* in determining whether a conviction was supported by the evidence - the date on which

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39 *Pell v The Queen* (2020) 268 CLR 123 at [38] (The Court).

40 *Libke v The Queen* (2007) 230 CLR 559 at [113] (Hayne J); *Pell v The Queen* (2020) 268 CLR 123 at [44] (The Court).

41 *SKA v The Queen* (2011) 243 CLR 400 at [24] (French CJ, Gummow and Kiefel JJ).

two of the offences were committed. In *SKA*, it was alleged that counts four and five had occurred between 1-25 December 2006, and the effect of the complainant's evidence was that the offences could only have occurred on either 22, 23 or perhaps 24 December 2006. The applicant led evidence to establish that he had an alibi for the entirety of this period.[42] This Court found that the reasons of the Court of Appeal had failed to disclose that it had conducted an independent assessment of the evidence in relation to the timing of the 2006 offences, which was "a critical matter".[43]

32. The situation in *SKA*, then, was quite different from the situation in this case. Here, there is no critical matter or fundamental issue that has not been dealt with by Parker and Livesey JJ. To that end, the comments in *SKA* to the effect that an appellate court is required to weigh the competing evidence in discharging its function must be read in their context, and it does not follow that Livesey J was required to revisit each and every inference drawn by the trial Judge and come to an independent view about whether that specific conclusion ought to have been drawn in order to fulfil the appellate task. Livesey J's reasons, when considered in their entirety, reveal that his Honour did independently review the whole of the evidence and, after doing so, concluded that the only rational hypothesis available on that innocence was that the appellant was guilty beyond reasonable doubt.

33. A complaint is made by the appellant about the "intermediate conclusion" drawn by the trial Judge that "it is highly unlikely that Mrs Dansie drowned accidentally in the pond" (CAB87) and Livesey J's subsequent endorsement of that finding at CCA[497]; CAB297. The respondent submits that there was nothing inappropriate about the trial Judge's intermediate finding, and that Livesey J's agreement with the intermediate conclusion does not expose error on his Honour's part.

34. The appellant contends that the trial Judge's intermediate conclusion that accidental drowning was "highly unlikely" involved a rejection of the appellant's account, and indicated that the trial Judge put the appellant's explanation to one side at an intermediate stage of his reasoning. To the contrary, the respondent submits that the trial Judge made clear - as did Livesey J at CCA [497]; CAB297 - that his conclusion that accidental drowning was highly unlikely was informed by a number of other aspects of the evidence (including the topography of the pond, the functioning of the

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42 *SKA v The Queen* (2011) 243 CLR 400 at [8]-[10] (French CJ, Gummow and Kiefel JJ).
43 *SKA v The Queen* (2011) 243 CLR 400 at [21] (French CJ, Gummow and Kiefel JJ).

deceased's wheelchair, and the appellant's improbable explanation for not being able to rescue his wife), and was in turn only one aspect of the prosecution's circumstantial case. It is uncontroversial that in a circumstantial case, individual pieces of evidence are not to be considered by either a jury or an appellate Court in a piecemeal fashion.[44]

35. Further, Livesey J expressly accepted that the high unlikelihood of accidental drowning could not, in and of itself, have established guilt beyond a reasonable doubt (CCA[497]; CAB297). His Honour went on to explain the other aspects of the circumstantial case that, in combination with the unlikelihood of accident, could properly support a finding of guilt. The evidence in this matter was extensive and complicated. The trial Judge repeatedly indicated that as this was a circumstantial case, no piece of evidence, and no inference, could be considered in isolation. There was nothing inappropriate about the trial Judge's expression of an "intermediate conclusion" in the circumstances of a case such as the present.

36. Respectfully, Livesey J's reasons do contain an explication of the basis upon which he concluded that accident could be rejected as a reasonably possibility. The trial was essentially a contest of two competing hypotheses - accidental or intentional drowning. Livesey J's analysis from CCA[491]-[504] (CAB294-298) is a clear and cogent explanation of why his Honour considered that the ultimate conclusion reached by the trial Judge was open on the evidence and thus that the verdict was not unreasonable or could not be supported by the evidence.

37. In bringing his judgment to a close Livesey J said:

> [505] The Court of Criminal Appeal does not decide whether inferences tending towards guilt should or should not have been drawn following a verdict of guilty where proof depends on circumstantial evidence. It decides whether it was open to the jury in a jury trial, or the trial judge in a trial by the judge alone, to draw those inferences and, ultimately, whether it was open at trial to conclude that the only rational hypothesis is guilt beyond reasonable doubt.
>
> [506] That conclusion is reached by the Court of Criminal Appeal only after it undertakes its own independent review of the evidence before the trial court. Recognising the trial court's advantage in seeing and hearing the witnesses, and respecting the demarcation between the trial court and the appeal court, the appeal court evaluates whether the evidence so lacks credibility, displays discrepancies or inadequacies, or is otherwise beset by such shortcomings or obstacles to proof, that there must, as distinct from might, have been reasonable doubt about proof of guilt. In most cases, a doubt experienced by an appeal court will be a doubt which ought to have been experienced by the jury or by the judge in a trial by judge alone. That is, whether there arises a significant possibility that an innocent person has been convicted.

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44 *R v Hillier* (2007) 228 CLR 618 at [48] (Gummow, Hayne and Crennan JJ); *Shepherd v The Queen* (1990) 170 CLR 573 at 579-580 (Dawson J, Mason CJ, Toohey and Gaudron JJ agreeing).

(Footnotes omitted)

These remarks reflect a correct understanding of the principles governing the task required of an appellate court considering the unreasonableness ground and the correct application of those principles.

38. Repeatedly, the appellant insists that the role of an appellate court in considering the unreasonableness ground is to weigh the evidence and then decide for itself the inferences that could *and should* have been drawn. It is indeed consistent with authority that the appellate court must independently review the evidence and identify the inferences that could be drawn from that evidence. In a circumstantial case, if the ultimate inference drawn by the trier of fact is not reasonably open on the evidence, it will follow that the appeal will be allowed.

39. There is no error in the reasons of Livesey and Parker JJ. The respondent submits that it is clear from the trial Judge's detailed consideration of the evidence and issues, and Livesey J's subsequent review of those materials on appeal, that there was ample evidence upon which the trial Judge could rely to find the appellant guilty of murder beyond a reasonable doubt and that it was "open" for his Honour to do so.

The Judgment of Nicholson J

40. The appellant submits that Nicholson J, in the dissenting judgment, correctly discharged the appellate function, and that a comparison between the approach taken by Nicholson J and the respective approaches of Parker and Livesey JJ reveals that the latter have erred in their application of the test in *M*. The respondent submits that this is not so, and that, respectfully, the approach Nicholson J took was not in accordance with that required of an appellate court in a circumstantial case.

41. *R v Hillier* requires a trier of fact to consider all of the circumstances established by the evidence as a whole in deciding whether guilt has been proved beyond reasonable doubt.[45] With respect, although Nicholson J adverted to this requirement at CCA[295]; CAB198, his Honour's reasons suggest a piecemeal approach to the prosecution case, and indicate that his Honour has not, in fact, considered all of the circumstantial evidence and its cumulative effect.

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45 *R v Hillier* (2007) 228 CLR 618 at [46]-[48] (Gummow, Hayne and Crennan JJ).

42. So much is clear from his Honour's consideration of the arguments contended by the appellant in support of accidental death being a reasonable possibility at CCA[357]; CAB218. At CCA[357](i)-(ii); CAB218 his Honour considers the appellant's inability to recollect or describe how his wife's wheelchair entered the pond. His Honour says that this may be accepted as not inconsistent with an accident having occurred in sudden and shocking circumstances. That may be so in and of itself, but it ignores the context of all the other evidence which points to the lack of recollection being because no such accident occurred.

10 43. The finding at CCA[357](xi); CAB219 that the evidence that the appellant was motivated by a desire to have a relationship with Sophia was weak because the appellant had the freedom to pursue that relationship due to Mrs Dansie's circumstances ignores that:

(a) Some of the communications with Sophia correlate with internet searches for information about funeral services;
(b) Sophia was in China, so pursuing that relationship necessitated being absent from Mrs Dansie, which would arouse suspicions, and the discussion of marriage with Sophia;
20 (c) The appellant did not disclose the "relationship" until he was aware that police would search his computers;
(d) The appellant's obsession with financial matters (which would be impacted by any separation).

44. Nicholson J's consideration at CCA[357](xx); CAB221 that the proximity between a search online for funeral information and a search online for sexy shoes may simply have been explained by the appellant searching for different matters of interest whilst on the internet without those matters being related ignores the wider context and other facts of the case, including the appellant's interest in a relationship with Sophia, and
30 is speculative.

45. His Honour's consideration at CCA[357](xvi); CAB220 that the location of the appellant's Armani watch (along with other items) in his car is equivocal ignores the lie that the appellant told to police about it (that he had left it in the car two days earlier, when CCTV footage clearly showed him wearing it shortly before going to the pond). The evidence is discarded by his Honour, notwithstanding a finding that it was probative of premeditation, on the basis that the appellant had "no need" for those items and they would be more secure in the locked car, when that was not the evidence of the appellant as to why the items (particularly the watch) were left there. That

reasoning is suggestive of an appellate Court formulating a hypothesis that was not left open on the evidence at trial, which is not permitted in accordance with *Baden-Clay*.[46]

46. Similarly, in respect of the internet searches, his Honour's acceptance at CCA[357](xx); CAB221 of the defence submission that the funeral searches were conducted by the appellant because of two recent deaths in the family of Mrs Dansie relied on an explanation for the searches that the trial Judge found was never given to police (CAB88, CCA[488]; CAB294).

47. There are other examples of Nicholson J dealing with items of evidence and then explaining them away, sometimes quite speculatively. For example, in relation to the evidence about the appellant placing Mrs Dansie's wheelchair on Rock B, Nicholson J agrees with the findings of the trial Judge about the difficulties of doing so (CCA[363]-[364]; CAB223), but then dismisses this on the basis that "people do unwise, even foolish and reckless, things" (CCA[367]; CAB223). However, this does not fit with Nicholson J's earlier indication at CCA[357](iii); CAB218 that the appellant was not unintelligent. His Honour's finding that the fact that the appellant had not pre-prepared a coherent explanation for the incident, and that this was inconsistent with a premeditated murder (CCA[370]; CAB224), ignores the fact that the appellant's explanation was exactly that - coherent, simple and easy to remember. His explanation was that he had hold of the wheelchair, Mrs Dansie released the brakes, and the wheelchair went into the pond. The fact that the appellant was consistent with this story indicates the coherent simplicity of it.

48. Nicholson J at one stage says that the evidence in respect of the two motives is not, at least considered in isolation, particularly powerful (CCA[375]; CAB225). This belies his Honour's approach. In essence, his Honour has dealt with the evidence piecemeal and discarded it (without truly ascribing weight) by his own theories of human behaviour and speculation.

49. This is to be contrasted with the approach of the trial Judge, who deals with evidence and then consistently says that "the significance of the evidence and submissions [about whichever topic he was discussing] can only be determined in light of the evidence as a whole", or words to that effect (Trial Judge (TJ) [125]; CAB32, TJ [155]; CAB37, TJ[272]; CAB61, TJ[318]; CAB70, TJ[326]; CAB71). This approach

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46 *R v Baden-Clay* (2016) 258 CLR 308 at [63] (French CJ, Kiefel, Bell, Keane and Gordon JJ).

demonstrates the appropriate manner of dealing with a circumstantial case, in line with *Chamberlain [No 2]*.[47] The danger in Nicholson J's approach is that his Honour has not in actual fact considered all of the circumstantial evidence and its cumulative effect.

Part VI: Estimate of the Time Required to Present Oral Argument

50. The respondent estimates that it will require between 1 hour and 90 minutes to present oral argument.

Part VII: List of Provisions, Statutes and Statutory Instruments

Criminal Procedure Act 1921 (SA), s 158(1).

158—Determination of appeals in ordinary cases

(1) The Court of Appeal, on any such appeal against conviction, will only allow the appeal if it thinks that—

(a) the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or

(b) the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or

(c) on any ground there was a miscarriage of justice.

Dated: 6 May 2022

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47 *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 535 (Gibbs CJ and Mason J), cited in *R v Hillier* (2007) 228 CLR 618 at [48] (Gummow, Hayne and Crennan JJ).