HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: No. B57/2022

THOMAS CHRIS LANG
Appellant

and

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Statement of issues

2. As to ground 1, did the Court of Appeal err by finding that the jury's guilty verdict was not unreasonable as, on the whole of the evidence, there is a reasonable possibility that the deceased committed suicide? Was the lie alleged to have been told by the appellant capable of showing a consciousness of guilt? Did the number of thrusts of the knife, and the rotation of it, support the guilty verdict? Is there a significant possibility an innocent person has been convicted?
3. As to ground two, did the Court of Appeal err in finding that the forensic pathologist's opinion that the deceased's wound was more likely inflicted by a second person than by herself was admissible?

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

4. The appellant has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* (Cth) and does not consider it necessary.

Part IV: Citation of judgment below

5. *R v Lang* [2022] QCA 29.

Part V: Narrative statement of the relevant facts

6. On 30 November 2020, the appellant was convicted by a jury of murder of Maureen Boyce and sentenced to life imprisonment.[1]

7. The appellant appealed the conviction to the Court of Appeal on the ground that the verdict was unreasonable and was not supported having regard to the whole of the evidence and on the ground that there was a miscarriage of justice occasioned by the forensic pathologist Dr Ong being permitted to give his opinion that it was more likely that the deceased's fatal wound had been caused by another person than the wound being self-inflicted.[2] The appeal was dismissed. Mullins JA (as her Honour then was) delivered the lead reasons. McMurdo JA and Brown J concurred with the reasons of Mullins JA and provided additional short reasons.

8. The deceased died in her bed in her apartment on the night of 21 October 2015 or the early hours of 22 October 2015 as a result of blood loss from a knife wound to her abdomen. The knife was one of the deceased's kitchen knives. When emergency services personnel attended to the deceased on the morning of 22 October 2015, her body was lying on the bed with the knife still in place in the wound.

9. Only the deceased and the appellant, who were in a romantic relationship, were in the apartment at the time of her death. At trial, it was common ground between the parties that there was, therefore, only two possible explanations for the death: either the deceased died by suicide or the appellant killed the deceased.

10. The Crown case was that, after the deceased had gone to bed on 21 October 2015, the appellant accessed the deceased's mobile telephone and viewed some text messages between the deceased and another man. He became enraged by the messages, which demonstrated the deceased's romantic interest in another man, and stabbed the deceased, thereby causing her death.

11. The defence case was that the appellant went to bed in a separate bedroom from the deceased's room, after the deceased had retired to her bed in the main bedroom. Unbeknownst to the appellant, the deceased died by suicide during the night and the appellant discovered the deceased's body in her bed at about 5.30am the next morning, at which time he telephoned for emergency services to attend.

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[1] Core Appeal Book [**CAB**] 87-92. The trial was a re-trial. The appellant had been convicted of the offence at an earlier trial, but that conviction was quashed on appeal to the Court of Appeal, and a re-trial ordered: *R v Lang* [2019] QCA 289. The sole ground in that appeal was different to the grounds of the present appeal.
[2] *R v Lang* [2022] QCA 29 [**CA**] [9] CAB 100-101.

12. The central issue in the trial was whether the Crown could exclude the reasonable possibility that the deceased had died by suicide. The Crown case was entirely circumstantial.

Brief background facts

13. The deceased was 68 years old when she died.[3] The appellant was 62.[4] They had first met in 1979. They first met and commenced a relationship in the United States of America where the appellant then lived, when the deceased was visiting there for a time.[5] They had a brief relationship before the deceased returned to Australia in 1980 to be with her husband, Graham Boyce.[6]

14. In 2013, the appellant and the deceased remade contact and their relationship rekindled, while the deceased was still married to her husband.[7] The appellant and the deceased travelled between Brisbane (where the deceased lived) and New Zealand (where the appellant lived) a number of times in 2014 and 2015.[8] On 6 October 2015, the appellant travelled from New Zealand to Brisbane and, at the time of the deceased's death, he was staying in the deceased's apartment in Kangaroo Point, Brisbane.[9] The deceased's husband was living and working in Cairns.[10]

15. On the evening of 21 October 2015, the appellant and the deceased went to dinner.[11] They returned to the apartment at 7.23pm.[12] No-one entered or left the apartment between then and when the emergency services personnel arrived the next morning.[13]

16. At approximately 5.30am on 22 October 2015, the appellant called emergency services to attend the apartment.[14] He said he had just woken up and found his fiancée was dead.[15] Paramedics and police officers arrived at the apartment at approximately 6.00am.[16]

The scene was inconsistent with a struggle having taken place

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[3] CA [8] CAB 100.
[4] CA [8] CAB 100.
[5] CA [11] CAB 101.
[6] CA [11] CAB 101.
[7] CA [28] CAB 104; AFM 391, lines 8-9; AFM 394, lines 20-38.
[8] CA [19]-[20] CAB 102.
[9] CA [21] CAB 102.
[10] CA [12] CAB 101.
[11] CA [22] CAB 102.
[12] CA [22] CAB 102.
[13] CA [22] CAB 102.
[14] CA [22] CAB 102.
[15] CA [22] CAB 102.
[16] CA [22] CAB 102.

17. When the emergency service personnel arrived, the deceased's body was on the left side of her bed (viewed from the foot of the bed).[17] She was lying on her back and partially on her right side with a kitchen knife protruding from her abdomen.[18] She was partially covered by a sheet and the knife had penetrated her body through the sheet.[19] The bedding on the right side of the bed was undisturbed.[20]

18. The deceased's left hand was touching the knife handle; her right hand was underneath the pillow her head was resting on.[21] There was blood on the knife handle, the area of the wound and on the deceased's left hand but not on her right hand.[22]

19. The scene, as viewed by the emergency services personnel, was not consistent with a struggle having taken place at or before the time of the deceased's death.

20. Later that morning, a forensic investigation team headed by forensic scientist Sergeant Owen Esaias, attended at the apartment and commenced an investigation.[23] Sergeant Esaias conducted a bloodstain pattern analysis and examined other physical evidence in an attempt to determine the events that had taken place.[24]

21. On the bed, Sergeant Esaias observed a saturation stain on a pillow which was next to the wound. On another pillow, which had been near the deceased's torso when she was found by emergency services but moved by them to the bottom of the bed before the arrival of Sergeant Esaias, was a saturation stain and 15 small circular stains.[25] There were two drops of blood on the carpet next to the side of the bed the deceased's body was on.[26] Other than those drops, all the blood detected by Sergeant Esaias was found on the bedding and the deceased.[27]

22. When the deceased's body was moved on the bed, it could be seen that the knife had penetrated the full extent of the deceased's abdomen and made small cuts in the sheet under her body.[28] Most of the blood (other than the stains described immediately above) was pooled under and around the deceased's body in the area of the wound.

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[17] CA [23] CAB 103.
[18] CA [23] CAB 103.
[19] CA [23] CAB 103.
[20] Appellant's book of further material [**AFM**] 186, lines 29-35.
[21] CA [23], [43] CAB 103, 107.
[22] CA [23], [43] CAB 103, 107.
[23] AFM 175, line 44 – 176, line 47.
[24] AFM 177, lines 24-28.
[25] CA [23], [43] CAB 103, 107.
[26] CA [43] CAB 107.
[27] CA [43] CAB 107.
[28] CA [70] CAB 113; AFM 234, lines 43-46.

23. In cross-examination, Sergeant Esaias agreed that the blood pattern on the bed was inconsistent with a struggle having taken place at or after the time of the infliction of the wound.[29] He said the blood pattern he observed would be a result of "the slow release of blood from the wound" over a period of time during which the wound remained in "pretty much a set fixed position with minimal movement".[30] There was no streaking of blood on the sheets consistent with a struggle having taken place on the bed at the time the injury was inflicted.

24. There was no blood detected anywhere else in the bedroom or the apartment more generally, and no evidence that blood had been cleaned up.[31] The sinks in the apartment were swabbed, along with the s-bends under the sinks, and no evidence of blood was detected.[32] Sergeant Esaias did not observe any other sign of a disturbance anywhere in the apartment.[33]

25. Other forensic examinations confirmed the lack of a struggle between the deceased and the appellant. When the appellant was forensically medically examined, there were no injuries on him or any other relevant forensic evidence.[34] At autopsy, it was determined that the deceased had no defensive injuries on her body.[35] The deceased's hands and the undersides of her fingernails were swabbed; the appellant's DNA was not located on those swabs.[36]

There was no other forensic evidence linking the appellant to the deceased's death

26. There was no other forensic evidence linking the appellant to the deceased's death. Examination of the knife handle revealed the presence of the deceased's DNA, but not the appellant's DNA.[37]

27. There was no evidence to explain why the appellant's DNA would not have been detected on the knife handle if he was the person who inflicted the injury. For example, there were no gloves found in the apartment. Police investigators examined

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[29] CA [46] CAB 108.
[30] AFM 214, lines 35-37.
[31] AFM 172, line 35 – 174, line 10.
[32] CA [45] CAB 108.
[33] CA [46] CAB 108.
[34] CA [71] CAB 113.
[35] CA [61] CAB 111.
[36] CA [71] CAB 113. The appellant's DNA was detected on the deceased's breasts (CA [71] CAB 113), but that was of no real significance in light of the nature of their relationship.
[37] CA [47] CAB 108.

the contents of the bins in the apartment and the building's bin accessible by a chute in the apartment, and located nothing of relevance to the deceased's death.[38]

28. Police also searched the building's grounds in the vicinity of the apartment. They found the deceased's mobile telephone, which had been thrown from the apartment the night before, but nothing else of relevance to the deceased's death.[39]

The significance of the lack of a struggle

29. The significant damage to the Crown case occasioned by the evidence of a lack of struggle became apparent in the evidence given by the forensic pathologist, Dr Beng Beng Ong.

30. Dr Ong attended at the scene at approximately 9.45am on 22 October 2015 and observed the deceased's body while it was still on the bed. Based on his observations of rigor mortis, he estimated that the time of the deceased's death occurred between 1.45am and 3.45am that morning. He conducted a further forensic examination of the body when he performed an autopsy the following day.[40]

31. His evidence about the autopsy contained two notable features which severely weakened the Crown case in light of the absence of a struggle.

32. **The first feature relates to the fact that the deceased was alive when the wound was inflicted and capable of struggling with an attacker, if there was one, for a number of minutes afterwards.**

33. Dr Ong determined that the deceased was alive at the time the wound was inflicted, and that she died as a result of blood loss from the wound.[41] She had not been smothered or asphyxiated before the wound was inflicted or at the time of her death.[42]

34. Although she had some alcohol (a blood alcohol concentration of 0.049) and prescription drugs in her system at the time of her death, Dr Ong gave evidence that they did not play any role in the deceased's death, nor would those levels have prevented her from fighting off an attacker, if there was one.[43]

35. The wound was fatal because it eventually occasioned an amount of blood loss which was inconsistent with life, but, importantly, the injury would not have immediately

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[38] AFM 172, line 35 – 174, line 10.
[39] AFM 324, lines 6-14.
[40] AFM 235, lines 18-19.
[41] CA [59]-[60] CAB 111.
[42] CA [61] CAB 111.
[43] CA [61] CAB 111.

disabled the deceased, or prevented movement on her part.[44] She was capable of at least attempting to ward off an attacker of the appellant's size, if the appellant had been the person to inflict the injury.[45] It would have taken a number of minutes before the deceased was weakened to the point of not being able to move.[46]

36. These features (the fact that the deceased was alive when the wound was inflicted and capable of movement for at least a number of minutes afterwards), when combined with the absence of a struggle, strongly detract from the Crown case that the appellant caused the deceased's death.

37. **The second feature relates to the fact that the deceased was capable of self-inflicting the injury and appeared to have been in a crouching position at the time the injury was inflicted.**

38. Dr Ong gave evidence that although there was a single wound, it comprised of two internal thrusts of the knife in one direction (along a path he described as "Track A"), a partial retraction and rotation of the knife while it was mostly withdrawn from her body, followed by a further two or three thrusts, with the knife rotated in a different direction to that of the first two thrusts (along a path he described as "Track B").[47]

39. Significantly, only mild to moderate force would have been required to inflict the injury.[48] Although the deceased suffered from arthritis in her hands, Dr Ong was satisfied that she was capable of self-inflicting the wound.[49] Given the absence of blood on her right hand, he could not say whether one or both hands were used, if the wound was self-inflicted.[50]

40. Dr Ong gave evidence that it appeared to him that, at the time of the initial penetration of the knife, the deceased was not lying flat on the bed but, rather, was "crouched" forward or sideways on the bed.[51] This appeared to be the case because two internal structures which do not lie next to each other were incised by Track A.[52] He said it would be unusual for one track to sever both the liver and renal vein, but that could be explained by the deceased being in a crouched position.[53]

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[44] CA [64] CAB 112.
[45] CA [67] CAB 112.
[46] CA [64] CAB 112.
[47] CA [50]-[51], [56]-[58] CAB 12-14.
[48] CA [55] CAB 110.
[49] CA [65] CAB 112.
[50] CA [66] CAB 112.
[51] CA [52] CAB 109; AFM 281, lines 26-38
[52] CA [52] CAB 109.
[53] CA [64] CAB 112.

41. The suggestion that the deceased was in a crouching position at the time of the initial penetration of the knife is consistent with the deceased being awake and moving at the time the wound was inflicted. At trial, the Crown prosecutor suggested to the jury that perhaps the explanation for the lack of a struggle was that the deceased slept through the attack on her.[54] But there was no evidence that a person in otherwise good health and not drugged or stupefied by alcohol would sleep through an attack involving a number of thrusts of a kitchen knife to the abdomen. Common sense dictates that such a scenario is fanciful. Moreover, Dr Ong's evidence that it appears the deceased was in a crouching position when the wound was inflicted sits uncomfortably with the Crown theory that the deceased was asleep when the wound was inflicted. It is more consistent with the deceased having been actively engaged in a suicide attempt by pulling her body in a crouched position towards the knife at the time of penetration of her body.

42. Dr Ong explained that penetration of the abdomen by another person with a knife would induce a physiological fight or flight response.[55] In those circumstances, if the wound was caused by someone else while the deceased was awake, it would be reasonable to expect that the victim would attempt to fight off an attacker or get up from the bed to call for help.[56]

43. In this regard, it is notable that, not only was there no evidence of a struggle against an attacker, but there was also no evidence of an attempt to seek help. The deceased had a landline telephone next to her bed.[57] It did not appear that any attempt had been made by the deceased to reach for the telephone to call for help.

44. The combination of the fact that the wound was capable of being inflicted by the deceased and her apparent crouching position, combined with the lack of a struggle in circumstances where struggle was possible and, indeed, an expected physiological response to an attack, further weakened the Crown case.

Dr Ong's controversial opinion

45. Dr Ong gave evidence at the trial, over objection, that it was his opinion that it was more likely that the deceased's wound was caused by a second party, although he could not exclude that it was a self-inflicted injury.[58]

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[54] AFM 557, lines 33-38.
[55] CA [67] CAB 112.
[56] AFM 287, lines 32-44.
[57] AFM 180, lines 1-9.
[58] CA [63] CAB 111.

46. He said he took a number of factors into account in reaching that opinion. One factor was the absence of evidence of self-harm, such as incisions to the deceased's wrists.[59] A second factor was the fact the knife had penetrated through the top sheet, although he said these two factors were not very strong factors one way or another.[60]

47. In cross-examination, he agreed that a previous suicide attempt would have been a factor which weighed towards the injury being self-inflicted and accepted that he did not know anything about the deceased's mental health history or whether she had ever spoken about committing suicide.[61] This was relevant because there was other evidence in the trial that the deceased had previously expressed suicidal thoughts about jumping off her balcony or the back of a ferry in order to kill herself and had, many times, told her husband, Dr Boyce, "I feel so bad, I wish I was dead".[62] There was also evidence, of which Dr Ong was unaware, that her son had, on an occasion in 2009, attended her apartment at which time she had made to stand on a chair positioned next to the balcony railing in circumstances where she had called her husband and told him she was going to jump off the balcony to kill herself.[63]

48. As regards the factor of the knife having pierced a sheet, he agreed in cross-examination that that feature was a neutral feature. Indeed, he said that the piercing of a sheet "does occur more often in suicides, but it's not a very strong feature".[64]

49. Dr Ong said that the factor he took most into account was "the multiplicity of the stab wounds" and he also took into account the "rotation of the blade".[65]

50. As to these features, in cross-examination, Dr Ong said that there was a "general acceptance" that the more stab wounds there are, the more likely it is that injury is inflicted by a second person.[66] However, he then gave evidence that he was aware of three suicide deaths that involved "a self-inflicted injury that has multiple tracks inside a single stab wound".[67]

51. He said that the significance of the rotation of the blade was that it would occasion a "slight delay" between the blade being withdrawn and then rotated.[68] When pressed

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[59] CA [62] CAB 111.
[60] CA [62] CAB 111.
[61] CA [68] CAB 112.
[62] CA [18] CAB 102.
[63] CA [68], [73] CAB 112, 113.
[64] CA [68] CAB 113; AFM 291, lines 29-31.
[65] CA [62] CAB 111.
[66] AFM 291, line 45 – 292, line 2.
[67] AFM 292, line 17 – 293, line 8.
[68] CA [68] CAB 113.

as to the significance of the rotation of the knife for his opinion that the injury was more likely to be inflicted by someone other than the deceased, he said, "I just find that it's – that if a person needs to – in an attempt to – to self-inflict injuries, that it – that – that the injurer would take the trouble to rotate a blade, rather than just plunge it in different directions."[69]

52. However, having expressed that view, he then conceded that multiple stabs, in the case of an attempt to die by suicide, would serve the practical purpose of making it more likely to achieve the aim of dying by suicide and volunteered that he had performed autopsies on people who had self-inflicted more than 20, 30 stab wounds (or more than 10 and maybe 20 stab wounds) in the course of dying by suicide, although he described them as "fairly superficial" wounds.[70]

53. When regard is had to the reasons given by Dr Ong for his opinion, it is apparent that those reasons (and his resultant opinion) were not so compelling as to undo the damage caused to the Crown case by the evidence of the absence of a struggle.

The evidence regarding the deceased's mental health

54. At trial, the Crown relied on what was said to be evidence which demonstrated that the deceased was not in a depressed state at the time of her death on the basis that this evidence tended to suggest that the deceased was unlikely to have killed herself.[71]

55. That reasoning was flawed. That is because people do not commit suicide only when they are in an observably depressed state. People can, and do, die by suicide in the most unexpected of circumstances including when, to all the world, they appear to be happy and content. Dr Mark Spelman, a psychiatrist called on the Crown case, gave evidence that, when assessing a person's risk of dying by suicide, it is not possible to predict whether a person will commit suicide at any point in time.[72] That point was neatly illustrated when he gave evidence that he was aware of cases where people had been discharged from psychiatric care units having been assessed as being well, only to almost immediately die by suicide.[73]

56. In any event, although the evidence demonstrated that the deceased had been in more troubled mental health at various times in the past than she was at the time of her death, there was, nonetheless, evidence that her diagnosed mental health conditions

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[69] CA [68] CAB 113; AFM 294, lines 11-14.
[70] CA [68] CAB 113; AFM 294, lines 19-36.
[71] AFM 580, line 44 – 584, line 35.
[72] CA [90] CAB 116.
[73] AFM 520, lines 19-21.

made her more prone to impulsivity and instability, and that she was in a troubled mental health state at the time of her death. Notably, there was evidence that she had described herself as being depressed and suicidal in the days prior to her death. In this way, the evidence about the deceased's mental health did not strongly support the Crown case and, in some respects, positively weakened it.

57. The evidence as to the deceased's mental health over the course of her adult life came primarily from her husband, her two adult children and her treating psychiatrist, Dr Spelman. Dr Spelman gave evidence that he had treated the deceased for depression since 2001 and, within a couple of years of that time, had also diagnosed her with having bipolar disorder.[74] He had also diagnosed her with having a borderline personality disorder.[75]

58. Over the years, she had had periods when she was pervasively depressed, during which she had difficulty sleeping and functioning in her daily life.[76] In addition to treatment in the form of cognitive behaviour therapy and anti-depressant medications, the deceased had received electroconvulsive therapy as a hospital inpatient on three occasions, most recently between 30 April and 14 May 2015, some five months prior to her death.[77] The operative stressors in her life at that time were her husband's diagnosis of cancer and her daughter's upcoming wedding.[78]

59. Dr Spelman last treated the deceased on 20 October 2015, the day before she died. She told him that she had switched out of her depressed period and her mood had been elevated. She did not appear to Dr Spelman to be depressed. He noted that her protective factors in reducing suicidality at that time were her daughter's pregnancy, her concern over her husband's ill-health and her recent attempts to sell the apartment she was living in so as to reduce the financial burden on her husband.[79]

60. What the deceased did not tell Dr Spelman about at that time, but about which there was evidence in the trial, was that her daughter was angry at her for having an affair with the appellant and had told her she would never meet her grand-child; that her husband was also aware of the deceased's affair and had, the month prior, posted a facebook message urging the deceased to "Crash slut" when the deceased posted a

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[74] CA [84] CAB 115.
[75] CA[86] CAB 116.
[76] CA [84] CAB 115.
[77] CA [85] CAB 116.
[78] CA [85] CAB 116.
[79] CA [88] CAB 116.

photograph of herself at the airport on the way to visit the appellant; that she was in fact having difficulty selling the apartment and that she had told her husband she wanted a divorce.[80] These matters eroded the protective factors Dr Spelman considered were operable at the time of her death; Dr Spelman made some concessions that that was so.[81]

61. There were two other significant pieces of evidence that suggested the deceased was experiencing depressive symptoms at the time of her death.

62. **First**, there was a text message sent by the deceased to her husband on 19 October 2015, two days before her death. The message read, "**I feel all depressed again. Up at 3am today**".[82] It is notable that the deceased was awake and feeling "all depressed again" at 3am, which is within the window of time (between 1.45am and 3.45am) that Dr Ong estimated the deceased's death to have occurred two days later.

63. **Second**, there was evidence the deceased expressed suicidal thoughts the day before her death. The statements were made to Ms Delphine Neilson who gave evidence about an unexpected call she received from the deceased on 20 October 2015. Ms Neilson, who described herself as having met the deceased 15 years earlier through "a friend of a friend", said that she had only seen the deceased only "half a dozen" occasions in that time.[83] The tenor of Ms Neilson's evidence was that they were not close friends and had not seen each other for "many years" when the deceased called her out of the blue on 20 October 2015.[84] In that phone call, the deceased told Ms Neilson that she was "**feeling very depressed**" and that she was "**suicidal**".[85]

64. The evidence about that phone call, made in circumstances which are themselves suggestive of the deceased's troubled state, and the statements made by the deceased in it, significantly damaged the Crown case. That is so, not only because the expression of being suicidal was consistent with the defence case that the deceased died by suicide the day after she made that statement, but also because it would be a remarkable coincidence for the deceased, having made those statements proximate to the time of her death, to in fact have been killed by someone else in circumstances where the death had many features consistent with being a suicide death.

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[80] CA [90] CAB 117; CA [78] CAB 114; CA [14] CAB 101; CA [15] CAB 102; AFM 396, lines 20-26.
[81] CA [90] CAB 117.
[82] CA [16] CAB 102.
[83] CA [83] CAB 115; AFM 466, line 1-18.
[84] CA [83] CAB; AFM 466, lines 28-45; AFM 623, [40].
[85] CA [83] CAB 115; AFM 468, lines 11-22.

65. Ultimately, the evidence did not establish that the deceased was not depressed at the time of her death.

The appellant's police interviews and the alleged lie showing consciousness of guilt

66. The appellant participated in a number of police interviews on 22 October 2015.[86] Throughout the interviews, he denied stabbing the deceased.

67. At trial, the Crown relied heavily on a lie it alleged the appellant had told about the deceased's mobile telephone as showing a consciousness of guilt of the deceased's murder.[87]

68. The appellant told police that, before he and the deceased went to bed on 21 October 2015, they had an argument and, as a result, the deceased threw her mobile telephone off the balcony of the apartment somewhere between 9pm and 9.45pm. He said the argument started because the deceased was suspicious of messages she had seen from female contacts on his phone. He said that during the argument the deceased locked him out of his phone. He asked her how she would feel if he went through her phone, at which time she took her phone and threw it off the balcony.[88]

69. The next morning, he went into the deceased's bedroom and found her body in her bed in the position emergency services personnel found her in a short time later.[89]

70. The phone was located, damaged, in the grounds of the apartment building at about 7.20am on 22 October 2015 and was subsequently forensically examined.[90] That examination revealed that the phone had been accessed at 11.56pm. At 11.58pm, the SMS application was opened. Screenshots, taken automatically by the phone, showed that for a period of time after midnight, a message from Kenneth McAlpine to the deceased, sent 18 May 2015, was open on the phone and romantic in nature. The telephone handset was used to make a (perhaps inadvertent) telephone call at 12.04am and the phone was back in a locked state at 12.06am.[91]

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[86] CA [24] CAB 103; CA [31] CAB 104; CA [37] CAB 106.
[87] AFM 567, lines 18-28; AFM 589, lines 26-38. The Court of Appeal also placed considerable weight on the significance of the lie. Mullins JA noted the Crown's reliance on the lie at trial: CA [107] CAB 120. McMurdo JA described it as "an important part of the prosecution case": CA [2] CAB 99. Brown J referred to the lie's "significance" in concurring with the lead reasons of Mullins JA: CA [116] CAB 122.
[88] CA [35] CAB 105; CA [38]-[40] CAB 106-107.
[89] CA [35] CAB 105.
[90] CA [26] CAB 104.
[91] CA [26] CAB 104.

71. There was evidence that the deceased and Mr McAlpine had had an affair in the early 2000s and had kept in contact sporadically since then, including meeting in person and exchanging text messages.[92]

72. At trial, the Crown argued that the appellant lied about the timing of the phone being thrown off the balcony and the fact that it was the appellant who threw the phone.[93] The Crown contended that the phone was thrown off the balcony after midnight, and that it was the appellant, enraged by the messages he had seen, who threw the phone off the balcony. The Crown relied on the lie as showing a consciousness of guilt of murder because his throwing of the phone was an emotional response to viewing the text messages which provided a motive or explanation for having killed the deceased.[94] The Court of Appeal concluded that the lie had the connection to a circumstance of the offence and was capable of showing his consciousness of guilt of the offence.[95]

Part VI: Argument

Ground 1

73. The test to be applied by a Court of Appeal in determining an appeal on the ground that the jury's verdict was unreasonable is set out in *M v The Queen*.[96] Pursuant to *M*, the ultimate question of whether it thinks that, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt.

74. This Court recently confirmed that the test laid down in *M* is applicable in circumstantial cases such the present one: *Coughlan v The Queen,*[97] *Dansie v The Queen.*[98] In *Dansie*, the Court observed, at [12]:

> Coughlan v The Queen *illustrates that an independent assessment of the evidence in a case in which the evidence at trial was substantially circumstantial requires the court of criminal appeal itself "to weigh all the circumstances in deciding whether it was open to the jury to draw the ultimate inference that guilt has been proved to the criminal standard" and in so doing to form its own judgement as to whether "the prosecution has failed to*

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[92] CA [82] CAB 115.
[93] CA [107] CAB 23.
[94] CA [111] CAB 121.
[95] CA [111] CAB 121.
[96] (1994) 181 CLR 487, 493-495, per Mason CJ, Deane, Dawson and Toohey JJ; 508, per Gaudron J.
[97] (2020) 267 CLR 654 at 674-675 [55].
[98] (2022) 96 ALJR 728; [2022] HCA 25.

exclude an inference consistent with innocence that was reasonably open". (citation omitted)

75. In this case, the Court of Appeal failed to adopt the mandated approach. That is evident in the Court of Appeal's treatment of the lie alleged to show a consciousness of guilt of murder, its assessment of the significance of the number of thrusts of the knife and the rotation of it, and the cursory consideration it gave to the features of the evidence which pointed to the death being a suicide.

The Court of Appeal erred in concluding that the alleged lie was capable of showing a consciousness of guilt

76. A lie can constitute an admission against interest only if it relates to a material issue and if it was told in circumstances in which the explanation for the lie is that the appellant knew the truth would implicate him in the offence: *Edwards v The Queen.*[99] In *Edwards*, the judgment of Deane, Dawson and Gaudron JJ continued:

> *Moreover, the jury should be instructed that there may be reasons for the telling of a lie apart from the realization of guilt. A lie may be told out of panic, to escape an unjust accusation, to protect some other person or to avoid a consequence extraneous to the offence. The jury should be told that, if they accept that a reason of that kind is the explanation for the lie, they cannot regard it as an admission.*[100]

77. That requirement applies equally to a Court of Appeal considering an unreasonableness ground.

78. In this case, accepting it was open to the Court of Appeal to conclude that the appellant lied about the timing of the telephone being thrown over the balcony and the fact that he threw it, there was, nevertheless, a plausible innocent explanation for that lie: his partner's body had just been discovered in circumstances where, given only he and she were in the apartment at the time, it would have been apparent that he would come under suspicion for the death. A plausible explanation for the lie is that he told it "out of panic", lest telling the truth that he had viewed text messages between the deceased and another romantic interest on the same night the deceased died by suicide led to an "unjust accusation" that he was involved in her death.

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[99] (1993) 178 CLR 193, 210, per Deane, Dawson and Gaudron JJ.
[100] (1993) 178 CLR 193, 211, per Deane, Dawson and Gaudron JJ.

79. The Court of Appeal concluded the lie was capable of being used as an admission of a consciousness of guilt without adverting to the possible innocent explanation or considering whether it could be excluded.[101] When viewed in the context of the whole of the evidence in the trial, including the compelling features of the evidence which point to the death being a suicide, it is not possible to exclude the innocent explanation for it. The evidence which damaged the Crown case was so compelling that, in light of it, it was not possible to exclude the possibility that the appellant's lie was an innocent one.

80. The Court of Appeal was wrong not to consider the innocent explanation, and, in light of the whole of the evidence in the trial, erred in its conclusion that the lie was capable of being used as showing a consciousness of guilt.

The Court of Appeal did not have regard to the whole of the evidence in concluding that the number of thrusts of the knife and its rotation supported the guilty verdict

81. Although the preponderance of the consideration of the unreasonableness ground undertaken by Mullins JA focused on the significance of the alleged lie, her Honour also concluded that, in addition to the lie and the motive it revealed, the "number of stab wounds [and] the rotation of the knife" were matters which supported the jury verdict.

82. In so concluding, the Court of Appeal erred. These features of the evidence, by themselves, did not positively support either the Crown or the defence case. Dr Ong's evidence was that the deceased was physically capable of inflicting the injury and so the number of thrusts and the rotation of the knife were not matters which tended to suggest that, for some physical reason, it was more likely that the injury was inflicted by the appellant than the deceased. Further, despite Dr Ong's opinion that he did not think a person would take the trouble to thrust the knife a number of times, and rotate it, there was no sound basis for a conclusion that the deceased would have been unlikely to carry out a suicide attempt in that manner. People carry out suicide in all manner of ways. Indeed, Dr Ong's evidence included reference to cases in which deaths by suicide were carried out in ways that would have been painful and slow.

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[101] Mullins JA concluded the lie was capable of being relied on to show the appellant's consciousness of guilt of the offence: CA [111] CAB 121. McMurdo JA concluded "there was no other explanation" for the lie and the jury was entitled "to think that this was a lie which an innocent person would not tell": CA [6] CAB 100. Brown J agreed with the reasons of Mullins JA, including with respect to the lie: CA [116] CAB 122.

83. However, while they were equivocal features when viewed in isolation, when viewed in conjunction with the evidence of the lack of a struggle, the number of thrusts of the knife and the rotation of it were features which, if anything, tended to support the defence case that the death was a suicide. The reason for that is two-fold. First, if the deceased was attacked by a knife, during the course of which attack there were a number of thrusts and rotation of said knife, it is unlikely in the extreme that she would have slept through the attack, as the prosecution contended. Rather, those features of the evidence make it highly likely that she would have woken and fought back against an attack, or attempted to flee, and there was no evidence of an attempt to do either. Second, the first thrust of the knife was apparently done while the deceased was in a crouching position. Such a position is inconsistent with the Crown case that the deceased was attacked in her sleep but consistent with suicide (namely, a sit-up movement of the body towards the knife coincidental with insertion of it). In this way, the Court of Appeal erred in concluding that the number of thrusts of the knife and the rotation of it supported the guilty verdict.

The Court of Appeal failed to address the effect of the compelling evidence which pointed to the death being a suicide

84. The Court of Appeal did not undertake a meaningful analysis of the features of the evidence which pointed to the death being suicide; rather, it brushed over those features as the reasons of Mullins JA illustrate (at CA [114] CAB 122):

> *Notwithstanding there was some evidence at the trial that arguably pointed to the possibility that Mrs Boyce committed suicide, there was no direct forensic evidence to implicate the appellant in the stabbing and there was no evidence that Mrs Boyce struggled with an attacker, a review of all the evidence does not reveal that there is a significant possibility that an innocent person has been convicted:* R v Miller *[2021] QCA 126 at [16] and [18].*

85. This passage unduly minimises the damage to the Crown case occasioned by the evidence of the absence of a struggle despite the deceased's ability to engage in one if there had been an attacker, the evidence consistent with the injury being self-inflicted and the evidence of the deceased's troubled mental state at the time of her death. In failing to undertake an analysis of these features, and what they meant for the strength of the Crown case, the Court of Appeal failed to properly conduct an assessment of the whole of the evidence.

Does a review of the whole of the evidence reveal a significant possibility that an innocent person has been convicted?

86. It was not open to the jury, acting rationally, to have eliminated all reasonable doubt with respect to the appellant's guilt. There is, here, a significant possibility an innocent person has been convicted. That is because, in the circumstances of this case, there is a significant possibility that the deceased died by her own hand or, at the least, the circumstances raise and leave a doubt that she did not.

87. Those circumstances include the evidence that she was alive when the wound was inflicted and capable of struggling with an attacker for a number of minutes afterwards; the absence of a struggle; the fact that she was capable of self-inflicting the injury and appeared to be in a crouching position when the injury was inflicted, consistent with being awake and with the injury being self-inflicted; the fact that the appellant's DNA was not located on the knife handle but the deceased's DNA was and the evidence of the deceased's troubled mental health at the time she died.

88. Those matters acted as "compounding improbabilities"[102] in the Crown case which are not lessened by the remainder of the evidence. A consideration of the whole of the evidence leaves open the significant possibility that the appellant is innocent.

Ground 2

89. There are two matters which must be established before expert opinion is admissible. First, there must be a field of specialised knowledge, in which the witness is an expert "by reason of specified training, study or experience". Second, the opinion must be "wholly or substantially based on the witness' expert knowledge".[103]

90. In this case, it is clear that forensic pathology is a field of specialised knowledge and that Dr Ong is an expert in that field. Regarding the expertise of pathologists, Gummow and Callinan JJ held, in *Veleveski v The Queen*:[104]

> *Whether wounds may have been suicidally self-inflicted is capable, in our opinion, of being the subject of expert evidence, if a suitable foundation as to the witnesses' training, study or experience has been laid.*

91. Their Honours continued:[105]

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[102] To adopt the language of *Pell v The Queen* (2020) 268 CLR 123 at [119].
[103] *Makita (Aust) Pty Ltd v Sprowles* (2001) NSWLR 705, [85], per Heydon JA.
[104] (2002) 187 ALR 233, 427 [156].
[105] (2002) 187 ALR 233, 428 [160].

Medical doctors, and pathologists in particular, are well capable therefore of processing specialized knowledge enabling them to offer informed opinions as to the infliction, self or otherwise, of injuries. Their experiential knowledge of the pathology of blood, tissue, bone and additionally of the way in which vulnerable parts of the body may be reached with weapons would, on that basis as well, qualify them to express an opinion on this matter.

92. Dr Ong's controversial opinion, that it was more likely that the deceased's wound had been caused by another person rather than herself, was objected to at a pre-trial hearing on the basis that the criteria for admissibility in *Makita* had not been satisfied.[106] The evidence was ruled admissible, citing *Velevski*.

93. On appeal, the Court of Appeal rejected the appellant's argument that the evidence should have been excluded from his trial, and that a miscarriage had occurred.

94. The difficulty with the controversial opinion is that it was, in truth, not wholly or substantially based on Dr Ong's expert knowledge gained by reason of his training, study or experience; rather, it was substantially based on his personal, subjective view as to how a person may or may not act when attempting to die by suicide. That this is so is demonstrated by, first, his evidence at the pre-trial hearing that his opinion relied on his analysis of "the logical sense of what happened."[107]. His explanation at the trial about the significance of the delay occasioned by the rotation of the knife between thrusts and, in particular, his opinion that he did not think a person would take the trouble to rotate a knife rather than just plunging it in different directions was similarly subjective and, therefore, inadmissible. Nothing said in *Velevski* renders expert evidence about the infliction of injuries and whether they are self-inflicted or otherwise admissible if the opinion does not also meet the *Makita* requirements. The evidence ought not to have been admitted.

95. Whilst inadmissible, Dr Ong's controversial opinion gave rise to a risk that the jury would have placed undue weight on it by virtue of being a doctor held out to the jury as an expert in the trial. There was unwarranted appearance of science attached to what was, in truth, no more than his subjective opinion as to how a person may or may not act. The evidence, coming with the imprimatur of an experienced doctor,

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[106] Judgement of Lyons SJA, 13 November 2020, [10]-[11] CAB 10.
[107] CA [101] CAB 118-119.

could well have been given significant weight by the jury. A miscarriage of justice occurred by its admission into evidence.

Part VII: Orders sought

96. If Ground 1 is successful, the appellant seeks an order quashing his conviction and entering an acquittal in its place.

97. If only Ground 2 is successful, the appellant seeks an order quashing the appellant's conviction and ordering a re-trial.

Part VIII: Time required for oral argument

98. The appellant estimates that he will require 1.5 hours to present his oral argument.

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