HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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 REPLY

Part I: Certification

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

Part II: Reply

2. The respondent has not engaged with the appellant's argument that the evidence could not exclude the reasonable hypothesis that the deceased committed suicide. The respondent's submissions address the difficulties inherent in the Crown case by suggesting speculative explanations that do not have a sound foundation in the evidence. The respondent has, in effect, reasoned backwards. On the premise that the appellant inflicted the injury to the deceased, the respondent's argument seeks to identify a pathway to conviction, without engaging with the whole of the evidence.

Ground 1

3. Ground one requires this Court to consider whether, upon the whole of the evidence, it was open to the jury to be satisfied of the appellant's guilt beyond reasonable doubt.[1] In a circumstantial case, guilt beyond reasonable doubt will not be established unless the circumstances are such as to be inconsistent with any reasonable hypothesis other than guilt. The Court must determine whether the Crown has failed to exclude an inference consistent with innocence reasonably open on the evidence.[2]

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[1] *M v The Queen* (1994) 181 CLR 487, 494; Respondent's submissions at [5.2].
[2] *Coughlan v The Queen* (2022) 267 CLR 654 at [55]; *Dansie v The Queen* [2022] 96 ALJR 728 at [12].

4. Notwithstanding the task for this Court, the respondent's arguments do not meet the appellant's argument that the whole of the evidence does not permit of a conclusion of the appellant's guilt beyond reasonable doubt. Rather, the respondent, after considering the evidence in a piecemeal fashion, contends that there is "no compelling evidence of suicide"[3], without answering the question whether the whole of the evidence is sufficient to exclude the reasonable possibility of suicide.

Sedated and asleep?

5. The respondent's response to the appellant's argument in respect of ground one is to claim, variously, that there is "substantial evidence" that the deceased was sedated and asleep when she was stabbed[4], or that the evidence demonstrates she was "likely" to have been knocked out, sedated and heavily asleep by a combination of alcohol, valium and fatigue[5], or that the evidence "supports" or "strongly supports" an inference that she was sedated and asleep or unconscious at that time.[6]

6. To support these claims, the respondent relies on the appellant's statements to police to the effect that, when the deceased retired to bed, she was groggy and wanted to go to sleep and that, when he went to kiss her goodnight a few minutes later, she was asleep before she woke, startled by his kiss.[7] Reliance on this evidence to support the claim that the deceased subsequently slept through an attack comprised of four or five stabs to the abdomen is misplaced. It is certainly not "substantial evidence".

7. Further, the respondent's reliance on these statements overlooks the uncontroversial medical evidence that, at the time of her death, the deceased's blood alcohol concentration was 0.049 (less than the legal driving limit) and her prescription medication was present in her system in therapeutic or sub-therapeutic levels only.[8]

8. As to the significance of these levels of alcohol and medication, Dr Ong gave evidence that, while reactions to alcohol and medications are subjective and may vary between people, there was nothing about the level of alcohol or medication in the deceased's system at the time of her death that would have prevented her from fighting against an attacker if she had been stabbed by someone other than herself.[9]

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[3] Respondent's submissions at [5.30].
[4] Respondent's submissions at [4.30].
[5] Respondent's submissions at [4.18].
[6] Respondent's submissions at [4.22] and [5.31].
[7] Respondent's submissions at [4.17].
[8] AFM 286, line 36.
[9] AFM 287, lines 6-10.

9. Dr Ong also gave evidence that the infliction of the wound would have been "probably painful".[10] This accords with common experience. In light of the evidence about the alcohol and medication present in the deceased's system, the respondent's suggestion that the deceased slept through being stabbed in the abdomen stretches credulity. It finds no support in the evidence led during the trial.

10. The respondent's claim that the evidence demonstrates it is "likely" the deceased was sedated and heavily asleep is baseless in light of the medical evidence referred to above, as is the claim that the evidence supports, much less strongly supports, the inference that she was in that state.

11. However, even if it were considered that the inference the deceased was attacked and did not struggle because she was sedated and heavily asleep is available on the evidence, such an inference is plainly not the only available inference upon an assessment of the whole of the evidence: the inference that she was not sedated and asleep is also open. The respondent's assertion that the deceased was sedated and asleep or unconscious at the time of the injury is the only answer that can explain the absence of struggle or movement by the deceased. It represents, on the case argued by the Crown, an indispensable link in the chain of reasoning relied upon to support the guilty verdict.[11] The evidence, taken as a whole, could not displace the inference consistent with innocence, that she was not so sedated. Indeed, the weight of the evidence suggests she was not.

The deceased's arthritis

12. The respondent claims that the angle of entry of the knife into the deceased's abdomen was "completely inconsistent" with the restrictions she experienced as a result of her arthritis.[12] This claim is unsupported by the evidence.

13. The respondent relies on the evidence of the deceased's son, Zachary Boyce. Such reliance is flawed in three respects: first, the respondent misstates Mr Boyce's evidence. Second, it ignores other evidence as to the deceased's physical ability and the level of force required to inflict the injury she sustained. Third, it overlooks the absence of evidence that the deceased was not capable of self-inflicting the wound.

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[10] AFM 276, line 44.
[11] *Shepherd v The Queen* (1990) 170 CLR 573 at 579.
[12] Respondent's submissions at [4.26]-[4.27] (the second of the two paragraphs identified as [4.27]).

14. The respondent says Zachary Boyce gave evidence that the deceased's daily activities were "severely restricted" by her arthritis.[13] This is an exaggeration of his evidence which was limited to evidence that she often asked him to open jars, dropped food and told him that she wished she could chop food as well as he did.[14] His evidence was not that she could not chop food, just that she could not chop things as well as he did. Zachary Boyce's qualifications as a doctor[15] do not elevate his evidence beyond that of the observations of the deceased's son; he was not called as an expert, and could not have given expert evidence in respect of the impact of the deceased's arthritis given he is a dermatologist.[16]

10 15. Other evidence in the trial established that the deceased could send text messages, hold a wine glass and eat a steak dinner.[17] She could put on her own makeup and take the dog for a walk.[18]

16. This evidence may be viewed against Dr Ong's evidence that infliction of the injury sustained by the deceased would have required only mild to moderate force.[19] Dr Ong gave no evidence that there was anything about the angle of entry of the knife that suggested the deceased would have had difficulty inflicting the wound herself. The respondent's claim that the angle of the entry of the knife is "completely inconsistent" with the deceased's physical restrictions as a result of arthritis, or for any other reason, is unfounded.

20 ***Absence of the appellant's DNA on the knife handle a neutral fact?***

17. Contrary to the respondent's submission, the absence of the appellant's DNA on the knife handle is not a "neutral fact".[20]

18. To establish its neutrality, the respondent relies on the appellant's statements to police that he touched the knife while it was in the deceased's body. This reliance is misplaced. First, the appellant told police that he "probably… bumped into the handle" of the knife with the back of his hand while he was shaking the deceased upon discovering her body;[21] this is quite different to grasping the knife to inflict the

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[13] Respondent's submissions at [4.25].
[14] AFM 424, lines 33-41.
[15] Referenced in the respondent's submissions at [4.25].
[16] AFM 412, line 20.
[17] AFM 424, lines 4-15, RFM 47.
[18] AFM 399, lines 26-47.
[19] AFM 257, line 10 – 258, line 36.
[20] Respondent's submissions at [4.14].
[21] RFM 171, lines 9-54.

wound. The absence of his DNA, particularly in circumstances where the deceased's blood on the knife showed it had not been wiped clean, is not a neutral fact in the sense of neither supporting nor detracting from the prosecution case; its absence does weaken the prosecution case.

Other material inaccuracies

19. The respondent describes the injury as "a precisely lethal attack" and references the appellant's medical qualifications.[22] There was no evidence, from Dr Ong or otherwise, to suggest there was some medically based level of precision to the injury.

20. The respondent states that the evidence was that the threat that the deceased would not see her unborn grandson "could" weaken her protective factors.[23] Dr Spelman's evidence was that it "would" weaken her protective factors.[24]

Ground 2

21. The respondent contends that Dr Ong's opinion that it is more likely the deceased's wound was caused by a second party was not a personal opinion, but an opinion arrived at by comparing the present case with "what he has seen autopsies he has done and cases he has examined".[25]

22. However, the limited number of cases he has seen, or autopsies he has performed, which involved suicides effected by multiple stabs with a rotation of the knife would not, without the overlay of his personal views of the matter, have provided a sufficient basis for his opinion. The fact that those cases were limited in number did not, by itself, make it more likely, in this case, that the deceased had not died by suicide. In truth, his opinion reflected his personal views that the deceased would not be likely to act in a certain way when causing her own death. As with the impugned expert evidence in *Honeysett*, Dr Ong's opinion gave "the unwarranted appearance of science" to the prosecution case that the deceased's death was not suicide.[26]

Dated: 3 March 2023

Ruth O'Gorman KC

Daniel Caruana

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[22] Respondent's submissions at [4.20].
[23] Respondent's submissions at [4.50].
[24] AFM 520, line 41.
[25] Respondent's submissions at [5.41]-[5.42].
[26] *Honeysett v The Queen* (2014) 253 CLR 122 at [45].