HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

BETWEEN:

THOMAS CHRIS LANG

Appellant

and

THE QUEEN

Respondent

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RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues the Respondent contends the appeal presents

2.1 The respondent contends each ground of appeal will be resolved by the application of well-established principles applied to appeals on the basis that a jury's verdict is unreasonable and cannot be supported having regard to the evidence, and the admissibility of expert evidence.

2.2 Further, in each instance, whether those principles were correctly and conventionally applied by the Court of Appeal.

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Part III: Certification regarding s 78B of the Judiciary Act 1903 (Cth).

3.1 The respondent considers that notice is not required pursuant to section 78B of the *Judiciary Act 1903 (Cth)*.

Part IV: Material facts

4.1 The appellants narrative statement of relevent facts is accepted except as follows.

4.2 The deceased abdomen was penetrated once,[1] but the knife[2] had then been repeatedly thrust, partially withdrawn and rotated so as to inflict not less than four and perhaps five distinct Internal wounds, creating two or perhaps three exit wounds to her back.

4.3 The appellant was heavily committed to what he believed was a long term monogamous romantic relationship with the deceased. She was not so committed, which was becoming obvious on the night of her death.

4.4 The common ground of the parties reflected the only rational inference which could be drawn from the evidence.

4.5 The central issue at trial was whether the prosecutions had proved the appellant had killed the deceased beyond reasonable doubt, Dr Ong's infliction opinion being just one piece of evidence in support of the prosecution case.

4.6 The appellant had conjectured suicide by the deceased to first response police.

4.7 The respondent accepts the appellants factual references in 13-18,20-25 and 26-29 of the "Brief background facts" save as follows.

4.8 [13][3] The deceased had returned to Australia some 30 years previously without warning and with disclosing that she was pregnant to the appellant. This had devasted the appellant who had dropped out of medical school for a time.[4] He had continued to love her and thought she did as well. [5]

4.9 [14] The appellant was heavily invested in the resumption of their relationship.[6] He once again had sacrificed his medical career for his relationship with the deceased.[7]Relations between the appellant and the deceased had dramatically deteriorated by the night of her death, they were arguing throughout the day, arguing for the first time in the entire relationship,[8] she lost interest sexual interaction that night,[9] he suspected her of being unfaithful and specifically referring to

[1] RFM 35-43. Diagrams at 39 and 42, are from the perspective of looking down from the top of the head.
[2] RFM 32.
[3] By reference to paragraph 13. of the appellants outline.
[4] RFM 134.29-60.
[5] RFM 218.11.
[6] RFM 177.5, 177.17, 183.30.
[7] RFM 183.30.
[8] RFM 187.1.
[9] RFM 141.35, 157.45.

"Kenneth"(McAlpine).[10] The deceased refused to allow him to sleep in the same bed as her for the first time in their entire relationship.[11]

4.10 [16] The appellant's 000 call was in two parts. The first call ended abruptly just after the appellant makes a point of telling the operator the deceased had her hand on the knife.[12] When the call resumed, he made a point of outlining that she was distraught the previous night and was upset.[13] Later the same day he would discuss "a hallmark" of depression.[14] The deceased apartment was on the 20th floor. [15] The appellant fabricated a narrative from the outset that the deceased had been acting irregularly after her unit had not sold and then in a fit of anger flung her mobile phone from the balcony not later than 10:00pm on 21 October 2015.[16] However the phone was recovered in a damaged state at the foot of the building a found to be in use until 12:06 am on 22 October 2015. That usage was consistent with reviewing text messages between the deceased and Mr McAlphine and an unanswered call to him.[17]The appellant's right middle fingerprint was found on the phone. [18]

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4.11 Dr Ong gave evidence opining the external wound was probably painful[19] in the context that all wounds to the deceased would probably been inflicted within maybe five seconds[20] with shock probably setting in within minutes, say five minutes[21] and the deceased being consciousness with five to 15 minutes.[22] In one of his interviews the appellant appears to describe the deceased stabbing herself in the stomach as "nice work with a razor sharp knife".[23] Further, a strong match of the appellant's DNA was found on the deceased left breast and a much weaker match on her right breast.[24] Her left breast was naked and the upper most part of her body as positioned on her bed. It was in close proximity to the entry wound.[25]

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4.12 The deceased was right-handed, suffered from arthritis with the consequence that she would frequently have difficulty opening jars and holding things including food.[26] She had no blood

[10] RFM 157.20, 183.19, 186.49.
[11] RFM 163.23.
[12] RFM 68.6-16.
[13] RFM 71.51.
[14] RFM 232.11.
[15] AFM 101.16.
[16] RFM 65.40-53,
[17] AFM 351-2.
[18] AFM 321.14.
[19] AFM 276.44.
[20] AFM 282.23.
[21] AFM 253.38.
[22] AFM 283.19-23.
[23] RFM 953.3.
[24] AFM 310.8-39.
[25] RFM 22,39.
[26] AFM 424.30-425.9, 426.25.

on her right hand[27] which was level with her head under a pillow when her body was discovered 181.45.[28] The fatal wound would have bled slowly.[29]

4.13 No fingerprints were recovered from the knife and only matches for the deceased DNA was found on the knife[30] even though the appellant had touched the knife while it was placed in deceased body.[31] The evidence on DNA included an explanation that DNA can be detected from bodily fluids such as blood which contain DNA or objects being touched leading to cells containing DNA being transferred from a person to an object or another person.[32] However, the unchallenged evidence of that witness was that transfer DNA "may" occur and there are variables surrounding the potential for transfer.[33] It was never put or suggested to this witness there ought to have been transfer DNA on the handle of the knife if the appellant had used it to stab the deceased.

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4.14 This evidence, along the potential brevity of the appellant's touching the handle of the knife, coupled with his admission he had touched handle of the knife without transfer DNA being detected would have permitted the jury to rationally reason, the possibility of transfer DNA was not realised in this case. Consequently its absence was a neutral fact.

4.15 The respondent accepts as accurate the evidential references contained in paragraphs 30, 33, 34, 35 and 36 of the appellants outline.

4.16 Dr Ong gave evidence the single external wound[34] was incised [35] which penetrated 4 cm through the skin and abdominal muscles[36] before the knife blade first penetrated the deceased's liver in two places.[37] The knife blade was retracted about 4cm, rotated[38] and reinserted creating two, perhaps three further internal wounds.[39] The whole time knife blade stayed within the deceased's body.[40] As already outlined this occurred in a space of maybe five seconds.[20]

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4.17 The appellant is a doctor[41] well familiar with the medication the deceased was on.[42] Part of his narrative was the deceased showed interest in a sexual interlude, before abruptly becoming groggy/passing out[43] and went to sleep. Within 5 to 10 minutes she was in bed and soundly

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27 AFM 240.34.
28 AFM 181.45.
29 AFM 282.37.
30 AFM 620.20-21.
31 RFM 940.53.
32 AFM 307.23-44.
33 AFM 307.40.
34 RFM 36.
35 AFM 233.27.
36 AFM 247.15.
37 AFM 232.19-33.
38 AFM 265.1-10.
39 AFM 261-262.
40 AFM 265.2.
41 RFM 80.28.
42 RFM 244.25-245.3, 245.23-27, 247.16, 249.20
43 RFM 141.36, 157.45, 232.10, 244.9

asleep[44] to the point that he could enter her room, and kiss her before she woke startled.[45] This was a consequence of her having consumed alcohol and her prescription Valium[46] and having been up since 5:00am.[47] He was sure she had consumed Valium because of the packaging beside the bed.[48]

4.18 However, the evidence outlined above demonstrates, as the appellant well knew, the deceased was likely to have been knocked out, to use his terminology,[49] sedated and heavily asleep by a combination of alcohol, Valium and fatigue when she was stabbed.

4.19 The evidence to which the respondent refers does not establish the deceased was capable of struggling much less that she had the opportunity to struggle if she was asleep and sedated as
10 the evidence strongly suggests.

4.20 On the other hand this evidence, when coupled with the appellant's medical qualifications, does support the inference it was a precisely lethal attack by someone with medical knowledge and well-motivated to kill the deceased.

4.21 In paragraphs 38 to 43 the appellant largely relies upon the summary of Dr Ong, evidence[50] in the Court of Appeal judgment. It is submitted, that for the purposes of considering the appellant's argument it is preferable to refer to the actual evidence of Dr Ong.[51] Further, that evidence is best considered with his diagrams,[52] photographs of the deceased [53] and the forensic diagram.[54]

4.22 As already outlined, the evidence strongly supports the inference the deceased was sedated and
20 asleep at the time of the attack. The fight or flight evidence is irrelevant in the absence of evidence the deceased was fully awake and perceptive of the attack when it started.

4.23 The phone on the bedside table is shown to be off the hook,[55] suggesting an attempt to use that phone was made at some stage, or it was moved out of reach.

4.24 Dr Ong's gave evidence that it was not easy to evaluate the deceased arthritis, her hands looked normal to him.[56] The practice was to do a CT to see the amount of damage.[57] He asked a

[44] RFM 265.30.
[45] RFM 265.5.
[46] RFM 141.36, 265.9.
[47] RFM 244.16.
[48] RFM 265.17-25, 18-20.
[49] RFM 249.20.
[50] CAB 101.
[51] AFM 242-297.
[52] RFM 37-42.
[53] RFM 16-18,21-24.
[54] RFM 15.
[55] RFM 18-19.
[56] AFM 283.46.
[57] AFM 283.47.

radiologist to look into the matter but could not remember off hand what he had said.[58] He was then asked that given the deceased could drive a car and carry bags and conduct other daily activities like that, her arthritis would not have prevented her from inflicting the wounds; he accepted that proposition.[59]

4.25 However, Zachary Boyce, a doctor and son of the deceased, would later give evidence that the deceased daily activities were severely restricted by the effects of her arthritis; in particular through lack of strength when grasping and holding household objects, including food.[60] It is submitted that while the Court of Appeal took a conservative view of this evidence the jury was not so constrained.

10 4.26 This evidence is highly significant. It directly contradicts the hypothesis the wounds were self-inflicted when his evidence is considered with the trajectory of each wound track as illustrated by Dr Ong and the placement of the deceased when stabbed as per the forensic diagram and photographs of the deceased.[61]

4.27 Dr Ong gave evidence the initial penetration was with the blade of the knife facing up because of the sharp edge of the upper section of the wound.[62] On the other hand the knife was still embedded in the body of the deceased at the time of her death with the blade of the knife facing downwards in the six o'clock position.[63] This rotation had occurred without altering the shape of the external entry wound.[64] It follows that the knife was originally inserted so that it tracked as illustrated in Dr Ong's diagrams at RFM 39 to 41.

20 4.27 The acute angle at which the deceased must have been holding the knife in ordered to affect the initial penetration is completely inconsistent with the restrictions she experienced through her arthritis.

4.28 Dr Ong did not give evidence that the deceased was crouched forward when initially stabbed. Rather, he explained that the fatal wound track, penetrated the liver before exiting the liver and lacerating the vena cava and a renal vein.[65]He noted that normally he would not expect the vena cava and renal vein to be close enough to each other to be lacerated at they were.[66] He postulated that that was an issue if the body was straight, however if the body was slightly curved, like crouching, that might have brought the vena cava and renal vessel sufficiently close together.[67]

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58 AFM 284.2.
59 AFM 284.10.
60 AFM 424.30-425.10.
61 RFM 36, 39,40-42, 15, 22.
62 AFM 246 considered with photo at 36.
63 AFM 243.34.
64 AFM 264.38-47.
65 AFM 250.39-45, 252.11-17.
66 AFM 253.5.
67 AFM 253.8.

In cross examination he accepted that the slight curvature/crouching might have been forward, sideways or lying backwards and tilted slightly to one side.[68]

4.29 It was never put to Dr Ong that this meant the deceased was in a crouching position and moving and hence awake when the initial penetration occurred. It is submitted Dr Ong's evidence on this point does not support any of these inferences.

4.30 As already outlined, there is substantial evidence the deceased was asleep and sedated when initially stabbed. The prosecution case was in no way weakened by this part of the evidence.

4.31 With regards to paragraphs 45 to 53 of the appellant's outline, it is submitted it is preferable to refer to the actual evidence of Dr Ong on these topics.

10 4.32 In evidence in chief Dr Ong[69] opined determining if a stab wound was self-inflicted was difficult. He then referred to a number of factors he had taken into account, including if the patient had injuries elsewhere indicating self-harm, whether the stab wounds penetrated the sheet(bedding) such as described in forensic texts and journals though this was not a strong factor, the multiplicity of wounds (the strongest factor, meaning tracks in different directions and rotation of the blade), whether the deceased have only used her left hand, and, the wound being to her liver.

4.33 Dr Ong was cross examined about each of these factors. In relation to self-harm he explained that had there been additional self-inflicted wounds about the wound site that would support the fatal wound being self-inflicted.[70] This included past effort of physical self-harm.[71] He was not
20 aware of the deceased's mental health history.[72] He was asked if the deceased having a history of self-harm would have been taken into account by him as making self-infliction more likely.[73] He was not asked if the fact of deceased mental health history would have been taken into account by him. He indicated that he would take self-harm into account but only as part of all of the features.[74] He accepted that multiple stabs wounds counted against self-infliction was a general factor at best.[75]

4.34 Dr Ong went on to explain that in his experience, having multiple tracks in different directions was odd for self-inflicted wounds as there was a lack of reported cases of rotation and there would be some delay associated with rotation of the blade.[76] In his experience of 20 to 30 self-inflicted fatal wound and more than 10, maybe 20, multiple wounds, the non-fatal stab wounds

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[68] AFM 281.23-38.
[69] AFM 270.15-42.
[70] AFM 290.25.
[71] AFM 290.38.
[72] AFM 290.42.
[73] AFM 291.10.
[74] AFM 291.13.
[75] AFM 292.45.
[76] AFM 293.35,45.

tend to be superficial.[77] He had never come across a self-inflicted stab wound involving rotation such as in this case, though he did not say it could not occur.[78] He accepted that multiple tracks was not definitive, all of the features he identified were not definitive and no evidence of a struggle or defensive wounds counted against it being a inflicted wound.[79]

4.35 It is submitted that the deceased mental health issues was not relevent to Dr Ong's opinion which focused his forensic examination of the deceased and his experience in forensic examination of deceased as a result of inflicted or self-inflicted injuries.

4.36 The discussion of the deceased mental health history below will demonstrate the references in paragraph 47 are or little relevance. For example, it is patently obvious the deceased may not
10 attempt to jump from the open window in her bedroom adjacent to her bed,[80] the balcony with open door apparently walked past twice in order to get the knife from the kitchen and then back to her bedroom in stab herself,[81] nor one of the other four balconies at her disposal.[82]

4.37 It is submitted that Dr Ong's evidence was not and does not stand alone. For the reasons already given the prosecution case was not weakened as submitted by the appellant in paragraphs 13-44 of his outline.

4.38 The respondent does not accept evidence of the mental health of the deceased is accurately reflected in 54 to 65 of the appellant's outline.

4.39 The appellant positively asserted the deceased had committed suicide.[83]

4.40 Dr Spelman was the deceased treating psychiatrist since 2001.[84] He initially treated for anxiety
20 and depression.[85] Within two or three years he diagnosed bipolar disorder.[86] That is abnormally high mood periods and major depressive periods. During periods of major depression she would be pervasively sad and unhappy, with reduced self-care (e.g. not showering), difficulty with her sleep, trouble getting out of bed in the morning and avoiding contact with other people, keeping to herself in her unit; the symptoms would be considerably worse in the morning.[87] His description of signs the deceased was depressed closely matched the observations of Zachary Boyce who had lived under the same roof as the deceased for a number of years.[88]

77 AFM 294.35.
78 AFM 295.3.
79 AFM 295-296.
80 RFM 16,23.
81 RFM 9.
82 AFM 87.5.
83 RFM 183.57.
84 AFM 487.42.
85 AFM 488.14,28.
86 AFM 489.30-45.
87 AFM 490.6.
88 AFM 417.11-17.

4.41 He described how the deceased wouldn't get out of bed until late in the afternoon, she would not want to go out or see her friends, would cancel appointments, would not take pride in her appearance, would note get dressed or wear makeup, and she would not really want to see him.

4.42 She had been on a range of medication including benzodiazepines to assist in sleeping and electroconvulsive therapy when drug therapy was not being effective.[89]

4.43 She was also diagnosed with a borderline personality disorder, the difference being a psychiatric illness tends to be phasic, it comes and goes. A disorder tends to have a more consistent pattern.[90]

4.44 On the issue of suicidal ideation Dr Spelman explained it as a point on a continuum. It is a step up from someone having thoughts of wanting to end their lives to preoccupation with thoughts of ending ones life, which can progress onto an actual intention to take their own life.[91] The ideation is thinking about it, the intention is putting those ideas into action, ideation, planning, intent, action and reaction.[92] The deceased had suicidal ideation.[93] She had had such ideation for a long time when she was depressed and struggling.[94] It had never progressed to intent in her discussions with Dr Spelman.[95]Her attempt to climb up on a balcony rail was a step up from ideation.[96]

4.45 As a general rule persons suffering a major depressive disorder are generally not as risk of self-harm, they are at risk of suicidal ideation, an increased risk of self-harm comes with a personality disorder; however the deceased never demonstrated self-harm ideation in discussions with him.[97] Valium was prescribed to induce sleep.[98]

4.46 In May of 2015 she had a number of stressors, including her daughter's marriage, her husband's treatment for prostate cancer, her son's birthday. A new drug was tried which was ineffective, leading to the use of electroconvulsive therapy.[99]

4.47 She made an appointment to see him on 20 October 2015, on short notice, she was accompanied by the appellant though he did not sit in on the consultation.[100]

4.48 She had told him, her daughter was pregnant and the baby was due in February, that her relations with her husband were strained, she had switched out of depression slowly, she was elevated,

89 AFM 490.15-35.
90 AFM 492.39-47.
91 AFM 493.13-20.
92 AFM 493.22.
93 AFM 493.27.
94 AFM 493.32.
95 AFM 493.41.
96 AFM 494.2.
97 AFM 494.14-18.
98 AFM 497.5.
99 AFM 498.28-499.5.
100 AFM 503.1, 504.15.

waking early in the morning and taking 5mg of Valium at night.[101] She wanted the appellant to return to New Zealand but had not discussed it with him yet.[102] She was upbeat and not expressing any depressive symptoms, there was no sign of her not engaging in self-care and she made an appointment to see him in six days.[103] Under cross examination Dr Spellman rejected the idea the deceased had strained relationships with her husband and daughter solely because of fear of abandonment.[104]

4.49 In summary, Dr Zelman did not see any signs of depression he had previously observed in his long-term treatment of the deceased.

4.50 With reference to paragraph 60 of the appellant's outline, the threat of the deceased not seeing her unborn grandson "could" weaken her protective factors.[105] However, the reference to her being "crash slut" by her husband was a month previously, and that was a very long time. He was actively back involved in her care.[106] The unit had been on the market for a number of years and was on the market when he saw her on the 20th.[107] The difficulty in selling her unit would not necessarily have made her suicidal.[108]

4.51 With respect to paragraph 62 of the appellant's outline, that message is in keeping with the deceased moving out of her down phase and inconsistent with her presentation to Dr Spelman on 20 October and her conversation with Graham Boyce on the evening on her death. Likewise her conversation with her son Zackary, again on the night of her death.[109] Crucially none of the signs of depression previously observed by Dr Zelman or Zackary were present.

4.52 Similarly, with respect to paragraph 63. At its highest it demonstrates suicidal ideation which the deceased had been experiencing for years with no escalation to intention. It is submitted it had minimal impact in the trial of the appellant, for or against the prosecution. None of the deceased long established signs of depression are present. On the contrary reaching out to an acquaintance such as Ms Nielson was atypical.

4.53 The deceased regularly expressed suicidal ideation, but only ideation. This was different from a personality disorder which manifested itself where there is a pattern of frequent suicidal gestures or self-harming gestures; that was not a feature of the deceased disorder, the ideation did not

[101] AFM 504.29-40.
[102] AFM 505.38.
[103] AFM 506.31-38.
[104] AFM 516.40.
[105] AFM 520.41.
[106] AFM 521.1-5.
[107] AFM 521.14.
[108] AFM 521.24.
[109] AFM 521.4-15.

come and go on a daily basis when she was not depressed.[110] When she did speak of suicidal ideation it was in terms of jumping off a building. [111]

4.54 The deceased, to his knowledge, had never self-harmed.[112] It is extremely rare for there to be suicidal ideation during the manic phase.[113]

4.55 Graham Boyce, the deceased husband, spoke to her by telephone on 21 October 2015, about 7 or 8, pm. He was under the impression that if she provided the valuation for the unit the sale would go ahead, and she was quite happy about that. She wanted him to get the valuation to her as soon as possible, she did not swear, she never does.[114] In contrast the appellant asserted she was even more angry during this conversation with Mr Boyce, she yelled at him to get the

10 "fucking" appraisal.[115]

4.56 It is submitted a fair reading of the prosecutors submission commencing at AFM 580 onwards does not entail a simple unlikelihood contention. Rather, it involved presenting a balanced picture of the state of the deceased mental health, identifying what indicia there was for and against her forming a suicidal intention, contrasting the state of her mental health with that projected by the appellant and mitigating the potential for irrational and prejudicial weighting of mental health issues by the jury.

4.57 The address was entirely unexceptional.

4.58 With respect to paragraph 65, of the appellant's outline, the very clear evidence of Dr Spelman, which was uncontested, was that depression may result in suicidal ideation, but that is radically

20 different from suicidal ideation. The deceased had experienced suicidal ideation for years without it progressing to suicidal intention and without escalation to self-harm.

4.59 Subject to the qualifications outlined above, the respondents outline of passages of the Court of the Appeal's judgement in paragraphs 66.-72 of his outline is accepted as accurate.

Part V: Argument – Ground 1 verdict unreasonable and unsupported by the evidence

5.1 Some relevant principles include:

5.2 "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence can resolve a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. Where the evidence lacks credibility for reasons which are not

[110] AFM 517.31-37.
[111] AFM 517.45.
[112] AFM 522.42.
[113] AFM 532.6.
[114] AFM 397.44-398.5.
[115] RFM 220.27.

explained by the way it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence. In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court 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."[116]

10 5.3 "Secondly, the assessment of the credibility of a witness by the jury because of what it has seen and heard of a witness in the context of the trial is within the province of the jury as representative of the community. Just as the performance by a court of criminal appeal of its functions does not involve the substitution of trial by an appeal court for trial by a jury, so the appeal court should not seek to duplicate the function of the jury in its assessment of the credibility of the witnesses where that assessment is dependent upon the evaluation of the witnesses in the witness-box. The jury performs its function on the basis that its decisions are made unanimously, and after the benefit of sharing the jurors' subjective assessments of the witnesses. Judges of courts of criminal appeal do not perform the same function in the same way as the jury, or with the same advantages that the jury brings to the discharge of its
20 function."[117]

5.4 "The function of the court of criminal appeal in determining a ground that contends that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, in a case such as the present, proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable. The court examines the record to see whether, notwithstanding that assessment – either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence – the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt."[118]

5.5 "[21] This Court's assessment of the evidence must proceed upon the footing that the jury was able to evaluate both "conflicts and imperfections" in the evidence at the trial. The Court must
30 pay full regard to the considerations that the jury is the body entrusted with the primary responsibility of determining guilt or innocence and that it has had the benefit of having seen and heard the witnesses give evidence. With that in mind, it was reasonably open to the jury to

[116] M v The Queen (1994) 181 CLR 487 at 494.
[117] Pell v The Queen (2020) 268 CLR 123 at 144-5[37].
[118] Pell's case supra at 145[39].

be satisfied beyond reasonable doubt upon the whole of the evidence that the appellant was guilty of the offences."[119]

5.6 "[21] This Court's assessment of the evidence must proceed upon the footing that the jury was able to evaluate both "conflicts and imperfections" in the evidence at the trial. The Court must pay full regard to the considerations that the jury is the body entrusted with the primary responsibility of determining guilt or innocence and that it has had the benefit of having seen and heard the witnesses give evidence. With that in mind, it was reasonably open to the jury to be satisfied beyond reasonable doubt upon the whole of the evidence that the appellant was guilty of the offences."[120]

10 5.7 In Dansie's case[121] at [15] this court cited Filippou's case[122] in support of the proposition an appellate court should conclude that it was not open for the tribunal of fact to be satisfied beyond reasonable doubt if its own assessment of the evidence leads to it having a reasonable doubt, unless the tribunal's advantage in seeing and hearing the evidence is capable of resolving that doubt. Ultimately error was found because intermediate appellate court in that case had reviewed the evidence only with a view to determining if there was a clear pathway to guilt open to the jury.

5.8 However, the intermediate appellate court must be careful to apply the correct standard of proof:[123]

"[46] The prosecution case against the respondent was circumstantial. The principles
20 concerning cases that turn upon circumstantial evidence are well settled.15 In Barca v R ,16 Gibbs, Stephen and Mason JJ said:

'When the case against an accused person rests substantially upon circumstantial evidence the jury cannot return a verdict of guilty unless the circumstances are 'such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused': Peacock v R .17 To enable a jury to be satisfied beyond reasonable doubt of the guilt of the accused it is necessary not only that his guilt should be a rational inference but that it should be 'the only rational inference that the circumstances would enable them to draw': Plomp v R ;18 see also Thomas v R .19

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[47] For an inference to be reasonable, it "must rest upon something more than mere conjecture. The bare possibility of innocence should not prevent a jury from finding the

[119] R v TAN [2020] QCA at 7[21] citing MFA v The Queen (2002) 213 CLR 606 at 634 and M v The Queen (1994) 181 CLR 487 at 493.
[120] R v TAN [2020] QCA at 7[21] citing MFA v The Queen (2002) 213 CLR 606 at 634 and M v The Queen (1994) 181 CLR 487 at 493.
[121] Dansie v The Queen [2022] HCA 25.
[122] Filippou v The Queen (2015) 256 CLR 47 at 75 [82].
[123] R v Gerard Robert Baden-Clay (2016) 258 CLR 308 at 323.

prisoner guilty, if the inference of guilt is the only inference open to reasonable men upon a consideration of all the facts in evidence"20 (emphasis added). Further, "in considering a circumstantial case, all of the circumstances established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence".21 (emphasis added). The evidence is not to be looked at in a piecemeal fashion, at trial or on appeal22

[48] Further, a criminal trial is accusatorial but also adversarial. Subject to well-defined exceptions, 'parties are bound by the conduct of their counsel, who exercise a wide discretion in deciding what issues to contest, what witnesses to call, what evidence to lead or to seek to have excluded, and what lines of argument to pursue.'23"

5.9 It is submitted the approach of the Court of Appeal through the primary judgement of Mullins JA was correct. It did review the evidence, but not with a view to determining if the jury had been in error, as urged by the appellant.

5.10 It is submitted the Mullins JA correctly directed herself as to the correct principles at [106][124] and then applied those principles. Her review of the evidence comprises paragraphs [10][125] to [92][126] of her judgement. At no point in that review does Mullins JA refer to the jury's assessment of any witness or whether that assessment was open to the jury.

5.11 In paragraphs [93] [127] to [104][128], Mullins JA deals with the admissibility of Dr Ong evidence ground.

5.12 At [105][129] Mullins JA commence discussion of unreasonable unsupported verdict, rejecting the appellant's contention of a stepped process as opposed to a total review of the evidence. In [106] [130] Mullins JA correctly directs herself concerning the law. In [107] [131] Mullins JA summarise the evidence and contentions concerning the appellant's lie concerning the disposal of the phone.

5.13 It is submitted this does not colour the purpose of the review of the evidence undertaken at [10] [132] to [92] [133], rather Mullins JA correctly identified a need to consider this aspect of the evidence differently because of the determinative advantage of the jury.

[124] CAB 120.
[125] CAB 101.
[126] CAB 117.
[127] CAB 117.
[128] CAB 119.
[129] CAB 119.
[130] CAB 120.
[131] CAB 120.
[132] CAB 101.
[133] CAB 117.

5.14 It is submitted a consideration of the judgement of Mullins JA demonstrates the review of the evidence in [10] [134] to [92] [135]was with e view to deciding if the Court of Appeal should have a reasonable doubt. For example Mullins JA attributed little weight to Ms Nielsen's evidence [110][136], adopted Mr Ong evidence on the arthritis issue [75][137] and qualitatively assessing the evidence of Dr Ong as opposed to deferring to the jury's assessment [99]-[101].[138]

5.15 At [108] the Mullins JA concluded it was not unreasonable for the jury to reject the appellant's claim the deceased threw her mobile phone off the balcony. However, it is submitted a fair reading of that part of her judgement does not demonstrate error. Mullins JA had extensively reviewed the evidence with a view for forming her own view as to whether she should entertain a reasonable doubt. It is submitted that at [108] Mullins JA identified one of the few areas where she felt the jury had a determinative advantage with the focus of the enquiry, correctly, switching to whether the view of the jury was rationally open to them.

5.16 Having then considered the probative value of that lie, Mullins JA then went on to independently assess the evidence of Dr Ong concerning self-infliction.

5.17 At [113][139] Mullins JA initially refers to the jury, but then progresses to discussing Dr Ong's evidence in an evaluative way, essentially concluding the concessions made by Dr Ong raised theoretical possibilities only. That is, the concessions raised no more than a bare possibility of innocence and hence need not and did not preclude her satisfaction of the guilt of the appellant beyond reasonable doubt.

5.18 This interpretation is confirmed when at [114] [140] Mullins JA cites Miller's case.[141] The cited paragraph in Miller referred to M's case and the core concepts of that case.

5.19 It is submitted the reference to the jury in [113] [142] should not be seen as colouring the nature of the review undertaken by Mullins JA. Rather her honour was addressing two issues. Firstly, should the review of the evidence lead to her having a reasonable doubt and was there any apparent error in the approach of the jury, resolving both issues against the appellant.

5.20 It is submitted the Mullins JA decided the appeal by correctly applying conventional principles. The agreeing judgements cannot alter the correctness of the approach undertaken by Mullins JA.

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134 CAB 101.
135 CAB 117.
136 CAB 121.
137 CAB 114.
138 CAB 119.
139 CAB 122.
140 CAB 122.
141 R v Miller [2021] QCA 126, at [16] and [18].
142 CAB 122.

Argument – Ground 1 Error lies.

5.21 The respondent accepts and adopts the quoted passages from Edward's case in the appellant's outline.

5.22 The appellant case at trial was that he did not lie about throwing the phone off the balcony, rather he was confused about when that had happened.[143]

5.23 The jury received a conventional Edward direction[144] which included a direction to consider whether there might be other explanations for the lie.[145] No redirections were sought, and those directions were not challenged on appeal.

5.24 It is evident from [107][146] to [110][147] of the judgement of Mullins JA that on appeal the issue raised was whether the prosecution had proved the appellant had lied.

10

5.25 In these circumstances, it is hardly surprising the Court of Appeal failed to expressly discuss the potential innocent explanations now advanced.

5.26 It is submitted the potential innocent explanation now advanced could not have been advanced at trial without undermining how the defence case had been conducted. Further, the explanation now advanced raises nothing more than a conjectured possibility.

5.27 It provides no support for this ground of appeal

Argument – Ground 1 Error thrusts of knife and rotation evidence and death by suicide evidence, significant possibility innocent person convicted.

5.28 Mullins JA makes reference to motive in paragraph [113].[148] It is submitted that Mullins JA did so in to context of considering whether the concessions by Dr Ong created a Pell type scenario, which is an uncontested body of evidence in the prosecution case which precluded satisfaction of guilt beyond reasonable doubt. Mullins JA conventionally concluded, having regard to the totality of the evidence, that it Ddid not.

20

5.29 For reasons already discussed, lack of evidence of struggle and a suggestion of crouching/curvature of the deceased body provided no rational obstacle to the appellant being proved guilty beyond reasonable doubt.

143 AFM 617.19.
144 CAB 30.10-31-20.
145 CAB 31.1-7.
146 CAB 120.
147 CAB 121.
148 CAB 122.

5.30 It is submitted that the above analysis of the evidence of Dr Spelman in the context of the other evidence demonstrates there was no compelling evidence of suicide.

5.31 As already discussed, the evidence supports the inference the deceased was unconscious and sedated when stabbed, the absence the appellant's DNA on the handle of the knife is unremarkable and the deceased mental health history when considered dispassionately does not support the hypothesis that she killed herself.

5.32 Consequently there are no compounding improbabilities consistent with innocence of the kind encountered in Pell's case supra.

Argument – Ground 2

10 5.33 The respondent adopts and accepts the caselaw referred to the appellant's outline on this topic and the history of proceedings in paragraphs 92 and 93 of his outline.

5.34 Dr Ong was a highly qualified and experienced forensic pathologist who had almost twenty years' experience at the time of giving evidence.[149] His qualifications were never challenged.

5.35 It is understood that his evidence is challenged to the extent he has not based his observations on his experience and observations, as opposed to conjecture about human behaviour, especially that of those who self-harm.

5.36 His evidence concerning his findings extends from AFM 227 to 269. He gives details, thorough and carefully considered evidence.

5.37 It is submitted these factors are important and strongly suggest such a highly trained and
20 experienced expert witness is unlikely falter and express personal opinions.

5.38 It is also submitted that it is more appropriate to consider this ground by reference to his actual evidence rather than the summary of it in the Court of Appeal decision.

5.39 The cross examination of Dr Ong relating to this particular aspect of his evidence commences at AFM 292.15 He is there being asked to focus on the aspect of a single wound with multiple tracks in the context of self-inflicted wounds. For the remainder of that page he exposes his reasoning by discussing other cases he has had reference to in formulating his opinion.

5.40 At AFM 293.10 cross examination moves on to significance of rotation. The following evidence is then given:

"10 Can we talk about the difference, if any, between a single entry wound with a
30 *number of tracks like you've just explaining to the jury and a single entry wound with a number of internal tracks plus a rotation of the knife. Is there any difference*

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149 AFM 224-226.

between the two scenarios in your mind? Is one more likely to be suicide or homicide?---I think that it would play a role because there'd be a – a slight delay in – 15 in the blade being rotated, yes.
I'm sorry, could you repeat that?---I think there's be a slight delay because when the blade is - - -

20 HER HONOUR: Sorry, did you say delay?---Yes. Because when the blade is rotate – withdrawn, there – there's be a – a bit of rotation before being plunged again. So I think that it – it plays – it does play a role in the final – what – what I – in – in my
10 *opinion, in how the injury occurred.*

*25 MS O'GORMAN: Is it because – and so the next fate – factor was the rotation of the knife which is why I'm interested to talk about these together. Is the fact of the rotation of the knife significant in your mind because it might cause more pain than if there had just been stabs within one direction?---**It's not just the, I think, pain. It's just the – the features of it. I mean, if you have two stabs in one direction and these 30 stabs are – they will eventually kill. I agree with you that in a – initial instance, it may not be immediately fatal. And then we have a – a de – a slight delay because there's a rotation of the blade**.*

20

Sure?---And further plunging in a different direction. And – and that is a bit – that is 35 odd. That is not common and I have not found any case of report of stabbing inj – injuries by this means.

Okay. So when you say you haven't found any reported cases of that, what you mean is that you haven't seen any that have involved that mechanism you've talked 40 about – a single entry wound, a couple of stabs, the rotation, a couple more stabs – being discussed in the literature?---Yes.

30 *And you haven't yourself dealt with a case like that?---Yes.*

45 Okay. Is it the fact of the delay that would have been necessary to turn the blade what is significant in your mind; is it?---I think this – it does play a part in my decision, yes."

5.41 It is submitted a fair reading of Dr Ong evidence is he is not expressing a personal opinion; he is not purporting to identify what a person self-harming might do or how they might engage in self-harm.

5.42 Rather he is comparing in his own mind what he has seen autopsies he has done and cases he has examined with what he has seen in this case.

5.43 The delay he is referring to is the delay as left by the traces of the injury, that is, as in this case rotation of the knife delays and hence changes the direction of the tracks. This is exemplified by the bold-faced passage. The example he gives is in the case of an immediate fatal stab wound, a delay and subsequent wound is inconsistent with the wound being self-inflicted.

5.44 At AFM 294.6 he gives further evidence.

"I understand. What I'm trying to get at is as I understand it, in your mind it's significant that there has been a rotation of the knife?---Yes.

10

And I'm just trying to understand why that's significant. As I understand it, you've said it's significant in part because 10 there might have – well, there would've been some delay to turn the handle. What's the – any other significance of it?---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.

15

Okay. And is that the sum total of it, of the significance of it?---Yes. Looking at it,

20 *yes.*

Okay. It did – or it would, wouldn't it, serve a – quite a very real practical purpose 20 in the sense that if one was intent on killing oneself in that manner, then you are more likely to achieve that aim, aren't you, if you have a number of stabs in your body than if you just have one or two?---Yes, I've – I've seen – like I said, I've seen – I've personally have – I've performed autopsies on a self-inflicted victim, more than 20, 30 stab wounds. But - - -

25

Sorry, can I just stop you, just to make sure I understand. Did you say that you've

30 *performed autopsies on bodies that had died by suicide where had – there had been more than 20 or 30 stab wounds?---Or multiple stab wounds, yes.*

30 Okay. But what was the number that you said?---Offhand, I can't remember but I'm sure it's more than 10, maybe 20.

Okay. And they've been suicides - - -?---Yes.

35 - - - cases like that?---But – but all these stabs are – they're fairly superficial, you know.

Superficial?---Mmm.

40 It'd be painful, nonetheless though, because it's the pain, the nerve endings on the skin that contain the pain receptors; isn't it?---I would think so, yes."

5.45 It is submitted that viewed in context, once again Dr Ong is giving unexceptional evidence, based on his experience and assessment of wounds. His answer at line 40 demonstrates subjective considerations are essentially irrelevant.

5.46 It is submitted his evidence was unexceptional and admissible. There was no error it in being admitted and no miscarriage of justice has occurred because it was placed before the jury.

10

Conclusion

The Court of Appeal did not err in its consideration of this matter. It correctly considered the evidence for itself and reached the conclusion the evidence supported guilt beyond reasonable doubt.

5.47 That view was open to the Court of Appeal.

5.48 There was no error in the admission of Dr Ong evidence. No miscarriage of justice has been occasioned by it admission.

5.49 The appeal should be dismissed.

Part VI

6.1 Not applicable.

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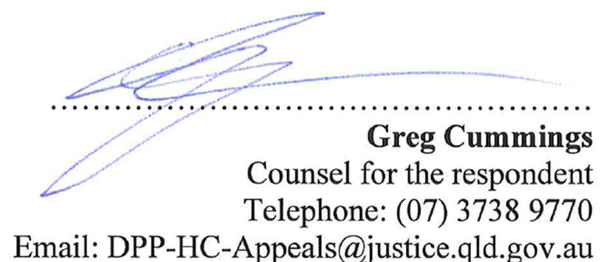
Part VII

7.1 It is estimated that 2 to 3 hours are required for presentation of the respondent's argument.

Dated: 10 February 2023



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