

BETWEEN:

DL
Appellant
and
The Queen
Respondent

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RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I:

It is certified that this outline is in a form suitable for publication on the internet.

Part II:

Different circumstances at the time of resentencing

1. This was an unusual case. The resentencing exercise by the Court of Criminal Appeal ("CCA") fell to be determined under different circumstances to those that existed at first instance. Importantly, eight years had passed and evidence of post sentence events demonstrated that the appellant had not been diagnosed with schizophrenia or psychosis in the intervening period (RWS [34], [36]).

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2. The original sentencing judge found that the appellant was "acting under the influence of some psychosis at the time of the murder". This finding entailed, albeit "without any confidence", the acceptance of challenged evidence of Dr Nielssen that the appellant was "probably in the early phase of psychotic illness" (RWS [27]), namely the prodromal phase of schizophrenia (RWS [23]). Contrary opinions had been expressed by two psychiatrists called by the Crown, Dr Allnutt and Dr Kasinathan (RWS [12]).

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3. This finding was significant as it resulted in a consequential finding that the appellant did not intend to kill but rather intended to inflict grievous bodily harm upon the deceased (RWS [28], [51]). Evidence that the appellant had stabbed the deceased 48 times to the head, neck and chest otherwise pointed inexorably to an intention to kill (RWS [51]).

4. At the time of the original sentence proceedings, which were conducted three years after the offence, Dr Nielssen acknowledged that the appellant's illness had not emerged in the way that he had expected (RWS [23]). Initially in 2007, Dr Nielssen had been confident that the appellant would develop a typical schizophrenic illness within a few years. He was not so certain at the time of giving evidence in 2008, but opined that it was still more likely than not that at some stage during the appellant's early adult life he would develop a typical syndrome of schizophrenia (RWS [24]).

Evidence of post sentence events

- 10 5. For the purposes of the re-sentencing exercise in the CCA, the parties tendered material relating to events that had occurred in the intervening period (RWS [35]). At that time the appellant was 27 years old (RWS [36]). Affidavit material indicated that the appellant had not been diagnosed with schizophrenia or psychosis over the ensuing eight years since the sentence was imposed, despite him being under regular and consistent observation and assessment of psychologists and psychiatrists (RWS [36]).

Crown submissions on resentencing

- 20 6. In the CCA the Crown submitted that in carrying out the resentencing exercise, the CCA should make a more serious finding in respect of the objective seriousness of the murder, albeit in the context that the standard non parole period no longer applied (RWS [60]). The Crown identified the sentencing judge's conclusion that the appellant did not have an intention to kill or that the offence was not premeditated as findings there were "unduly favourable" (RWS [63]).

Resentencing by the CCA

- 30 7. Error having been found, it was the duty of the CCA to exercise the sentencing discretion afresh, "taking into account all relevant matters, including evidence of events that [had] occurred since the sentence hearing": *Kentwell v The Queen* (2014) 252 CLR 601 (RWS [41]).
8. This required the CCA to have regard to the absence of any diagnosis of schizophrenia or psychosis in the evidence of post sentence events. The absence of any such diagnosis constituted a material change in the nature of the evidence before the

sentencing court (AWS [70]). This is particularly so given the uncertain state of the psychiatric evidence in the original proceedings and Dr Neilssen's expectation in relation to the later development of schizophrenia.

9. This absence had an impact on the central issue of whether the appellant was suffering from the prodromal phase of schizophrenia or a psychosis at the time of the offence (RWS [72]). Consequently, the findings in respect of the appellant's intention at the time of the offence, in terms of whether there was pre-meditation and whether he was unlikely to reoffend were also potentially affected (RWS [51], [52]).

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Denial of procedural fairness

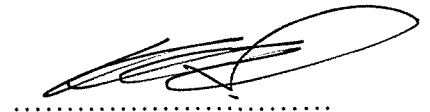
10. It is accepted that the independent re-exercise of the sentencing discretion must be performed by the CCA in accordance with the requirements of procedural fairness. What those requirements involve will depend upon the circumstances of the particular case (RWS [57]).

11. In the unusual circumstances of the present appeal, it was open to the majority of the CCA to conclude that the appellant had an awareness of the relevant issue and an opportunity to address this during the appeal. It was apparent that whether there had been the development of schizophrenia or psychosis since the time of sentencing was of importance as a consequence of:

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- the challenge to this finding by the Crown at the original sentence proceedings;
- the inconsistent and uncertain state of the psychiatric evidence at that time, as acknowledged by the sentencing judge; and
- the absence of this evidence in the post sentence conduct material, despite regular observation and assessment of the appellant in the intervening eight years.

Dated: 11 May 2018



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K N Shead
Senior Counsel for the Respondent