IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY No. M30 of 2013

ON APPEAL FROM THE COURT OF APPEAL, SUPREME COURT OF VICTORIA

BETWEEN:

DANG KHOA NGUYEN

Appellant

and

THE QUEEN

Respondent

RESPONDENT'S REPLY ON THE NOTICE OF CONTENTION

PART I: SUITABILITY FOR PUBLICATION

1. The Respondent certifies that this document is in a form suitable for publication on the internet

Part II: A CONCISE RESPONSE ON THE APPELLANT'S REPLY TO THE NOTICE OF CONTENTION

2. The Appellant's Reply on the Notice of Contention

2.1 The Appellant raises the following matters in reply to the Respondent's Notice of Contention:

(a) *Gilbert* stands for the proposition that on a charge of murder, it is a substantial miscarriage of justice for a trial judge to fail to direct a jury as to an alternative of manslaughter where such an alternative verdict is viable and open on the evidence;

(b) It is unfair to seek to overturn *Gilbert* because no attempt was made to do so in the case of the co-accused *Dang Quang Nguyen*; and

(c) None of the conditions referred to in *John v. Federal Commissioner of Taxation* (1988-1989) 166 CLR 417 at 438 to 439 or in *Imbree v. McNeilly* (2008) 236 CLR 510 at 526 [45]are present so as to warrant a re-consideration of *Gilbert* and *Gillard.*

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3. The Respondent's Reply

The Principle in *Gilbert*

3.1 The principle in *Gilbert* is not that which is asserted by the Appellant. The true principle of that case is that, in determining whether or not a defence or alternative verdict is viable or open on the evidence, no regard may be had to the guilty verdict returned by the jury.

3.2 It was the long established principle in *Ross v. The King* (1922) 30 CLR 246, which had been applied without difficulty by Intermediate Courts of Appeal for almost 80 years that was overturned. That principle was stated by the plurality in that Court at 254:

> "[W]e think it is clear that, if on a trial the Judge correctly instructs the jury on the essential ingredients of the crime charged and fully and fairly puts to the jury the defence set up by the prisoner, a verdict of guilty amounts to a finding by the jury of every essential element of that crime, and cannot be disturbed by a suggestion that the jury on the evidence might have found him guilty of a lesser offence if the Judge had informed them that they were at liberty to do so."

Unfairness in Overturning *Gilbert*

3.3 In paragraph 51 of the judgment in *R. v. Nguyen* (2010) 242 CLR 491, 505 this Court observed:

> "Whether some different conclusion could or should be reached about substantial miscarriage of justice in the case of *Dang Khoa Nguyen* is a question that was not addressed in argument and about which we express no opinion..."

3.4 As is apparent from the submissions filed on behalf of the Respondent to the appeal, it is the position that there are material factual distinctions between the cases of *Quang* and *Khoa*. As observed at [29] there was no evidence that *Quang* was involved in any drug transaction with Mau Duong or that he knew of any drug debt. By contrast, *Khoa* was on the evidence a party to the drug debt and gave instruction to Ho to shoot the first victim. *Khoa* had no record of interview and gave no sworn evidence about anything connected to this case.

3.5 The overruling of *Gilbert* would permit the evidence in *Khoa's* case to be tested against the proposition that the verdict of murder was properly arrived at by the jury and excluded the possibility of the alternative of manslaughter.

3.6 The significant factual difference between *Khoa* and *Quang* made such an argument untenable in *Quang's* appeal. There is therefore no inequality of treatment which is the proposition implicit in the Appellant's reply.

Re-consideration of *Gilbert* Warranted

3.7 Prior to the dramatic change of course taken in *Gilbert*, the law had been settled since at least 1922 when *Ross* was decided. It had been consistently applied in Intermediate Courts of Appeal with little difficulty.

3.8 The law prior to *Gilbert* had been worked out in "a significant succession of cases". It had been based on the acceptance of the fundamental principle, still in force today, that juries in reaching their verdict do so according to the instructions given by the Judge.

3.9 The principle in *Ross* still applies to every other offence than murder: *R. v. Saad* (2005) 156 A Crim R 533 [102].

3.10 The decision of the majority judgment in *Gilbert* is based on different reasoning. Gleeson CJ and Gummow J seemed to concentrate on their perception of the "realities of the matter", being that juries may hesitate to acquit because of their concern for victims of crime and their families [15] – [17]. Callinan J. held at [102] that the real question was "whether in all the circumstances, the failure to direct in accordance with ... the true interpretation of S.8 caused either of the trials in question to miscarry".

3.11 There was no support in the authorities referred to by the majority to move away from the interpretation in *Ross*. The result contended for by the majority could have been accommodated within the *Ross* principle. This is so because there were facts on which manslaughter was clearly open and the defence wanted it left as an issue. The trial judge, however, took that option away from the jury in a manner which was contrary to S.8.

3.12 What actually occurred, therefore was that the case was not "fully and fairly" put to the jury. It would follow that the conviction for murder could not be relied on as representing the jury's verdict as the "proper verdict on the evidence put forward".

3.13 The dissenting judgments of McHugh and Hayne JJ were strong dissents based on principle.

3.14 The first and second category in *John's* case are made out.

3.15 The third category is also made out. The decision has caused inconvenience – see analysis of Nettle JA in *R. v. Saad* at [90] – [102]. Even more significantly it has created an anomaly between murder and other cases which is not justifiable on principle.

3.16 It is argued by the Respondent in the submission that there is now a need to establish a better connection between *Pemble, Alford v. Magee* and the significant changes in criminal procedure which have introduced case management as an aim of the criminal justice system. This change is analogous to that which occurred in the civil law in *AON Risk Services Australia Limited v. Australian National University* (2009) 239 CLR 175, and resulted in a re-consideration of previous authorities of the High Court dealing with amendment.

3.17 This approach, it is submitted, falls within concept in *Imbree v. McNeilly*.

3.18 There are therefore four principles on which to re-consider the decision in *Gilbert*.

3.19 It is noted that the Appellant has made no response to the first ground of contention i.e. that relating to *Pemble* and *Alford v. Magee*.

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Dated: 21 May, 2013

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