HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS
Appellant

and

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MICHAEL O'CONNELL
Respondent

APPELLANT'S SUBMISSIONS

PART I CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES PRESENTED BY THE APPEAL

2. The respondent was convicted of the murder of his partner, Ms Jordan, following trial by jury. The respondent appealed against his conviction on several grounds including that the verdict was unreasonable and could not be supported by the evidence. By majority, the Court of Appeal of the ACT (**CA**) (Taylor J, Loukas-Karlsson J agreeing) upheld the appeal and entered a verdict of not guilty on the charge of murder (**JCAB 146**). That order is the subject of the appellant's (**Director**) appeal in this proceeding.[1]

10 3. Ms Jordan suffered a fatal head injury when she fell from the respondent's car. The prosecution case at trial was that the respondent drove with Ms Jordan on the bonnet of his vehicle, in circumstances where he was recklessly indifferent as to the probability of her death (**CA [2] JCAB 74**). The majority accepted that it was open to the jury to find that Ms Jordan was on the bonnet of the vehicle as the respondent was driving and when she fell, expressly deferring to the jury's advantage in seeing and hearing the evidence at trial on that issue (**CA [265] JCAB 128**). However, it concluded that the jury ought to have entertained a reasonable doubt about whether, knowing Ms Jordan was on the bonnet, the respondent was recklessly indifferent as to the probability of her death. The majority considered the jury did not enjoy any advantage in that assessment, because the 20 respondent's state of mind was established by circumstantial evidence (**CA [266]-[267] JCAB 128**).

4. That hypothesis as to innocence — that the respondent did not know or realise death was probable in circumstances where Ms Jordan was on the bonnet— was not one which was put to the jury at trial or raised by the respondent in his grounds of appeal. Indeed, it was inconsistent with *every* out-of-court version the respondent gave, in which he maintained

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[1] Subsequently, the same majority entered a verdict of guilty on the statutory alternative of manslaughter (**JCAB 174**). That order is the subject of the respondent's appeal in proceeding C2/2026 (to be addressed in separate submissions).

Ms Jordan was *not on the bonnet at all* at the time she fell to her death. Against that context, this appeal raises two issues:

(a) to what extent is an appellate court, in determining an unreasonable verdict ground of appeal, constrained by the adversarial context in which that challenge to the jury's verdict is brought? Here, did the majority err in setting aside the verdict of the jury on the basis of a ground that was not relied upon on appeal and which was excluded by the conduct of the case at trial?; and

(b) to what extent can an appellate court discount the jury's advantage in seeing and hearing the evidence on a particular issue, because the evidence which goes to that issue is "circumstantial"? Here, did the majority err in disregarding the jury's advantage in hearing and seeing the evidence on the issue of reckless indifference because it was established by several circumstances?

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PART III SECTION 78B NOTICE

5. The Director does not consider that notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV CITATION

6. The judgment of the Court of Appeal of the Australian Capital Territory has not been reported; its medium neutral citation is *O'Connell v DPP* [2025] ACTCA 20.

PART V: RELEVANT FACTS

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7. The respondent was tried on indictment before Baker J (the **trial judge**) and a jury in the ACT Supreme Court on a single count of murder relating to the death of Ms Jordan (**JCAB 6**). The prosecution case relied critically on the eyewitness evidence of Ms X, who was living with Ms Jordan at the time of the incident. The case for murder was left to the jury on the basis that the respondent was recklessly indifferent to the probability of causing Ms Jordan's death.[2] The statutory alternative of manslaughter[3] was left to the jury on the basis of an unlawful and dangerous act, namely that the respondent drove the car with Ms Jordan on the bonnet, with the intention that Ms Jordan would fall from the vehicle and collide with the road (**CA [195] JCAB 114**).

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2 See *Crimes Act 1900* (ACT), s 12(1)(b).
3 See *Crimes Act 1900* (ACT), s 49.

The circumstances of Ms Jordan's death

8. Ms Jordan lived on Coutts Place, which is on a hill that ends in a cul-de-sac at the bottom. At the top of the hill, there was a T-intersection where Coutts Place met Alfred Hill Drive. Ms Jordan's residence was approximately halfway between the cul-de-sac and the T-intersection (**CA [33] JCAB 81**). During the evening of 14 April 2022, the respondent attended Ms Jordan's house. Ms X's evidence was that at about 2:00am she woke and heard the respondent and Ms Jordan arguing, with "banging and clanging" and "shit smashing".[4] The respondent eventually left the house but returned sometime later. Ms X described the respondent as having returned, "ranting and raving", and said the pair began 10 to argue again, with Ms Jordan telling the respondent, "Michael, if you're just going to start your shit, just leave."[5] The respondent left the house for a second time, and Ms X, Ms Jordan and the respondent ended up outside the front of Ms Jordan's house (**CA [15], [32] JCAB 77, 80-81**).

9. The respondent's car, a Mitsubishi Triton utility vehicle, was parked at the front of Ms Jordan's house, facing up the hill towards the T-intersection with Alfred Hill Drive (**CA [15], [33] JCAB 77, 81**). Ms Jordan climbed onto the bonnet of the respondent's vehicle, telling him to come inside so they could talk. The respondent exited his vehicle and walked down the street towards the cul-de-sac. Ms Jordan "dived in the window" of the respondent's vehicle to find her vape. The respondent returned to the vehicle and 20 dragged Ms Jordan out. Ms Jordan asked him to go back inside to talk, before she got back onto the bonnet of the vehicle. The respondent got into the driver's seat (**CA [34] JCAB 81**). Ms X described the respondent, at this point, as "schizo" and "like, really angry" (**CA [37] JCAB 82**), and said "he was really mad and cracked out".[6]

10. The respondent started driving with Ms Jordan still on the bonnet, and Ms X stood in front of the vehicle. The respondent started driving slowly towards Ms X and as he did so, Ms X stepped back and the respondent continued towards her. The respondent continued to drive towards Ms X all the way to the end of Coutts Place. At this point, the respondent reversed the vehicle, before he "put his foot down" and drove straight towards

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[4] The evidence of this interview was led through police at trial: T114.35-36 (Constable Mann) **ABFM 27**; see also **CA [23] JCAB 79**.

[5] MFI #2 (Transcript of Record of Interview with Ms X on 17 April 2022) at Q/A71 (**ABFM 207**) (the recording of which was played to the jury at trial: **CA [29] JCAB 29**.

[6] MFI #16 (Transcript of 000 phone call made by Ms X on 15 April 2022) at p 2 (**ABFM 226**) (the recording of which was played to the jury at trial: see T339.25-46 (**ABFM 108**)).

Ms X, causing her to jump out of the way. The respondent drove his vehicle to the end of Coutts Place, turning left onto Alfred Hill Drive (**CA [35] JCAB 81**). Ms Jordan remained on the bonnet, holding on to the lip just below the windscreen wipers (**CA [38], [327] JCAB 82, 140**).

11. Ms X ran after the respondent's vehicle. She described hearing "a screech and, like, a doof". As she approached the point where the respondent's vehicle had stopped, Ms X saw the respondent get out of his vehicle, walk to the back and pick Ms Jordan up from the road, and put her into the passenger seat (**CA [35] JCAB 81**). She heard the respondent say, "Baby, I'm so sorry".[7] Ms X told her to get Ms Jordan to the hospital and
10 threatened she would hurt him if she didn't (**CA [27] JCAB 80**) The distance from 6 Coutts Place to the point on Alfred Hill Drive where Ms Jordan fell was 266.8 metres, on a downhill gradient (**CA [17] JCAB 77**). The evidence was that the respondent was driving at 53 kilometres per hour immediately before the brakes were applied.[8]

12. The respondent took Ms Jordan to the hospital where he told staff and members of Ms Jordan's family, including her mother, that Ms Jordan had fallen from the steps at the back of the house (**CA [18]-[19] JCAB 77-78**). Ms Jordan suffered a severe head injury as a result of falling from the respondent's vehicle (**CA [331] JCAB 141-142**). She died in hospital two days later, after it was determined that she could not survive and her life support was turned off (**CA [1] JCAB 74**). The forensic pathologist, Professor Duflou,
20 described Ms Jordan's injuries — which included a severe skull fracture, as well as grazing to the face and other parts of the body — as consistent with a fall from a vehicle moving at speed (**CA [80] JCAB 91-92**). Ms Jordan was described by Professor Duflou as a "small lady", weighing 46 kilograms and 1.53 metres tall.[9]

The respondent's version(s)

13. The respondent participated in an electronically recorded interview with police on 16 April 2022. The respondent's initial version of events was that Ms Jordan had fallen off the back of the vehicle whilst it was stationary. The respondent denied that Ms Jordan

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[7] MFI #16 (Transcript of 000 phone call made by Ms X on 15 April 2022) at p 2 (**ABFM 226**) (the recording of which was played to the jury at trial: see T339.25-46 (**ABFM 108**).

[8] T333.24-29 (Leading Senior Constable Smorhun) (**AFBM 71**). The respondent accepted at trial that the car was travelling at a speed of 53 kilometres per hour before braking: T533.33-35 (defence closing) (**ABFM 186**; *cf* **CA [322]-[324] JCAB 139-140**.

[9] T321.9-20 (**ABFM 97**).

was on the vehicle at any point as he drove away from Coutts Place, telling police that Ms Jordan chased after him after he left Coutts Place. He explained that he stopped his vehicle along Alfred Hill Drive, and it was then that Ms Jordan caught up to his vehicle and jumped on the back. He got out of his stationary vehicle to get Ms Jordan off, and at that point, she fell, hit her head and was unconscious (**CA [58]-[71] JCAB 87-90)**. He described it as a "freak accident".[10]

14. The respondent later gave a different version of events to family members on recorded phone calls — after he had been told that there was CCTV footage facing the street — that Ms Jordan had jumped on the back of his vehicle (without his knowledge), he had noticed her in rear vision mirror while driving away, had started slowing the car down at which point she "lost her footing" and fell, and *after* which he slammed on the brakes.[11]

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15. During his interview with police, the respondent explained that when Ms Jordan was initially on the bonnet of his car, and she "wouldn't get off" his car, he "ended up walking, and leaving my car there where it was was…", "then I turned it off as I – because – and walked off, because she wasn't going to – she wasn't going to get off" and that when she had jumped on the bonnet, he hadn't driven the car but had instead gotten out and walked off. He explained that at no point was Ms Jordan on the vehicle as it was moving, because he "wasn't driving with her on it. That's plain and simple. Not a chance in the world".[12]

16. The respondent agreed in his interview with police that he had lied to hospital staff and Ms Jordan's mother when he said Ms Jordan had fallen down the back stairs. He said he did not want to "tell people that she'd been a loony and – and – and running and chasing after me" (**CA [73]-[74] JCAB 90**).

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The trial

17. There was no issue at trial that Ms Jordan had died as a result of falling from the respondent's vehicle. The critical issue was whether the prosecution had proved beyond a reasonable doubt that Ms Jordan was on the bonnet as the respondent drove away. The

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[10] MFI #17 (Transcript of Record of Interview with the Respondent dated 16 April 2022) at Q/A60, 67, 70 (**ABFM 236-237**) (the recording of which was played to the jury at trial: see T340.16-343.25 (**ABFM 109-112**)).

[11] The version which defence counsel invited the jury to accept was the version given to the respondent's son on 22 April 2022: see MFI #18 (Transcript of AMC phone call dated 22 April 2022 (**ABFM 293-295**) and T512.8-15 (**ABFM 179**); T567.1-32 (summing-up) (**JCAB 30)**; *cf* **CA [155] JCAB 107)**.

[12] MFI #17 (Transcript of Record of Interview with the Respondent dated 16 April 2022) at Q/A 427 (**ABFM 264 - 265**), see also Q/A 59/60, 266, 285 (**ABFM 236, 253-254** (the recording of which was played to the jury at trial: see T340.16-343.25 (**ABFM 109-112**)).

"foundation of the prosecution case" for both murder and manslaughter was the respondent driving for "something in the order of 209 metres…at speeds between 40 kilometres and 60 kilometres an hour with Ms Jordan on the bonnet".[13] Defence counsel opened on the basis that "the entire Crown case depends on the premise that [the respondent] drove his vehicle with Ms Jordan on the bonnet" and that "I have to say to you, from the start of this trial, that is heavily contested".[14]

18. During his closing address, the prosecutor invited the jury to accept the evidence of Ms X, submitting that the evidence established Ms Jordan was on the bonnet of the respondent's vehicle at the relevant time. In addressing the respondent's state of mind, the prosecutor submitted that, if the jury were satisfied that Ms Jordan was on the bonnet of the vehicle, they would be satisfied beyond a reasonable doubt that the respondent was recklessly indifferent to the probability of causing death having regard to the inferences to be drawn from all the circumstances, including the respondent's knowledge of Ms Jordan on the bonnet, her "small and slight" size, and the precariousness of her position on the bonnet of a "substantial" and "big" vehicle as it moved, accelerating up the road at speed over a significant distance.[15]

19. The respondent's case at trial was that the jury could not be satisfied beyond a reasonable doubt that Ms Jordan was on the bonnet as the prosecution contended,[16] and instead there was a reasonable possibility that Ms Jordan was on the back of the vehicle at the time he drove his vehicle away from Coutts Place.[17] At the commencement of his closing address, defence counsel told the jury that "the central issue in this case is quite clear, and that is, if you have a doubt as to whether [Ms Jordan] was on the bonnet of the car, and [the respondent] knew she was on the bonnet of the car, you must enter a verdict of not guilty"[18] on both murder and manslaughter. He said that the "Crown brings this case to say [Ms Jordan] is on the front of the vehicle" and referred to evidence he said caused a doubt as to that issue.[19] He told the jury they needed to "exclude all doubts about whether [Ms Jordan] was on the front of the car".[20]

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[13] T17.31-41 (prosecution opening address) (**ABFM 8**).
[14] T26.35-44 (defence opening address) (**ABFM 18**).
[15] T491.11-492.2 (prosecution closing address) **(ABFM 158-159)**.
[16] T501.38-43 (defence closing address) (**ABFM 168**).
[17] T502.11-13 (defence closing address) (**ABFM 169**).
[18] T495.40-42 (defence closing address) (**ABFM 161**).
[19] T538.15-17 (defence closing address) (**ABFM 191**).
[20] T502.10-12 (defence closing address) (**ABFM 169**).

20. During his closing address, defence counsel made references to there being an absence of "murderous intent", but in the context of submissions that the evidence did not support Ms Jordan being on the bonnet of the vehicle. For example, counsel referred to the manner of the respondent's driving and submitted the evidence was "simply not consistent with this idea of [the respondent] having a murderous intent" but that it was "equally consistent" with the respondent not knowing Ms Jordan was on the back of his vehicle.[21]

21. During her summing up, the trial judge (correctly) treated the factual finding of whether Ms Jordan was on the bonnet of the vehicle as an essential link in the prosecution case and directed the jury that they could not find the respondent guilty, unless they were
10 satisfied of this fact beyond a reasonable doubt.[22]

The Court of Appeal

22. The respondent appealed on four grounds, namely, that the verdict of guilt was unreasonable or could not be supported having regard to the evidence (ground (a)),[23] as well as grounds alleging a miscarriage of justice arising from the trial prosecutor's conduct and directions given to the jury (grounds (b)-(e)).[24]

23. The respondent's case on the unreasonableness ground was, like his case at trial, that the evidence in the prosecution case was insufficient to support the finding that Ms Jordan was on the bonnet at the time, submitting on the appeal that: "The dispute, of course, is whether or not she was on the bonnet at the time that she fell".[25] It was not part of the
20 respondent's case on appeal that, if Ms Jordan was on the bonnet, it could not be established that he lacked the requisite state of mind of mind for the offence of murder (**CA [246], [297] JCAB 124, 135**).

24. The majority allowed the respondent's appeal on the unreasonableness ground (**CA [345]-[346] JCAB 144-145** (Taylor J), **CA [257] JCAB 126** (Loukas-Karlsson J), **CA [256] JCAB 126** (McCallum CJ, dissenting).[26] The majority agreed with McCallum CJ that it was open for the jury to find that Ms Jordan was on the bonnet of the vehicle,

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[21] T499.41-500.25, T534.8-18 (defence closing address) (**ABFM 166-167, 187**).
[22] T585.46-586.4, T587.20-28 (J**CAB 36, 38**).
[23] See *Supreme Court Act 1933* (ACT), s 37O(2)(a)(i).
[24] See *Supreme Court Act 1933* (ACT), s 37O(2)(a)(iii).
[25] Appeal transcript – day 1, T9.25-26 (**ABFM 338**); Appeal transcript – day 2, T29.30-30.40 (**ABFM 443-444**).
[26] All members of the Court would have dismissed the remaining grounds of appeal (**CA [106]-[230] JCAB 97-120** (McCallum CJ), **CA [257] JCAB 126** (Loukas-Karlsson J), **CA [258] JCAB 127** (Taylor J).

however concluded that the "reasonable inference" that the respondent "did not know or realise that her death was *probable,* was not excluded" (**CA [345] JCAB 144** (emphasis in original)).

25. Prior to delivering its decision, the Court invited additional submissions from the parties on whether the issue of reckless indifference was raised at trial or on appeal (**CA [245] JCAB 123**). As McCallum CJ observed, the respondent's submissions "did not squarely address the question whether the issue was raised in the trial and expressly accepted that it was not raised in the appeal" (**CA [246] JCAB 124**).

26. The majority acknowledged that "...the conduct of the trial undoubtedly concentrated on the presence of Ms Jordan on the bonnet of the vehicle". However, their Honours concluded that "proof of reckless indifference was contested" and the conduct of the trial did not "exclud[e] a reasonable hypothesis consistent with innocence such that this Court is precluded from considering it" (**CA [278] JCAB 131**). Critical to this conclusion was that trial counsel for the respondent did not concede that the respondent's state of mind was not in issue (**CA [285] JCAB 132**).

27. By contrast, McCallum CJ determined that trial counsel made a forensic decision not to put a hypothesis to the jury that, if Ms Jordan was on the bonnet, the respondent lacked the requisite state of mind for proof of the offence of murder. Her Honour concluded that the hypothesis which the majority considered had not been excluded was "not raised, or at best was only barely raised at trial", and to the extent it was, "it was not a reasonable hypothesis". Her Honour further considered that it was excluded as a hypothesis open to be considered by the appellate Court, by the respondent's version of events, for the reasons explained in *R v **Baden-Clay*** (2016) 258 CLR 308 (**CA [232] JCAB 120-121**).

28. As for the issue not being raised on the appeal, the majority considered that it was open to consider the issue of reckless indifference because: (a) they would have granted leave if the respondent had sought to amend his grounds of appeal, (b) the general "treatment" of reckless indifference was raised in the appeal albeit under specific grounds alleging error in the trial (and notwithstanding the basis on which the appeal was allowed did not fall within that ground: **CA [299] JCAB 135**); and (c) because the "focus of the unreasonable verdict ground" was the "factual foundation necessary for a finding of guilt", it "properly raise[d] for this Court's consideration" whether having concluded

Ms Jordan was on the bonnet, it was "open to the jury to find the [respondent] guilty of murder" (**CA [302] JCAB 136**).

29. By contrast, McCallum CJ determined that the approach of the majority was to disregard the "adversarial nature of criminal proceedings and confinement to the issues raised by the parties" as an "incident of the requirement of impartiality" and fell foul of the observations of this Court in *The King v **ZT*** (2025) 281 CLR 137 at [11] (**CA [251] JCAB 125**).

30. For the reasons which follow, McCallum CJ was correct to conclude the majority's hypothesis was not raised at trial, correct to conclude the issue should not be determined
10 on appeal, and correct to conclude it was not a reasonable hypothesis on the evidence.

PART VI: ARGUMENT

Ground (i): allowing the appeal on a basis not raised

31. The Court's assessment of whether a verdict can be sustained under the first limb of the common form appeal provision is constrained by the parameters of the case run by the parties, both at trial and on appeal. That is because of both the function of the Court in determining a ground under the first limb, as described in ***M v The Queen*** (1994) 181 CLR 487 and the role of the Court as an impartial tribunal in an adversarial system of criminal justice.

32. As for the function of the Court, in determining whether a verdict of guilty is
20 unreasonable, "the question which the court must ask itself is whether it 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".[27] The adversarial constraint emerges from this test; the Court is to consider whether it experiences a reasonable doubt *in the context of the trial which was conducted.* Put another way, the test speaks to whether there is a reasonable doubt that the jury *ought* to have entertained, in the context of the trial which was had.

33. As for the role of the Court, the appellate court's independent assessment of the sufficiency and quality of the evidence to sustain the verdict of guilt is "undertaken in a context in which an appeal is as much of an adversarial process as the criminal trial from which the appeal is brought", and in which it is for the parties to identify the evidence,

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[27] *M v The Queen* (1994) 181 CLR 487 at 494.

and its features, that support their case on appeal.[28] Those observations reflect the nature of criminal appeals: like the trial from which it is filed, an appeal is not a general "inquisition" into guilt or innocence.[29] Rather, it is an adversarial contest in which the "protagonists are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue… The judge is to take no part in that contest".[30] The reason for this principle is foundational: it reflects the institutional role of the courts in our system of justice and their defining characteristic of impartiality.[31] For an appellate court to decide a ground of appeal on the basis of arguments not raised by the parties compromises the court's "even-handedness … by assuming a responsibility for the conduct of the case of one of the parties".[32] In the result, it undermines an important aspect of the institutional role of the court.

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34. These important constraints are not gainsaid by the fact that the Court is assessing whether a miscarriage of justice has occurred.[33] That is because, as was emphasised in *ZT,* it is for the parties to "place all evidentiary material and submissions before the appellate court which they consider relevant to the discharge of the court's function and it is for the parties to identify and address the aspects of the evidence adduced at the trial that warrant the conclusion that the verdict was either unreasonable or not".[34] There is no miscarriage of justice (or indeed unfairness) in holding a party to the legitimate forensic decisions it makes during the course of adversarial litigation.[35]

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35. Consistently with his approach at trial, the respondent conducted the unreasonableness ground of appeal on the basis that the evidence did not establish beyond a reasonable doubt that Ms Jordan was on the bonnet of the vehicle. Indeed, the respondent fairly and properly accepted he had not raised the issue of reckless indifference as part of his appeal (**CA [246] JCAB 124**). The majority ought not have, in these circumstances, fashioned a

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28 *ZT* (2025) 281 CLR 137 at [11].

29 *Ratten v The Queen* (1974) 131 CLR 510 at 517 (Barwick CJ).

30 *Ratten v The Queen* (1974) 131 CLR 510 at 517 (Barwick CJ). See also *Gipp v The Queen* (1998) 194 CLR 106 at [58] (McHugh and Hayne JJ), [130] (Kirby J).

31 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [3], [81]; *North Australian Aboriginal Legal Aid Service Inc v Bradley (*2004) 218 CLR 146 at [3], [29]; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [41], [64], [66]; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [125]. See also **CA [251], [255] JCAB 125-126** (McCallum CJ).

32 *Pantorno v The Queen* (1989) 166 CLR 466 at 473 (Mason CJ and Brennan J).

33 *M v The Queen* (1994) 181 CLR 487 at 494.

34 *The King v ZT* (2025) 281 CLR 137 at [11].

35 *Nudd v The Queen* (2006) 80 ALJR 614 at [9]. See also *Ratten v The Queen* (1974) 131 CLR 510 at 517; *Doggett v The Queen* (2001) 208 CLR 343 at [1].

new ground of appeal not advanced by the respondent himself. Chief Justice McCallum was correct to conclude that it was not open to the Court to allow the appeal on the basis identified and pursued by the majority. This is a sufficient basis to dispose of the appeal but is fortified by the manner in which the trial was conducted, as set out below.

Hypothesis not reasonable

36. Whilst proof of the respondent's state of mind for the offence was an "issue" at trial because it was an element of the offence, practically, the dispute at trial was narrowed to the critical factual question of the location of Ms Jordan on the car at the relevant time. As McCallum CJ observed, there were prudent forensic reasons for the course adopted
10 by defence counsel at trial: acceptance of a scenario where Ms Jordan was on the bonnet, but that the respondent did not turn his mind to the probability of her death, had the capacity to undermine the respondent's version put to the jury (**CA [235] JCAB 121**).

37. In *Baden-Clay,* the Court emphasised that for an inference consistent to be reasonable, it "must rest upon something more than mere conjecture",[36] and that on appeal, the parties are bound by the conduct of the trial including "what lines of argument to pursue".[37] In *Baden-Clay,* the appellant had been charged with the murder of his wife. Similar to the present case, an alternative verdict of manslaughter was left to the jury, because the Crown bore the onus of proving the respondent acted with the necessary *mens rea* for murder.[38] The appellant's evidence to the jury was that he had nothing to do with the
20 circumstances in which she was killed. On appeal, the appellant accepted that it was open to the jury to find that he had caused the death of his wife but contended that the jury could not be satisfied of the necessary intent for murder (contrary to the approach taken by the respondent).[39] The Court of Appeal upheld the appeal on that basis, finding that "there remained in this case a reasonable hypothesis consistent with innocence of murder: that there was a physical confrontation between the appellant and his wife in which he delivered a blow which killed her (for example, by the effects of a fall hitting her head against a hard surface) without intending to cause serious harm".[40]

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[36] (2016) 58 CLR 308 at [47].
[37] (2016) 58 CLR 308 at [48].
[38] *R v Baden-Clay* [2015] QCA 265 at [34].
[39] *R v Baden-Clay* [2015] QCA 265 at [38].
[40] *R v Baden-Clay* [2015] QCA 265 at [48].

38. In allowing the appeal, this Court observed that the Court of Appeal "should not have treated the case as one in which it was open to it to identify a hypothesis as to the circumstances of the death of the deceased on the basis that the respondent's evidence could be disregarded as if it had not been given at all".[41] Those observations apply equally to the approach of the majority in this case; the respondent's version which was before the jury at trial was consistent as to at least one thing: Ms Jordan was not on the bonnet.

39. The majority distinguished *Baden-Clay* on three bases, none of which withstand examination. *First*, on the basis that trial counsel did not explicitly concede reckless indifference was not an issue (**CA [282]-[293] JCAB 132-134)**, *second,* because the respondent did not give sworn evidence (**CA [280] JCAB 131-132**), and *third,* on the reasoning that rejection of the respondent's version did not prove his state of mind, nor exclude the possibility he was not recklessly indifferent (**CA [281], [294] JCAB 131-132, 134**).

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40. As to the *first* reason, it was not to the point that trial counsel never explicitly disavowed the hypothesis that, had he been driving with Ms Jordan on the bonnet, he lacked the requisite state of mind for murder.[42] As McCallum CJ observed, trial counsel equally did not "put a hypothesis that, if [Ms Jordan] was not 'finally off the car' but in fact still on the bonnet … he may nonetheless not have foreseen the probability that she would fall hard on the road and suffer mortal injury." (**CA [233] JCAB 121**). The decision not to put that hypothesis "was explicitly a forensic decision" (**CA [235] JCAB 121**)).

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41. As to the *second* reason, the circumstances in *Baden-Clay* were not rationally distinguishable merely because the respondent did not give *sworn* testimony. The respondent's version of events was before the jury in the form of his out-of-court statements, including his recorded interview with police and recorded phone calls.[43] Indeed, the jury was given a *Liberato* direction.[44]

42. As to the *third* reason, as in *Baden-Clay,* acceptance of the facts underpinning the prosecution case necessarily excluded any reasonable inference that the respondent lacked the requisite state of mind for murder. Having rejected the respondent's version(s) of events, the jury were left with the evidence that, having left Coutts Place in anger, the

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41 *R v Baden-Clay* (2016) 58 CLR 308 at [58].
42 cf *R v Baden-Clay* (2016) 258 CLR 308 at [33].
43 See fn 11 above.
44 *Liberato v The Queen* (1985) 159 CLR 507; see T567.1-32 (**JCAB 30**).

respondent drove off with Ms Jordan clinging to the bonnet. The hypothesis that, in those circumstances, he nonetheless lacked the requisite recklessness for murder "was mere speculation and conjecture".[45] The only witness who could have given evidence supporting the majority's hypothesis was the respondent, however his version of events "necessarily excluded it as a possibility".[46] As McCallum CJ observed at **CA [241] JCAB 123,** "it is necessarily speculative to hypothesise that the [respondent] might have been driving slowly and carefully enough to exclude what was otherwise an obvious and probable consequence" of his actions.

43. It is further not to the point that prosecution case on reckless indifference was circumstantial (cf **CA [308] JCAB 137**). The manner in which a trial is conducted — the evidence which is given (and not given) and the lines of argument which are pursued — will shape what is or may be a reasonable inference which can be drawn from the evidence. As Bond JA more recently observed in *R v Smith; R v Sagar*, "[t]he only hypotheses consistent with innocence which must be excluded by the Crown are those which are adjudged in that way to have been hypotheses reasonably open on the evidence".[47] The hypothesis preferred by the majority was excluded by the versions given by the respondent. As was the case in *Baden-Clay*, "[t]his conclusion is sufficient to require the appeal be allowed and the respondent's conviction for murder restored."[48]

Ground (ii) – error in the approach to a circumstantial case

44. Ground (ii) presents an additional and sufficient basis to allow the appeal and restore the verdict.

45. As a starting point, it is common ground that the prosecution case on the issue of the *mens rea* for murder was circumstantial. There was no direct evidence of the respondent's state of mind on the basis that Ms Jordan was on the bonnet. The prosecutor asked the jury to examine "all of the evidence",[49] but highlighted the obvious danger to her in being on the bonnet of a large utility vehicle accelerating and turning around a corner. Thus, in closing on the issue of the *mens rea* for murder, the prosecutor submitted that the respondent "accelerated partially up Coutts Place, around to the left into Alfred Hill Drive and he

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45 *R v Baden-Clay* (2016) 258 CLR 308 at [55].
46 *R v Baden-Clay* (2016) 258 CLR 308 at [57]
47 *R v Smith; R v Sagar* [2025] QCA 130 at [11].
48 *R v Baden-Clay* (2016) 258 CLR 308 at [64].
49 T491.30 (prosecution closing address) (**ABFM 158**).

drove at speed over a significant distance" (observing that the jury had walked the relevant ground on the view and would have observed a downhill gradient).[50] The prosecutor also relied on the evidence of the respondent's regret after the incident (Ms X's evidence being that he said to her "I shouldn't have done it"[51]). The jury was asked to consider the circumstances of "Ms Jordan's size, the size of the vehicle, the speed, the distance, the road and her precarious position on the bonnet" and find that "the only available inference is that the [respondent] knew that death would probably result from continuing with his act".[52]

46. In the context of this evidence, the majority made two related errors in assessing whether
10 the jury ought to have entertained a reasonable doubt about the respondent's state of mind, both contrary to binding authority. The *first* was to approach the circumstantial evidence described above in a piecemeal fashion.[53] The *second* was to disregard the advantages of the jury in seeing and hearing the witnesses give their evidence.[54]

<u>Approaching circumstances in a piecemeal fashion</u>

47. The majority reasoned to the conclusion that the jury acting reasonably ought to have experienced a doubt by taking the following erroneous approach to its analysis: (a) taking each one of the various circumstances in a piecemeal fashion,[55] (b) imposing a standard of proof to those circumstances of "beyond reasonable doubt", and (c) then concluding that because no single circumstance was itself either proved to that standard or itself
20 demonstrative of guilt, the finding of the jury on *mens rea* was not available.

48. *First,* on what the majority considered to be the critical issue of the manner and speed of driving at **CA [313]-[326],** their Honours concluded that it was not "open to the jury to be satisfied beyond reasonable doubt that the [respondent] was driving 63 kilometres per hour when the brakes were applied", and that in fact the evidence permitted of the

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50 T491.42-43 (prosecution closing address) (**ABFM 158**).

51 MFI #2 (Transcript of evidence-in-chief interview with Ms X on 17 April 2022) at Q/A216 (**ABFM 220**) (the recording of which was played to the jury at trial: **CA [26] JCAB 80**).

52 T491.45-T492.2 (prosecution closing address) (**ABFM 158-159**).

53 Cf *Coughlan v The Queen* (2020) 267 CLR 654 at [55]; *R v Hillier* (2007) 228 CLR 618 at [46]-[48]; *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521 at 535.

54 Cf *Dansie v The Queen* (2022) 274 CLR 651 at [9]; *M v The Queen* (1994) 181 CLR 487 at 493-495; *Pell v The Queen* (2020) 268 CLR 123 at [37]; *R v Baden-Clay* (2016) 258 CLR 308 at [65]; *SKA v The Queen* (2011) 243 CLR 400 at [13].

55 *Dickson v The Queen* [2017] NSWCCA 78 at [86] (Bathurst CJ), citing *R v Baden-Clay* (2016) 258 CLR 308 at [46]-[48].

possibility he was driving at "37.5 kilometres per hour or less", and that on observing the CCTV footage, there was nothing "remarkable or erratic" about the manner of driving.

49. There are at least three problems with the analysis of this circumstance. *First,* it was contrary to the case the respondent put to the jury, which was that the evidence demonstrated that he was driving at 53 kilometres an hour at the time the brakes were applied.[56] *Second,* it was contrary to the established principle that it is not necessary for a jury to be satisfied beyond reasonable doubt of intermediate facts in a circumstantial case.[57] *Third,* as the majority acknowledged, the significance of the speed "required careful consideration to determine what the evidence could establish about the speed of
10 the vehicle, and what "if anything" it revealed about the respondent's state of mind. Ultimately, the majority concluded that in their assessment, the vehicle was travelling at a speed between 37.5km and 51.5km and that this was neither "fast" nor "slow"— leading to the finding at **CA [325]-[326] JCAB 140** that seemingly nothing could rationally be drawn about the respondent's state of mind from the speed and manner of driving of the vehicle. The parsing and disregarding of the evidence in this way was quintessentially to take an impermissible piecemeal approach to a circumstantial case.[58]

50. *Second,* the majority erred in the same way in assessing that the admission relied on by the prosecution — "I shouldn't have done it" — was simply "neutral" with respect to proof of the respondent's state of mind (**CA [312] JCAB**). On its own, perhaps. In light
20 of all of the circumstances, however — which included the respondent's anger at Ms Jordan both earlier in the evening and immediately prior to the incident, and that he had gotten *out* of the car and walked away the first time Ms Jodan sat on the bonnet (**CA [34] JCAB 81**) — the admission was plainly capable of being relied on as one circumstance going to proof of the *mens rea* for murder.

51. *Third,* the majority discounted the evidence of Ms Jordan's position on the bonnet, reasoning that "the presence of slightly built Ms Jordan on the bonnet of the utility vehicle and the fact that it was moving did not evidence a probability or a 'high' probability of death, nor the [respondent's] advertence to it" (**CA [335] JCAB 142**). In isolating each circumstance, the majority erroneously discounted the significance of this fact and the

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56 See fn 8 above.

57 *HML v The Queen* (2008) 235 CLR 334 at [29]-[31] (Gleeson CJ); *Shepherd v The Queen* (1990) 170 CLR 573 at 579-580.

58 *R v Baden-Clay* (2016) 258 CLR 308 at [46]-[48]; *R v Hillier* (2007) 228 CLR 618 at [46]-[48].

inference to be drawn from it as to the respondent's state of mind. Further, the majority erroneously focused on the necessity to establish the probability of death, as distinct from the necessity to establish the respondent's state of mind.

52. *Fourth,* and relatedly, the majority dismissed as irrelevant the evidence of the respondent's state of mind at the time of the incident (**CA [336]-[341] JCAB 142-144**). That the prosecutor did not "refer" to the respondent's anger on the issue of reckless indifference was not to the point, the respondent's demeanor immediately prior to the incident loomed large in the evidence at trial and the prosecutor expressly invited the jury to examine "all of the evidence" in assessing the respondent's state of mind.[59] The majority reasoned that the domestic violence which Ms X witnessed at 2:00am could not "substantially inform" his state of mind a few hours later (**CA [339] JCAB 120**). Whether or not it could "substantially" inform it, it was plainly relevant as a circumstance, and ought not to have been discounted as an irrelevancy. Moreover, the evidence established his state of mind *immediately* prior to the incident was that he was "schizo", "really angry", "mad" and "cracked out": see paragraph [9] above.

53. *Fifth,* the majority perceived some "inconsistencies" between the respondent's conduct in the aftermath of Ms Jordan falling from the vehicle (that is, stopping the vehicle and attending to her) and him having a reckless indifference as to death in the moments prior (**CA [342]-[343] JCAB 144**). The advantages of the jury in that assessment are dealt with at paragraph [61] below. But even if those advantages could be put to one side, the majority's analysis tends to confuse *intention* to kill with *reckless indifference* as to the probability of death. That emerges most clearly from the majority's observation that the "his immediate response, was contrary to him having just brought about the very outcome that he knew was probable" (**CA [343] JCAB 144**). Immediate regret may sometimes be inconsistent with an intention to kill (although it may not always be so). But immediate regret is not, as a matter of ordinary human experience, necessarily or even commonly inconsistent with a state of mind of reckless indifference.

54. *Finally,* that none of the circumstances parsed by the majority, taken alone, were capable of excluding the inference that the respondent did not know or realise death was probable is hardly surprising. To establish that particular individual facts leave open a reasonable hypothesis consistent with innocence (and thus permit a reasonable doubt) will not be a

[59] T491.30 (prosecution closing address) (**ABFM 158**).

sufficient basis for setting aside a verdict unless the Court is satisfied that having regard to all of the circumstantial evidence, the doubt remains.[60] As this Court observed in *R v Hillier* (2007) 228 CLR 618 at [48], it will often be the case that evidence of matters, when viewed in isolation "would yield an inference compatible with the innocence of the accused. But neither at trial, nor on appeal is a circumstantial case to be considered piecemeal." In approaching the evidence in this way, the majority erred. Taken together, it was plainly open to the jury to be satisfied beyond reasonable doubt that the respondent knew death was the probable result of his actions.

<u>Disregarding the advantages of the jury</u>

10 55. In *ZT*, this Court emphasised the importance of making full allowance for the jury's advantage when determining an unreasonable verdict ground. The Court observed that "the appellate court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence or the consideration that the jury has had the 'benefit of having seen and heard the witnesses'".[61] The Court further emphasised that the "advantages" of the jury are not confined to the witness testimony they observed, but include "the advantages the jury had, including by the application of the juror's collective wisdom and experience of ordinary affairs, from seeing and hearing the evidence as it unfolds when evaluating factual matters, especially witness credibility".[62] The "existence, nature and scope of
20 those advantages" will vary from case to case, and it is the duty of the appellate court to identify the existence, nature and scope of those advantages, in order to afford "full allowance" to them.[63]

56. Unrestrained by this principle, Taylor J observed that she would have entertained a doubt on the critical issue as to the presence of Ms Jordan on the bonnet. The doubt which she harboured in that regard was "explained by the advantage of the jury in seeing and hearing the evidence, which included a view of the scene where the incident occurred" (**CA [265] JCAB 128)**.

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60 *Macdonald v The King* (2023) 112 NSWLR 402 at [378] (not disturbed on appeal: *Obeid v The King* [2026] HCA 1).

61 (2025) 281 CLR 137 at [7] quoting *M v The Queen* (1994) 181 CLR 487 at 493.

62 (2025) 281 CLR 137 at [9].

63 (2025) 281 CLR 137 at [17].

57. However, her Honour went on to find that because the evidence going to the question of reckless indifference was circumstantial, the jury had no discernible advantage over the appellate court (**CA [267] JCAB 128**), relying on the dissenting judgment of Hamill J in *Dawson v The King* [2025] NSWCCA 85 at [134] that in "drawing inferences from the direct evidence, and deciding whether all inferences consistent with innocence have been excluded, the trial court has no discernible advantage over this Court in considering the whole of the record of the trial".

58. In so concluding, the majority erred in both the identification of correct principle, and in its application. As for the identification of principle, it is correct that in *some*
10 circumstantial cases, the advantages possessed by the trier of fact may be "slight". As the Court noted in *ZT,* that was the case in *Dansie v The Queen,* because the evidence consisted mostly of transcripts of unchallenged evidence, and the appellant in that case did not give evidence.[63] There is no general principle of law that in *every* circumstantial case, the advantages of the jury are slight. Many cases, or issues within cases (as here) rely on circumstantial reasoning in furtherance of proof. By simply saying that a circumstantial case (or issue in a case) means that *ipso facto* the jury has no relevant advantage is to risk inappropriately trespassing in many cases on the proper constitutional function of the jury.

59. The circumstantial matters going to reckless indifference in this case were not in the
20 nature of uncontested evidence from which the ultimate inference of guilt was to be drawn.[64] Rather, the evidence of each of the circumstances parsed by the majority was in the nature of contested oral evidence, which meant the jury had a significant advantage over the appellate court. Not only did the jury hear and see Ms X give evidence (the eyewitness to the incident), but they also attended a view of the scene of the incident.

60. This was significant for two reasons. *First,* in circumstances where Ms X's interview with police was conducted at the scene of the incident (**CA [29] JCAB 80**), the jury were better placed to assess her descriptions of what she said she saw. *Second,* the jury were able to see for themselves the distance travelled, the nature of the road and its undulations and assess the other evidence (including expert evidence) about the respondent's vehicle, its
30 speed, manner of driving and journey in the context of their real-world observations. Indeed, the majority appeared to accept that the view was significant on the issue of

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64 Cf *Dansie v The Queen* (2022) 274 CLR 651.

whether Ms Jordan was on the bonnet (**CA [265] JCAB 128**). Just as it was significant on that issue, so too was it significant on the assessment of the "nature and manner of driving" (relied on as supporting the innocent hypothesis at **CA [313]-[326] JCAB 138-140**) and the risk of harm by reason of the position of Ms Jordan on the bonnet (relied on as supporting the innocent hypothesis at **CA [327]-[335] JCAB 140-142**).[65]

61. The other evidence assessed by the majority was the respondent's admission "I shouldn't have done it" at **CA [312] JCAB 137-138** and the "expressions, tone and reaction" of the respondent heard on the CCTV footage (**CA [343] JCAB 144**) which the majority considered "were not compatible" with a recklessly indifferent state of mind. The jury similarly had an advantage in assessing what inferences could be drawn from the admission, or the respondent's reaction; and it was the proper province of the jury to make that assessment. As observed in *ZT,* the advantages of the jury include possessing a "breadth of understanding of how different people speak and behave in such circumstances that a judge may not have".[66] For example, one can readily conceive that the jury, acting rationally, could conclude the respondent's reaction was on the onset of immediate regret for the consequence he knew was likely to happen; and consistent with the *mens rea* alleged. Had the majority properly acknowledged the significant advantage of the jury, any doubt that may have been possessed on the issue of reckless indifference was one which was capable of resolution by deference to that advantage.

62. For these additional reasons, the majority erred in entering a verdict of not guilty on the charge of murder.

PART VII: ORDERS SOUGHT

63. The following orders are sought:[66]
    i. Appeal allowed.
    ii. Set aside Orders 1 and 2 of the orders of the Court of Appeal of the Australian Capital Territory made on 25 June 2025, and in their place order that the appeal be dismissed.

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[65] Indeed, the prosecutor expressly relied on matters observed in the view in addressing on the circumstances which established reckless indifference: T491.41-42 **ABFM 158**.

[66] In the event the Director's appeal in this proceeding is successful, and the respondent's appeal in proceeding C2/2026 is unsuccessful, it would be necessary for the Court to also set aside the orders of the CA made on 29 September 2025 (**JCAB 174**) and the sentence for manslaughter imposed by Baker J on 4 December 2025 (*DPP v O'Connell (No 6)* [2025] ACTSC 529 (**ABFM 310**) in order that there not be inconsistent judgments: see *Wishart v Fraser* (1941) 64 CLR 470 at 483; *R v Marks* (1981) 147 CLR 471 at 476.

PART VIII: ESTIMATE OF HOURS

64. The Director estimates that 1.25 hours is required for the presentation of her oral argument in this appeal.

Dated: 12 March 2026

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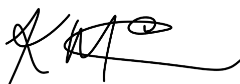

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ANNEXURE TO APPELLANT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	*Crimes Act 1900* (ACT)	Republication No. 135 effective 11 November 2021 – 11 May 2022	ss 12, 49	Relevant version as at the date of the offence	14 to 18 April 2022
2	*Supreme Court Act 1933* (ACT)	Republication No. 71 effective 15 May 2024 – 25 November 2025	s 37O	Version as at the date of the decision of the ACT Court of Appeal in *O'Connell v DPP* [2025] ACTCA 20.	27 June 2025