HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C3 of 2026

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS
Appellant

and

MICHAEL O'CONNELL
Respondent

APPELLANT'S REPLY

PART I CERTIFICATION

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

PART II REPLY

Reply to factual contentions

2. The respondent submits at **RS [6]** that LSC Smorhun's evidence in cross-examination was that the speed of the car at braking could have been "as low as 51.5km/hr". In re-examination, LSC Smorhun's evidence was that the pre-braking speed was "53 kilometres an hour".[1] In further cross-examination, he was asked to assume a drag factor of 0.811 was applied, and on that assumption, accepted that the speed at braking would be 51.5km/h,[2] producing the evidence on which the respondent now relies. That assumption was not one which was made good on the evidence, because his evidence was that he calculated a drag factor of 0.835 in accordance with his training,[3] and he did not ever accept that a drag factor of 0.811 could be applied.[4] In that context, defence counsel appropriately accepted (and indeed, relied upon) the evidence demonstrating he was driving at 53 km/h when the brakes were applied, and Taylor J's analysis of the evidence was both not open and contrary to the forensic decision made by defence counsel as to what could be put (*cf* **RS [44]**).

3. Nothing in this appeal turns on the difference between 51.5km/h or 53km/h.[5] But this issue instantiates the inadvisability of an appellate court roving through the evidence to identify hypotheses consistent with innocence which have not been advanced by an accused person. It risks misunderstanding the evidence in the context of the trial and appeals being decided on a different basis to the case put to the jury. The latter point is problematic for at least two reasons. *First*, "decisions as to the conduct of a trial are often based upon confidential information, and an appreciation of tactical considerations, that may never be available to an appellate court. The material upon which a judge, either at trial or on appeal, may form an opinion as to the wisdom of a course taken by counsel can be dangerously inadequate, and, when it is, the judge may have no way of knowing that".[6] *Second*, at a systemic level,

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1 T333.39-41 (**ABFM 71**).
2 T338.18-21 (**ABFM 76**).
3 T280.41 (**ABFM 56**), T281.37-39 (**ABFM 57**).
4 T281.34-39 (**ABFM 57**)
5 As the Crown put in closing, "whilst Leading Senior Constable Smorhun's approach was scientific, he did not purport to tell you it was precise": T471.4-6 (prosecution closing) (**ABFM 138**).
6 *Crampton v The Queen* (2000) 206 CLR 161 at [17] (Gleeson CJ).

it risks that which Gleeson CJ cautioned against in *Crampton v The Queen:* a trial being treated as a "preliminary skirmish in a battle destined to reach finality before a group of appellate judges".[7]

Reply to submissions on ground one

4. It is common ground that it was incumbent on the prosecution to prove each element of the offence beyond reasonable doubt, including reckless indifference (*cf* **RS [21]**). So much was accepted at **AS [36]**. But it remains the case that — as McCallum CJ correctly observed at **CA [232]-[236] CAB 120-122** — defence counsel did not put to the jury a hypothesis that "if Ms Jordan was not 'finally off the car' but in fact still on the bonnet … he may nonetheless have not foreseen the probability that she would fall hard on the road and suffer mortal injury" (**CA [234] CAB 121).** That choice, "explicitly a forensic decision" as it was (**CA [235]** **CAB 121**) has consequences for the determination of a first limb appeal. It was not, and has not, been suggested that the manner in which the issue was left to the jury gave rise to a miscarriage of justice.

5. At **RS [26]** the respondent concedes that the unreasonable verdict ground of appeal was not argued on the basis of whether it was open to the jury to be satisfied beyond reasonable doubt of reckless indifference, but contends it was "inextricably part of the unreasonable verdict ground" because the CA was required to consider whether "any inference with innocence had been excluded" (**RS [27]**). That tends to invite a test involving the very kind of roving commission which this Court cautioned against in *ZT* (2025) 281 CLR 137 at [11]-[12]. Moreover, that articulation of the test is impossible to reconcile with the submission at **RS [34]** that the Court was not "obliged to actively identify whether [it] had a doubt with respect to the reckless indifference element of the offence given the way the appeal was initially argued". The test for which the respondent contends devolves to the position that whether some hypotheses are considered and excluded depends on what the judges on the day happen to identify — see **RS [34]** "having identified that issue and sought further submissions about it, it was open to her Honour to uphold the appeal on that basis". The test which is substantively advanced must be: appellate judges can (but need not) trawl through the record to identify reasonable hypotheses not put by the parties.

6. The application of this sort of test under the first limb is apt to lead to systemic issues. *First,* the intensity of the review of the trial record on first limb appeals would depend on

[7] (2000) 206 CLR 161 at [16].

the vagaries of individual judicial approach. *Second,* it gives rise to the same problem identified in *Crampton,* that appeals may be determined on bases contrary to information not known to the appellate court, most significantly, the instructions given by an accused person to counsel which may constrain what can be put. *Third,* it creates uncertainty for the parties to the litigation, risks appeals being decided on bases entirely devoid of the practical realities of a trial and ultimately undermines the integrity of the trial process. In a criminal trial, the parties determine what evidence to lead, including the extent of such evidence and the necessity of it, and the arguments to be made, based on the forensic context of the trial. A roving commission, devoid of the forensic context and realities of a trial process, is apt to lead to systemic issues in the way trials are conducted at first instance.

7. These considerations mean that the corollary of there being no obligation to investigate is that there must be constraints on the circumstances in which an appellate court does so (*cf* **RS [33]**). The obvious constraints, consistent with longstanding principle, are the parameters set by what is put in issue at trial and by the convicted person on appeal.

8. The different circumstance of the Court relying on the proviso, even where the prosecution does not (as sanctioned in *Linsday v The Queen* (2015) 255 CLR 272), is of no assistance to the respondent (*cf* **RS [29]**). That is because the proviso is a statutory limitation on the Court's power, and "[i]t is not to be supposed that, if an appellate court concluded that there had been no substantial miscarriage of justice, the appellate court could nevertheless allow the appeal and direct that a new trial be had".[8] Similarly, this Court's conclusion in *Coughlan v The Queen* (2020) 267 CLR 654 that the evidence led at trial did not establish that an offence had in fact occurred (there, the Crown's expert evidence did not exclude that the fire was not an accident), does not assist the respondent because there is a difference – subtle, but important — between a reasonable hypothesis which is left open on the Crown case and one which is not raised on the Crown case and is directly in conflict with the evidence from the accused and the case they invite the jury to accept (*cf* **RS [31]**).

9. The different circumstances of a Court considering an appeal under the second and third limb also do not assist (*cf* **RS [30]**). Each of the examples cited by the appellant in relation to intermediate appellate courts "intervening to correct miscarriages of justice in respect of points not taken at first instance" were cases invoking the second and third limbs of the common form provisions — evidence not being adduced at trial (*Ratten*), the failure to

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[8] *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at [25].

give a direction (*Doggett*), or incompetence of counsel (*Nudd*). Such cases look at irregularities in the trial process and the effect, if any, on the outcome.[9] The first limb, consistently with *M v The Queen,* is concerned with the verdict actually reached in the circumstances it was reached,[10] the question is "one of fact".[11] That question is appropriately constrained by the parameters of the trial which was had and the arguments advanced by a convicted person on an appeal.

10. Further, the limitation the respondent seeks to place (**RS [35]-[41]**) on the applicability of reasoning in *Baden-Clay* should not be accepted. That an inference may cease to be a reasonable if it rests on "mere conjecture" is a longstanding principle of broad application[12]. That is not to say that *Baden-Clay* precludes reliance on any hypothesis which is inconsistent with a previous version the accused has given "in any forum" (*cf* **RS [41]**), but rather, the consideration of whether an inference is reasonable or "mere conjecture" is not made absent of the forensic context of the trial proceedings, including whether, as was the case here, the hypothesis was inconsistent with every out-of-court version the respondent gave, the version the respondent expressly invited the jury to accept, and absent any basis in the evidence at trial. Seen in this light, the respondent's reliance on *Knight v The Queen* (1992) 175 CLR 495 at 503 (**RS [38]**) is misplaced. That the Crown must exclude all reasonable hypotheses consistent with innocence is simply an illustration of the onus and standard of proof. In *Knight,* the Crown conceded that the first of two shots fired was done without the necessary intention, being an intention to kill for a charge of attempted murder, thereby leaving open the rational hypothesis that the appellant's intention at the time of firing the second shot fell short of the necessary intention to kill. Alternatively, to the extent that the limitation contended for by the respondent exists, that the issue here was one which goes to the *mens rea* for murder, puts it well within the realm of the *Baden-Clay* circumstances, because the only *direct* evidence which could support the hypothesis would come from the accused —it is *his* state of mind (cf **RS [38]-[39]**).

11. Finally, that the accused in this case did not give sworn evidence is of no moment here (*cf* **RS [40]**). The jury were not given a *Mule* direction (that they were entitled to give less

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[9] *Brawn v The King* (2025) 99 ALJR 872 at [10]; *MDP v The King* (2025) 99 ALJR 969 at [7] (Gageler J), [104] (Gleeson, Jagot and Beech-Jones JJ).

[10] (1994) 181 CLR 487 at 494-495 (Mason CJ, Deane, Dawson and Toohey JJ).

[11] (1994) 181 CLR 487 at 492 (Mason CJ, Deane, Dawson and Toohey JJ).

[12] *Baden-Clay* (2016) 258 CLR 308 at [47]; *Barca v The Queen* (1975) 133 CLR 82 at 104 (Gibbs, Stephen and Mason JJ) citing *Peacock v The King* (1911) 13 CLR 619 at 661 (O'Connor J). See, eg, *Lane v The Queen* (2013) 241 A Crim R 321 at [111]; *R v Luhan* [2009] VSCA 30 at [31]-[37].

weight to exculpatory assertions than admissions made in the accused's out-of-court statements[13]) and they were given a *Liberato* direction.[14] The *Liberato* direction in effect, elevated the respondent's out of court version to the status of sworn evidence, such that the distinction drawn by Taylor J and the respondent is one without a difference.

Reply to submissions on ground two

12. There are two matters which arise in reply on ground two. The *first* is the contention at **RS [46]** that the submissions made in respect of ground two challenge conclusions rather than "approach" and that the appropriate order if the errors in approach are made out is that the matter be remitted. The Director's second ground of appeal expressly contends that the CA erred in determining the question of reckless indifference in a manner contrary to *M v The Queen* and *Hillier*. It is appropriate and necessary for the errors in approach to be demonstrated to have resulted in a wrong conclusion; the appeal would otherwise lack utility. In circumstances where the Court accepts the errors in approach were made and affected the conclusion, it should not hesitate to restore the verdict of the jury (as it did in *Baden-Clay*). The *second* is the submission that the jury had little advantage on the issue of the respondent's state of mind. This is denied by the fact that both the prosecution and defence emphasised the importance of the view in this case,[15] and the absence of any reasoned basis for the jury having such an advantage on the critical question of whether Ms Jordan was on the bonnet. By way of example, and contrary to **RS [50]**, the jury and the appellate court plainly had very different experiences of the "objective evidence" going to the "layout of the area". By further example, their advantage is exemplified in the respondent's misplaced reliance at **RS [12]** on his expressions of "love" for the deceased; in the context of dysfunctional relationships of the kind evident in this case expressions of love are not infrequently accompanied by acts of violence, including serious violence. The advantage of the jury was significant and should not have been disregarded.

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Victoria Engel SC
Director of Public Prosecutions (ACT)
victoria.engel@act.gov.au
(02) 6207 5399

Katie L McCann
Crown Chambers
katie.mccann@act.gov.au
(02) 6207 5399

Naomi Wootton
Sixth Floor Selborne Wentworth Chambers
nwootton@sixthfloor.com.au
(02) 8915 2610

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13 *Mule v The Queen* (2005) 79 ALJR 1573 at [25]. *Cf Nguyen v The Queen* (2020) 269 CLR 299 at [24].

14 T567.16-19 (**JCAB 30**). See generally *De Silva v The Queen* (2019) 268 CLR 57 at [11].

15 See T491.41-42 (prosecution closing) (**ABFM 158**); T498.13-16. T511.5 (defence closing) (**ABFM 56, 69**).