HIGH COURT OF AUSTRALIA

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Details of Filing

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C3/2026

IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

BETWEEN: DIRECTOR OF PUBLIC PROSECUTIONS
Appellant
and

MICHAEL O'CONNELL
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Form of submissions

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

Part II: Concise statement of issues

2 The respondent takes issue with the framing of the issues by the appellant at [4] of the Appellant's Submissions (**AS**). Contrary to the appellant's submission, whether the prosecution had established beyond reasonable doubt that the respondent was recklessly indifferent to the probability of Ms Jordan's death was in issue at trial and it was raised on the appeal by the respondent by virtue of his reliance on an unreasonable verdict ground of appeal: cf. AS [4]. It did not follow from a rejection of the respondent's previous out-of court statements that the prosecution had proved reckless indifference beyond reasonable doubt: cf. AS [4].

3 The issue presented by the appeal is whether the majority erred in its approach to the ground of appeal alleging the verdict of guilty to murder was unreasonable and could not be supported having regard to the evidence: **CAB 189**.

Part III: Section 78B *Judiciary Act 1903* notices

4 The respondent does not consider that there is any need for notices under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: **Relevant facts**

5 The respondent does not take issue with the factual summary at AS [8]-[12] save for the following issues.

6 The appellant states that "the evidence was that the respondent was driving at 53 kilometres per hour immediately before the brakes were applied": AS [11]. At trial, Leading Senior Constable Smorhun gave evidence that at the time the brakes were applied the vehicle was travelling at 63.1km/hr: *O'Connell v DPP* [2025] ACTCA 20 (CA) [316] **CAB 138**. In cross-examination, he agreed that the speed at the time of braking could have been as low as 51.5km/hr: CA [320] **CAB 139**. He also gave evidence that the speed of the vehicle as it passed through the CCTV field of view was 42.5km/hr: CA [316] **CAB 138**. There was a margin of error of 5km/hour which meant that the car as it passed through the view of the CCTV could have been travelling at 37.5km/hr or less: CA [322] **CAB 139**. Leading Senior Constable Smorhum also agreed in cross-examination that the speed of the vehicle was indicative of "modest acceleration" and the noise of the vehicle was not indicative of "heavy or rapid acceleration": CA [320] **CAB 139**; T337.38-.48; **ABFM 75**.

7 There was no evidence in the trial that the respondent was driving in an erratic manner including in CCTV footage which showed a portion of the vehicle's movements on Alfred Hill Drive: CA [326] **CAB 140**. Nor was it part of the prosecution case that the respondent was driving erratically or swerving across the road: T499.35-.39 **ABFM 166**. The prosecution did not allege that the respondent's act of applying the brakes was indicative of an intention to dislodge Ms Jordan or as an act reflective of reckless indifference: T499.38-.39 **ABFM 166**; CA [323] **CAB 139**. The prosecution case at trial was that Ms Jordan fell from the vehicle prior to the respondent applying the brakes: T455.3-.5 **ABFM 122**.

8 There were no signs that Ms Jordan had been run over by the vehicle: CA [83] **CAB 92**. Ms X said that she saw the respondent pick Ms Jordan up and put her in the passenger seat of his vehicle, and that he said "I'm sorry, mate, I didn't mean to do it" and "I'm sorry bub, I'm so sorry, I didn't mean to do that" and/or "I'm so sorry baby, I love you": CA [35]-[36] **CAB 81-82**; sentencing judgment [15] **CAB 53**. At some point he said to Ms X "I shouldn't have done it": CA [270] **CAB 129-130**.

The respondent's versions

9 The respondent did not give evidence in the trial. There was evidence before the jury of various versions he had given from the point at which he arrived at the hospital which can be grouped as follows.

10 First, there was evidence that the respondent made statements to various people including Ms Jordan's family, friends and staff at the hospital immediately after the incident to the effect that she had fallen down some stairs: SU566 **CAB 29**.

11 Second, on 16 April 2022 (the following day), the respondent gave an interview with police in which he admitted that Ms Jordan had fallen off his car but said that she fell off the back of the car: CA [58]-[74] **CAB 87-90**. The respondent described Ms Jordan getting on and off his car as he attempted to leave the house. He said that at one point when Ms Jordan jumped on the car and would not get off he "ended up walking, and leaving my car there where it was" and that he "walked down…the street" (**ABFM 235**) before returning to the car. He denied driving with Ms Jordan on the bonnet, however, and said that he drove up the road "a bit" when she eventually got off the car, and that she "caught up and jumped back on the car again" at a point when he had stopped to check whether he had all of his belongings: **ABFM 236, 245, 258.** He said he got out of the car and Ms Jordan tripped, fell down and hit her head: **ABFM 236**. He became emotional in his interview and said it was a "freak accident": **ABFM 236.** He admitted to lying to the staff at the hospital, and to asking Ms X to repeat the same lie: **ABFM 263, 277**.

12 Third, there were a series of recorded calls tendered in the trial between the respondent and others while he was in custody (**the gaol calls**). In a call on 20 April 2022 with his father (John O'Connell), the respondent admitted to driving "up the road" with Ms Jordan on his bonnet but said that she got off before he drove around the corner. He said he kept driving and then looked in his rear vision mirror and saw her on the back. He said that he started to slow down and it looked like she was "just about to jump off" but then lost her footing and then fell: **ABFM 290.** He gave a similar version in a call with his son, Liam O'Connell, on 22 April 2022 (**ABFM 294**) and in subsequent calls with John and Liam O'Connell: **ABFM 296, 298-299 and 301.** He told his son in the 22 April 2022 call that he "lied in the first place" and "that's fucked me up a bit…with what happened": **ABFM 293**. In the calls he also referred to his love for Ms Jordan. For example, in a call on 10 May 2022 with Liam O'Connell he said as to his relationship with Ms Jordan that "there was a light…at the end of the tunnel…. We were going to be the best, strongest couple on the planet,

mate": **ABFM 305**. In a call with a person named Shane Moffitt on 5 July 2022 he also referred to how he "loved [Ms Jordan] to bits": **ABFM 308**.

13 There was no dispute that the respondent's statements in the immediate aftermath of the events were lies. Defence counsel at the trial opened to the jury on this basis and also accepted in his opening address that the respondent was "not totally frank when he spoke to police", referring to the police interview: T31.1-.20 **ABFM 23**. In closing, defence counsel described the police interview as a "mixture of truth and prevarication…putting it favourably to [the respondent]," and conceded that the jury might think the explanation he gave in the interview was "not a very convincing explanation or it's at least lacking in frankness": T543.13-.15, 543.36-40 **ABFM 196**. The trial judge directed the jury that if they accepted the respondent's version in his call to his son on 22 April 2022 or thought that he might be telling the truth, they should acquit him: SU567.1-.32, **CAB 30**.

The majority's reasoning on the unreasonable verdict ground

14 The respondent appealed against his conviction on various grounds including that the jury's verdict of murder was unreasonable and could not be supported having regard to the evidence: CA [5] **CAB 74-75.** The appeal was heard on 12-13 February 2024. The respondent's arguments on the unreasonable verdict ground at the hearing specifically addressed whether it was open to the jury to be satisfied beyond reasonable doubt that Ms Jordan was on the bonnet of the vehicle at the time she fell: see **ABFM 337-380**. While judgment was reserved, the CA invited additional submissions on the issue of the respondent's state of mind for murder and related questions: CA [245] **CAB 123-124**.

15 The CA by majority (Taylor J, Loukas-Karlsson J agreeing; McCallum CJ dissenting) upheld the unreasonable verdict ground, ordered that a verdict of not guilty to murder be entered and reserved on the question of whether to substitute another verdict: CA [257], [346] **CAB 126, 145, 146**.

16 Taylor J entertained a doubt as to whether or not Ms Jordan was on the bonnet at the time she fell but considered that this doubt was capable of being explained by the advantages of the jury in seeing and hearing the evidence, and attending a view of the scene: CA [265] **CAB 128.** Her Honour concluded, however, that it was not open to the jury to be satisfied beyond reasonable doubt of the respondent's guilt because the prosecution had not excluded the reasonable inference that when the respondent drove the vehicle with Ms

Jordan on the bonnet he did not know or realise that her death was probable: CA [345] **CAB 144** see also [266]-[267], [271]-[272] and [305], [310] **CAB 128, 130, 136-137**.

17 Taylor J did not consider that the conduct of the trial or the appeal of the decision of *R v Baden-Clay* (2016) 58 CLR 308 (***Baden-Clay***) precluded the Court from upholding the unreasonable verdict ground on the basis that the prosecution had not proved beyond reasonable doubt the issue of reckless indifference: CA [278]-[304] **CAB 131-136**.

18 McCallum CJ did not uphold the unreasonable verdict ground of appeal. Her Honour was not persuaded that the jury ought to have entertained a reasonable doubt as to proof of guilt following an analysis of the evidence as to whether the respondent drove the vehicle with
10 Ms Jordan on the bonnet: CA [105] **CAB 96**. Her Honour concluded that the hypothesis that the respondent did not foresee the probability of Ms Jordan's death could be excluded: CA [232] **CAB 120-121**. This was because it "was not raised, or at best was only barely raised, as an issue in the trial"; it was not a reasonable hypothesis; and, further, that it was excluded as a hypothesis by the respondent's version of events in accordance with *Baden-Clay*: CA [232] **CAB 120-121**. McCallum CJ also concluded that Taylor J's decision contravened the principles in *The King v ZT* (2025) 281 CLR 137 (***ZT***) as to the adversarial nature of appeal proceedings and that these principles are an incident of the requirement for impartiality: CA [251] **CAB 125**.

Part V: **Argument**

20 **Ground (i): whether the majority erred by allowing the appeal on a basis "not raised" or excluded by the respondent's versions**

19 Contrary to the appellant's submissions, the question of whether the prosecution had proved reckless indifference beyond reasonable doubt was in contest at trial: cf. AS at [4], [27], [30], [40]; cf. CA [232]-[235], [248]-[249] **CAB 120-121, 124-125**. Consideration of that issue was also raised generally on appeal by virtue of the respondent's ground of appeal alleging the verdict of murder was unreasonable: cf. AS at [4], [28], [33], [35]; cf. CA [246] **CAB 124**. *Baden-Clay* did not preclude Taylor J from concluding the verdict of murder was unreasonable on the basis that the prosecution had not proved beyond reasonable doubt that the respondent was recklessly indifferent as to Ms Jordan's death:
30 cf. AS at [38]-[43]; cf. CA [237]-[241] **CAB 122-123**.

Reckless indifference in contest at trial

20 Criminal proceedings including those brought against the respondent in this case are both accusatorial and adversarial: *X7 v Australian Crime Commission* (2013) 248 CLR 92 (***X7***) at [97]. As set out by Barwick CJ in *Ratten v The Queen* (1974) 131 CLR 510 (***Ratten***) at 517 a criminal trial involves "a trial in which the protagonists are the Crown on the one hand and the accused on the other" and "[e]ach is free to decide the ground on which it or he will contest the issue …". The accusatorial aspect of the proceedings means that it is for the prosecution to determine what charge is to be preferred against the accused and bears the onus of proving the elements of the charge: *X7* at [99]; *Woolmington v Director of Public Prosecutions* [1935] AC 462 at 481. The requirement of the prosecution to prove its case against the accused beyond reasonable doubt is an incident of both the adversarial and accusatorial nature of criminal proceedings: *X7* at [97]-[98]; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 503, 544, 550-551.

21 The respondent pleaded not guilty to murder thereby putting in issue all elements of the offence. It was therefore incumbent on the prosecution to prove each element of the offence beyond reasonable doubt. There was no agreement at trial that if the jury were satisfied that the respondent deliberately drove the vehicle with Ms Jordan on the bonnet knowing of her presence on the bonnet then it followed that the jury would also be satisfied that the respondent did so whilst recklessly indifferent as to the probability of her death. The question of reckless indifference was neither explicitly nor implicitly conceded by defence at trial.

22 On the contrary, and contrary to the appellant's submissions at [4], [27], [35], [40], proof of reckless indifference was put in issue by the respondent at trial: Taylor J CA [285]-[291], [295] **CAB 132-134**. Defence counsel ended his closing address by expressly addressing proof of reckless indifference including on the basis that the jury may conclude that she was on the bonnet: CA [290] **CAB 133-134**; T544.29-545.28 **ABFM 197-198**. Defence counsel also made other submissions throughout his closing address about an absence of a murderous intent including in the context of the prospect that Ms Jordan was on the bonnet of the vehicle: T499.1-.44 **ABFM 166**; T500.10-.23 **ABFM 167**; CA [289] **CAB 133**; T534.8-.18 **ABFM 187**.

23 The prosecution itself separately addressed proof of reckless indifference in the closing address in addition to making submissions on the central issue in dispute namely, whether

Ms Jordan was on the bonnet of the vehicle at the time she fell from it to her death: T491.11-492.2 **ABFM 158-159**.

24 Accordingly, the trial judge directed the jury that in order to return a verdict of guilty to murder they had to be satisfied of the element of reckless indifference beyond reasonable doubt and summarised the parties' cases on that issue: SU554.17-.24 **CAB 17**; SU586.6-.25 **CAB 37**; SU591.1-.13 **CAB 42**. The jury sought further clarification on the meaning of reckless indifference during the summing up: SU581.17-582.3 **CAB 32-33**. As Taylor J found, there was no indication in the directions to the jury that the case for murder depended entirely on resolution of whether Ms Jordan was on the bonnet when she fell from the vehicle: CA [292]-[293] **CAB 134**.

25 The fact that manslaughter was left to the jury as an alternative verdict was itself a recognition of the possibility that the jury might conclude that the respondent drove with Ms Jordan on the bonnet of his vehicle (despite any out-of-court assertions to the contrary) but nonetheless did not have the requisite mental state for murder.

The appeal against conviction in the court below

26 It is accepted at the outset that the respondent's submissions in the CA in relation to the unreasonable verdict ground as initially put specifically attacked the verdict for murder on the basis that it was not open to the jury to be satisfied beyond reasonable doubt that the respondent deliberately drove the vehicle with Ms Jordan on the bonnet. However, as contended by the respondent in the court below once the issue was raised by the CA, the question of whether it was open to the jury to be satisfied beyond reasonable doubt of reckless indifference was inextricably part of the unreasonable verdict ground particularly in circumstances where the mens rea for murder was to be established by reference to the conduct alleged to constitute the deliberate act and act causing death: CA [297] **CAB 135**. Taylor J did not "fashion[] a new ground of appeal" (cf. AS [35]) rather her Honour considered the ground of appeal in accordance with *M v The Queen* (1994) 181 CLR 487 (***M v The Queen)*** and *SKA v The Queen* (2011) 243 CLR 400 (***SKA***) at [11]-[14].

27 The CA was required to consider whether upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty of the offence: *Dansie v The Queen* (2022) 274 CLR 651 (***Dansie***) at [8]; *SKA* at [11]-[14]; *M v The Queen* at 492-494. This included considering whether any inference consistent with innocence had been excluded as per *Knight v The Queen* (1992) 175 CLR 495 at 503. The task

required the Court to make an independent assessment of the evidence as to guilt and ask itself whether it has a doubt about guilt and, if so, whether that doubt is capable of being resolved by the jury's advantage in seeing and hearing the witnesses give evidence: *M v The Queen* at 493, *Dansie* at [9]. It was open to Tayor J in determining the unreasonable verdict ground to consider proof of each of the elements of the offence.

28 The adversarial nature of the proceedings does not advance the appellant's arguments: cf. AS [31]-[35]. As set out above, the respondent's state of mind was put in issue at trial. The ground of appeal advanced was that the verdict of murder was unreasonable and could not be supported by the evidence: **CAB 68**. This invoked s 37O(2)(a) of the *Supreme Court Act 1933* (ACT) which provides that the Court of Appeal "must … allow the appeal if it considers that – (a) the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence". The terms of that provision obliged the CA to set aside the verdict if it came to the view that the verdict was unreasonable applying the test in *M v The Queen*, subject to the requirement to afford the parties procedural fairness about which there is and could be no complaint. This accords with *M v The Queen* at 494 where it was said that if 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": see also 493, and *Davies and Cody v The King* (1937) 57 CLR 170 at 180; *Ratten* at 515.

29 This Court in *Lindsay v The Queen* (2015) 255 CLR 272 (***Lindsay***) at [47]-[48], in obiter dicta, observed that the fact that prosecution does not rely on the proviso to the common form appeal provisions in the intermediate appellate court is no bar to its application given the text and structure of the proviso in the common form appeal provisions. This is subject to the obligation to accord procedural fairness: *Lindsay* at [44]-[46]. The Court also observed in *Lindsay* at [48] that this "does not sit readily with acceptance of the appellant's submission invoking the adversarial nature of criminal justice" and where the appellate court concludes there has been no substantial miscarriage of justice the appeal must be dismissed regardless of whether the prosecution has invoked the proviso. As such, the terms of the common form appeal provisions can and do qualify the extent to which the adversarial nature of the proceedings apply to constrain an appellate court in determining an appeal against conviction. In principle, there is no material difference to the circumstances considered in *Lindsay* in respect of the proviso and Taylor J's determination of the unreasonable verdict ground in the respondent's case.

30 In addition to the terms of s 37O of the *Supreme Court Act*, the adversarial nature of criminal proceedings does not prevent intermediate appellate courts from intervening to correct miscarriages of justice in respect of points not taken at first instance: *Nudd v The Queen* (2006) 80 ALJR 614 at 618 [9]. Some of the authorities referred to by the appellant at AS [34] for the opposite proposition are examples of this. For instance, in *Doggett v The Queen* (2001) 208 CLR 343 this Court upheld an appeal alleging that the trial judge erred in failing to give a direction where it was not sought at first instance, notwithstanding the experience of trial counsel and that there was potentially a forensic decision made not to seek the direction: see at [55], [147]-[148]. In *Ratten*, Barwick CJ acknowledged at 517-518 that despite the adversarial nature of a criminal trial and a conclusion that a trial was "fair", an appellate court could nonetheless act on evidence not adduced at the trial where it gives rise to a doubt as to guilt.

31 Moreover, this Court's decision in *Coughlan v The Queen* (2020) 267 CLR 654 (***Coughlan***) indicates that an intermediate appellate court is permitted to consider whether each element of the offence has been established (and reasonable hypotheses consistent with innocence excluded) regardless of the arguments advanced on appeal. There, the appellant argued that the intermediate appellate court misapplied *M v The Queen* because it had simply identified a pathway to guilt as opposed to weighing matters which militated against guilt: *Coughlan* at [50]. The Court observed that the approach taken by the intermediate appellate court appeared to reflect the choice the appellant made in that case to focus on the prosecution's inability to exclude the second man hypothesis: *Coughlan* at [50]. The hypothesis that the appellant argued was not excluded was that a particular "bearded man" seen near the scene had not been excluded as responsible for the explosion: *Coughlan* at [36]. The Court nevertheless went on to conclude that it was not open to the jury to be satisfied of the appellant's guilt beyond reasonable doubt because the prosecution did not exclude the reasonable possibility that the explosion was of a build up of gas that was ignited by an electrical fire: *Coughlan* at [56].

32 This Court's decision in *ZT* does not preclude an intermediate appellate court from considering whether it has a doubt as to an element of an offence in considering an unreasonable verdict ground even though no specific argument has been addressed to that element on the appeal, subject to the obligation to afford procedural fairness which occurred in this case: CA [244]-[245] **CAB 123-124**, [299] **CAB 135**. An appellate court is not obliged to simply "reconsider the parties' respective cases at the trial" and is entitled

to rely on the parties to identify and address the aspects of the evidence adduced at trial that warrant the conclusion that the verdict is unreasonable or not: *ZT* at [12]. However, it does not follow from this that an intermediate appellate court is precluded from setting aside the verdict in order to give effect to a doubt it experiences and which cannot be resolved having regard to the jury's advantage of seeing and hearing the witnesses at trial simply because an appellant did not (initially) specifically raise or address a particular element on the appeal.

33 Nor do the dissenting judgments of McHugh and Hayne JJ and Kirby J in *Gipp v The Queen* (1998) 194 CLR 106 preclude an intermediate appellate court from acting to set aside a conviction on the ground that it is unreasonable on the basis of a reasonable doubt in respect of an element not (initially) specifically addressed by an appellant: see CA [299]-[303] **CAB 135-136**. In that case, the appellant made a submission that an intermediate appellate court in considering an appeal against conviction has a "duty to examine the record for errors that are "manifest on the face of the record": *Gipp* at [46]. This argument was made in *Gipp* because in that case none of the errors raised in this Court were raised at the trial or in the intermediate appellate court: *Gipp* at [46]. McHugh and Hayne JJ rejected the notion that an appellate court has a "duty to examine the whole record and determine whether that record contains error requiring the quashing of the accused's conviction notwithstanding that the appellant has not relied on an issue or on evidence": *Gipp* at [55], see also at [50]-[56], see also at [100] and [130] per Kirby J. The appellant relies on *Gipp* at [58] which is addressed to the necessity to identify a ground of appeal to ground an appellate court's jurisdiction: AS [33]. This does not assist the appellant in this case in circumstances where the ground of appeal relied upon was sufficient to ground jurisdiction and sufficient to raise for the appellate court's consideration the question of whether it was open to the jury to be satisfied beyond reasonable doubt of the issue of reckless indifference. Further, it does not follow from the dissenting judgments in *Gipp* that an appellate court is actively constrained from acting in relation to a doubt it has experienced on its independent assessment of the evidence because it was not (initially) specifically addressed by an appellant in submissions in respect of the unreasonable verdict ground. The dissenting judgments simply recognise that there is no positive obligation on the appellate court to review the entire record of trial for errors.

34 The approach taken by Taylor J to the resolution of the unreasonable verdict ground in this case does not undermine the institutional integrity of the court or its impartiality: cf. AS

[33]; CA [251]-[255] **CAB 125-126**. The issue was raised with the parties and both parties were accorded procedural fairness: CA [244]-[245] **CAB 123-124**. Whilst Taylor J was not obliged to actively identify whether she had a doubt with respect to the reckless indifference element of the offence given the way the appeal was initially argued, having identified that issue and sought further submissions about it, it was open to her Honour to uphold the appeal on that basis. The cases cited by the appellant at AS [33] in respect of the institutional integrity of Australian Courts do not address a like situation. Further to this, in *Lindsay* the Court expressed no reservations in respect of the impartiality or institutional integrity of the appellate court in raising with the parties the application of the proviso.

Baden-Clay and its application to this case

35 The respondent's case was not one to which the reasoning in *Baden-Clay* applied nor was it a case where it was not open to the CA to consider that the hypothesis that when the respondent drove with Ms Jordan on the bonnet he did not know or realise her death was probable had not been excluded: CA [345] **CAB 144**; cf. AS at [36]-[43]; cf. CA at [232]-[243] **CAB 120-123**. The present case bears no resemblance to *Baden-Clay*.

36 In *Baden-Clay* the hypothesis upon which the appellate court acted upon was not only inconsistent with the respondent's sworn evidence and not "left" to the jury, it was specifically disavowed by the respondent's counsel at trial: see at [33], [60], [63]. In the respondent's case there was no express (or implicit) disavowal of the hypothesis acted upon by Taylor J. It is plain from the above that the issue of reckless indifference was contested at trial and defence counsel put the Crown to proof on the respondent's state of mind in the event that the jury concluded that Ms Jordan was on the bonnet of the car: cf. AS at [40].

37 In *Baden-Clay* the Court said at [55] that the hypothesis identified by the appellate court in that case was based on no more than "mere speculation or conjecture". This was because there was no evidence in *Baden-Clay* that suggested the respondent killed his wife in a physical confrontation without intending to kill her: *Baden-Clay* at [55]. The cause of the wife's death in *Baden-Clay* was unknown due to the decomposition of her body and there was no evidence of any injury to the wife's body that might have killed her: *Baden-Clay* at [55]. There were no fractures to the head that might have indicated she had fallen and hit her head on a hard surface nor were there other fractures to her body: *Baden-Clay* at [55], see also [11]-[14]. In this case, however, the Crown relied on an eye-witness to the

events that led to Ms Jordan's death and relied on her evidence in respect of the act causing death as well as on the question of reckless indifference. There was also CCTV footage depicting the vehicle and expert evidence as to the speed of the vehicle at the relevant times. As Taylor J explained at CA [305]-[343] **CAB 136-144**, there was a sound foundation in the evidence at trial for her Honour's conclusion that when the respondent drove the vehicle with Ms Jordan on the bonnet he did not know or realise that her death was probable: cf. AS at [42]. It was not the case that "acceptance of the facts underpinning the prosecution case necessarily excluded any reasonable inference that the respondent lacked the requisite state of mind for murder": cf. AS at [42]. This is in contrast to *Baden-Clay* where the respondent was the only person who could speak to the circumstances surrounding his wife's death given the unchallenged conclusion that he was the agent of her death: see *Baden-Clay* at [50]-[52].

38 In this respect, the respondent's case was more like the case in *Knight* which the Court distinguished in *Baden-Clay* at [56]. In *Baden-Clay* at [56] the Court observed that in *Knight* the jury were entitled to disbelieve the accused's evidence, but that a hypothesis that the accused did not fire the shot with intent to kill was nevertheless open on the evidence. As explained in *Baden-Clay* at [56] *Knight* was "not a case where the only evidence which raised the hypothesis consistent with an absence of intention to kill came from the accused". In *Knight*, the appellant was charged with attempted murder. There was no dispute that he had fired two shots with a rifle at the victim, one of which struck him (the second shot) giving rise to the charge. The appellant initially denied being present at the scene at all, but later gave a version in which he admitted he had the rifle but said he was not aware that it had been loaded or discharged or that the victim had been shot, and that he did not intend to shoot or kill the victim: see *Knight* at 499, 508. The majority in *Knight* reasoned at 504-505 that although the jury "may well have disbelieved the appellant's story" having regard to those matters (and the lies he told about not being present), the evidence did not exclude the reasonable hypothesis that he fired the second shot without any intention to kill (as was necessary to establish the attempted murder charge) in the course of a struggle with the victim. The approach taken by the Court in *Knight* accords with the approach required of the jury by *Liberato v The Queen* (1985) 159 CLR 507 and *De Silva v The Queen* (2019) 268 CLR 57 where if the jury does not believe the accused's account, they must put it to one side and ask whether the Crown has proved the offence beyond reasonable doubt. In the respondent's case, as set out above, rejection

of the respondent's previous versions, left the jury (and the appellate court on the unreasonable verdict ground) to consider whether any inferences consistent with innocence were reasonably open on the evidence: cf. AS at [42]. This is in contrast with *Baden-Clay* where "the only evidence which actually related to the hypothesis on which the respondent sought to rely was evidence which was inconsistent with that hypothesis": *Baden-Clay* at [56].

39 Critical to the reasoning in *Baden-Clay* was the potential applicability of *Weissensteiner v The Queen* (1993) 178 CLR 217 (***Weissensteiner***) reasoning to the case. In *Baden-Clay* at [50] the Court observed that "[g]iven the unchallenged conclusion that the respondent was the agent of his wife's death, the compelling inference is that he was the last person to see his wife alive and was the only person who knew the circumstances of her death". These circumstances raised the prospect of *Weissensteiner* reasoning, namely that hypotheses consistent with innocence may cease to be reasonable in the absence of evidence to support them when that evidence is within the knowledge of the accused: *Baden-Clay* at [50], *Weissensteiner* at 227-228. In *Baden-Clay* at [52] the case was considered to be "stronger" for the prosecution than in *Weissensteiner* because the respondent chose to give evidence. It was in this context that the Court said "[t]he evidence given in the present case by the respondent narrowed the range of hypotheses reasonably available upon the evidence as to the circumstances of the death of the respondent's wife. Not only did the respondent not give evidence which might have raised the hypothesis on which the Court of Appeal acted, the evidence he gave was capable of excluding that hypothesis": *Baden-Clay* at [54]. Further, the Court said at [57] in *Baden-Clay* the respondent's evidence "was important, even if it was disbelieved, because it was open to the jury to consider that the hypothesis identified by the Court of Appeal was not a reasonable inference from the evidence when the only witness who could have given evidence to support the hypothesis gave evidence which necessarily excluded it as a possibility". As such, the reasoning in *Baden-Clay* is confined to cases like *Baden-Clay* and *Weissensteiner* where the circumstances are such that hypotheses consistent with innocence may cease to be reasonable in the absence of a believable factual foundation. The respondent's case was not of that kind given that the cause and circumstances of Ms Jordan's death were known and the subject of extensive evidence at trial.

40 In *Baden-Clay*, the respondent gave evidence at trial and it was this evidence which this Court said excluded the reasonable hypothesis identified by the Court of Appeal as a

possibility: see at [54], [57], [58]. In this case the respondent did not give evidence and his account that was before the jury was contained in his gaol calls and police interview. It is one thing for an accused to give an account to police in an interview or in conversations with his family. It is another thing altogether for an accused to waive his right to silence at trial, give evidence under oath or affirmation and subject himself to cross-examination before the jury.

41 The appellant's submissions suggest that the Court's reasoning in *Baden-Clay* extends to preclude an accused from relying on any hypothesis in their criminal trial (or on appeal) where it is not consistent with a previous version they have given (in any forum). That is at odds with the Court's decisions in *Knight* and *Liberato,* and tends to undermine the requirement for the prosecution to prove the elements of the offence beyond reasonable doubt. *Baden-Clay* does not go as far as the appellant's reliance on it suggests. Rather, the Court in *Baden-Clay* confirmed that a hypothesis will not be a reasonable one available on the evidence where it is based on mere conjecture, and, in a case where *Weissensteiner* type reasoning is available, a decision by an accused to give evidence in their trial may operate to narrow the range of reasonable hypotheses that the Crown must exclude (in conjunction with other decisions made in the course of the trial): *Baden-Clay* at [47], [54], [57]-[58].

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

Approaching the circumstances in a piecemeal fashion

42 Contrary to the appellant's submission at [46] it is plain from Taylor J's reasons that her Honour did not approach the prosecution's circumstantial case on reckless indifference in a piecemeal fashion. Her Honour made clear at various points that she had considered the entirety of the evidence at trial in arriving at her conclusion that the verdict was unreasonable: eg at [305], [310]-[311], [345] **CAB 136-137, 144**. Her Honour considered, in detail, the various aspects of the evidence that concerned the respondent's state of mind at the time including the circumstances expressly relied upon by the prosecutor in closing on the issue of reckless indifference and including how those circumstances related to each other: CA [270], [306]-[344] **CAB 129, 136-144**. Her Honour ultimately concluded "on the whole of the evidence that was accepted by the jury, in my opinion, the reasonable inference that when the [respondent] drove the vehicle with Ms Jordan on the bonnet, he did not know or realise that her death was *probable*, was not excluded": CA [345] **CAB 144 (**emphasis in the original). Again, this makes plain that her Honour did not consider

this question in a piecemeal fashion. Her Honour was (like the jury) required to "weigh all the circumstances in deciding whether it was open to the jury to draw the ultimate inference that guilt has been proved to the criminal standard": *Dansie* at [12]; *Coughlan* at [55]. This necessitated engagement with each of the individual circumstances said to be relevant to the respondent's state of mind at the relevant time, which is what her Honour did. Nothing in her Honour's judgment supports the view that her Honour assessed each circumstance in isolation.

43 The appellant also argues that Taylor J erred by imposing a standard of proof of "beyond reasonable doubt" with respect to the individual circumstances that she discussed: AS [47], [49]. The one example given of this is her Honour's statement 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": AS [48] referring to CA [321], **CAB 139**. This is the only instance in the reasoning where her Honour referred to the question of whether a circumstance had been established beyond reasonable doubt. Read in context, this appears to have been no more than a slip on her Honour's part: *ZT* at [67]-[68]. The Crown had opened its case on the basis that the respondent was driving at 63 kilometres per hour prior to braking: T 25.38-.40 **ABFM 16.** The point that her Honour was making, in the detailed analysis of the relevant evidence at CA [313]-[324] **CAB 138-140,** was that the evidence in the Crown case as to the respondent's speed over the distance travelled was uncertain, that the speed prior to braking may have been in the order of 51.5 kilometres per hour as opposed to the higher figure relied upon in opening by the Crown, and that these matters affected the inferences that could be drawn as to *mens rea* for murder: CA [320] **CAB 139**. This "slip" does not indicate any broader error in her Honour's reasoning. In particular, it does not support the appellant's further assertion that her Honour required proof of individual circumstances beyond reasonable doubt before they could be taken into account as proof of the element: cf. AS [47]. Her Honour was, appropriately, concerned only with what inferences could rationally be drawn from the whole of the evidence.

44 The appellant suggests her Honour was wrong to note the possibility the respondent was driving 37.5km/hr or less as this was inconsistent with the respondent's case as put to the jury that he was driving at 53km/hr at the times the brakes were applied: AS [49]. However, Taylor J's analysis of the evidence was correct. At the time the brakes were applied the respondent's speed could have been as low as 51.5km/hr: CA [320] **CAB 139**. At the earlier time when the respondent's vehicle is in the field of view of the CCTV the

respondent's speed could have been as low as 37.5km/hr: CA [322] **CAB 139**. These two speeds refer to different points in time and her Honour was not in error in recognising that.

45 The appellant contends that Taylor J concluded the vehicle was travelling neither "fast" nor "slow" "leading to the finding at CA [325]-[326] **CAB 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": AS [49]. This does not reflect the reasoning of Taylor J. Nowhere in the judgment does her Honour say that nothing can rationally be drawn about the respondent's state of mind from the speed and manner of driving nor do the passages cited by the appellant suggest that her Honour reached this conclusion. Her Honour had recognised that the speed of the vehicle was critical to an assessment of the respondent's state of mind and proof of reckless indifference: CA [324] **CAB 140**.

46 The remainder of the appellant's submissions on this ground appear to challenge her Honour's conclusions on the significance of certain circumstances or the inferences that could be drawn from them, rather than her Honour's process of reasoning or "approach", which is the subject of the ground of appeal and the grant of special leave: e.g. at AS [48]-[53]. Furthermore, the appellant's ground is directed to the majority's approach to the unreasonable verdict ground as opposed to its ultimate conclusion: **CAB 189**. Nevertheless the appellant submits that 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" and seeks an order that the orders made by the Court of Appeal be set aside and, in their place, order that the respondent's appeal be dismissed: AS [54], [63]. If the Court is satisfied the majority erred in its approach to the unreasonable verdict ground (which the respondent submits it would not be), then the appropriate order would be for the matter to be remitted to the Court of Appeal to be determined in accordance with law.

47 The appellant contends that the majority "dismissed as irrelevant the evidence of the respondent's state of mind at the time of the incident": AS [52]. However, Taylor J expressly accepted that the appellant's anger and frustration were relevant circumstances to be taken into account: see CA [336] **CAB 142**. Her Honour made the point, however, that the appellant's anger and frustration was no substitute for the requisite *mens rea* (CA [336] **CAB 142)**, which was accurate given the need for the Crown to establish a specific awareness of the probability of death. Her Honour also observed that the evidence suggested the appellant's mood over the course of the morning was variable, such that there were limits on how much could be drawn from his actions some hours before the

incident: CA [339] **CAB 143.** Similarly, Taylor J was, with respect, correct to observe that the respondent's conduct and distress in the immediate aftermath was inconsistent with him having realised Ms Jordan's death was a probable consequence of him driving with her on the bonnet: CA [342]-[343] **CAB 144**; cf. AS [53].

The jury's advantage

48 The appellant also contends that the majority erred in concluding that the jury did not enjoy any advantage in its assessment of the respondent's state of mind because it was established by circumstantial evidence: see AS [3]-[4]. Taylor J did not make any finding to that effect, nor did her Honour "discount" or "disregard" the jury's advantage solely on the basis that the case was circumstantial or suggest there was any "general principle" concerning circumstantial cases as suggested at AS [58]. Taylor J's reference to the dissenting judgment of Hamill J in *Dawson v The King* [2025] NSWCCA 85 at CA [267], **CAB 128** does not alter this conclusion. There, Hamill J reached the conclusion he did in the circumstances of the case before him, as Taylor J did in the respondent's case. Rather, her Honour concluded, after identifying the relevant principles, that the jury's advantages did not overcome the doubt that she had about this aspect of the prosecution case: CA [262]-[267] **CAB 127-128**. The fact that her Honour reached the opposite conclusion with respect to the question of whether Ms Jordan was on the bonnet of the vehicle points against any error of principle.

49 It was open to Taylor J to reach the conclusion she did on the extent of the jury's advantage on the facts of the case. The "existence, nature and scope" of a jury's advantages will vary on a case-by-case basis: *ZT* at [9]; see also *Dansie* at [17]; AS [55]. They may also vary on an issue-by-issue basis within the one case. In circumstantial cases where the evidence is largely uncontested, the advantages of a jury *may* be slight: *Dansie* at [17].

50 It is relevant to the existence, nature and scope of the jury's advantages in this case that Taylor J proceeded on the basis that Ms X's evidence was credible and reliable, and that that the respondent deliberately drove the vehicle while Ms Jordan was on the bonnet: CA [270] **CAB 129-130**. The jury's advantage in seeing and hearing the evidence had little (if any) significance in those circumstances. While the jury did have the benefit of a view - see AS [59] - that was of limited assistance to resolving whether the respondent was recklessly indifferent to her death. The CA was otherwise apprised of the same objective evidence bearing on the respondent's conduct as the jury, including the expert evidence as to the speed of the vehicle, the size of the vehicle, the distance driven and the layout of the

area. In all of these circumstances, any advantage on the issue of the appellant's state of mind must have been very slight: cf. AS [61] where it is characterised as "significant". That advantage was not "disregarded" by Taylor J, it was just not an advantage capable of resolving her Honour's doubt about proof of reckless indifference. There was no error in that approach.

Response to Intervener's Submissions (Director of Public Prosecutions - South Australia)

51 The respondent does not contend that an intermediate appellate court is required to conduct an "inquisition" nor that an intermediate appellate court is required to "trawl through" the record in search of error or to identify reasons why a verdict may not be unreasonable that are not drawn to the court's attention: Intervener Submissions (**IS**) [15], [19], [33], [46]. It is not an error if the intermediate appellate court fails to examine the record to identify whether there are any errors, irregularities or other reasons why a verdict may be unreasonable which are not relied upon or identified by an appellant in an appeal against conviction: IS at [19], [34], [47]. However, if the intermediate appellate court, in the course of conducting its own independent assessment of the evidence as required under *M v The Queen*, experiences a doubt as to an element which has not been the subject of specific submissions, there is no principle precluding it from acting on that doubt in upholding the ground provided that procedural fairness is accorded to the parties: cf. IS [34]. Such an approach is consistent with the appellate function in conviction appeals under the common form appeal provisions to correct miscarriages of justice and that an overly formalistic approach is not to be taken: IS at [16], [47].

52 The principle of finality is subject to the common form criminal appeal provisions and the power of an intermediate appellate court to correct miscarriages of justice including the specific power to review a jury's verdict and set it aside if satisfied it is unreasonable and cannot be supported having regard to the evidence.

53 An intermediate appellate court must not "disregard or discount" the role of the jury or its advantages: *M v The Queen* at 493; *ZT* at [7]. The jury's advantages are accommodated in the test in *M v The Queen* by the requirement that the court consider whether the doubt it experiences is capable of being resolved by the jury's advantage in seeing and hearing the witnesses give evidence: *Dansie* at [9]; IS at [31]-[32]. The appellate function on an unreasonable verdict ground goes beyond simply reviewing the evidence to determine whether, as a matter of law, the evidence was sufficient for a jury to convict and extends

to a review of the sufficiency and *quality* of the evidence to prove an appellant's guilt beyond reasonable doubt: *M v The Queen* at 493, *SKA* at [11], [14]; IS [24]-[25].

54 The reference in *Pell v The Queen* (2020) 268 CLR 123 at [39] to the intermediate appellate court's determination of an unreasonable verdict ground "proceed[ing] upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable" does not mean that the intermediate appellate court's own independent assessment of the evidence must proceed on that assumption: cf. IS [32]. In any event, here the CA conducted its assessment on the basis that Ms X was credible and reliable: CA [271] **CAB 130**.

10 55 Insofar as the intervener makes submissions with respect to the determination of an unreasonable verdict ground having regard to the context of the trial and "fresh hypotheses" raised on appeal, as set out above, reckless indifference was in issue at the trial: see IS at [12], [14], [29].

Part VI: Argument on the respondent's notice of contention or notice of cross-appeal

56 There is no notice of contention or notice of cross-appeal. The respondent has made separate submissions in his own appeal (C2/2026) to this court from the CA's subsequent decision to substitute a verdict of guilty for manslaughter for the guilty verdict for murder in *O'Connell v DPP (No 4)* [2025] ACTCA 41.

Part VII: **Estimated time required**

20 57 The appellant estimates that 1 hour will be required for the presentation of the appellant's oral argument.

Dated: 1 April 2026

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ANNEXURE TO RESPONDENT'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	*Supreme Court Act 1933* (ACT)	Version R71 (15/05/24-25/11/25)	s 37O	Provisions in force on the date of the Court of Appeal decision. Still in force.	27 June 2025: Date of the Court of Appeal decision.