



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
 CANBERRA REGISTRY
 BETWEEN:

No. C3 of 2026

DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

and

MICHAEL O'CONNELL

Respondent

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OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANT

PART I INTERNET PUBLICATION

This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The trial that was had (AS [7]-[21])

1. The critical issue at trial was whether the Crown established that the deceased was on the bonnet of the respondent's car while he was driving.
2. The Crown case relied on the eyewitness evidence of Ms X (**ABFM 225-227** (000 call); **ABFM 202-203, 207-213** (electronically recorded interview); see also Map of Coutts Place: **Supp ABFM 4**). The jury were given a *Shepherd* direction in relation to Ms X's evidence (**JCAB 24-25**).
3. Other evidence included: mostly obscured CCTV footage from 1 Flower Place (**CA [49]-[53] JCAB 85-86**); expert evidence as to the speed of the vehicle (**ABFM 34-35, 55, 71**); and images of the respondent's car and evidence as to its height (**Supp ABFM 5-7**).
4. The hypothesis consistent with innocence advanced by the respondent was that Ms Jordan was on the back of the vehicle. His versions demonstrated his knowledge of the dangerousness of driving with Ms Jordan on the bonnet (**ABFM 236, 254, 264-267** (respondent's ROI); **ABFM 293, 298-299, 303** (recorded goal calls)).

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The adversarial constraints on first limb appeals (AS [22]-[43]; AR [4]-[11])

5. It is common ground the majority's new hypothesis was not raised by the respondent before the Court of Appeal (CA [244]-[246] **JCAB 123-124**).
6. There are two important constraints on the determination of a first limb appeal that arise by reason of the adversarial context of criminal proceedings.
7. The first constraint is the issues in fact raised by the parties to the appeal: *R v ZT* (2025) 281 CLR 137 at [11]-[12] (**JBA Vol 5, Tab 39**). This is consistent with the test articulated in *M v The Queen* (1994) 181 CLR 487 (**JBA Vol 5, Tab 32**). The approach of the majority of the Court of Appeal is apt to turn first limb appeals into roving commissions into trials and lead to systemic issues.
8. The second constraint is the conduct of the case at trial on behalf of the accused (*R v Baden-Clay* (2016) 258 CLR 308 at [46]-[54]) including the evidence which is in fact given (*Baden-Clay* at [57]-[58], [63]) (**JBA Vol 5, Tab 37**). The way a case is run can narrow the issues and an accused's version may exclude what could otherwise be a rational hypothesis consistent with innocence.
9. The respondent's version excluded the possibility that he drove with Ms Jordan on the bonnet without a reckless indifference as to the probability of her death, which possibility was otherwise not open. He repeatedly asserted he would not have driven with her on the bonnet. In those circumstances, the hypothesis relied on by the majority was mere speculation/conjecture. It is of no moment that the respondent's versions were not sworn; the jury were not given a *Mule* direction and were given a *Liberato* direction, which elevated the status of his out-of-court statements (see **JCAB 30**).

The majority erred in discounting the jury's advantages (AS [55]-[61]; AR [12])

10. The majority erred in discounting the advantage of the jury (CA [265]-[267] **JCAB 128**). There is no rational basis for the distinction between the jury's advantage on the critical issue and its advantage on the evidence of the respondent's state of mind. It was not irrelevant because the respondent's state of mind was established by several circumstances, which is how proof of a mental element is routinely and commonly established in criminal trials.
11. The view of Coutts Place was itself evidence (**JCAB 30**) and was significant in the context of the so-called "objective" evidence going to proof of the respondent's state of mind (*cf* **RS [50]**). The view was not the jury's only advantage: they perceived both

Ms X's evidence and the respondent's versions. This included her descriptions of the manner in which the respondent was driving, her fear, and her descriptions as to Ms Jordan's fear. The jury's advantage extended to their collective wisdom and experience of ordinary affairs: *R v ZT* (2025) 281 CLR 137 at [9] (**JBA Vol 5, Tab 39**)

The majority erred in approaching the circumstances piecemeal (AS [47]-[54]; AR [12])

12. The majority erred in approaching the circumstances relied on in a piecemeal way (**CA [312]-[344] JCAB 137-144**). It also:

- 10 (a) erroneously imposed a standard of beyond reasonable doubt on proof of each of the circumstances (e.g. in relation to the evidence of speed (**CA [313]-[325] JCAB 138-140**), and Ms Jordan's "precarious" position (**CA [327] JCAB 140-141**));
- (b) assessed the manner of driving by reference to the CCTV in isolation (**CA [326] JCAB 140**) (which depicted only <40m of the 266.8m travelled (**ABFM 45; Supp ABFM 4**), which area the jury viewed);
- (c) conflated proof of the respondent's state of mind with proof of objective probability of death and elevated that to a circumstance that had to be proven beyond reasonable doubt (**CA [329]-[335] JCAB 141-142**);
- (d) discounted the significance of the evidence of the conflict between Ms Jordan and the respondent and ignored entirely the other evidence of his state of mind on Ms X's evidence and his own versions (**CA [336]-[341] JCAB 142-144**);
- 20 (e) discounted the jury's advantage in assessing the respondent's expressions, tone and reaction (**CA [342]-[343] JCAB 144**); and
- (f) failed entirely to assess the circumstances relied on at trial as a whole and consider what those circumstances demonstrated about the respondent's state of mind.
13. The inference the majority identified was not rational; it was excluded by the conduct of the trial and appeal, and the evidence. The verdict should be restored (*cf* **RS [46]**).

Dated: 12 May 2026



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