



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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C3/2026

IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

BETWEEN: DIRECTOR OF PUBLIC PROSECUTIONS
Appellant

and

10

MICHAEL O'CONNELL
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Form of Submissions

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

Outline of oral argument

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

1. The question of whether the prosecution had proved reckless indifference beyond reasonable doubt was in issue at the respondent's trial: see Respondent's Submissions (**RS**) RS [19]-[25]; T 544.25-545.29 Appellant's Book of Further Materials (**ABFM**) 197-198, see also T499.1-.44 **ABFM 166**; T 500.10-.23 **ABFM 167**; *O'Connell v Director of Public Prosecutions* [2025] ACTCA 20 (**First J**) First J [278] Core Appeal Book (**CAB**) 131; SU 554.17-.24 **CAB 17**, SU 586.6-.25 **CAB 37**, SU 591.1-.13 **CAB 42**; cf. Appellant's Submissions (**AS**) [4], [27], [30], [40]; Appellant's Reply (**AR**) [4]; First J [232]-[235], [248]-[249] **CAB 120-121, 124-125**.

30 2. Section 37O(2)(a) requires the Court of Appeal (**CA**) to allow the appeal if it considers that the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence: RS at [28]. The issue of whether it was open to the jury to be satisfied beyond reasonable doubt of reckless indifference was, therefore, raised on appeal by virtue of the respondent's ground of appeal alleging the verdict was unreasonable and could not be supported by the evidence: First J [246] **CAB 124**; by analogy, *Lindsay v The*

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Queen (2015) 255 CLR 272 Joint Book of Authorities (JBA) Vol 5 1421; RS [29]; cf. AS [4], [28], [33], [35]; AR [8]).

3. It was not erroneous for Taylor J to act on a doubt she experienced in the course of conducting her own independent assessment of the evidence as required by *M v The Queen* (1994) 181 CLR 487 at 493 JBA Vol 5 1459 given that procedural fairness was accorded to the parties, even though initially it had not been the subject of specific submission by the respondent in the court below: RS [27]-[34], [51]; cf. AR [5]-[7]. *Coughlan v The Queen* (2020) 267 CLR 654 JBA Vol 4 1157 is illustrative.
4. *R v Baden-Clay* (2016) 258 CLR 308 did not preclude Taylor J from concluding the verdict was unreasonable: RS [35]-[41]; cf. AS [36]-[48]; AR [10]:
 - a. The hypothesis that Taylor J found had not been excluded arose on the evidence: see Taylor J's judgment in First J [312]-[345], CAB 137-144; cf. *Baden-Clay* where the hypothesis identified by the appellate court was based on "mere speculation or conjecture": RS [37], [38]; *Baden-Clay* [55]-[56] JBA Vol 5 1695-6; see *Knight v The Queen* (1992) 175 CLR 495 at 504-505 JBA Vol 4 1364-5;
 - b. The hypothesis that Taylor J considered was raised at trial (see above); cf. *Baden-Clay* where the hypothesis was inconsistent with the accused's sworn evidence, not left to the jury and specifically disavowed by counsel at trial: RS [37]; *Baden-Clay* [33], [60], [63] JBA Vol 5 1688, 1696-8;
 - 20 c. Unlike *Baden-Clay* where the circumstances of the wife's death were unknown and the accused was the last person to see her alive, the respondent's case did not lend itself to *Weissensteiner*-type reasoning: RS [37], [39]; *Baden-Clay* [11]-[14], [50], [52], [55], [57] JBA Vol 5 1685, 1693-6.
 - d. The respondent's case was like *Knight* where, consistent with *Liberato v The Queen* (1985) 159 CLR 507, it was open to the jury to reject the respondent's account, however the evidence at trial left open a possibility consistent with innocence for murder: RS [38].

No other error of principle in resolving the appeal

- 30 5. As required by *R v Hillier* (2007) 228 CLR 618, Taylor J considered the evidence as a whole and concluded that the reasonable inference that the respondent did not act with reckless indifference to Ms Jordan's life was not excluded: RS [42]; cf. AS [46]; First J [305], [310]-[311], [345] CAB 136-137, 144.

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6. Taylor J did not disregard the jury's advantage: First J [262]-[267] **CAB 127-128**; cf. AS [4](b), [56]-[57]. Taylor J did not purport to state any principle by reference to *Dawson v The King* [2025] NSWCCA 85 or otherwise but concluded that in the circumstances of the case before her, the jury's advantage could not resolve the doubt her Honour experienced: RS [48]; cf. AS [58].

Orders sought by the appellant

7. If the Court concludes that Taylor J erred in her approach to the unreasonable verdict ground then the appropriate order is for the matter to be remitted to the CA for
10 determination of the ground in accordance with law.

Dated: 12 May 2026



Bret Walker