



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

BETWEEN: **DIRECTOR OF PUBLIC PROSECUTIONS**
Appellant (C3/2026) / Respondent (C2/2026)

and

MICHAEL O'CONNELL
Respondent (C3/2026) / Appellant (C2/2026)

INTERVENER'S OUTLINE OF ORAL SUBMISSIONS**Part I: Certification**

The Intervener certifies that this outline is in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument**The real issues at trial and the unreasonableness ground (SA [29]; [32]-[35])**

1. Where, as in this case, a competing hypothesis consistent with innocence is solely founded on out of court statements of an accused, and that hypothesis does not comprise a justification or excuse, the ultimate issues in the trial will be:
 - a. whether the prosecution has excluded the defence hypothesis as a reasonable possibility, and, if so
 - b. whether the prosecution has proven the prosecution hypothesis (and thereby all elements of the charged conduct) beyond reasonable doubt.
2. The *Liberato v The Queen* (1985) 159 CLR 507 direction reflects this.
3. On an appeal asserting unreasonableness, in a case of the kind referred to in [1] above, the unreasonableness may be in either the rejection of the defence hypothesis as a reasonable possibility or the acceptance of the prosecution hypothesis beyond reasonable doubt. Put slightly differently, that it was not open to the jury to be

satisfied of guilt because on an “independent assessment of the evidence, both as to its sufficiency and its quality”, a court of appeal could not be satisfied that either:

- a. the defence hypothesis was excluded as a reasonable possibility, or,
- b. that it was, but nonetheless there remained a doubt in the proof of the prosecution hypothesis.

M v The Queen (1994) 181 CLR 137 at 493; JBA Vol 5, 1459; *R v ZT* (2025) 281 CLR 137 at 146 [11]; JBA Vol 5, 1745.

4. *Baden-Clay v The Queen* (2016) 258 CLR 308 requires no different approach.
5. In *Baden-Clay* the evidence, including the respondent's evidence, excluded from the range of reasonable possibilities consistent with innocence the hypothesis raised by the Court (accidental death arising in the course of a confrontation) (*Baden-Clay* at [53]; JBA, Vol 5, 1694). It remained, however, for the prosecution to exclude the possibility that a person other than the accused committed the murder (the defence hypothesis) and prove beyond reasonable doubt that he did (the prosecution hypothesis) (*Baden-Clay* at [50]; JBA, Vol 5, 1694).

The advantage of the trier of fact over a court of appeal (SA [20]-[22]; [30]-[32])

6. In a circumstantial case a court of appeal does not always enjoy the same advantage as a jury in determining what inferences are supported by the evidence.
 - i. The strands in the cable may include intermediate facts, proof of which turns on the credibility and reliability of a witness or witnesses.
 - ii. Acknowledging that a jury accepted a witness as truthful and reliable does not mean an appellate court can necessarily weigh that witness' evidence from the record in a manner equivalent to the trier of fact.

R v ZT (2025) 281 CLR 137 at 145 [9] – 146 [10]; JBA Vol 5, 1744-1745; *Pell v The Queen* (2020) 268 CLR 123 at 145 [39]; JBA Vol 5, 1630.

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