



HIGH COURT OF AUSTRALIA

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Details of Filing

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C2/2026

IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

BETWEEN:

MICHAEL O'CONNELL
Appellant

and

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DIRECTOR OF PUBLIC PROSECUTIONS
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Form of Submissions

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

20 Outline of oral argument

Section 37O Supreme Court Act 1933 (ACT) does not permit a "substituted verdict"

1. The terms of s 37O(1)(d) Joint Book of Authorities (**JBA**) **Vol 2 608** permit the CA to "set aside a verdict and order in a trial on indictment and order a verdict of not guilty (*or* another verdict) to be entered". The terms of the provision do not extend to allow for the entry of a verdict of guilty for another offence: cf. *O'Connell v DPP (No 4)* [2025] ACTCA 41 (**Second J**) [46], [56]-[57] and [61] Core Appeal Book (**CAB**) **158, 160-161, 164**; see Appellant's Submissions (**AS**) at [26]; cf. Respondent's Submissions (**RS**) [12], [15].
2. Section 49 of the *Crimes Act 1900* (ACT) **JBA Vol 1 87** cannot be read together with s 37O(1)(d) to provide the CA with the power to substitute a verdict for an alternative offence: AS [29].
3. The absence of prescription in s 37O(1)(d) as to the circumstances in which the CA may substitute a verdict for an alternative offence speaks against construing the provision as providing a power to substitute for an alternative offence. Contrast with s 7(2) of the *Criminal Appeal Act 1912* (NSW) **JBA Vol 3 788** and s 30BB(3) of the *Federal Court of*

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Australia Act 1976 (Cth) JBA Vol 3 747: AS [27]-[28]; Appellant's Reply (AR) [5]; cf. RS [21].

4. The terms of s 37O(1)(d) reflect a choice by the legislature not to provide the CA with a power to substitute a verdict for an alternative offence in favour of requiring there to be a further trial by jury in respect of any alternative offence: AR [4].

This was not a case for the exercise of a substitution power

5. By its verdict, the jury must have been satisfied that the appellant (AS [35]-[36], SU pp 552-554 **CAB 15-17**):

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- a. drove with Ms Jordan on the bonnet of his vehicle;
- b. caused her death by doing so; and
- c. acted with reckless indifference to the probability of her death occurring.

6. Manslaughter was also left to the jury on the basis that (a) and (b) above constituted the deliberate act causing death but the state of mind relied upon in order to establish the act was unlawful was that "the accused drove the vehicle with the intention that Ms Jordan would fall from the vehicle and collide with the roadway": SU 554.17-555.12.12 **CAB 18 AS** at [17].

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7. The majority concluded that the jury necessarily found that the appellant drove the vehicle intending that Ms Jordan would be dislodged from it and collide with the roadway: Second J at [108] **CAB 172**, see also [84] and [109] **CAB 166, 172**; AS at [34]. This conclusion was contrary to *Spies v The Queen* (2000) 201 CLR 603 [43] and [50] **JBA Vol 5 1811-2, 1814-5** for the following reasons:

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- a. This reasoning failed to have regard to the successful ground of appeal and how it affected the question of what facts the jury found. The majority considered the jury necessarily made this finding because the jury were satisfied beyond reasonable doubt that he acted with reckless indifference: Second J [83]-[85], [96], [108]-[110] **CAB 166, 169, 172**. However, the majority had found that it was not open to the jury to be so satisfied: *O'Connell v Director of Public Prosecutions* [2025] ACTCA 20 at [345] **CAB 144**; AS [34], [35], [37]; AR [6].
- b. The conclusion failed to take account of the difference in the states of mind relied upon for murder and manslaughter in the respondent's case and failed to recognise that the jury never determined adversely to the appellant the issue of whether he had an intention to dislodge Ms Jordan from the vehicle: AS at [36].

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- c. The conclusion failed to appreciate the difference between intention and foresight: AS [38]; Second J [62] **CAB 162**; *Zaburoni v The Queen* (2016) 256 CLR 482 [10] **JBA Vol 5 1854-5**; AR [7]; cf. RS [34].

Section 297 of the *Crimes Act* was a bar to the CA substituting the verdict

8. Section 297 of the *Crimes Act* **JBA Vol 1 306** precluded the CA from entering a verdict of guilty for manslaughter or from making an order for a new trial for the offence of manslaughter: AS [42]-[55]; AR [9]-[12]; cf. RS [43]; cf. Second J [24].
9. The appellant had been “tried for” the offence of murder and acquitted at the point when the CA considered what further orders to make. Section 297 operated to limit the orders the CA could make pursuant to s370 of the *Supreme Court Act*, and precluded the entry of a verdict for manslaughter (“the other offence”) on the “same facts”: AS [44], [50] AR [12]; cf. RS [44].
10. There was no textual or contextual basis for the construction adopted by McCallum CJ at Second J [12], **CAB 150** and it involved reading words in to the provision to confine its scope without a basis to do so: *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531 [21]-[25], [37]-[48]; AS [45].
11. The purpose of s 297 extends beyond a statutory reflection of the principle of autrefois acquit: AS [48]; AR [10]. Even on the respondent’s construction the provision does more than the principle of autrefois acquit in that it operates to preclude further prosecution for an alternative offence not relied upon at the trial that led to the acquittal for the principal offence: cf. RS [42].
12. *Sio v The Queen* (2016) 259 CLR 47 **JBA Vol 5 1770**, *AJS v The Queen* (2007) 235 CLR 505 **JBA Vol 4 922** and *R v PL* (2009) 199 A Crim R 199 **JBA Vol 6 2029** did not consider the effect of a provision in the same terms as s 297: AR[9]; AS [47], [51]; cf. RS [44], [54].

Dated: 12 May 2026



Bret Walker

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