HIGH COURT OF AUSTRALIA

FRENCH CJ,
BELL, GAGELER, KEANE AND NETTLE JJ

CHRISTOPHER ANGELO FILIPPOU APPELLANT

AND

THE QUEEN RESPONDENT

Filippou v The Queen
[2015] HCA 29
12 August 2015
S59/2015

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

T A Game SC with G A Bashir SC and J L Roy for the appellant (instructed by John Anthony Solicitors)

L A Babb SC with K McKay for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

Filippou v The Queen

Criminal law – Appeal – Appeal against conviction – Trial by judge alone – Application of *Criminal Appeal Act* 1912 (NSW), s 6(1) in appeal from trial by judge alone – Application of "proviso".

Criminal law – Appeal – Appeal against sentence – Aggravating and mitigating circumstances – Onus and standard of proof – Where not proved beyond reasonable doubt that appellant brought murder weapon to scene and not proved on balance of probabilities that deceased brought murder weapon to scene – Whether sentencing judge bound to take view of facts most favourable to offender.

Words and phrases – "miscarriage of justice", "substantial miscarriage of justice".

Crimes Act 1900 (NSW), s 23.
Criminal Appeal Act 1912 (NSW), ss 5, 6(1).
Criminal Procedure Act 1986 (NSW), s 133.
Crimes (Sentencing Procedure) Act 1999 (NSW), s 21A.

1 FRENCH CJ, BELL, KEANE AND NETTLE JJ. In October 2011, the appellant stood trial before the Supreme Court of New South Wales by judge alone (Mathews AJ) on two counts of murder. To each count he pleaded not guilty of murder but guilty of manslaughter by reason of provocation. The sole issue at trial, therefore, was provocation. On 18 November 2011, the judge found the appellant guilty of murder on both counts[1] and, on 22 December 2011, her Honour sentenced the appellant to an effective head sentence of imprisonment for 31 years with an effective non-parole period of 25 years[2].

2 The appellant appealed to the Court of Criminal Appeal against conviction and sentence but the appeals were dismissed[3]. McClellan CJ at CL, with whom Fullerton and S Campbell JJ agreed, held that, although the trial judge erred in fact as to the sequence of events leading up to the killings, and may perhaps also have erred in law in directing herself as to the elements of the "ordinary person" test of provocation[4], there was no miscarriage of justice because the appellant had been proved guilty beyond reasonable doubt of the offences charged. The Court of Criminal Appeal also found no error in the sentence.

3 On 13 March 2015, Hayne and Nettle JJ granted special leave to appeal on grounds concerning both conviction and sentence. The principal question in relation to conviction is the nature of an appeal to the New South Wales Court of Criminal Appeal from the judgment and verdict of a judge alone. The sole issue in relation to sentencing is whether in the particular circumstances of this case the judge was bound to take the view of the facts most favourable to the appellant although it had not been established on the balance of probabilities.

4 As will appear, the Court of Criminal Appeal is required to deal with an appeal from judge alone in three stages. The first is to determine whether the judge has erred in fact or law. If there is such an error, the second stage is to decide whether the error, either alone or in conjunction with any other error or circumstance, is productive of a miscarriage of justice. If so, the third stage is to ascertain whether, notwithstanding that the error is productive of a miscarriage of justice, the Crown has established that the error was not productive of a substantial miscarriage of justice.

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1 [2011] NSWSC 1379.

2 [2011] NSWSC 1607.

3 [2013] NSWCCA 92.

4 *Crimes Act* 1900 (NSW), s 23(2)(b).

As will also appear, the trial judge was not bound to adopt the view of the facts most favourable to the appellant for the purposes of sentencing.

The nature of a criminal appeal from a judge alone

6 Section 133 of the *Criminal Procedure Act* 1986 (NSW) provides that a judge who tries a criminal proceeding without a jury may make any finding that could have been made by a jury on the question of guilt of the accused and that such a finding has the same effect as a verdict of a jury. In that sense, "finding" means an ultimate finding of guilt as opposed to a finding of fact leading to the finding of guilt. The section also provides that the judge must include in his or her reasons for judgment the principles of law applied and the findings of fact on which the judge relies; and that, if any Act or law requires a warning to be given to a jury in such a case, the judge is to take the warning into account in dealing with the matter. As was held in *Fleming v The Queen*[5], the requirement to take a warning into account necessitates that the judge expressly refer to the warning in his or her reasons for judgment.

7 Section 5 of the *Criminal Appeal Act* 1912 (NSW) provides that a person convicted on indictment may appeal to the Court of Criminal Appeal against conviction on any ground which involves a question of law alone and, with the leave of the Court or on the certificate of the judge, on any ground of appeal which involves a question of fact alone, or question of mixed law and fact, or any other ground which appears to the Court to be a sufficient ground of appeal.

8 Section 6(1) of the *Criminal Appeal Act* provides in effect that the Court of Criminal Appeal shall allow an appeal against conviction if:

(1) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or

(2) where the judgment of the court of trial is wrong by reason of wrong decision of a question of law; or

(3) for any other ground there has been a miscarriage of justice,

provided that the Court may dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

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5 (1998) 197 CLR 250 at 263 [32] per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ; [1998] HCA 68.

9 As was also explained in *Fleming*, perforce of s 133 of the *Criminal Procedure Act*, each of the three limbs of s 6(1) of the *Criminal Appeal Act* is capable of application to the verdict of a judge alone[6]. For the purposes of the first limb, the question is whether, upon the evidence on which the judge acted, or upon which it was open to the judge to act, the judge's finding of guilt is "unreasonable" or "cannot be supported". For the purposes of the second limb, the question is whether the judge has erred in law in the sense of a departure from trial according to law[7]. Under the third limb, the question is whether for any other reason there has been a miscarriage of justice.

10 In *Fleming*[8], the Court left open the question of whether the Court of Criminal Appeal should intervene under the first or third limb of s 6(1) only if it appears that there is no evidence to support a finding of guilt or the evidence is all the one way or where there has been a misdirection leading to a miscarriage of justice[9]. For the purposes of this appeal, it is necessary to answer that question.

11 Beginning with the first limb of s 6(1) of the *Criminal Appeal Act*, it is clear from the terms of s 133(1) of the *Criminal Procedure Act* that the effect of the latter provision is to equate a judge's finding of guilt to a jury's finding of guilt "for all purposes". It follows from the natural and ordinary meaning of the words of s 133(1) that, for the purposes of an appeal against conviction under s 5 of the *Criminal Appeal Act*, a judge's finding of guilt is to be treated as if it were the same as a jury's finding of guilt.

12 Authority makes plain that a jury's finding of guilt is not to be disturbed unless it appears that there is no or insufficient evidence to support the finding, or the evidence is all the one way, or the finding is otherwise unreasonable, or unless there has been a misdirection leading to a miscarriage of justice[10]. It

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6 (1998) 197 CLR 250 at 261 [24] (referring to s 33 of the *Criminal Procedure Act*, which was then in identical terms to s 133 as presently in force).

7 *Weiss v The Queen* (2005) 224 CLR 300 at 308 [18]; [2005] HCA 81.

8 (1998) 197 CLR 250 at 262 [26].

9 See also *O'Donoghue* (1988) 34 A Crim R 397 at 401 per Hunt J.

10 *Whitehorn v The Queen* (1983) 152 CLR 657 at 686 per Dawson J; [1983] HCA 42; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 532 per Gibbs CJ and Mason J, 621 per Deane J; [1984] HCA 7; *Knight v The Queen* (1992) 175 CLR 495 at 502-503 per Mason CJ, Dawson and Toohey JJ; [1992]

(Footnote continues on next page)

follows perforce of s 133(1) of the *Criminal Procedure Act* that, in the case of an appeal against a judge's finding of guilt, the finding is not to be disturbed under the first limb of s 6(1) of the *Criminal Appeal Act* unless there is no or insufficient evidence to support the finding, or the finding is otherwise unreasonable, or the evidence was all the one way, or the judge has so misdirected himself or herself on a matter of law as to result in a miscarriage of justice. It is, however, to be borne steadily in mind that, as with a jury's verdict, so also with the judgment and verdict of a judge alone, in most cases a doubt experienced by an appellate court will be a doubt which the judge ought to have experienced. To adopt and adapt the language of *M v The Queen*[11]:

> "It is only where a [judge's] advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. ... If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the [judge], 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."

13 Turning to the second limb of s 6(1) of the *Criminal Appeal Act*, it will be seen that to some extent it overlaps the first. A "wrong decision of any question of law" includes misdirections on matters of substantive law as well as misdirections on matters of adjectival law. And, as with the first limb, the question under the second limb will be whether the error constitutes a miscarriage of justice in the sense of a departure from trial according to law[12].

14 The third limb covers cases where, by reason of irregularity or otherwise, an accused has not received a trial according to law or has not received a fair trial[13].

HCA 56; *M v The Queen* (1994) 181 CLR 487 at 493 per Mason CJ, Deane, Dawson and Toohey JJ; [1994] HCA 63.

11 (1994) 181 CLR 487 at 494 (footnote omitted).

12 *Weiss v The Queen* (2005) 224 CLR 300 at 308 [17]-[18] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

13 See, eg, *Weiss v The Queen* (2005) 224 CLR 300 at 317 [45].

15 That leaves the proviso, which in terms is applicable to all three limbs of s 6(1). It directs that, even where error of the kind identified in any of the three limbs is established and amounts to a miscarriage of justice, the Court of Criminal Appeal may dismiss the appeal if it is satisfied that the error has not been productive of a substantial miscarriage of justice. By "substantial miscarriage of justice" what is meant is that the possibility cannot be excluded beyond reasonable doubt that the appellant has been denied a chance of acquittal which was fairly open to him or her[14] or that there was some other departure from a trial according to law that warrants that description[15]. Consequently, if the Court of Criminal Appeal is persuaded that the first limb applies, it will follow that it has concluded that there has been a substantial miscarriage of justice. In contrast, where the second limb applies, the circumstances in some cases may be such that, despite the judge making "the wrong decision of [a] question of law", the Court of Criminal Appeal is persuaded that the error could not have deprived the appellant of a chance of acquittal that was fairly open to him or her. In that case the proviso will operate. Where the third limb is engaged, if the Court of Criminal Appeal has concluded that the appellant has not received a fair trial it will follow that it has concluded that there has been a substantial miscarriage of justice. But where, despite some other identified irregularity, the Court of Criminal Appeal is satisfied that the appellant has received a fair trial according to law and not otherwise been deprived of a chance of acquittal that was fairly open to him or her, once again the proviso will operate. It is also to be borne in mind, as was explained in *Baiada Poultry Pty Ltd v The Queen*[16] and more recently noticed in *Lindsay v The Queen*, that, although the proviso is expressed in permissive terms, "if the condition (the conclusion that no substantial injustice has actually occurred) is satisfied"[17] the proviso must be applied.

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14 *Pollock v The Queen* (2010) 242 CLR 233 at 252 [70]; [2010] HCA 35.

15 *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 102-103 [22]-[23] per French CJ, Gummow, Hayne and Crennan JJ; [2012] HCA 14; see, eg, *AK v Western Australia* (2008) 232 CLR 438 at 456-457 [57]-[59] per Gummow and Hayne JJ, 482 [109]-[110] per Heydon J; [2008] HCA 8.

16 (2012) 246 CLR 92 at 103 [25].

17 (2015) 89 ALJR 518 at 528 [43] per French CJ, Kiefel, Bell and Keane JJ; 319 ALR 207 at 219; [2015] HCA 16.

The facts

16 In early 2009, the appellant purchased a home in Mayfield, New South Wales. The property shared a back fence with the home of William Willis ("the Willis home"). William Willis was away from the Willis home between 4 April and 20 June 2009. One Sunday night during his absence, his son Sam Willis held a party or "drinking session" at the Willis home. The party involved an open fire in the back yard and very loud music which continued well into the early hours of the morning. A neighbour (not the appellant) yelled out at the partygoers, called the police (who did not attend), hosed the partygoers with water and later commenced a verbal exchange of abuse. At some point during that exercise, the appellant entered his back yard and joined in the abuse of the partygoers, but the partygoers returned the abuse using offensive language.

17 A few days later, a handwritten letter (which was found by a handwriting expert to have been written by the appellant) was left at the Willis home. The letter complained that noise was bothering the author's mother (although the appellant did not live with his mother) and threatened to call the police and report hidden "dope" at the Willis home and the home of Sam Willis's mother (who lived at a different location).

18 Sam Willis canvassed the neighbourhood to ascertain if anyone knew anything of the letter. William Willis gave evidence that Sam Willis told him that the appellant denied writing it but said: "if you come around and threaten me again I'll shoot you". Sam Willis told his mother that the appellant had threatened to kill him.

19 Some days after that, William Willis raised the issue with the appellant over the back fence. According to William Willis, the appellant told him that Sam Willis had come to his house without a shirt on, very upset, angry and threatening. William Willis also recalled that the appellant said: "I was upset Sam was upset we just let off a little bit of steam ... I just don't want to be threatened by Sam again". The appellant also said to William Willis that he had told Sam Willis: "If you come around again, I will shoot you". William Willis said he replied that he would "talk to Sam and sort it out". The judge accepted that evidence.

20 Following their conversation, there were amicable exchanges between the two households, including a conversation about the erection of a common fence.

21 In December 2009, Luke Willis moved into the Willis home to stay for a while with his father and brother. Early in January 2010, hypodermic syringes

were scattered on the pavement outside of the Willis home. William Willis gave evidence that he took that to be "just part of living in Mayfield".

22 Late in January 2010, on the eve of Luke Willis moving out of the Willis home, Luke, Sam and William Willis had a barbeque and played music in the back yard until about 11pm. The next day, the front gate of the Willis home was found to be sprayed with shiny grey paint with paint splatters leading to an empty paint tin about four houses away.

23 Some days after that, a second letter (also found to have been written by the appellant) was left on the front lawn of the Willis home. It complained about noise and rubbish, told the Willises to move out and threatened to make their stay unbearable if they remained. Sam Willis and his father canvassed the neighbours about that letter, too, but all the neighbours to whom they spoke, including the appellant's wife ("Mrs Filippou"), said they did not have any problems with the Willises.

24 From 11 April 2010, William Willis was away overseas. He gave evidence that, while away, he was in contact with his sons up until a few days before the shooting and that they told him that there had not been any problems at the Willis home during his absence.

25 On Saturday 26 June 2010, Sam Willis and Luke Willis, Luke Willis's girlfriend and one Alex Best had a barbeque and drank beer at the property where Luke Willis was then living. At around 9pm, Sam Willis and Best went to the Willis home, having purchased a bottle of bourbon on the way. There they found a plastic bag on the front lawn containing a mass of dried leaves and a piece of cardboard on which was written: "Cheers you Dope from Alex". The note may have been there for some weeks and the judge thought it possible that it had been written by Best. At the time, however, Sam Willis and Best decided that the appellant had put the bag on the lawn and they went to his home and poured the contents of the bag and the note onto the appellant's utility, which was parked in the driveway. Best also scratched the words "Suck me" onto the back of the utility.

26 On Sunday 27 June 2010, at around 11am, Mrs Filippou found the leaves and the cardboard note and called the appellant. When he saw what had happened, he called out abusively over the back fence but there was no response. He then went out briefly at around midday and on his way home he pulled up outside the Willis home. He found there was no one there.

27 At 5.50pm, Luke Willis and Sam Willis were seen standing outside the Willis home inspecting the lounge room window. It had been broken with a

plastic bag containing telephone books. The appellant's son later admitted to having broken the window and the judge accepted his evidence. But Luke Willis and Sam Willis concluded that it was the appellant who had broken the window and they went to confront him.

28 At about 6pm, Mrs Filippou heard male voices calling the appellant and she assumed that it was the Willis brothers. When she told the appellant about the yelling, she said that he went straight down the hall and out the front door and (she thought) onto the footpath. Very shortly after that, she said, the appellant ran back into the house and told her to call their son, which she did. Mrs Filippou said that the appellant then went outside again, she heard all the men yelling and she thought that she heard the word "police". Then, the appellant ran back inside again and said: "I'm going", went out the back door and immediately got into his utility and reversed out of the driveway. Later, the police arrived and found that both Sam Willis and Luke Willis had been shot dead. Sam Willis had a gun in his hand with his finger in the trigger guard close to the trigger.

29 A single eyewitness to the shooting, Brett Allen, gave evidence that he heard two popping noises and went to his window. At that point, he saw through the window the silhouette of a man bending over slightly with an outstretched arm. Then he saw a flash come from the end of the man's arm accompanied by another popping noise. Allen said that he realised that the noise had come from a gun and that a person had been shot, and he called police. Allen said that he also saw the man walk "fairly casually" into the house, then come out again, crouch over the silhouette of the man lying on the ground and move his arms in a pulling motion. Other neighbours gave evidence that they also heard two shots in close succession and then a third shot a few seconds later.

30 Ballistics evidence established that the gun was a .38 special calibre Smith & Wesson Model 36 five-chamber revolver, from which three shots had been fired: one into the chest of each deceased from a distance of approximately 800mm to 1m; and a third into the neck of Sam Willis from a distance of approximately 300mm. It was also established that the chamber under the hammer was empty, indicating that there had been an attempt to fire the weapon again after the third shot had been fired.

31 After leaving the scene, the appellant went to his place of work and called a previous acquaintance. He stayed with her that night, appearing to her to be on edge and restless, and he called his young daughters from her telephone the following morning. At 10.35am, he handed himself in to police and told them: "they pulled a gun on me and I took it off 'em and shot 'em. They're shit. If

you're going to pull a gun on me, be prepared to use it. That's all I'm going to say."

32 Later, in his Electronically Recorded Interview of a Suspected Person ("ERlSP"), the appellant repeated the effect of that statement a number of times. He said that a man whom he had not seen before (Luke Willis) had taken a gun out of his pocket with his right hand and said: "I've got this". The appellant said that he immediately grabbed the gun and shot Sam Willis, because Sam Willis was still abusing the appellant. He then pointed the gun at Luke Willis and shot him too. He estimated that the Willises were no more than one metre away from him when he shot them and he said that he left the gun in the hand of one of the men (he could not remember who) "[b]ecause it['s] theirs, they may as well keep it". Then he went back inside, changed and left in his utility. He added that he might have shot someone on the ground but it all happened so fast that he could not remember. He had "just shot whatever bullets were there".

33 During forensic procedures following the ERISP, the appellant said to a police officer, "I was always taught never bring a gun unless you are prepared to use it", and his demeanour changed and he clenched his fists and said, "I'm fucking proud of what I done. Fucking proud of it."

34 After his arrest, the appellant was taken into custody and his telephone conversations were recorded. In a call recorded on 18 August 2010, the appellant said to Mrs Filippou: "They come around with a fucken gun we didn't" and "Who the fuck do they think they are coming around like fucken would be gangsters ... if they had of fucken brought a knife I would have cut their fucken heads off".

The judge's reasons for judgment

35 At the time of the Willis brothers' deaths, the partial defence of provocation in New South Wales was defined by s 23 of the *Crimes Act* 1900 (NSW) as follows:

> "**Trial for murder—provocation**
>
> (1) Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.

(2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where:

(a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused, and

(b) that conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased,

whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.

(3) For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation as provided by subsection (2), there is no rule of law that provocation is negatived if:

(a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission,

(b) the act or omission causing death was not an act done or omitted suddenly, or

(c) the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm.

(4) Where, on the trial of a person for murder, there is any evidence that the act causing death was an act done or omitted under provocation as provided by subsection (2), the onus is on the prosecution to prove beyond reasonable doubt that the act or omission causing death was not an act done or omitted under provocation.

(5) This section does not exclude or limit any defence to a charge of murder."

36 Thus, after summarising the evidence, the judge turned first to the question posed by s 23(2)(a) and (4) of the *Crimes Act* of whether the Crown had established beyond reasonable doubt that the appellant's acts of shooting the

deceased were not the result of a loss of self-control on the part of the appellant induced by any conduct of the deceased. Defence counsel had argued in the course of his final address that the evidence left open a reasonable possibility that one or other of the deceased brought the gun to the scene and that that act, combined with the events which occurred leading up to their arrival at the appellant's house with the gun, caused the appellant to lose self-control and in that state of lost self-control shoot the deceased. The judge rejected that submission.

37 The judge appreciated that the provenance of the gun was "a significant factual issue" because her finding on the matter would "inevitably influence [her] finding as to the state of mind of the accused when he shot the two deceased". Having considered the evidence, her Honour found she was not satisfied beyond reasonable doubt that the accused brought the gun. Even so, her Honour concluded that, assuming that one or other of the deceased had brought the gun to the scene, the appellant's conduct during the shooting and immediately and later after it demonstrated beyond reasonable doubt that the appellant had not lost self-control at the time of the killing.

38 As for the appellant's conduct after the shooting, the judge acknowledged that "[a] significant factual question arises here, as to how Mr Allen's observations of these crucial events can be reconciled with the account Mrs Filippou gave to the police later that night". After assessing their evidence her Honour ultimately concluded:

> "I must assume that the sequence of events as described by Mr Allen is the correct one. He was very precise in his observations ... Mrs Filippou said that it all happened very quickly, and at one point she expressed uncertainty as to whether the verbal confrontation she heard might have taken place before her husband retuned and asked her to ring [the appellant's son]."

39 As a result, her Honour found the "most likely picture" of the confrontation to accord with Allen's evidence, which supported a finding that the appellant had not lost self-control.

40 The judge then referred to the statements made in the appellant's ERISP and during the recorded telephone conversation with Mrs Filippou and found as follows:

> "It is abundantly clear from the totality of the evidence that the accused was, at the relevant time, an inherently angry man. [Defence counsel] did not seek to argue otherwise. ...

> I regard the statements made by the accused after the event as ultimately determinative of this issue, for the following reason. A loss of self-control under s 23 necessarily involves the accused committing the act causing death whilst his capacity to think rationally has been temporarily suspended by reason of the provocative conduct of the deceased. By definition it is an act which the person would not have done if he was in his normal state of mind. It follows that if the person continues, well after the effect of the provocative conduct has ceased, to justify his conduct and indicate that he would do the same thing again in the same situation, then this is inconsistent with the proposition that it was a temporary loss of self-control which caused him to act as he did. And this is precisely what the accused has continued to do. He did it several times the following day, when he was being interviewed by the Police. Amongst other things, he said that the deceased brothers 'probably deserved what they got', and that he was 'fucking proud' of what he had done. This is not the attitude of a man who has come back to rationality after a temporary loss of control. Even in his telephone conversation with his wife some six weeks later he was placing the blame on the deceased brothers, saying that they were 'just garbage people'."

41 In the judge's view there was "no reasonable possibility that it was a loss of self-control" which caused the appellant to shoot the deceased. The first limb of provocation was therefore not made out.

42 Although that was sufficient to dispose of the matter, the judge then went on to deal with the objective element of provocation, which is provided for in s 23(2)(b). Her Honour concluded that she was "quite unable to accept that an ordinary person, confronted with this situation, could have lost self-control so as to form an intention to kill or inflict grievous bodily harm on the brothers". She continued:

> "I am hesitant to use the word 'disproportionate', for there is no requirement of proportionality in relation to the defence of provocation as currently formulated. However, if the response is grossly disproportionate to the provocation, then it inevitably means that it will fail the 'ordinary person' test. And that, in my view, is clearly the situation here."

For these reasons it followed that the defence of provocation failed.

The appeal to the Court of Criminal Appeal

43 There were three grounds of appeal to the Court of Criminal Appeal, each comprised of a number of parts but amounting in substance to:

(1) The verdict was unreasonable within the meaning of the first limb of s 6(1) of the *Criminal Appeal Act* and could not be supported having regard to the evidence. This was because, in finding that the appellant had not lost self-control, the judge misdirected herself as to the inferences to be drawn from the statements made by the appellant while in custody; erred in the inferences drawn from the gap in time between the second and third shots; and misdirected herself as to the "ordinary person" test.

(2) The judge erred in law within the meaning of the second limb of s 6(1) of the *Criminal Appeal Act* by making each of the errors identified in the first ground.

(3) In all the circumstances, the conviction was a miscarriage of justice within the meaning of the third limb of s 6(1) of the *Criminal Appeal Act*.

44 McClellan CJ at CL dealt first with the complaint that the judge erred in fact as to the sequence of events surrounding the shooting and thus the gap in time between the second and third shots. It is to be inferred from his Honour's reasons that the thrust of the appellant's argument on that point may have expanded in the course of hearing to a contention that the judge wrongly perceived Mrs Filippou's recollection of the sequence of events to be inconsistent with Allen's evidence; as a result wrongly doubted Mrs Filippou's reliability; and thus erred in rejecting Mrs Filippou's evidence concerning the appellant's apparent emotional state at the time of the shooting. McClellan CJ at CL appears to have accepted that contention:

> "I am satisfied that [the trial judge's] account is not correct. I am satisfied that the appellant went out to the street and then returned inside. He then went out again, the brothers were shot and the appellant then went inside or moved in that direction before returning to place the gun and then again leave the scene by returning to the house. Although after the shooting Mr Allen observed the appellant to walk back into the front yard of the house he did not see him go inside. Mrs Filippou said that the appellant came back inside on two occasions but on the second occasion rather than return to the scene of the shooting he took a motor vehicle and left altogether.
>
> Her Honour observed that Mr Allen described the appellant as walking 'quite calmly' when he went back towards the house. Mrs Filippou said that he was running, or was walking quickly and was angry. Her Honour concluded that the appellant's actions in returning

outside and placing the revolver into Sam Willis's hand is an action 'at least suggestive of rational thinking.'

Again, I believe her Honour has not identified the correct sequence. On the first occasion the appellant went back inside, which was before the shooting he was agitated. However, after the brothers had been shot his demeanour changed and he in relative calm returned to place the gun."

45 Somewhat perplexingly, however, having so identified those supposed errors, McClellan CJ at CL did not then say anything further about them. There is no mention in his Honour's reasons of whether he considered them to be productive of a miscarriage of justice or, if so, whether he was satisfied that the Crown had established that they were not productive of a substantial miscarriage of justice. There is no indication of how his Honour reconciled them with his conclusion that the appeal should be dismissed.

46 McClellan CJ at CL next dealt with the appellant's complaint that the judge misdirected herself as to the inferences to be drawn from statements made by the appellant while in custody and, more generally, erred in basing her conclusion concerning the appellant's state of mind at the time of the shooting on evidence of the appellant's conduct and statements during and after the shooting. It is not clear but it appears from the following passage of McClellan CJ at CL's reasons that his Honour may have accepted that the judge also erred in those respects by treating the post-offence statements as "determinative" of the appellant's state of mind at the time of the killings:

"It was open to her Honour to have regard to the appellant's subsequent statements to the extent they were capable of shedding light on his state of mind at the time of the shootings. However, her Honour could not reason that because those statements made at a time when the appellant was apparently calm and rational, sought to justify the killing without a suggestion that he lost control were determinative of his state of mind at the time of the shootings. Nor could the statements of themselves negative loss of self-control.

There is an ambiguity in her Honour's reasons. Her Honour said that the appellant's later statements were 'ultimately determinative' of the issue. If her Honour meant that they alone determined the issue I could not agree. If she meant that they provided determinative weight I, with respect, could also not agree. To my mind the statement justifying his conduct together with the indication that he would do the same thing again (although no doubt engendering a sense of revulsion in ordinary people), does not provide any significant assistance in determining the state of

> mind under which the appellant did the relevant acts and whether he lost his self-control. It is conceivable that a person who temporarily loses their self-control may later not regret their actions. Although they may have acted in a complete absence of control, later justification of their actions may not prove to be of any assistance to the prosecution case."

47 Ultimately, however, McClellan CJ at CL dealt with the point on the basis that, despite his concerns about the judge's process of reasoning, he was not persuaded that her Honour's finding of guilt was erroneous:

> "Notwithstanding my reservations about her Honour's approach to the issue I am not persuaded that her Honour's conclusion was erroneous. Indeed, having considered the evidence I am satisfied that the Crown discharged the onus that it carried to the criminal standard. I have previously related the findings that her Honour made in relation to the actions of the appellant and the observations of his movements made by the witnesses. The appellant said in his ERISP that he removed the gun from one of the deceased and then fired it to kill both brothers. There was nothing to suggest that he acted as a result of losing his self-control. Indeed the only available conclusion was that in taking the gun and shooting the brothers he acted in a deliberate and calculated way not only in firing the first two shots but in firing the third shot, which the evidence established was responsible for the death of Sam Willis."

48 *Ex facie*, that appears to mean that McClellan CJ at CL did not consider that the errors he identified in the judge's reasoning process were productive of an error in her Honour's conclusion because he was satisfied beyond reasonable doubt that the appellant was guilty. It is as if his Honour conceived himself to be deciding a civil appeal by way of rehearing under s 75A of the *Supreme Court Act* 1970 (NSW). But, if so, that was not a proper way of disposing of the appeal. As was earlier explained, an appeal from judge alone under s 5 of the *Criminal Appeal Act* is not an appeal by way of rehearing. Having identified error, the task for the Court of Criminal Appeal is to determine whether the error is productive of a miscarriage of justice. In this context that would have meant determining whether the judge had so erred in fact by preferring Allen's version of events over Mrs Filippou's recollections as to engage either the first or third limbs of s 6(1), or so erred in law by giving "determinative" weight to the appellant's post-offence statements as to engage the second limb of s 6(1); and, if so, then assessing whether it was established that the error was not productive of a substantial miscarriage of justice in the sense of depriving the appellant of a chance of acquittal (or, in this case, a chance of a manslaughter verdict) fairly open to him. To dispose of the matter on the basis simply that the Court of Criminal Appeal was not satisfied that the judge's conclusion was erroneous

because the Court of Criminal Appeal considered that the appellant had been proved guilty beyond reasonable doubt did not engage with the requirements of the statutory task.

49 Thirdly, McClellan CJ at CL turned to consider the complaint that the judge erred in directing herself as to the ordinary person test of provocation for the purposes of s 23(2)(b) of the *Crimes Act*. His Honour concluded that, irrespective of whether the judge had done so, the error was not productive of a miscarriage of justice because he had no doubt that an ordinary person with the characteristics of the appellant would not have acted as the appellant did:

> "It was submitted that by expressing herself as she did her Honour has reversed the onus of proof. I am not persuaded that the submission should be accepted. The criticism is focused on the paragraph which commences with the words 'I am quite unable to accept ...' A reading of the entire paragraph suggests that her Honour may have merely been intending to convey that in the circumstances she was satisfied beyond any doubt that an ordinary person could not have been induced to lose their self-control and kill the brothers. Her Honour's finding is reflected in the last sentences of the paragraph where she identifies the response as being grossly disproportionate to the provocation with the consequence that the Crown has proved its case to the criminal standard.
>
> Irrespective of whether her Honour should be understood as framing her conclusion in an inappropriate manner I am nevertheless completely satisfied that there has been no miscarriage of justice. Even accepting the appellant's submission that he did not bring the gun to the scene and that he responded to the fact that the brothers brought it, he must have taken it from the brother carrying it and then without any apparent hesitation used it to kill both of them. There was no suggestion of a struggle or any attempt by the appellant to remove himself from the scene or deal with the situation without using the gun. I have no doubt that an ordinary person with the characteristics of the appellant, including his tendency to anger, would not have acted as the appellant did in the circumstances by taking the gun and forming the intention to kill."

50 With respect, that was not correct either. The test was not whether an ordinary person *would have acted as the appellant did* but whether the conduct of the deceased *could have induced an ordinary person* in the position of the appellant to have so far lost self-control as *to have formed the intent to kill or to inflict grievous bodily harm.*

51 Finally, McClellan CJ at CL dealt with the complaint that the judge erred in failing to direct herself as to the care to be taken in drawing inferences adverse to the appellant. His Honour rejected that contention:

> "Complaint was made that her Honour failed to warn herself about the caution necessary in drawing inferences. There is no reason to doubt that her Honour, a very experienced trial judge, was mindful of the need to be careful in this respect and there is nothing in her Honour's judgment which would suggest that the proffered criticism could be sustained."

52 The Court of Criminal Appeal was correct to reject that contention. Subject to statute[18], judges are required to give juries particular warnings such as a *Longman*[19] warning, a *Domican*[20] warning, an accomplice warning[21] or a *Pollitt*[22] warning, for the purpose of alerting juries to particular difficulties with particular classes of evidence with which they are unlikely to be familiar. Perforce of s 133(3) of the *Criminal Procedure Act*, the same applies to trial by judge alone. As was explained in *Fleming*[23], the obligation under s 133(3) "to take [a] warning into account" requires that the particular warning be included in the judge's reasons for judgment. But it is different in the case of directions other than warnings. Apart from warnings of the kind referred to in s 133(3), judges are required to give juries certain ineluctable directions as to matters such as the functions of the judge and jury, the burden and standard of proof, what constitutes evidence, the drawing of inferences from direct evidence, the care to be exercised in drawing inferences and, if an inference forms an essential step in the jury's process of reasoning to guilt, the need to be satisfied of that inference

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18 Cf *Jury Directions Act* 2013 (Vic).

19 *Longman v The Queen* (1989) 168 CLR 79 at 90-91 per Brennan, Dawson and Toohey JJ; [1989] HCA 60.

20 *Domican v The Queen* (1992) 173 CLR 555; [1992] HCA 13; *Evidence Act* 1995 (NSW), s 116.

21 *Peacock v The King* (1911) 13 CLR 619; [1911] HCA 66; *Evidence Act* 1995 (NSW), s 165.

22 *Pollitt v The Queen* (1992) 174 CLR 558 at 599 per Dawson and Gaudron JJ; [1992] HCA 35.

23 (1998) 197 CLR 250 at 263 [32] per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ.

beyond reasonable doubt[24]. Such directions are principles of law within the meaning of s 133(2) and therefore, in the case of trial by judge alone, must be applied. But it is sufficient if a judge's reasons show either expressly or by implication that they have been so applied[25].

53 As can be seen from the passages of the judge's reasons for judgment earlier referred to[26], her Honour repeatedly referred to the need to be satisfied of guilt beyond reasonable doubt and twice specifically referred to the need for satisfaction beyond reasonable doubt in relation to the inferences which she drew concerning the appellant's state of mind at the time of the killings. Consequently, quite apart from such, if any, significance as might be attributed to the fact of the judge being "a very experienced trial judge", her Honour's reasons for judgment leave no room for doubt that she did take into account the care to be taken in drawing inferences and did take into account the need to be satisfied beyond reasonable doubt of the inferences which were critical to her conclusion of guilt.

No miscarriage of justice

54 Other things being equal, the Court of Criminal Appeal's failure to deal with the consequences of what it perceived to be the judge's error concerning the sequence of events surrounding the shooting; the irregularity of the fashion in which their Honours disposed of the question of whether the judge erred in giving the appellant's post-offence conduct determinative effect; and their Honours' apparent error in relation to the application of the ordinary person test prescribed by s 23(2)(b) of the *Crimes Act*, would dictate that the appeal be allowed and that the matter be remitted to the Court of Criminal Appeal for determination of the appeal against conviction according to law.

55 For the reasons which follow, however, it can be seen that the judge did not err in either of the first two respects identified by the Court of Criminal Appeal and, accordingly, that the manner in which her Honour essayed the s 23(2)(b) test was of no consequence.

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24 *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 535-536 per Gibbs CJ and Mason J, 626-627 per Deane J; *Shepherd v The Queen* (1990) 170 CLR 573 at 581 per Dawson J; [1990] HCA 56.

25 *Fleming* (1998) 197 CLR 250 at 263 [30].

26 Above at [36]-[41].

56 Starting with the first of the judge's supposed errors, the question for the Court of Criminal Appeal was not whether it was "satisfied that the judge's account was correct" but whether her Honour's findings as to the sequence of events were not reasonably open. And, plainly, they were open. Contrary to the Court of Criminal Appeal's reasoning, the judge's analysis of the pertinent evidence did not overlook that Allen did not look out of his window until after the first two shots had been fired. Allen's observation of the appellant going into the house after the third shot had been fired (which, on Mrs Filippou's version of events, would have been the second occasion that the appellant went back into the house) was of the appellant walking calmly inside, then coming out again, and then crouching over the deceased and using his arms in a pulling motion. As the judge rightly observed, that version of events was starkly inconsistent with Mrs Filippou's recollection that the appellant had run or walked back in quickly on the second occasion in an agitated state of mind and then driven away in his utility. Thus, for the reasons which her Honour gave, she was entitled to prefer Allen's version of events over Mrs Filippou's variously stated recollections.

57 As to the second of the judge's supposed errors, of giving determinative force to the appellant's post-offence statements, McClellan CJ at CL did not say whether he perceived that to be an error of fact or of law. Logically, however, it could not have been either unless the trial judge meant that, regardless of other evidence, the post-offence statements were determinative of the appellant's state of mind at the time of the killings.

58 Read in isolation, that is a possible interpretation of what the judge said at [103] of her reasons. But, read in the context of the whole of the analysis which began at [94] and continued to [103], it is plain that her Honour treated the post-offence statements as no more than the final, and in that sense determinative, piece of evidence which, when added to the other evidence of the appellant's actions (shooting the deceased, walking calmly into the house, and exiting and placing the gun in Sam Willis's hand), sustained the inference beyond reasonable doubt that the appellant had not lost self-control at the time of the shooting.

59 Finally, with respect to the judge's observations concerning the effect of s 23(2)(b), it was conceded before this Court that, if it were open for the judge to conclude that the appellant had not lost self-control at the time of the shooting, any error which her Honour might have made in thereafter analysing the ordinary person test for the purposes of s 23(2)(b) could not have been of any consequence. That concession was rightly made. Once any possibility of the appellant losing self-control at the time of the shooting was excluded beyond reasonable doubt, the defence of provocation became untenable.

Conclusion on conviction

60 Other than the alleged error in relation to s 23(2)(b), which was of no consequence given the judge's finding that the appellant had not lost self-control at the time of the killings, the judge did not make any errors contended for by the appellant. The appeal against conviction to the Court of Criminal Appeal should have been dismissed. For the same reason, the ground of appeal to this Court concerning conviction fails.

Appeal against sentence

61 Section 21A of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) ("the Sentencing Act") provides that, in determining the appropriate sentence for an offender, the court must take into account any of the aggravating factors listed in s 21A(2) which are known to the court, any of the mitigating factors listed in s 21A(3) which are known to the court and any other objective or subjective factor that affects the relative seriousness of the offence. One of the aggravating factors, listed at s 21A(2)(c), is that the offence involved the actual or threatened use of a weapon and one of the mitigating factors, listed at s 21A(3)(c), is that the offender was provoked by the victim.

62 Here, the fact that the appellant killed the deceased with a gun was known to the court and, therefore, was an aggravating factor which the sentencing judge was required to take into account in accordance with s 21A(2)(c). Equally, because the partial defence of provocation was excluded beyond reasonable doubt, it could not be said that the appellant had been so much provoked as to lose self-control. Nevertheless, the deceased's conduct could be prayed in aid as a mitigating factor under s 21(3)(c). Despite the exclusion of provocation as a partial defence, the question of whether the appellant or the deceased brought the weapon to the scene was a factor which bore on the relative seriousness of the offences.

63 If it had been known to the court that the appellant brought the weapon to the scene, the judge would have been entitled to conclude that the appellant went to the scene at least contemplating the use of the weapon and, therefore, that his moral culpability was significantly greater than if the offences had been wholly spontaneous. In contrast, if it had been known to the court that the deceased brought the weapon to the scene, the judge would have been entitled to regard that as a factor which was favourable to the appellant, in the sense that it would have made it more likely that the first and possibly second shots were a spontaneous reaction to the situation with which the appellant was confronted.

64 But, as was established in *R v Olbrich*[27], a sentencing judge may not take facts into account in a way that is adverse to an offender unless those facts have been established beyond reasonable doubt and, contrastingly, the offender bears the burden of proving on the balance of probabilities matters which are submitted in his or her favour. Where, therefore, the prosecution fails to prove a fact or circumstance which is adverse to the offender, but the judge is not satisfied on the balance of probabilities of an alternative version more favourable to the offender, the judge is not bound to sentence the offender on a basis which accepts the accuracy of the more favourable version. If the prosecution fails to prove beyond reasonable doubt a possible circumstance of the offending which, if proved, would be adverse to the offender but the offender fails to establish on the balance of probabilities a competing possibility which, if proved, would be favourable to the offender, the judge may proceed to sentence the offender on the basis that neither of the competing possibilities is known. As was stated by the majority in *Olbrich*[28]:

> "[W]e reject the contention that a judge who is not satisfied of some matter urged in a plea on behalf of an offender must, nevertheless, sentence the offender on a basis that accepts the accuracy of that contention unless the prosecution proves the contrary beyond reasonable doubt. The incongruities that would result if this submission were accepted are well illustrated by the present case. The respondent swore that he was a courier but the judge disbelieved him. To require the judge to sentence the respondent on the basis that he *was* a courier is incongruous."

65 Despite these principles, the argument advanced on the appeal to this Court (which was not advanced before the Court of Criminal Appeal) was that, although the judge found it to be likely that the appellant had brought the gun to the scene of the killing, that fact was not proved beyond reasonable doubt and, therefore, her Honour was bound to sentence the appellant on the basis that it was one or other of the deceased who had brought the gun to the scene of the killing. Counsel for the appellant relied on the following example, cited in *Cheung v The Queen*, of circumstances in which, although a version of events favourable to an accused has not been established on the balance of probabilities, it is one of only

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27 (1999) 199 CLR 270 at 281 [25]-[27] per Gleeson CJ, Gaudron, Hayne and Callinan JJ; [1999] HCA 54, adopting *R v Storey* [1998] 1 VR 359 at 369 per Winneke P, Brooking and Hayne JJA and Southwell AJA.

28 (1999) 199 CLR 270 at 280-281 [24] (emphasis in original).

two logical possibilities, of which the other is unfavourable to the accused and has not been proved beyond reasonable doubt, and therefore the judge may be bound to sentence on the basis of the version of events favourable to the accused[29]:

> "A simple example may be provided by a charge of murder against someone who has caused the death of an elderly, ill, person by administering a lethal injection. It may be the prosecution case that the accused was motivated by a desire to inherit the victim's estate. Another possible view of the facts may be that the accused was motivated by a desire to put an end to the victim's suffering. Both possibilities may be consistent with guilt. A jury would probably be instructed that, although the prosecution alleged a motive of greed, it was not essential that such motive be established. Some jurors may accept that there was such a motive. Others may not. The sentencing judge may need to address the question of motive. If the judge were unable to be satisfied beyond reasonable doubt as to the motive of personal gain, then the accused would be sentenced upon the more favourable basis. But that would be because the sentencing judge could not be satisfied of the prosecution's allegation. It would not be because the judge was obliged to sentence upon the view of the facts most favourable to the offender that was consistent with the jury's verdict."

66 The argument should be rejected. As *Olbrich* made clear, where an offender asserts a fact favourable to the offender and the Crown contests it or the court is not otherwise disposed to accept it[30], it is incumbent on the offender to establish the fact on the balance of probabilities. Properly understood, there is no inconsistency between those requirements and what was said in *Cheung*.

67 The example in *Cheung* was directed to circumstances which might arise following trial by jury, where, because of the relative inscrutability of a jury verdict, it is impossible to say whether the jury has convicted the offender on the more or less favourable version of events, of which either would have sustained the conviction. In such circumstances, because of the necessity for a judge to sentence in accordance with the jury's findings of fact, the judge might take the view that he or she should assume that the jury has convicted the offender on the

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29 (2001) 209 CLR 1 at 11 [9] per Gleeson CJ, Gummow and Hayne JJ; [2001] HCA 67.

30 (1999) 199 CLR 270 at 281 [25].

basis of the more favourable version of events, and thus sentence the offender on that basis.

68 So to say, however, does not mean that the judge would necessarily be bound to sentence on that basis. If, in the example cited in *Cheung*, it did not appear whether the jury decided the case on the basis that the homicide was a mercy killing as opposed to being motivated by greed, the offender failed to establish on the balance of probabilities that it was a mercy killing and the judge felt otherwise unable to accept that it was a mercy killing, the judge would be entitled to proceed on the basis that it was not known what motivated the killing. *A fortiori* in a case of trial before judge alone because, in such a case, the judge is the jury and knows the basis on which he or she has found the accused to be guilty. In such circumstances, even if the judge is not satisfied beyond reasonable doubt of the version of events which is unfavourable to the accused, the judge well knows whether the favourable version of events is or is not established on the balance of probabilities. If it is not, the judge is entitled to sentence accordingly.

69 Counsel for the appellant contended that so to proceed would be in effect to sentence an accused on the basis of an aggravating circumstance which the Crown had not proved beyond reasonable doubt. But that contention wrongly equates the absence of proof beyond reasonable doubt of an aggravating circumstance with proof of a mitigating circumstance on the balance of probabilities. In a case like this, the choice is not between absence of proof beyond reasonable doubt of an aggravating circumstance and proof on the balance of probabilities of a mitigating circumstance, but rather between absence of proof beyond reasonable doubt of an aggravating circumstance and absence of proof on the balance of probabilities of a mitigating circumstance.

70 Certainly, a sentencing judge must do his or her best to find the facts which determine the nature and gravity of the offending, including the facts which inform the offender's moral culpability. Even so, it is sometimes not possible for the judge to ascertain everything which is relevant, especially where an offender chooses not to offer any evidence on the plea. Where that occurs, the judge must proceed on the basis of what is proved and leave to one side what is not proved to the requisite standard. As was stated in *Weininger v The Queen*[31]:

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31 (2003) 212 CLR 629 at 636-637 [20] per Gleeson CJ, McHugh, Gummow and Hayne JJ; [2003] HCA 14 (footnote omitted).

> "The sentencing judge may not be able to make findings about all matters that may go to describe [the] circumstances. In particular, an offender may urge a particular view of the nature and circumstances of the offence, favourable to the offender. The sentencing judge may be unpersuaded that the view urged is, more probably than not, an accurate view of the circumstances. In such a case, it is not correct that the judge is bound to sentence the offender on that favourable basis, unless the prosecution proves the contrary beyond reasonable doubt. Accordingly, in the particular facts of *Olbrich*, where the offender asserted that he was no more than a courier of the drugs, but the sentencing judge disbelieved him, it was neither necessary nor appropriate to sentence him on the basis that he was a courier."

That accords with the requirements in s 21A(1) of the Sentencing Act that facts be taken into account only in so far as they are "known to the court" according to the principles of proof laid down in *Olbrich*.

71 It is different in some other common law jurisdictions. In England, the prosecution must, generally speaking, rebut mitigating facts asserted by an offender unless they are inconsistent with the jury's verdict, wholly implausible, manifestly false or extraneous in the sense of being unrelated to the facts of the offence or the offender's part in it or wholly outside the prosecution's knowledge and ability to refute[32]. In Canada, s 724(3) of the *Criminal Code*[33] requires that a disputed fact be proved by the party asserting it on the balance of probabilities and that the prosecution must establish aggravating facts beyond reasonable doubt, but in the event of uncertainty as to the basis of the jury's verdict, the accused is entitled to the benefit of the doubt[34]. In New Zealand, where the position is modelled on ss 723 and 724 of the Canadian *Criminal Code*, the prosecution must negate beyond reasonable doubt any disputed mitigating fact raised by the defence that is not wholly implausible or manifestly false unless it is not related to the nature of the offence or the offender's part in the offence, in which case it falls to the offender to prove it on the balance of probabilities[35].

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32 *Broderick* (1993) 15 Cr App R (S) 476 at 479.

33 RSC 1985, c C-46.

34 *R v Craig* (2003) 177 CCC (3d) 321 at 327-328 [25]-[26] per Laskin JA for Laskin, MacPherson and Gillese JJA.

35 *Sentencing Act* 2002 (NZ), s 24.

72 Arguably, there is something to be said for those approaches. Obviously, it is undesirable that a judge should be required to sentence an offender without knowing all of the relevant facts and circumstances of the offending. Hence, at one level, the idea of making an assumption in favour of an offender in relation to facts and circumstances which are unknown to the court has a deal to commend it. But, as against that, the requirements of proof laid down in *Olbrich* are informed by principles of fairness which would not be served by making assumptions that could lead to an offender being sentenced on too favourable a basis. It is preferable to recognise that as a consequence of the rules of proof which those principles inform there will be some few cases, of which this is one, where an offender must be sentenced without the judge having a complete knowledge of what is relevant. For the reasons explained in *Weininger*, justice is likely to be better served if that approach is adhered to[36].

Conclusion

73 It follows that the appeal should be dismissed.

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36 (2003) 212 CLR 629 at 637-638 [23]-[24].

74 GAGELER J. I agree with the joint reasons for judgment that the appeal to this Court from the Court of Criminal Appeal must be dismissed. I also agree with the reasoning set out in the joint reasons for judgment as to why the appeal must be dismissed in so far as it relates to sentence.

75 What follows are my own reasons as to why the appeal must be dismissed in so far as it relates to conviction. In stating those reasons, I adopt without repetition the statement of facts and the explanation of the reasoning of the primary judge set out in the joint reasons for judgment.

76 The sole ground of the appeal to this Court in so far as it relates to conviction is that the Court of Criminal Appeal erred in failing to apply s 6(1) of the *Criminal Appeal Act* 1912 (NSW) in its determination of an appeal against a conviction that was entered following a trial by judge alone, which was governed by s 133 of the *Criminal Procedure Act* 1986 (NSW).

77 Section 133 of the *Criminal Procedure Act* provides:

> "(1) A Judge who tries criminal proceedings without a jury may make any finding that could have been made by a jury on the question of the guilt of the accused person. Any such finding has, for all purposes, the same effect as a verdict of a jury.
>
> (2) A judgment by a Judge in any such case must include the principles of law applied by the Judge and the findings of fact on which the Judge relied.
>
> (3) If any Act or law requires a warning to be given to a jury in any such case, the Judge is to take the warning into account in dealing with the matter."

78 Section 6(1) of the *Criminal Appeal Act* is a common form criminal appeal provision. I explained my understanding of each of the three limbs of a common form criminal appeal provision, and of its proviso, in *Baini v The Queen*[37]. My statement that "it has always been understood that it is for the respondent and not the appellant to establish to the satisfaction of the court of criminal appeal that the case is within the proviso"[38] has since been overtaken by the holding in *Lindsay v The Queen*[39]. Otherwise, I see no reason to revise what I

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37 (2012) 246 CLR 469 at 485-491 [46]-[56]; [2012] HCA 59.

38 (2012) 246 CLR 469 at 487 [49].

39 (2015) 89 ALJR 518 at 529 [46]-[48], 532 [63]-[67]; 319 ALR 207 at 219-220, 223-224; [2015] HCA 16.

said in *Baini*. It might be necessary to revisit the requirements of the proviso as stated in *Weiss v The Queen*[40] in light of subsequent developments[41], but this is not the occasion to do it. The Court of Criminal Appeal did not reach the proviso here.

79 What is necessary is to relate each of the three limbs, which I explained in *Baini* in the context of an appeal against conviction following a jury trial, to an appeal against a conviction that has been entered following a trial by judge alone governed by s 133 of the *Criminal Procedure Act*.

80 Section 133 of the *Criminal Procedure Act* draws a distinction between the ultimate finding which the trial judge makes on the question of guilt and intermediate findings of fact which the trial judge makes in the process of reasoning from the evidence to that ultimate finding. Section 133(2) relevantly requires the trial judge to include in his or her reasons for judgment all intermediate findings of fact on which he or she actually relied, together with the principles of law which he or she applied, in arriving at an ultimate finding of guilt. Section 133(1) relevantly requires the trial judge's ultimate finding of guilt to be treated as if it were a guilty verdict of a jury for the purpose of s 6(1) of the *Criminal Appeal Act*.

81 The requirement of s 133(1) that the Court of Criminal Appeal treat the trial judge's ultimate finding of guilt as if it were a guilty verdict of a jury means that, subject to the proviso, the Court of Criminal Appeal must allow an appeal against conviction if it is of the opinion that the trial judge's ultimate finding of guilt should be set aside on a ground falling within any of the three limbs of s 6(1). If the trial judge has complied with s 133(2), the Court of Criminal Appeal considering those grounds will have the benefit of reasons for judgment of the trial judge which will explain the trial judge's intermediate findings of fact in a way which links those intermediate findings to the evidence and to the principles of law which the trial judge applied[42]. If the trial judge has not complied with s 133(2), that non-compliance will itself amount to a wrong decision on a question of law within the second limb in the same way as non-compliance by the judge with s 133(3) would amount to a wrong decision on a question of law[43].

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40 (2005) 224 CLR 300; [2005] HCA 81.

41 Cf *Reeves v The Queen* (2013) 88 ALJR 215 at 226 [64]-[66]; 304 ALR 251 at 264-265; [2013] HCA 57; *Lindsay v The Queen* (2015) 89 ALJR 518 at 535-536 [85]-[86]; 319 ALR 207 at 229.

42 *Fleming v The Queen* (1998) 197 CLR 250 at 262-263 [28]; [1998] HCA 68.

43 *Fleming v The Queen* (1998) 197 CLR 250 at 263-264 [31]-[33].

82 Under the first limb, which refers to the ground that a verdict "is unreasonable, or cannot be supported, having regard to the evidence", a trial judge's ultimate finding of guilt must be set aside on the same principle as a jury's verdict of guilt must be set aside. That is to occur if the Court of Criminal Appeal concludes on the whole of the evidence that it was not open to the relevant tribunal of fact, whether it be a jury or a trial judge, to be satisfied beyond reasonable doubt that the accused was guilty. The Court of Criminal Appeal will conclude that it was not open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty if its own review of the evidence leads it to have a reasonable doubt that the accused was guilty, unless that tribunal's advantage in seeing and hearing the evidence is capable of resolving that doubt[44].

83 Irrespective of whether it is applied in an appeal against conviction following a jury trial or in an appeal against conviction following a trial by judge alone, the question under the first limb is always whether the ultimate finding of guilt was one which was open to the tribunal of fact on the whole of the evidence. In some cases of an appeal against a conviction following a trial by judge alone, consideration of the first limb will require the Court of Criminal Appeal to review for itself the totality of the evidence so as to form its own assessment of whether or not it was open to the trial judge to be satisfied beyond reasonable doubt that the accused was guilty without any regard to the reasons for judgment of the trial judge given in compliance with s 133(2). In a case where the argument in the appeal against conviction is that there are particular reasons why it was not open to the trial judge to be satisfied beyond reasonable doubt that the accused was guilty, it may be open to the Court of Criminal Appeal to discharge its appellate function under the first limb by reviewing the evidence and forming its own independent assessment of that evidence to the extent necessary to engage with that argument while adopting, without need for independent assessment, other intermediate findings of fact of the trial judge about which no complaint is made in the appeal. But having adopted the intermediate findings of fact of the trial judge about which no complaint is made, and having arrived at its own conclusion on the evidence to the extent necessary to engage with the particular argument, the question for the Court of Criminal Appeal in such a case will remain whether or not the Court of Criminal Appeal has a reasonable doubt about the ultimate finding of guilt which cannot be resolved by taking into account the trial judge's advantage in seeing and hearing the evidence.

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44 *M v The Queen* (1994) 181 CLR 487 at 493-494; [1994] HCA 63; *SKA v The Queen* (2011) 243 CLR 400 at 405-406 [11]-[14]; [2011] HCA 13; *Fitzgerald v The Queen* (2014) 88 ALJR 779 at 781 [5]; 311 ALR 158 at 160; [2014] HCA 28.

84 Under the second limb, which refers to the ground "that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law", the trial judge's finding of guilt must be set aside (subject to the proviso) if (amongst other possibilities) the Court of Criminal Appeal concludes that the reasons for judgment of the trial judge disclose any error of law which was material to the way in which the trial judge arrived at the ultimate finding of guilt.

85 Under the third limb, which is engaged where "on any other ground whatsoever there was a miscarriage of justice", the trial judge's finding of guilt must be set aside (subject again to the proviso) if the Court of Criminal Appeal concludes, for some reason not already covered by the first or the second limb, that there was a miscarriage of justice. There is no reason in principle why an error of fact in arriving at an intermediate finding of fact, which is disclosed by the reasons for judgment of the trial judge, should not be characterised as a miscarriage of justice if that error might reasonably have affected the ultimate finding of guilt.

86 The observations in *Simic v The Queen*[45], directed to review under the third limb of a "misstatement of an important matter of fact"[46] which a trial judge made in a direction to a jury, can in my view be applied to review of an error of fact made by the trial judge in a trial by judge alone. Having made the point that the onus rests on an appellant to show that a misstatement of fact amounted to a miscarriage of justice, the unanimous judgment in *Simic* continued[47]:

> "Of course minor inaccuracies and omissions will not be likely to make it possible that the verdict was affected. Bare and remote possibilities may be disregarded, but if it is considered reasonably possible that the misstatement may have affected the verdict and if the jury might reasonably have acquitted the appellant if the misstatement had not been made, there will have been a miscarriage of justice, and a substantial one. In considering a question of this kind, the appellate court must have regard to the gravity of the misstatement as well as to the strength of the case against the appellant."

87 Where, in an appeal against conviction following a trial by judge alone, it is argued that the reasons for judgment of the trial judge disclose an error of fact in the way in which the trial judge reasoned from the evidence to make an intermediate finding of fact on which the trial judge relied in arriving at the

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45 (1980) 144 CLR 319; [1980] HCA 25.

46 (1980) 144 CLR 319 at 326.

47 (1980) 144 CLR 319 at 332.

ultimate finding of guilt, I cannot see how the appellant can discharge the onus of establishing a miscarriage of justice under the third limb unless the appellant can persuade the Court of Criminal Appeal of two things. The first is that the trial judge did make that error of fact in arriving at an intermediate finding of fact. The second is that, having regard to the gravity of the error of fact and the strength of the case against the appellant, it was reasonably possible that the trial judge might not have arrived at the ultimate finding of guilt if the trial judge had not made that error.

88 Applied to a mere error of fact on the part of the trial judge, as distinct from some error going to the trial process, it is therefore difficult to see how reliance by an appellant on the third limb can add anything to reliance on the first limb. Unless the Court of Criminal Appeal on its own review of the evidence can be persuaded that the error of fact gave rise to a reasonable doubt about the ultimate finding of guilt, which doubt cannot be resolved by the trial judge's advantage in seeing and hearing the evidence, neither limb will avail the appellant.

89 This is, in my view, consistent with the explanation given by Hunt CJ at CL in *Kurtic*[48] of the role of the Court of Criminal Appeal when considering the application of the first limb in an appeal against conviction following a trial by judge alone. The explanation was quoted without disapproval in *Fleming v The Queen*[49]. In *Kurtic*, Hunt CJ at CL said[50]:

> "In such a case, it is the duty of [the Court of Criminal Appeal] – whether the appeal is from a jury trial or a judge alone trial – to make its own independent assessment of both the sufficiency and the quality of the evidence, in order to see whether the jury (or judge trying the case alone) *ought* to have a reasonable doubt or whether [the] Court itself experiences such a doubt or is persuaded that there is a significant possibility that an innocent person has been convicted. ... As the finding of a judge in such a trial is to be given the same effect as a verdict of a jury for all purposes, error may be demonstrated if there is no evidence to support a particular finding, or if the evidence is all one way, or if the judge has misdirected himself or herself leading to a miscarriage of justice."

If there were no evidence to support a particular finding, or if the evidence were all one way, the case would be one of a wrong decision on a question of law so as

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48 (1996) 85 A Crim R 57.

49 (1998) 197 CLR 250 at 256-257 [14], see also at 262 [26].

50 (1996) 85 A Crim R 57 at 60 (emphasis in original).

to also fall within the second limb[51]. If the trial judge were shown merely to have got some intermediate fact wrong, the first limb would be engaged only if it were also shown that the wrong finding of fact deprived the appellant of a reasonable possibility of acquittal. For the reasons I have given, the third limb could then in my view equally be seen to be engaged.

90 The grounds of appeal to the Court of Criminal Appeal in the present case were elaborately drawn. They were in the following terms:

> "1. Her Honour's verdict is unreasonable and cannot be supported having regard to the evidence, in particular, but not exclusively, upon the following bases:
>
> (a) that, in finding that there was no reasonable possibility that the [appellant] had lost self-control, within the meaning of section 23 of the Crimes Act 1900, at the time that he fired the shots causing death, Her Honour
>
> (i) misdirected herself as to the inferences to be drawn from statements made by the [appellant] while in custody;
>
> (ii) drew erroneous inferences from those statements; and
>
> (iii) failed to consider alternative inferences fairly available on the evidence.
>
> (b) that, in finding as to the circumstances of the shooting and the explanation for the gap in time between the second and third shots, Her Honour
>
> (i) failed to direct herself as to the need to consider other inferences; and
>
> (ii) failed to consider other evidence [sic] fairly available on the evidence.
>
> (c) that, in dealing with the 'ordinary person' test within the meaning of section 23 of the Crimes Act 1900, Her Honour
>
> (i) misdirected herself as to the question of proportionality;

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51 *M v The Queen* (1994) 181 CLR 487 at 492.

(ii) determined the reasonable person issue on the basis of that misdirection; and

(iii) applied the wrong burden of proof.

2. Her Honour made the following errors of law:

(a) misdirected herself as to the inferences available to be drawn from statements made by the [appellant] while in custody;

(b) failed to direct herself, with respect to such statements, of the need to be satisfied that the inference proposed to be drawn is the only rational available inference;

(c) failed, in that regard, to consider available alternate inferences;

(d) with respect to the movements of the [appellant] at the time of the shooting and the sequence of shots, failed to direct herself as to the need to be satisfied that the inference proposed to be drawn is the only rational available inference;

(e) misdirected herself as to the role of 'proportionality' in the issue of provocation;

(f) in considering the issue of the 'reasonable person' within the meaning of section 23 of the Crimes Act 1900, Her Honour applied the wrong onus of proof.

3. In all the circumstances the conviction of the [appellant] for murder amounts to a miscarriage of justice."

91 The three enumerated grounds were plainly cast to invoke each of the three limbs of s 6(1) of the *Criminal Appeal Act*.

92 Although the words "but not exclusively" in the introduction to the first enumerated ground might be seen to have introduced an element of equivocation, the factual basis for the ground was that the primary judge reached her ultimate finding of guilt through a process of reasoning which involved three particularised errors in the making of intermediate findings of fact. Cast as it was to invoke the first limb of s 6(1), the gravamen of the ground could only have been that, correcting for those errors, it was not open to the primary judge to be satisfied beyond reasonable doubt that the appellant was guilty of murder.

93 Although somewhat obscured by the detail of its drafting, the burden of the second ground appears to have been to recast the same three particularised errors as wrong decisions by the primary judge on questions of law.

94 The third ground then recast those same errors as having given rise to a miscarriage of justice. The third ground appears not to have been independently pressed in the course of the hearing before the Court of Criminal Appeal. For reasons I have already explained, I am unable to see how the third ground could materially add to the first.

95 The first two of the particularised errors both related to the primary judge's conclusion in relation to s 23(2)(a) of the *Crimes Act* 1900 (NSW), which she expressed in terms that there was "no reasonable possibility" that a loss of self-control caused the appellant to fire the fatal shots[52]. The primary judge explained that it followed from that conclusion that the defence of provocation could not succeed and that the appellant was to be convicted of murder. The primary judge explained that she went on to deal with s 23(2)(b) only for the sake of completeness[53]. What the primary judge went on to say about s 23(2)(b) obviously played no part in the finding of guilt which she had already reached. Her further conclusion that the requirements of s 23(2)(b) were not satisfied was stated on the express assumption that, contrary to her earlier finding, the appellant had in fact lost self-control[54]. The contingent nature of that conclusion meant that any error of fact or of law which the primary judge might have made in arriving at it was at most conditionally relevant to her ultimate finding that the appellant was guilty of murder.

96 The structure of the primary judge's reasons for judgment had the following implication for the third of the particularised errors on which the appellant sought to rely in the Court of Criminal Appeal, which related only to the way in which the primary judge interpreted and applied s 23(2)(b). Unless the appellant was able to persuade the Court of Criminal Appeal that the conviction for murder would have otherwise been required to be set aside by reference to either or both of the first two particularised errors, which related to the way in which the primary judge interpreted and applied s 23(2)(a), there was no reason for the Court of Criminal Appeal to consider the third particularised error at all. The consequence for the appeal to this Court is that, whatever criticism might be levelled at the way in which the Court of Criminal Appeal dealt with the third particularised error, that criticism is beside the point if there was nothing wrong with the way the Court of Criminal Appeal dismissed the

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52 *R v Filippou* [2011] NSWSC 1379 at [104].

53 *R v Filippou* [2011] NSWSC 1379 at [105].

54 *R v Filippou* [2011] NSWSC 1379 at [105], [113].

grounds of appeal in so far as those grounds related to the first two particularised errors.

97 In my opinion, there was no error of methodology in the way in which the Court of Criminal Appeal determined the appeal in relation to the first two particularised errors. Looking carefully to the reasons for judgment of the primary judge and evaluating the evidence for itself in so far as it related to the intermediate findings of fact criticised by the appellant, the Court of Criminal Appeal accepted the appellant's factual contention that both errors had occurred. It first found that the primary judge erred as to the inference to be drawn from the gap in time between the second and third shots[55]. It then went on to find that the primary judge erred as to the inference to be drawn from the statements made by the appellant while in custody[56].

98 Although not abundantly clear, I think that it is to be inferred from the reasoning of the Court of Criminal Appeal that it identified those two errors as being concerned with whether the inferences drawn by the primary judge should have been drawn on the totality of the relevant evidence, as distinct from being concerned with whether those inferences were capable of being drawn on that evidence. That is to say, the Court of Criminal Appeal appears to have seen both errors as errors of fact and not as errors of law. That was enough to dispose of the second ground of appeal, which relied on characterising the errors as wrong decisions by the primary judge on questions of law.

99 What is quite explicit in the reasoning of the Court of Criminal Appeal is that, notwithstanding the errors it identified in the primary judge's intermediate fact-finding, the Court was satisfied on its own review of the evidence in so far as it was controversial in the appeal that the evidence supported the primary judge's ultimate finding of guilt. The conclusion, as expressed by McClellan CJ at CL, with whom Fullerton and S Campbell JJ agreed, was that "having considered the evidence" he was "satisfied that the Crown discharged the onus that it carried to the criminal standard"[57]. That conclusion was, in my view, expressed in terms which reflected the correct legal approach to the first limb of s 6(1). It was sufficient to dispose of the first ground of appeal, which relied on characterising the errors as having contributed to a finding of fact which was not open on the whole of the evidence. It was also sufficient to dispose of the third ground of appeal if and to the extent that ground might have remained in play.

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55 *Filippou v The Queen* [2013] NSWCCA 92 at [51]-[52], [75]-[84].

56 *Filippou v The Queen* [2013] NSWCCA 92 at [85]-[87], [102]-[104].

57 *Filippou v The Queen* [2013] NSWCCA 92 at [105].