

# HIGH COURT OF AUSTRALIA

GAGELER, KEANE, GORDON, STEWARD AND GLEESON JJ

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PETER REX DANSIE

APPELLANT

AND

THE QUEEN

RESPONDENT

*Dansie v The Queen*  
[2022] HCA 25  
*Date of Hearing: 15 June 2022*  
*Date of Judgment: 10 August 2022*  
A4/2022

## ORDER

1. *Appeal allowed.*
2. *Set aside the order made by the Full Court of the Supreme Court of South Australia on 2 November 2020.*
3. *Remit the matter to the Court of Appeal of the Supreme Court of South Australia for rehearing.*

On appeal from the Supreme Court of South Australia

### Representation

T A Game SC with K G Handshin QC and K J Edwards for the appellant (instructed by Nathan White Lawyers)

M G Hinton QC with D Petraccaro SC for the respondent (instructed by Office of the Director of Public Prosecutions (SA))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## **CATCHWORDS**

### **Dansie v The Queen**

Criminal practice – Appeal – Where appellant tried and convicted of murder of wife by judge alone in Supreme Court of South Australia – Where appellant appealed conviction on ground that verdict unreasonable or could not be supported having regard to whole of evidence – Whether Full Court of Supreme Court of South Australia sitting as Court of Criminal Appeal misapplied test in *M v The Queen* (1994) 181 CLR 487 – Function of court of criminal appeal determining appeal against conviction on unreasonableness ground following trial by judge alone.

Words and phrases – "advantage in seeing and hearing the evidence", "circumstantial case", "function of a court of criminal appeal", "independent assessment of the evidence", "inference of guilt", "jury questions", "pathway to proof of guilt", "unreasonable verdict", "unreasonableness ground".

*Criminal Procedure Act 1921* (SA), s 158(1)(a).



1 GAGELER, KEANE, GORDON, STEWARD AND GLEESON JJ. The  
appellant was tried in the Supreme Court of South Australia for the murder of his  
wife. At his election, the trial proceeded without a jury. The trial judge, Lovell J,  
found him guilty of murder<sup>1</sup>. As a consequence, he was convicted and sentenced  
to life imprisonment with a non-parole period of 25 years.

2 The appellant appealed against his conviction to the Full Court of the  
Supreme Court of South Australia, sitting as the Court of Criminal Appeal. The  
grounds of appeal included that the verdict could not be supported having regard  
to the evidence. The Court of Criminal Appeal, by majority, rejected that ground  
and dismissed the appeal<sup>2</sup>. The majority was comprised of Parker and Livesey JJ.  
Nicholson J dissented.

3 By special leave, the appellant now appeals to this Court from the decision  
of the Court of Criminal Appeal. The sole ground of the appeal to this Court is that  
the majority in the Court of Criminal Appeal erred in how it approached the ground  
that the verdict was unreasonable or could not be supported having regard to the  
evidence. The appellant argues that the majority misinterpreted and misapplied the  
approach required to be taken to that ground in accordance with *M v The Queen*<sup>3</sup>  
as applied in *Filippou v The Queen*<sup>4</sup>.

4 The appellant's argument is well founded. The appeal must be allowed. The  
order of the Court of Criminal Appeal dismissing the appeal against the conviction  
must be set aside, and the matter must be remitted for rehearing.

### **The requisite approach**

5 The *Juries Act 1927* (SA) makes provision for a criminal trial before the  
Supreme Court to proceed without a jury at the election of the accused<sup>5</sup>, in which  
event "the judge may make any decision that could have been made by a jury and

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1 *R v Dansie* [2019] SASC 215.

2 *Dansie v The Queen* [2020] SASCF 103.

3 (1994) 181 CLR 487.

4 (2015) 256 CLR 47.

5 Section 7(1).

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such a decision will, for all purposes, have the same effect as a verdict of a jury"<sup>6</sup>. The "decision" of the judge thereby given the same effect as the verdict of a jury is the ultimate finding of the judge that the accused is guilty or not guilty of the offence tried.

6 Not spelt out in any South Australian statute<sup>7</sup>, but implicit in the conferral of the trial function on a judge alone, is that "a judge returning a verdict following a trial without a jury is obliged to give reasons sufficient to identify the principles of law applied by the judge and the main factual findings on which the judge relied"<sup>8</sup>. Justifications for recognising that obligation of the trial judge to give reasons include the inability of the Court of Criminal Appeal, in the absence of reasons from the trial judge, to undertake the assessment required of it by s 158(1)(b) and (c) of the *Criminal Procedure Act 1921* (SA) when determining on an appeal against conviction "whether the judge has correctly applied the relevant rules of law ... to correct a verdict affected by a wrong decision on any question of law"<sup>9</sup> and "whether there has been a miscarriage of justice as a result of the manner in which the conclusion of guilt was reached"<sup>10</sup>.

7 Nevertheless, as the decision under appeal illustrates, undue attention to the factual findings on which the trial judge relied in returning a verdict of guilty can distract the Court of Criminal Appeal from the proper performance of the assessment required of it by s 158(1)(a) of the *Criminal Procedure Act* when determining on an appeal against conviction whether the verdict "should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence". That is because the function to be performed by the Court of Criminal Appeal when determining an appeal on the unreasonable verdict ground is not to determine whether there was error in the factual findings on which the trial judge relied in ultimately finding the accused guilty of the offence tried. The function to be performed by the Court of Criminal Appeal is to determine for itself

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6 Section 7(4).

7 Compare s 133 of the *Criminal Procedure Act 1986* (NSW).

8 *Douglass v The Queen* (2012) 86 ALJR 1086 at 1089 [8]; 290 ALR 699 at 702. See also *DL v The Queen* (2018) 266 CLR 1 at 26 [80], 45 [132].

9 *R v Keyte* (2000) 78 SASR 68 at 76 [38] (cleaned up). See also *Douglass v The Queen* (2012) 86 ALJR 1086 at 1090 [14]; 209 ALR 699 at 703.

10 *R v Keyte* (2000) 78 SASR 68 at 76 [38].

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whether the evidence was sufficient in nature and quality to eliminate any reasonable doubt that the accused is guilty of that offence.

8 That understanding of the function to be performed by a court of criminal appeal in determining an appeal on the unreasonable verdict ground of a common form criminal appeal statute was settled by this Court in *M*. The reasoning in the joint judgment in that case establishes that "the question which the court must ask itself" when performing that function is "whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty"<sup>11</sup>, that question being "one of fact which the court must decide by making its own independent assessment of the evidence"<sup>12</sup>.

9 The joint judgment in *M* made clear that "in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses"<sup>13</sup>. The joint judgment equally made clear how those considerations are to impact on the court's independent assessment of the evidence. That was the point of the carefully crafted passage in which their Honours stated<sup>14</sup>:

"It is only where a jury'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 [on the unreasonable verdict ground]. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. 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 a jury, 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. In doing so, the court is not substituting trial by a court

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11 (1994) 181 CLR 487 at 493. See also at 508.

12 (1994) 181 CLR 487 at 492.

13 (1994) 181 CLR 487 at 493.

14 (1994) 181 CLR 487 at 494-495 (footnotes omitted).

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of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."

10 That passage was immediately followed in the joint judgment in *M* with an explanation that "[a]lthough the propositions stated in the four preceding sentences have been variously expressed in judgments of members of the Court in previous cases, we have put aside those differences in expression in order to provide authoritative guidance to courts of criminal appeal by stating the propositions in the form in which they are set out above"<sup>15</sup>. As a consequence of *M*, prior formulations of principle to be found in numerous decisions on the unreasonable verdict ground which preceded *M* must be approached with caution. Indeed, some prior formulations are irreconcilable with the key passages in *M* and must be understood to have been overtaken by *M*.

11 One example is to be found in the judgment of Menzies J in *Plomp v The Queen*<sup>16</sup>, on which reliance was placed by the majority in the decision under appeal. Menzies J identified the question arising on the unreasonable verdict ground in *Plomp* as being "not whether this Court [standing in the shoes of the court of criminal appeal] thinks that the only rational hypothesis open upon the evidence was that the applicant [for special leave to appeal] drowned his wife" but "rather whether this Court thinks that upon the evidence it was open to the jury to be satisfied beyond reasonable doubt that the death of the deceased was not accidental but was the work of the applicant"<sup>17</sup>. Menzies J went on to answer the question so framed by agreeing with the court of criminal appeal below "that there was sufficient evidence upon which the jury, fulfilling their duty not to convict unless the inference of guilt was the only inference which they considered that they could rationally draw from the circumstances, could have convicted the applicant"<sup>18</sup>. The deference to the inference of guilt inherent in the verdict returned by the jury reflected in those statements does not accord with the approach to the exercise of the appellate function set out in the joint judgment in *M*.

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<sup>15</sup> (1994) 181 CLR 487 at 495.

<sup>16</sup> (1963) 110 CLR 234.

<sup>17</sup> (1963) 110 CLR 234 at 247.

<sup>18</sup> (1963) 110 CLR 234 at 252. Contrast Dixon CJ at 244.



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12 The authoritative guidance to be gained from the joint judgment in *M* has not diminished with time. *M* was unanimously affirmed in *MFA v The Queen*<sup>19</sup> and again in *SKA v The Queen*<sup>20</sup>, where it was spelt out that the "test set down in *M*" required a court of criminal appeal to undertake an "independent assessment of the evidence, both as to its sufficiency and its quality"<sup>21</sup> and that consideration of what might be labelled "jury" questions does not lie beyond the scope of that assessment<sup>22</sup>. *Coughlan v The Queen*<sup>23</sup> illustrates that an independent assessment of the evidence in a case in which the evidence at trial was substantially circumstantial requires the court of criminal appeal itself "to weigh all the circumstances in deciding whether it was open to the jury to draw the ultimate inference that guilt has been proved to the criminal standard" and in so doing to form its own judgment as to whether "the prosecution has failed to exclude an inference consistent with innocence that was reasonably open".

13 *Pell v The Queen*<sup>24</sup> makes clear that nothing said in *Libke v The Queen*<sup>25</sup>, to which repeated reference was made in the decision under appeal, should be understood to have departed from *M*. *Pell* itself was a case in which discrepancies and inadequacies in the evidence ought to have led a court of criminal appeal to experience a reasonable doubt which was incapable of being resolved by the advantages, which the jury was acknowledged to have had, in assessing the credibility and reliability of testimony available to the court on appeal only in the form of audio-visual recordings<sup>26</sup>.

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19 (2002) 213 CLR 606 at 614-615 [25], 623-624 [55]-[59].

20 (2011) 243 CLR 400 at 405-406 [11]-[14], 412 [37], 422 [80].

21 (2011) 243 CLR 400 at 406 [14], quoting *Morris v The Queen* (1987) 163 CLR 454 at 473.

22 (2011) 243 CLR 400 at 407 [18], 409 [23].

23 (2020) 267 CLR 654 at 674-675 [55].

24 (2020) 268 CLR 123 at 146-147 [43]-[45].

25 (2007) 230 CLR 559.

26 See (2020) 268 CLR 123 at 144-145 [37]-[39].

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14 *R v Baden-Clay*<sup>27</sup>, on which reliance was also placed by the majority in the decision under appeal, was a case in which the jury had the distinct advantage of having seen and heard the evidence of the accused. The observation in *Baden-Clay* to the effect that setting aside a conviction on the unreasonableness ground "is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial"<sup>28</sup> was made with reference to *M* and must be understood in that context.

15 *Filippou* confirmed that the function of a court of criminal appeal determining an appeal on the unreasonable verdict ground is to be performed under the guidance of *M* in exactly the same way where the trial has been by judge alone as where the trial has been by jury<sup>29</sup>. In each case, the court must conduct an independent assessment of the whole of the evidence to ask itself the question of fact whether it thinks it was open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty. In each case, the court "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 [assessment] 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"<sup>30</sup>.

16 Where the trial has been by judge alone, the reasons of the trial judge must be approached by the court of criminal appeal performing that function with circumspection lest the findings of fact made by the trial judge divert the court from undertaking the requisite independent assessment of the evidence. The court will be required to consider the arguments of the parties in the appeal and will be entitled to treat findings of fact made by the trial judge about which no issue is taken in the appeal as an accurate reflection of so much of the evidence as bore on those findings. But the question for the court in every case will remain whether the court's assessment of the totality of the evidence leaves the court with a reasonable doubt as to guilt which the court cannot assuage by having regard to such

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27 (2016) 258 CLR 308.

28 (2016) 258 CLR 308 at 329 [65].

29 (2015) 256 CLR 47 at 54 [12], 75 [82].

30 (2015) 256 CLR 47 at 75 [82], citing *M v The Queen* (1994) 181 CLR 487 at 493-494 and *SKA v The Queen* (2011) 243 CLR 400 at 405-406 [11]-[14]. See also (2015) 256 CLR 47 at 53-54 [12].

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advantage as the trial judge can be taken to have had by reason of having seen and heard the evidence at trial.

- 17        The advantage that a trial judge might have had over a court of criminal appeal by reason of having seen and heard the evidence at trial will vary from case to case depending on the form in which the evidence was adduced at the trial and depending on the nature of the issues that arose at the trial. In a case such as the present, where the prosecution case was circumstantial, where the evidence adduced by the prosecution was largely uncontested and for the most part in the form of transcripts of unchallenged testimony, and where the appellant did not give evidence, the advantage must be slight.

**The trial**

- 18        The offence for which the appellant was tried, and of which he was found guilty by Lovell J, was that he murdered his wife on 16 April 2017.

- 19        The appellant and his wife had then been married for more than 40 years. His wife had long suffered from physical and cognitive disabilities as a result of a stroke in 1995 which had resulted by 2015 in her becoming wheelchair dependent and living permanently in a nursing home. During the afternoon of 16 April 2017, the appellant had taken her by car from the nursing home to the South Parklands in Adelaide. There he had positioned her wheelchair near a pond that was just over a metre deep.

- 20        The appellant called emergency services on his mobile telephone shortly before 6.30pm. Ambulance officers and police officers arrived minutes later. The body of the appellant's wife was seen by them to be lying face down in the pond. The wheelchair was also in the pond. The appellant was wet to his waist. There were no witnesses to what had occurred at the pond before the officers arrived.

- 21        The prosecution case was that the appellant had deliberately pushed the wheelchair into the pond with the intention of drowning his wife. The defence case was that she had drowned as a result of the wheelchair accidentally entering the water whilst the appellant was attempting to manoeuvre it away from the pond.

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22 The issue at trial was succinctly framed by Lovell J in terms of "whether the prosecution could prove that [the appellant's wife] was murdered thus excluding accidental drowning as a reasonable possibility"<sup>31</sup>.

23 The prosecution evidence was largely uncontested. For the most part, the evidence was in documentary form. Much of it was adduced in the form of transcripts of unchallenged testimony given by witnesses who had been called at an earlier trial which had been aborted. There was extensive evidence concerning the relationship between the appellant and his wife over many years, their financial circumstances, and the appellant's role in the management of his wife's care. There was evidence concerning his wife's physical and mental condition in the months leading up to her death, concerning her post-mortem examination (which attributed the cause of her death to drowning), and concerning the topography of the pond and its immediate vicinity. There was detailed evidence of the appellant's movements on the day of his wife's death, of his call to emergency services, of his appearance and behaviour when ambulance officers and police officers arrived at the pond, of a number of subsequent interviews which he had with police, of the results of a search conducted by police of his car, which had been parked on South Terrace, of the results of a search later conducted by police of his house involving the seizure of his computer, and of telephone conversations which he later had which were intercepted and recorded.

24 Lovell J noted that there was little dispute as to the primary facts established by the evidence. The critical question at the trial was what inferences could be drawn from those primary facts<sup>32</sup>.

25 Lovell J drew from the primary facts pertaining to the appellant's interviews with police a number of inferences adverse to the appellant's credit<sup>33</sup> to which his Honour then had regard in assessing the account which the appellant had given to police of what had occurred at the pond to be implausible<sup>34</sup>. In making that assessment, his Honour inferred from the appellant's behaviour during interviews with police that his relationship with his wife had changed since she had been living permanently in the nursing home, such that he had come to see her as "taking

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31 [2019] SASC 215 at [3].

32 [2019] SASC 215 at [25], [369].

33 [2019] SASC 215 at [370]-[374].

34 [2019] SASC 215 at [375]-[402].

up his time" and no longer had a caring relationship with her<sup>35</sup>. His Honour found that the appellant's behaviour during the call to emergency services was "demonstrative of a lack of any genuine intention or desire to help" her<sup>36</sup>.

26 Lovell J found support for the prosecution case in the primary facts revealed by the police searches that the appellant had left certain items (his watch and wallet and a change of clothes) in his car before his wife's death and had the month before used his computer to conduct internet searches about funerals<sup>37</sup>. His Honour also found that the prosecution had established that the appellant had two distinct but interconnected motives for killing his wife<sup>38</sup>. One was a financial motive, being to reduce costs associated with her care, to obtain insurance and pension benefits and to become the sole proprietor of property which he held with his wife as joint tenants. The other was a "relationship" motive, being that he considered his wife a burden and wanted to free himself to pursue a relationship with a woman whom he had previously met on the internet and with whom he was in subsequent telephone contact.

27 Having drawn those inferences and made those findings, his Honour concluded that the only rational inference available on the whole of the evidence was that the appellant deliberately pushed the wheelchair into the pond with intent to kill his wife and that the prosecution had therefore proved beyond a reasonable doubt that the appellant had committed the offence of murder<sup>39</sup>.

### **The appeal against conviction**

28 The Court of Criminal Appeal unanimously rejected grounds of the appellant's appeal against his conviction which the Court interpreted as raising specific challenges to the adequacy and contents of the reasoning of Lovell J within the scope of s 158(1)(b) and (c) of the *Criminal Procedure Act*<sup>40</sup>. The Court of Criminal Appeal divided as to the outcome of the appeal on the unreasonableness

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35 [2019] SASC 215 at [393]-[397].

36 [2019] SASC 215 at [400].

37 [2019] SASC 215 at [403]-[408].

38 [2019] SASC 215 at [409]-[421].

39 [2019] SASC 215 at [422]-[425].

40 [2020] SASCFC 103 at [4], [17], [165]-[289], [408], [507].

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ground, which in terms challenged his Honour's finding of guilt as unable to be supported having regard to the evidence, under s 158(1)(a) of the *Criminal Procedure Act*.

29           The issue in the appeal to this Court is whether the approach to the unreasonableness ground adopted by the majority was in conformity with the test in *M*.

30           Turning to examine the approach to the unreasonableness ground adopted by the majority, it is sufficient to look to the reasons for judgment of Livesey J, with whose conclusion and mode of analysis Parker J specifically agreed<sup>41</sup>.

31           The respondent fairly emphasises that the reasons of Livesey J commence with a quotation from *Filippou* that restates the test in *M* in terms applicable to the application of the unreasonableness ground to an appeal against conviction following a trial by a judge alone<sup>42</sup>; state a conclusion in language appropriate to express the result of an orthodox application of that test ("[h]aving reviewed the evidence before [Lovell J], I do not doubt the guilt of the appellant"<sup>43</sup>); end with a recitation of principle consistent with that test<sup>44</sup>; and contain numerous references to authority which are not incorrect. The respondent also emphasises that his Honour provided an extensive account of what he understood to be the primary facts established by the evidence as found by Lovell J<sup>45</sup> before going on to express his specific agreement with each of the inferences drawn by Lovell J adverse to the credit of the appellant as well as with each of the inferences drawn by Lovell J from the appellant's behaviour and as to the appellant's motive<sup>46</sup>.

32           From beginning to end, however, his Honour's reasons frame the inquiry in which he saw himself as engaged as one directed to the detection of error in the

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41   [2020] SASCFC 103 at [387], [390].

42   [2020] SASCFC 103 at [413].

43   [2020] SASCFC 103 at [416].

44   [2020] SASCFC 103 at [506].

45   [2020] SASCFC 103 at [473].

46   [2020] SASCFC 103 at [474]-[488].

decision of the trial judge<sup>47</sup>, who was to be recognised as having the primary function of determining guilt or innocence through the drawing of inferences from the evidence<sup>48</sup>. The reasons reveal that his Honour understood that the inquiry needed to be undertaken with deference or restraint in order to give respect to the primacy of that function<sup>49</sup>.

33 Perhaps because of the similarity of the facts (each appellant having been convicted on circumstantial evidence of the murder of his wife by drowning), his Honour placed particular reliance on the reasoning in *Plomp*<sup>50</sup>, and in so doing equated the question before the Court of Criminal Appeal on the unreasonable verdict ground with the question formulated and answered by Menzies J in that case<sup>51</sup>. His Honour relied on the terms in which that question was formulated and answered by Menzies J for the proposition that "[i]n a case depending on circumstantial evidence, it is not for this Court to determine whether the only rational inference to be drawn from the circumstances was guilt beyond reasonable doubt"<sup>52</sup> and to reinforce the proposition that "responsibility for determining guilt beyond reasonable doubt, or innocence, rests with the trier of fact"<sup>53</sup>.

34 Consistently with that understanding of the question to be answered by the Court of Criminal Appeal, his Honour proceeded on the view that "[i]t is neither necessary nor appropriate for this Court to dwell upon what might be regarded as arguments for the defence about inferences"<sup>54</sup>. "Whether the inferences tending towards guilt should or should not be drawn, and the weight to be given to each, as well as the whole of the evidence", his Honour said, "were primarily and

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47 [2020] SASCFC 103 at [422], [441], [495].

48 [2020] SASCFC 103 at [415], [419], [422], [426], [427], [441], [456], [472], [495].

49 [2020] SASCFC 103 at [435], [441].

50 [2020] SASCFC 103 at [451]-[456].

51 [2020] SASCFC 103 at [456], quoting *Plomp v The Queen* (1963) 110 CLR 234 at 247.

52 [2020] SASCFC 103 at [422], citing *Plomp v The Queen* (1963) 110 CLR 234 at 247. See also [2020] SASCFC 103 at [505].

53 [2020] SASCFC 103 at [456].

54 [2020] SASCFC 103 at [495].

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classically matters for the trier of fact" so that "even if a piece of evidence is capable of being viewed in a manner consistent with innocence, that will not require that this Court intervene unless, for example, it has been erroneously addressed by the trial judge (so as to lead to error), or its role as part of the whole necessarily raises scope for reasonable doubt"<sup>55</sup>.

35 Although his Honour expressed views additional to those of Lovell J as to some inferences available to be drawn from the evidence<sup>56</sup>, he did so only for the purpose of demonstrating that "there was a clear pathway to proof of guilt beyond reasonable doubt"<sup>57</sup>. What was missing from this analysis, because it had been eschewed as raising "jury" questions<sup>58</sup>, was any independent consideration of whether the evidence left open reasonable hypotheses consistent with innocence. Conversely, Nicholson J assessed this issue in detail as part of his independent assessment of the whole of the circumstantial case<sup>59</sup>. His Honour correctly and expressly recognised that this assessment required him to form a view on questions as to the inferences to be drawn notwithstanding that they might be characterised as "jury" questions<sup>60</sup>.

36 For reasons already explained, the approach adopted by Menzies J in *Plomp* cannot be reconciled with the approach formulated by the joint judgment in *M*. The propositions which Livesey J derived from *Plomp*, and the view of the limited nature of his own fact-finding role on which he proceeded in accordance with those propositions, led him to fail to undertake his own independent assessment of the evidence in the manner and to the extent necessary to apply the test in *M*.

37 For the Court of Criminal Appeal to be satisfied that the finding of guilt arrived at by Lovell J could be supported having regard to the evidence required more of each of its members than mere satisfaction as to lack of error in each of the findings of fact made by Lovell J in arriving at that finding of guilt. It required

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55 [2020] SASCF 103 at [496].

56 eg [2020] SASCF 103 at [491].

57 [2020] SASCF 103 at [493]. See also at [429].

58 [2020] SASCF 103 at [494].

59 [2020] SASCF 103 at [360], [379].

60 [2020] SASCF 103 at [380].



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more than mere satisfaction as to the existence of a pathway to proof of guilt beyond reasonable doubt<sup>61</sup>.

38       What each member of the Court of Criminal Appeal needed to do in order to apply the test in *M* in the circumstances of this case was to ask whether he was independently satisfied as a result of his own assessment of the whole of the evidence adduced at the trial that the only rational inference available on that evidence was that the appellant deliberately pushed the wheelchair into the pond with intent to drown his wife and, if not, whether the satisfaction arrived at by Lovell J could be attributed to some identified advantage which Lovell J had over him in the assessment of the evidence. That is what Nicholson J did in dissent. That is what the majority did not do.

### Orders

39       The application of the test in *M* to the evidence adduced at the trial is quintessentially a matter for the Court of Criminal Appeal. Neither party asks this Court to undertake that task. The appellant proposes and the respondent does not dispute that the orders appropriate to be made in the event of this Court finding that the majority in the Court of Criminal Appeal misapplied the test are orders which result in the matter being remitted for rehearing.

40       The appeal is therefore to be allowed. The order of the Court of Criminal Appeal is to be set aside. The matter is to be remitted for rehearing.

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61    *Coughlan v The Queen* (2020) 267 CLR 654 at 674-675 [55].