# HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

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THE KING APPELLANT

AND

ZT RESPONDENT

*The King v ZT*
[2025] HCA 9
*Date of Hearing: 15 November 2024*
*Date of Judgment: 2 April 2025*
S38/2024

**ORDER**

1. *Appeal allowed.*

2. *Set aside the orders made by the Court of Criminal Appeal of the Supreme Court of New South Wales on 29 September 2023.*

3. *Remit the matter to the Court of Criminal Appeal of the Supreme Court of New South Wales for determination according to law.*

On appeal from the Supreme Court of New South Wales

**Representation**

S C Dowling SC with E S Jones and J Styles for the appellant (instructed by Solicitor for Public Prosecutions (NSW))

D G Dalton SC with P R Coady SC for the respondent (instructed by Nyman Gibson Miralis)

## CATCHWORDS

## The King v ZT

Criminal practice – Appeal – Recorded evidence – Where principal evidence implicating respondent was alleged admissions in intercepted telephone calls and police interviews – Where recordings of principal evidence played to jury and tendered as exhibits – Where respondent appealed conviction on ground that verdict unreasonable or could not be supported having regard to the evidence – Where majority of Court of Criminal Appeal of New South Wales ("CCA") held reasonable doubt as to respondent's guilt – Where majority of CCA did not view or listen to recordings of principal evidence – Whether CCA erred in concluding reasonable doubt not capable of being explained away by jury's natural advantages in having listened to principal evidence without listening to recordings – Whether in failing to listen to or view principal evidence CCA failed to discharge appellate function described in *M v The Queen* (1994) 181 CLR 487.

Words and phrases – "admissions", "advantage in seeing and hearing the evidence", "ascertaining the effect of the evidence visually or by sound", "beyond reasonable doubt", "circumstantial case", "consciousness of guilt reasoning", "credibility and reliability", "demeanour", "electronic exhibits", "extended joint criminal enterprise", "function of the appellate court", "generalised inference", "indispensable intermediate fact", "intercepted telephone calls", "joint criminal enterprise", "natural advantages of the jury", "procedural fairness", "real forensic purpose", "recorded evidence", "recorded witness testimony", "relevant or significant advantage", "tone of voice", "transcript", "unreasonable or could not be supported having regard to the evidence", "video recorded evidence".

*Criminal Appeal Act 1912* (NSW), s 6.

1 GAGELER CJ, GLEESON, JAGOT AND BEECH-JONES JJ. After a trial in the Supreme Court of New South Wales, the respondent, ZT,[1] was convicted of the murder of the deceased, William Chaplin, and sentenced to a substantial term of imprisonment.[2] The respondent applied to the New South Wales Court of Criminal Appeal for leave to appeal against his conviction.[3] A majority of the Court of Criminal Appeal (Kirk JA and Sweeney J, Fagan J dissenting) upheld the respondent's contention that his conviction was unreasonable, or could not be supported, having regard to the evidence.[4] The Court of Criminal Appeal: granted the respondent leave to appeal against his conviction; allowed the appeal; quashed the respondent's conviction; and in its place entered a judgment of acquittal.[5]

2 The principal evidence implicating the respondent in the murder of the deceased was intercepted telephone calls between the respondent and members of his family and associates, and the respondent's interviews with the police. Recordings of those telephone calls and police interviews were tendered as exhibits. Transcripts of those telephone calls and police interviews were provided to the jury not as evidence but as a guide to the evidence. The prosecution contended that in those conversations and interviews the respondent admitted his involvement in the killing of the deceased by the principal offender, PW. In the Court of Criminal Appeal, Kirk JA (with whom Sweeney J relevantly agreed) concluded that the alleged admissions were not "sufficiently reliable" (ie, plausible or true[6]) to demonstrate that the respondent was guilty of murder.[7]

3 The issue of principle raised by this appeal is whether, in circumstances where the majority of the Court of Criminal Appeal did not listen to any part of the intercepted telephone calls or watch any part of the police interviews, their

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**1** As the proceedings relate to ZT, who was a child when the offence the subject of the appeal was committed, his name must not be published: *Children (Criminal Proceedings) Act 1987* (NSW), s 15A(1)(a).

**2** *R v ZT* [2022] NSWSC 511 at [4], [185].

**3** *Criminal Appeal Act 1912* (NSW), s 5(1)(b).

**4** *Criminal Appeal Act*, s 6(1).

**5** *ZT v The King* [2023] NSWCCA 241 at [132], [267].

**6** *R v Swaffield* (1998) 192 CLR 159 at 197 [78], cited in *Em v The Queen* (2007) 232 CLR 67 at 93 [73]; see also *Burns v The Queen* (1975) 132 CLR 258 at 261.

**7** *ZT v The King* [2023] NSWCCA 241 at [121].

Honours erred in concluding that the reasonable doubt they held as to the respondent's guilt was not capable of "being explained away by the natural advantages"[8] held by the jury in having listened to the telephone calls and watched the interviews.[9]

4 For reasons to be explained, in circumstances where the doubt the majority held about the respondent's guilt concerned the plausibility of the respondent's admissions in the intercepted telephone calls and recorded police interviews and there was the real potential for the jury to have enjoyed advantages in listening to and watching that material, the majority erred in concluding that the jury did not have any advantages without listening to a sufficient part of the intercepted telephone calls and watching a sufficient part of the police interviews to identify whether there were any such advantages.

5 As the grant of special leave to appeal did not extend to having this Court determine whether the respondent's conviction was unreasonable, the orders of the Court of Criminal Appeal will be set aside and the matter will be remitted to that Court for redetermination in accordance with these reasons.

## "Full allowance" for the jury's advantage

6 Similar statutory provisions have been enacted in each Australian jurisdiction empowering the appellate court to allow an appeal against a conviction following a criminal trial if the court believes that the verdict of the jury should be set aside on the ground that it is unreasonable or could not be supported having regard to the evidence.[10] In *M v The Queen* this Court authoritatively stated the function to be performed by the appellate court in applying those provisions.[11] That

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**8** *ZT v The King* [2023] NSWCCA 241 at [131].

**9** *ZT v The King* [2023] NSWCCA 241 at [124], [131], [266].

**10** *Criminal Appeal Act*, s 6(1); *Criminal Code* (Qld), s 668E(1); *Criminal Procedure Act 1921* (SA), s 158(1)(a); *Criminal Code* (Tas), s 402(1); *Supreme Court Act 1933* (ACT), s 37O(2)(a)(i); *Federal Court of Australia Act 1976* (Cth), s 30AJ(1)(a); *Criminal Code* (NT), s 411(1); *Criminal Appeals Act 2004* (WA), s 30(3)(a); *Criminal Procedure Act 2009* (Vic), s 276(1)(a).

**11** (1994) 181 CLR 487 at 493.

statement has been repeatedly endorsed in this Court since then,[12] including when considering an appeal from a conviction on indictment by a judge sitting alone.[13]

7 *M v The Queen* requires the appellate court, in deciding whether a conviction is unreasonable, or could not be supported, having regard to the evidence, to ask itself "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".[14] In answering that question, the appellate 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".[15] To the contrary, the appellate court is obliged to pay "full regard to those considerations"[16] as follows:[17]

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. 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. 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*

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**12** See, eg, *Jones v The Queen* (1997) 191 CLR 439 at 452; *MFA v The Queen* (2002) 213 CLR 606 at 614 [25], 623-624 [55]-[59]; *R v Hillier* (2007) 228 CLR 618 at 630 [20]; *R v Nguyen* (2010) 242 CLR 491 at 499-500 [33]; *SKA v The Queen* (2011) 243 CLR 400 at 405-406 [11]-[14], 422 [80]; *R v Baden-Clay* (2016) 258 CLR 308 at 329-330 [65]-[66]; *Pell v The Queen* (2020) 268 CLR 123 at 145 [38]; *Dansie v The Queen* (2022) 274 CLR 651 at 659-660 [12]-[15].

**13** *Filippou v The Queen* (2015) 256 CLR 47 at 54 [12], 75 [82], cited in *Dansie v The Queen* (2022) 274 CLR 651 at 660 [15]; see also at 661 [16].

**14** (1994) 181 CLR 487 at 493.

**15** *M v The Queen* (1994) 181 CLR 487 at 493.

**16** *M v The Queen* (1994) 181 CLR 487 at 493.

**17** *M v The Queen* (1994) 181 CLR 487 at 494-495.

> *advantages enjoyed by the 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 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." (emphasis added, footnotes omitted)

8 Three aspects of *M v The Queen* should be noted.

9 First, although another passage of *M v The Queen* refers to the advantage the jury has in "seeing and hearing the witnesses",[18] the passage above confirms that the jury's advantages are not confined to witness testimony but may extend to all of the evidence adduced at trial.[19] The advantages spoken of are the advantages the jury had, including by the application of the jurors' collective wisdom and experience of ordinary affairs,[20] from seeing and hearing the evidence as it unfolds when evaluating factual matters, especially witness credibility.[21] The existence, nature and scope of those advantages will vary from case to case depending on the form in which the evidence was adduced and the nature of the issues that arose at the trial.[22] For example, in *Dansie v The Queen* the advantage possessed by the trial judge as arbiter of fact was assessed as "slight" because the prosecution case was circumstantial, consisting mostly of transcripts of unchallenged testimony, and the appellant did not give evidence.[23]

10 Second, in applying *M v The Queen* the appellate court is required to give "full allowance" to the advantages of the jury in seeing and hearing the evidence when assessing whether those advantages are capable of resolving any doubt the appellate court holds about the appellant's guilt.[24] Whether the evidence is adduced in the form of witness testimony or recorded conversations or recorded interviews,

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**18** (1994) 181 CLR 487 at 495.

**19** (1994) 181 CLR 487 at 494-495.

**20** *Doney v The Queen* (1990) 171 CLR 207 at 214.

**21** See, eg, *AK v Western Australia* (2008) 232 CLR 438 at 472 [94].

**22** *Dansie v The Queen* (2022) 274 CLR 651 at 661 [17].

**23** (2022) 274 CLR 651 at 661 [17].

**24** (1994) 181 CLR 487 at 494.

the advantages may extend to an assessment of matters such as: the tone and manner in which the witness or participants spoke or conducted themselves; their maturity; their emotional state and intelligence; and how they interact with others, including family members, associates, strangers or officials (eg, police officers). The jury can consider those matters possessing a breadth of understanding of how different people speak and behave in such circumstances that a judge may not have.[25]

11 Third, *M v The Queen* requires that the appellate court undertake an "independent assessment" of the sufficiency and quality[26] of the "whole of the evidence".[27] However, that assessment is undertaken in a context in which an appeal is as much of an adversarial process as the criminal trial from which the appeal is brought[28] and in which it is for the parties to identify the evidence that the appellate court must review and assess and the features of that evidence that support their respective cases on appeal. The appellate court does not determine the grounds of appeal by simply reconsidering the parties' respective cases at the trial.

12 In some appellate courts, the practice in criminal appeals is for the entirety of the trial court's file to be provided to the appellate court. Even so, given the adversarial nature of an appeal and the appellate court's function in hearing an appeal, it is for the parties to place all evidentiary material and submissions before the appellate court which they consider relevant to the discharge of the court's function[29] and it is for the parties to identify and address the aspects of the evidence adduced at the trial that warrant the conclusion that the verdict was either unreasonable or not.

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**25** See *AK v Western Australia* (2008) 232 CLR 438 at 472 [94]. See also *Doney v The Queen* (1990) 171 CLR 207 at 214 and comments of Sir Frederick Jordan in relation to civil juries noted in Evatt, "The Jury System in Australia" (1936) 10 *Australian Law Journal (Supplement)* 49 at 72.

**26** *SKA v The Queen* (2011) 243 CLR 400 at 406 [14].

**27** (1994) 181 CLR 487 at 493.

**28** See *Whitehorn v The Queen* (1983) 152 CLR 657 at 682; *R v Baden-Clay* (2016) 258 CLR 308 at 324 [48].

**29** *Pell v The Queen* (2020) 268 CLR 123 at 137 [10].

**Recorded witness testimony and electronic exhibits**

13 During oral argument before the Court of Criminal Appeal in this matter, senior counsel for the respondent invited the Court to listen to the recordings of the intercepted telephone calls, albeit without identifying how that could have assisted the Court in undertaking its function. One member of the majority, Kirk JA, expressed the view that to do so would be contrary to *Pell v The Queen*.[30] Regardless of the reason, the majority did not undertake that task.

14 Since *M v The Queen* was decided, various legislative developments have meant that the testimony of a witness or witnesses in some criminal trials is recorded and replayed to the jury. In *SKA v The Queen* French CJ, Gummow and Kiefel JJ rejected the suggestion that the mere availability of a video-recording of a witness's evidence at trial meant that to fulfil the function explained in *M v The Queen* it was necessary for the appellate court to view the recording.[31] Instead, their Honours observed that it will usually be sufficient for the appellate court to review the transcript of the testimony and consider the language used in a witness's evidence, unless there is "something in the [particular] circumstances of the case which necessitates"[32] the appellate court watching the recording. This may include something about the witness's evidence which can only be discerned visually or by sound, in which case the parties should identify the need for the appellate court to adopt such an approach.[33] French CJ, Gummow and Kiefel JJ also identified a concern which may arise in the appellate court viewing the recording of a particular witness's evidence. Their Honours noted that an imbalance may be created whereby the evidence of the other witnesses would not be viewed, even if such evidence had been recorded.[34]

15 In *Pell v The Queen* this Court described the "assessment of the weight to be accorded to a witness' evidence by reference to the *manner* in which it was given by the witness" as a matter within "the province of the jury" (emphasis added).[35] The outcome of that case illustrates that an appellate court can set aside

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**30** (2020) 268 CLR 123.

**31** (2011) 243 CLR 400 at 410-412 [27]-[35].

**32** *SKA v The Queen* (2011) 243 CLR 400 at 411 [31].

**33** *SKA v The Queen* (2011) 243 CLR 400 at 411 [31].

**34** *SKA v The Queen* (2011) 243 CLR 400 at 410 [28]-[29].

**35** (2020) 268 CLR 123 at 145 [38].

a verdict based on concerns about the reliability of a witness's evidence assumed to be accepted as credible by the jury.[36] This Court rejected the suggestion that the mere existence of such recordings made it "appropriate" for the appellate court to watch the recording of the witness's testimony,[37] observing that:[38]

> "There may be cases where there is something particular in the video-recording that is apt to affect an appellate court's assessment of the evidence, which can only be discerned visually or by sound. In such cases, there will be a *real forensic purpose* to the appellate court's examination of the video-recording. But such cases will be *exceptional*, and ordinarily it would be expected that the forensic purpose that justifies such a course will be adopted by the parties, rather than upon independent scrutiny by the members of the court.
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> ... [T]he assessment of the credibility of a witness by the jury *on the basis of what it has seen and heard of a witness* in the context of the trial is within the province of the jury as representative of the community. Just as the performance by a court of criminal appeal of its functions does not involve the substitution of trial by an appeal court for trial by a jury, so, generally speaking, the appeal court should not seek to duplicate the function of the jury in its assessment of the credibility of the witnesses where that *assessment is dependent upon the evaluation of the witnesses in the witness-box*. The jury performs its function on the basis that its decisions are made unanimously, and after the benefit of sharing the jurors' subjective assessments of the witnesses. Judges of courts of criminal appeal do not perform the same function in the same way as the jury, or with the same advantages that the jury brings to the discharge of its function." (emphasis added, footnotes omitted)

16 The context of this statement is that the majority of the Court of Appeal of the Supreme Court of Victoria had reviewed a video-recording of the complainant's testimony in the trial the subject of the appeal to draw its own conclusions as to the credibility of that testimony by reference to the witness's demeanour. Neither this passage from *Pell v The Queen* nor anything else stated in that case or any other decision of this Court precludes the appellate court from reviewing the recorded testimony of a witness if there is a "real forensic purpose"

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**36** *Pell v The Queen* (2020) 268 CLR 123 at 164-165 [119], 166 [127]-[128].

**37** *Pell v The Queen* (2020) 268 CLR 123 at 144 [35]-[36].

**38** *Pell v The Queen* (2020) 268 CLR 123 at 144-145 [36]-[37].

for doing so, such as ascertaining some aspect of the evidence that "can only be discerned visually or by sound". As recognised in *Pell v The Queen*, however, such cases will be "exceptional" because the transcript will usually be sufficient to convey the effect of the evidence. But, undertaking an assessment of the credibility of a witness's evidence by reference to the *manner* in which that evidence was given is not a "real forensic purpose" for the appellate court to review recorded witness testimony. As *Pell v The Queen* emphasised, such assessments are the constitutional function of the jury – they are not to be undertaken by the appellate court.

17 As explained, one aspect of the appellate court's function is to afford "full allowance" for the jury's advantages, which requires the appellate court to identify the existence, nature and scope of those advantages. In most (if not all) cases, an appellate court can identify the existence, nature and scope of the jury's advantages in seeing and hearing the witnesses give testimony in the formal context of a criminal trial without having to view recordings of their testimony. The matters that inform that assessment, such as: the length of time the witness gave evidence for; the age and personal characteristics of the witness; and the subject matter of their evidence, are obvious and will be apparent from the transcript. In assessing the advantages held by the jury, those matters can be considered by an appellate court comprised of judges familiar with the formality and atmosphere of a criminal trial in which witness testimony is delivered. Nevertheless, depending on the circumstances, the discharge of this aspect of the appellate function may warrant the appellate court viewing the recorded testimony of a witness.

18 In principle there is no relevant difference between the circumstances in which the appellate court may view recorded witness testimony and in which it may listen to and watch exhibits containing recorded statements. Nothing in *Pell v The Queen* prevents or impedes the appellate court watching and listening to exhibits containing recorded statements, such as recordings of police interviews and intercepted telephone calls, provided there is a "real forensic purpose" for doing so. Such a purpose can include ascertaining the effect of the evidence visually or by sound, or assessing the existence, nature and scope of the advantages possessed by the jury in seeing and hearing that evidence (before giving "full allowance" to those advantages, if found to exist). What such a purpose does not include is the appellate court making its own assessment of the credibility of anything stated in those police interviews or intercepted telephone calls by reference to the manner in which those statements were made. Such assessments are (again) the province of the jury.

19 Whether listening to or watching witness testimony or exhibits containing recorded statements enables some aspect of the evidence to be discerned that is not discernible from the transcript, or assists the appellate court to understand the

extent, nature and scope of the jury's advantages not apparent from the transcript, may not be ascertainable until after the event. Accordingly, an appellate court does not err merely because it takes those steps only to conclude that there was no "real forensic purpose" for doing so. Whether error is established depends on the *use* the appellate court makes of listening to and watching such material.

20 Given the adversarial nature of an appeal, and as with recorded witness testimony, the appellate court can expect the parties to identify whether there is a real forensic purpose for the appellate court to listen to or watch a recording of a police interview or telephone call, or part of such a recording. If no purpose is identified, or the purpose identified is not persuasive in the circumstances, then it is unlikely that in the ordinary course it could be concluded that the appellate court had any obligation to undertake that task.

21 The difficulty in this case is that the principal evidence implicating the respondent in the commission of the offence was the respondent's admissions in the intercepted telephone calls and police interviews. In respect of that evidence, there was an obvious potential for the jury to possess advantages in assessing the credibility of the respondent's admissions, including by comparing admissions made in the different contexts of the intercepted telephone calls and police interviews. Having reasoned to a reasonable doubt about the credibility and plausibility of those admissions, it was not open to the majority of the Court of Criminal Appeal to *both* decline to listen to any part of the intercepted telephone calls or watch any part of the recorded police interviews and decide that the jury did not have any advantages capable of resolving its doubt. Given the nature of the doubt held, the majority did not have a rational basis to conclude that the jury had no advantages capable of resolving its doubt without having seen and heard sufficient of the evidence to identify the existence, nature and scope of the jury's advantage(s), if any.

**The prosecution case**

22 During the period of the indictment, namely 30 March 2010 to 31 May 2010, the respondent, who was then 16 years of age, was living with PW, who was then 39 years of age, and his wife, SW. According to SW's evidence, PW and the respondent were very good friends, although admissions made by the respondent suggested that he was sexually abused by PW and that he was fearful of him. The deceased also lived with PW and SW and had become friends with PW.

23 It was not in dispute at the trial that, on one evening during the indictment period, PW killed the deceased in an area known as the "round yard", which was part of a paddock behind PW and SW's home. It was also not in dispute that, on

the following day, PW and the respondent placed the deceased's body in a shallow grave in the round yard and, with the assistance of SW, burnt the deceased's remains. In his opening to the jury at trial, senior counsel for the respondent conceded that his client was present when PW killed the deceased.

24 The prosecution contended that the respondent was guilty of murder on two alternative bases. The first and primary basis was that the respondent participated in a joint criminal enterprise with PW to kill or inflict grievous bodily harm upon the deceased (and that PW did so pursuant to that agreement). The second basis was that the respondent participated in an extended joint criminal enterprise arising out of an alleged agreement between himself and PW to assault the deceased and that, in carrying out that agreement, the respondent knew of or foresaw the possibility that PW would kill the deceased intending to kill or at least inflict grievous bodily harm upon him.

25 In opening, the Crown Prosecutor described the prosecution case as being that PW "elicited the aid of his friend the [respondent] to help him kill [the deceased]", while acknowledging that the prosecution "does not know precisely when or how [the deceased] was murdered". In the Court of Criminal Appeal, Fagan J correctly observed that to prove the respondent's participation in the alleged joint criminal enterprise it was sufficient if the prosecution proved beyond reasonable doubt that, "by some means spoken or unspoken", the respondent and PW reached an agreement or understanding that together they would kill the deceased and that, while their agreement or understanding remained on foot, they carried out such acts as were necessary to kill the deceased pursuant to and in accordance with their agreement.[39] However, it was not necessary for the jury to be satisfied beyond reasonable doubt that particular words were spoken, or actions taken, to signify the respondent's agreement in the enterprise of murder or demonstrate his participation in carrying out that enterprise.[40] That said, the respondent was not charged with being an accessory after the fact to the murder of the deceased and, of themselves, his actions in participating in the disposal of the deceased's body were not sufficient to render him culpable for murder.

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**39** *ZT v The King* [2023] NSWCCA 241 at [136].

**40** *ZT v The King* [2023] NSWCCA 241 at [136].

*The prosecution's evidence*

26 The respondent did not give evidence at the trial. Leaving aside the intercepted telephone calls and police interviews, the prosecution adduced four main kinds of evidence.

27 First, the prosecution adduced evidence of admissions made by PW to various witnesses, including SW.

28 Second, the prosecution adduced evidence of statements made by the respondent to a friend, SW's mother, and PW's first wife.

29 Third, the prosecution adduced evidence from SW concerning the disposal of the deceased's body.

30 Fourth, the prosecution adduced forensic evidence concerning the deceased's skeletal remains, which were discovered by police in 2019 buried in the round yard.

31 It is not necessary to describe the effect of this evidence in any detail other than to note that of itself it did not necessarily implicate the respondent in the killing of the deceased as opposed to the disposal of his remains.

*The electronic exhibits*

32 The intercepted telephone calls were between the respondent and each of his parents, his uncle, his brother, his partner, SW, and various police officers. The calls were made between 15 August and 3 September 2019. The respondent's telephone calls with his mother were nearly two hours in length in total. The total length of the respondent's telephone calls with each of his father and SW was around an hour. The respondent's first interview with the police occurred on 5 September 2019. He was interviewed again the following day. The interviews lasted nearly five and a half hours in total.

33 As noted, the recordings of the intercepted telephone calls and police interviews were tendered at trial as exhibits and played to the jury. The jury was provided with transcripts of those recordings. The jury was provided with the exhibits in the jury room and could replay the intercepted telephone calls and police interviews. The jury was directed that the transcripts of the intercepted telephone calls and police interviews were not evidence, but were instead provided as a guide to assist in understanding the recordings.

*The intercepted telephone calls and their effect*

34 In giving the principal reasons for the majority, Kirk JA considered the transcripts of the intercepted telephone calls. Kirk JA accepted that the intercepted telephone calls provided "compelling evidence" in the sense of clear admissions by the respondent of his involvement in the murder of the deceased.[41] Thus, in a conversation with his mother on 15 August 2019 and in a conversation with his father on 24 August 2019, the respondent admitted to cutting the deceased's throat. However, Kirk JA concluded that those admissions "probably were not true" given SW's evidence of her observations of the deceased's body in which she did not see any blood on his neck or notice any damage, cuts or bruising to his neck, was positive she saw no cuts to the deceased's throat, and was sure that, if the deceased's throat had been cut, she would have seen it.[42] Fagan J, on the other hand, did not accept that the respondent's admission to cutting the deceased's throat undermined the reliability of his account because his Honour considered that the jury was not bound to regard SW's evidence "as a definitive contradiction"[43] of the respondent's admission. It is not necessary to resolve this dispute.

35 Kirk JA and Fagan J also disagreed over the evidentiary effect of other statements made by the respondent, which were said to amount to admissions of his involvement in the murder, but which did not specify how the deceased was killed. This is best illustrated by their Honours' respective treatment of a conversation between the respondent and his father on 22 August 2019 in which they discussed whether a person went "missing" and whether the respondent and someone else "made this person disappear" and, if so, why.

36 In that conversation, the respondent answered a question from his father about whether a person who was "missing" had deserved to go "missing" by stating, "I don't know if he went missing dad, I couldn't tell you". However, in answer to his father's statement, "as long as you [didn't] do shit", the respondent said, "[w]ell I did, kind of" and said that the person went "missing" because he "may have touched the wrong little girl ... [a]nd was caught, was caught in the act". When his father asked whether there was "any physical evidence", the respondent said "[n]o there's no physical evidence of absolutely anything". In answer to his father questioning whether his knowledge was hearsay or he witnessed what

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**41** *ZT v The King* [2023] NSWCCA 241 at [82].

**42** *ZT v The King* [2023] NSWCCA 241 at [108].

**43** *ZT v The King* [2023] NSWCCA 241 at [169].

happened, the respondent said "I witnessed the lot" and then added, "[b]ut I don't know anything".

37 The conversation between the respondent and his father on 22 August 2019 also included the following exchange:

> "Father: You didn't, you didn't *make person disappear* did you?
>
> Respondent: Um, no comment at this point in time.
>
> Father: … yeah well if you, if you did help, was there, was there more involved in *making person disappear*?
>
> Respondent: Yeah.
>
> Father: Oh there was a few people.
>
> Respondent: There was one.
>
> Father: One other?
>
> Respondent: Yeah.
>
> Father: Right, you and someone else *made this person disappear*.
>
> Respondent: Yeah.
>
> ...
>
> Respondent: Correct." (emphasis added)

38 Kirk JA did not regard the references in this conversation to making a person "disappear" as compelling admissions to murder. His Honour considered that these references were "also consistent with [the respondent] assisting to dispose of the body".[44] Fagan J concluded that it was open to the jury to conclude that both the respondent and his father understood the references in this conversation to the person going "missing" and being made to "disappear" as references to killing a person, not just the disposal of a body, especially given the

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**44** *ZT v The King* [2023] NSWCCA 241 at [64].

accompanying discussion about why the person went missing or was made to disappear.[45]

39 Kirk JA also treated the respondent's admission to having "witnessed the lot" as an assertion by the respondent that he witnessed the sexual abuse of a child by the person who disappeared, which his Honour characterised as "highly doubtful, and likely illustrat[ing] the [respondent's] propensity to make things up".[46] However, Fagan J treated the respondent's admission of having "witnessed the lot" as merely an acknowledgement that he was present when the deceased went "missing"; ie, was killed.[47]

*The police interviews*

40 During the first police interview, the police played the respondent extracts of the intercepted telephone calls and sought his comment. The respondent first denied having any knowledge of the deceased's death, and then maintained that he only knew of the death because PW had told him about it and had directed him to claim responsibility. The respondent then stated that PW had directed him to say that the deceased had gone to Western Australia. Maintaining that he only knew of the murder through PW, the respondent then said that PW had directed him to claim that either he or SW had committed the murder. Ultimately, the respondent said he witnessed PW killing the deceased by hitting him on the head with a rock and then shooting him with a pistol.

41 In the second police interview, the respondent said that PW instructed him to obtain some fishing line and go to the round yard and climb up on the tyre wall. When the respondent arrived at the round yard, PW accused the deceased of molesting his daughter. The respondent said that SW came out from the house and instructed PW to "[j]ust do it". The respondent said that PW then instructed him to wrestle the deceased to the ground and that PW "plunged [a] knife into his chest".

**The Court of Criminal Appeal's assessment of the reliability of the respondent's admissions**

42 Before the Court of Criminal Appeal, the prosecution submitted that it was open to the jury to find that the various accounts given by the respondent "taken

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**45** *ZT v The King* [2023] NSWCCA 241 at [180].

**46** *ZT v The King* [2023] NSWCCA 241 at [62].

**47** *ZT v The King* [2023] NSWCCA 241 at [182].

as a whole, despite the inconsistencies, were 'powerful evidence of the [respondent's] direct involvement in the intentional killing of [the deceased]'".[48] Kirk JA characterised this submission as inviting the drawing of some "generalised inference that taken together the various admissions manifest [the respondent's] participation in the murder".[49] His Honour rejected that submission for two separate reasons. First, his Honour considered that it involved "consciousness of guilt reasoning" without seeking to meet the standard for such reasoning.[50] This conclusion is addressed below. Second, his Honour did not accept that the respondent's admissions were reliable[51] because the respondent told his parents that he cut the deceased's throat when that was probably not true,[52] that both his mother and father considered the respondent to be "prone to story telling"[53] and that on a series of occasions the respondent told "needless lies", which suggested that he is either a compulsive liar, a fantasist or both.[54] One of those "needless lies" was the statement that Kirk JA attributed to the respondent witnessing the deceased abusing PW's daughter.[55]

43 Fagan J considered that the admissions in the intercepted telephone calls were made to the respondent's parents, with whom he was likely to be frank about a matter as serious as his participation in a murder. His Honour noted that the respondent's statements in the intercepted telephone calls were often "oblique and guarded" and bore "no indication of boasting or fantasising". His Honour also noted that the discussions involved exploration of "routes for escape" from criminal liability, such as an alibi, acting under duress or the absence of any knowledge of the deceased's fate.[56]

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**48** *ZT v The King* [2023] NSWCCA 241 at [110].

**49** *ZT v The King* [2023] NSWCCA 241 at [110].

**50** *ZT v The King* [2023] NSWCCA 241 at [110].

**51** *ZT v The King* [2023] NSWCCA 241 at [111], [121].

**52** *ZT v The King* [2023] NSWCCA 241 at [112].

**53** *ZT v The King* [2023] NSWCCA 241 at [114].

**54** *ZT v The King* [2023] NSWCCA 241 at [116].

**55** *ZT v The King* [2023] NSWCCA 241 at [115(2)].

**56** *ZT v The King* [2023] NSWCCA 241 at [253].

44 On the basis of the intercepted telephone calls alone, Fagan J concluded that the respondent's admissions to his parents were sufficient to prove his guilt beyond reasonable doubt.[57] Fagan J accepted that the respondent's denials and claims of exculpation in the police interviews were "long winded, manipulative and ever-changing", but noted that the respondent's answers "culminate[d] in admissions of participation" at the end of the second interview.[58] His Honour concluded that the jury could find the respondent's admissions to his parents and in the second police interview compelling to the extent that he admitted having taken part in the murder with PW.[59]

## The Court of Criminal Appeal's application of *M v The Queen*

45 Kirk JA's doubts about the reliability of the admissions in the intercepted telephone calls led to his Honour having a reasonable doubt that the respondent was guilty of murder.[60] His Honour then asked whether such "doubt can be explained away by reference to the natural advantages of the jury". His Honour referred to a passage from *Dansie v The Queen*, which found that the trial judge's advantage in having seen and heard the evidence was "slight",[61] as "resonat[ing] in this case".[62] As explained below, the comparison with *Dansie v The Queen* was not apt.

46 Kirk JA accepted that the jury listened to the intercepted telephone calls and watched the recordings of the police interviews but noted that "I do not consider that any part of *my reasoning* depends in any material way on what impression would have been conveyed by what the jury heard and saw in that regard" (emphasis added).[63] His Honour found that listening to the intercepted telephone calls did not give the jury "any significant advantage in assessing their significance

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**57** *ZT v The King* [2023] NSWCCA 241 at [252].

**58** *ZT v The King* [2023] NSWCCA 241 at [254].

**59** *ZT v The King* [2023] NSWCCA 241 at [251].

**60** *ZT v The King* [2023] NSWCCA 241 at [123]-[124].

**61** See above at [9].

**62** *ZT v The King* [2023] NSWCCA 241 at [126].

**63** *ZT v The King* [2023] NSWCCA 241 at [128].

to the case".[64] His Honour concluded that there was a significant possibility that the respondent was innocent of the offence charged.[65]

47 As noted, Sweeney J agreed with Kirk JA.[66] Although her Honour noted that she was "mindful of the jury's advantage", her Honour found that she had a "reasonable doubt ... for the reasons explicated by Kirk JA".[67] Her Honour did not expand upon the nature of that advantage or that doubt. In those circumstances, any error on the part of Kirk JA in relation to the assessment of those matters also affects Sweeney J's reasons.

48 Based on his assessment of the evidence, including the transcripts of the intercepted telephone calls, Fagan J was "left with no reasonable doubt concerning the [respondent's] guilt".[68] Irrespective of this satisfaction regarding the respondent's guilt beyond reasonable doubt, his Honour considered that the advantages enjoyed by the jury in listening to the intercepted telephone calls and watching the police interviews resolved any doubt that might be experienced by appellate judges. His Honour observed that "[i]t is not the function of this Court to attempt to replicate the jury's experience of the evidence at trial. However ... it is a necessary part of the Court's obligation to consider the entire trial record that sufficient of the phone conversations and of the police interviews should be listened to for the purpose of discerning whether there were characteristics of the ways in which the [respondent] spoke on each occasion that the jury could reasonably have taken into account in deciding which, if any, of his statements were reliable."[69]

49 Fagan J said that he had listened to "short passages" of the first police interview in which portions of the intercepted telephone calls were played back to the respondent. His Honour observed a "very marked difference" between the respondent's tone and manner when speaking to his parents compared to the

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**64** *ZT v The King* [2023] NSWCCA 241 at [130].

**65** *ZT v The King* [2023] NSWCCA 241 at [131].

**66** *ZT v The King* [2023] NSWCCA 241 at [267].

**67** *ZT v The King* [2023] NSWCCA 241 at [266].

**68** *ZT v The King* [2023] NSWCCA 241 at [252].

**69** *ZT v The King* [2023] NSWCCA 241 at [255].

verbose and discursive answers he gave to the police.[70] Fagan J found that the jury had a significant advantage over the Court of Criminal Appeal in determining which of the respondent's statements could be relied upon.[71]

**Majority's error in the assessment of the jury's advantage(s)**

50 The grounds of appeal contend that the majority of the Court of Criminal Appeal erred in concluding that the jury enjoyed no relevant or significant advantage over that Court and erred in its application of the test in *M v The Queen*.

51 These grounds are directed to the part of Kirk JA's application of the test in *M v The Queen* whereby, having concluded that he had a reasonable doubt about the respondent's guilt, his Honour considered whether the jury's advantages in seeing and hearing the evidence were capable of resolving that doubt.[72] Although Kirk JA did not accept that the jury enjoyed a "significant advantage" in seeing and hearing the evidence in the form of the intercepted telephone calls and the police interviews, it is apparent from his Honour's reference to *Dansie v The Queen* that his Honour did not consider that the jury had any relevant advantages. Nor did his Honour identify any advantage.

52 The appellant contended that Kirk JA, and consequentially Sweeney J, erred as the jury possessed a significant advantage in: assessing whether the respondent admitted his involvement in the killing of the deceased; assessing whether various statements were admissions or false denials; and forming a conclusion about the respondent's general credibility, including whether he had a propensity to tell lies and fantasise. The appellant submitted that the majority could not dismiss the significance of the advantages enjoyed by the jury without listening to at least part of the recordings of the intercepted telephone calls and watching part of the police interviews, as Fagan J had done.

53 The appellant's submission should be accepted. In concluding that "I do not consider that any part of *my reasoning* depends in any material way on what impression would have been conveyed by what the jury heard and saw",[73] Kirk JA did not correctly apply the test in *M v The Queen*. That test does not involve

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**70** *ZT v The King* [2023] NSWCCA 241 at [256].

**71** *ZT v The King* [2023] NSWCCA 241 at [257].

**72** *ZT v The King* [2023] NSWCCA 241 at [125]; see also *M v The Queen* (1994) 181 CLR 487 at 494.

**73** *ZT v The King* [2023] NSWCCA 241 at [128].

deciding whether the *appellate court's reasoning* to the holding of a reasonable doubt depends on an assessment of what the jury heard or saw. Instead, the relevant question is whether the nature of the reasonable doubt that the appellate court holds is one that is capable of being resolved by the appellate court making full allowance for the jury's advantages in seeing and hearing the evidence.

54 Several critical aspects of the majority's reasoning in support of the conclusion that the respondent's admissions were unreliable were matters upon which it is apparent that the jury was in a significantly better position than the majority to evaluate. That is especially so with the telephone calls in which the respondent allegedly made more general admissions regarding his involvement in the deceased's killing, such as the conversation with his father described above.[74] In particular, the jury was best placed to determine the contested contextual meaning of such words or phrases as "missing", "[w]ell I did, kind of", "making [a] person disappear" and "I witnessed the lot".

55 The jury also had an apparent advantage in assessing whether, when discussing the death of the deceased with his parents, especially his father, the respondent was a general fantasist or prone to exaggeration, as Kirk JA found[75] (or more "oblique and guarded", as Fagan J concluded[76]). Kirk JA noted the prosecution's submission to the Court of Criminal Appeal that the jury had the benefit of listening to the tone of the respondent's voice when he was talking (to his father) about "making somebody disappear" in order to evaluate whether he was "being quite sort of restrained" or, as his mother accused him of, being "dramatic". In response, his Honour noted that the Crown Prosecutor did not suggest to the jury at the trial that the respondent was "bragging" and noted that his mother's evidence in cross-examination that the respondent was prone to making up stories was not challenged in re-examination.[77] However, that reasoning did not address the prosecution's point, which was that there was a contrast between the way the respondent generally spoke and how he spoke to his father when discussing the deceased's death.

56 In light of the length of the intercepted telephone calls and police interviews, the identity of the participants, the debate over the contextual meaning

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**74** See above at [35]-[39].

**75** See above at [42].

**76** See above at [43].

**77** *ZT v The King* [2023] NSWCCA 241 at [130].

of the words spoken and whether there was any difference between how the respondent spoke to his parents and how he spoke to others, the majority's conclusion that the jury had no relevant advantage over the appellate court could not be reached without listening to a sufficient part of the intercepted telephone calls and watching a sufficient part of the police interviews to make an assessment of the existence, nature and scope of the advantages the jury held. In the result, the majority's assessment of the advantages of the jury miscarried and their Honours could not discharge the function of the appellate court as described in *M v The Queen*.

*Generalised inference and consciousness of guilt reasoning*

57 The respondent submitted that the difficulty with the appellant's and Fagan J's reliance on what Kirk JA characterised as a "generalised inference" was that, as Kirk JA observed, it involved (or appeared to involve) consciousness of guilt reasoning without seeking to meet the standard for such reasoning, as established in *Edwards v The Queen*.[78] The respondent also contended that, where it was common ground that it was PW who killed the deceased, reliance on such a generalised inference is problematic because it does not sufficiently differentiate between the elements of joint criminal enterprise, extended joint criminal enterprise and manslaughter, or sufficiently distinguish them from the hypothesis consistent with innocence of murder which the prosecution had to exclude, namely the respondent's participation in the disposal of the deceased's body. The respondent submitted that, on the approach of the majority, any allowance for the advantages held by the jury in listening to the intercepted telephone calls or viewing the police interviews would not affect a doubt arising from that difficulty.

58 Fagan J's process of reasoning, namely that the respondent's admissions could be relied on to prove that the respondent participated in a joint criminal enterprise to murder the deceased, even if the details of that involvement or his exculpatory statements were rejected, did not involve consciousness of guilt reasoning.

59 Once evidence of a confessional statement, including an admission, is admitted, its weight and probative value are matters for the jury. It is for the jury to determine whether the confessional statement was made and whether the admission was true in whole or in part.[79]

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**78** (1993) 178 CLR 193.

**79** *Burns v The Queen* (1975) 132 CLR 258 at 261.

60 This Court's decision in *Edwards v The Queen* specified the conditions under which a lie told by an accused could be treated as an implied admission of guilt on the basis that it exhibits a consciousness of guilt; ie, a consciousness that the truth would implicate the accused in the commission of the offence.[80] However, where an accused makes a statement that contains an admission, but it is also exculpatory or includes a false detail, then for the prosecution to urge acceptance of the admission and rejection of the exculpatory statement or false detail, including by asserting that the exculpatory statement or detail was a lie, does not involve consciousness of guilt reasoning. Even so, if in such circumstances there is a "real danger" that the jury might deploy that false statement as an admission, then a protective direction may need to be given.[81]

61 In this case, the jury was given an *Edwards v The Queen* direction in relation to statements the respondent made to police officers during some of the intercepted telephone calls and in the first police interview to the effect that the respondent denied being aware of the police investigation or what it concerned, and had no knowledge of the deceased or at least what had happened to him. Beyond that, neither the prosecution nor the reasoning of Fagan J sought to deploy any false statement made by the respondent as a positive proof of his guilt.

62 Otherwise, if the admissions were sufficiently compelling to demonstrate the respondent's involvement in murder as Fagan J concluded,[82] then the admissions were necessarily inconsistent with the "innocent" hypothesis of the respondent only being involved in the disposal of the deceased's body.

63 The balance of the respondent's submission about the difficulty of using what Kirk JA described as a "generalised inference" to prove the elements of a joint criminal enterprise or extended joint criminal enterprise in this case need not be addressed to dispose of this appeal. This is so because the majority did not reject any reliance by the prosecution on any "generalised inference" because such an inference did not sufficiently enable the court to be satisfied of the requisite elements of murder in the two ways the prosecution put its case. Instead, the majority simply held that no generalised inference of the respondent's involvement should be drawn, and that that conclusion was "not capable of being explained

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**80** (1993) 178 CLR 193 at 210-211.

**81** *Dhanhoa v The Queen* (2003) 217 CLR 1 at 12 [34], citing *Zoneff v The Queen* (2000) 200 CLR 234.

**82** See above at [48].

away by the natural advantages [enjoyed by] the jury".[83] In reaching their conclusion about the lack of any advantage enjoyed by the jury, their Honours erred and the matter will need to be remitted to the Court of Criminal Appeal to be redetermined.

**The assessment of the circumstantial case**

64 The appellant's written submissions contended that the appeal to this Court also raised an issue about whether the majority of the Court of Criminal Appeal erred in its assessment of the circumstantial case against the respondent by proceeding on the basis that it was necessary for the respondent's admission(s) to be proved to a particular standard before it would be open to the jury to view those admissions as a basis for drawing the ultimate inference of guilt beyond reasonable doubt.

65 The appeal to this Court did not raise this issue. It was not the subject of a grant of special leave to appeal and is not the subject of a ground of appeal. In oral submissions, the appellant noted that this complaint was said to fall within the ground of appeal that contended that *M v The Queen* was not properly applied, which it does not. However, as the matter will be remitted to the Court of Criminal Appeal to be reconsidered and no point was taken on behalf of the respondent about the appellant's departure from the grounds of appeal, the matter raised by the appellant will be addressed briefly.

66 The appellant raised two related concerns. First, the appellant focused on a statement by Kirk JA that it was "for the Crown to establish beyond reasonable doubt that the admissions made were sufficiently reliable to establish guilt beyond reasonable doubt".[84] The appellant submitted that this imposed an unnecessary standard of proof for one element of the circumstantial case, namely the admissions, when there was no suggestion that any admission was an indispensable intermediate fact.[85]

67 Read literally, the statement by Kirk JA that the prosecution had to "establish beyond reasonable doubt that the admissions made were sufficiently reliable" is erroneous. Leaving aside proof of an indispensable intermediate fact in a circumstantial case, the elements of an offence must be proved beyond

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**83** *ZT v The King* [2023] NSWCCA 241 at [131].

**84** *ZT v The King* [2023] NSWCCA 241 at [122].

**85** See *Shepherd v The Queen* (1990) 170 CLR 573 at 579.

reasonable doubt rather than the evidence that supports proof of those elements.[86] None of the admissions relied on by the prosecution were such an indispensable intermediate fact.

68 However, the impugned statement of Kirk JA appears to involve a slip. It was most likely meant to read that it was "for the Crown to establish ... that the admissions made were sufficiently reliable to establish guilt beyond reasonable doubt". This is evident from the statement by Kirk JA later in his judgment that "the admissions made by the [respondent] – on which the Crown case depends – are not reliable enough to found a solid conclusion that he was involved in the murder in the manner alleged ... [and] I do not think it was reasonably open to the jury to be satisfied beyond reasonable doubt that the accused was guilty".[87] That conclusion accurately reflects the distinction between weighing the reliability of the admissions on the one hand and proof of guilt beyond reasonable doubt on the other.

69 Second, the appellant contended that the majority erred in seeking to choose between the different accounts given by the respondent to prove that the respondent had in one of those accounts truthfully admitted how he was involved in the murder of the deceased, whereas the prosecution case merely required proof of the respondent's "involvement" to the criminal standard without proof of the particular act(s) that constituted involvement.

70 As has been explained, it is correct that the prosecution was not required to prove the "reliability" of any particular admission or that the respondent truthfully admitted the particulars of his involvement in the murder of the deceased. However, it is not necessary to parse the reasons of the majority to ascertain whether their Honours found or assumed to the contrary. These matters can be considered by the Court of Criminal Appeal (along with the balance of the respondent's submission noted above) after this matter is remitted.

**Conclusion on grounds of appeal**

71 Both grounds of appeal should be upheld.

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**86** *Director of Public Prosecutions v Benjamin Roder (a pseudonym)* (2024) 98 ALJR 644 at 649 [19]; 418 ALR 190 at 195.

**87** *ZT v The King* [2023] NSWCCA 241 at [131].

**Relief**

72 The appeal should be allowed, the orders of the Court of Criminal Appeal should be set aside, and the matter should be remitted to the Court of Criminal Appeal to be redetermined in accordance with these reasons. The effect of setting aside the orders of the Court of Criminal Appeal is to restore the respondent's conviction and sentence. Neither of the parties contended that this Court should take any step in that regard.

73 The following orders should be made:

(1) Appeal allowed.

(2) Set aside the orders made by the Court of Criminal Appeal of the Supreme Court of New South Wales on 29 September 2023.

(3) Remit the matter to the Court of Criminal Appeal of the Supreme Court of New South Wales for determination according to law.

74 GORDON, EDELMAN AND STEWARD JJ. In conducting an assessment of whether a verdict at trial is "unreasonable, or cannot be supported, having regard to the evidence"[88] an appellate court must have regard to all of the evidence.[89] The same is true in relation to an appellate court's task in considering the common form proviso to criminal appeals, which requires consideration of "the *whole* of the record of the trial".[90] But that does not mean that every aspect of the evidence requires the same degree of scrutiny. For instance, it is not uncommon at trials for witnesses to give evidence that by the conclusion of the trial turns out to be peripheral or irrelevant to the facts that are in issue. Such evidence usually requires little or no scrutiny in an assessment of the record of the trial.

75 The same is true of video or audio recordings of oral evidence that is given at trial or video or audio recordings of evidence containing express or implied admissions that are tendered as exhibits at trial. An intense scrutiny of the evidence of witnesses, by viewing or listening to recordings, has limited marginal utility for an appellate court due to the danger of demeanour assessments. In *Fennell v The Queen*,[91] this Court referred to "the well-known scientific research that has revealed the difficulties and inaccuracies involved in assessing credibility and reliability". In short, "an ounce of intrinsic merit or demerit in the ... comparison of evidence with known facts, is worth pounds of demeanour".[92]

76 In *Pell v The Queen*,[93] this Court said the following of the video recorded evidence of witnesses:

> "There may be cases where there is something particular in the video-recording that is apt to affect an appellate court's assessment of

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**88** *Criminal Appeal Act 1912* (NSW), s 6(1). See also *Criminal Code* (Qld), s 668E(1); *Criminal Procedure Act 1921* (SA), s 158(1)(a); *Criminal Code* (Tas), s 402(1); *Supreme Court Act 1933* (ACT), s 37O(2)(a)(i); *Criminal Code* (NT), s 411(1); *Criminal Appeals Act 2004* (WA), s 30(3)(a); *Criminal Procedure Act 2009* (Vic), s 276(1)(a).

**89** *M v The Queen* (1994) 181 CLR 487 at 493.

**90** *Weiss v The Queen* (2005) 224 CLR 300 at 317 [43] (emphasis in original).

**91** (2019) 93 ALJR 1219 at 1233 [81]; 373 ALR 433 at 452.

**92** *Fox v Percy* (2003) 214 CLR 118 at 129 [30], quoting *Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co (The "Palitana")* (1924) 20 Ll L Rep 140 at 152.

**93** (2020) 268 CLR 123 at 144 [36] (footnote omitted).

> the evidence, which can only be discerned visually or by sound. In such cases, there will be a real forensic purpose to the appellate court's examination of the video-recording. But such cases will be exceptional, and ordinarily it would be expected that the forensic purpose that justifies such a course will be adopted by the parties, rather than upon independent scrutiny by the members of the court."

77 These remarks in *Pell* should not, and cannot logically, be confined in their application to video recordings of the oral evidence of witnesses. For instance, there is no rational difference for the purposes of an appellate court's assessment between recorded evidence of an accused's police interview which is played at trial and recorded evidence from a complainant which is played at trial. The reasoning in *Pell* applies in exactly the same way, and for exactly the same reasons, to any video and audio evidence of a trial or in a trial in which such evidence is relied upon for matters concerning demeanour.

78 For example, there is no reason of principle why video recorded evidence of an interview that included an admission by an accused person should be of any lesser quality, or any more difficult to understand, than video recorded evidence of testimony from a witness. But even if recorded evidence in the former category were more difficult to understand than recorded evidence of testimony from a witness, listening to or viewing that evidence where proper comprehension can only be discerned visually or by sounds fits soundly within the statement of principle in *Pell*. Further, if a different rule existed for listening to or viewing evidence of testimony from a witness, that different rule may also create an imbalance in the perception of the evidence by the appellate court, especially where the evidence is in the form of a recorded interview.[94]

79 Nor can any distinction be drawn between recorded evidence that includes an admission by an accused person, and recorded evidence of testimony from a witness, on the basis that the jury must have assessed one but not the other. An implied admission in a recording of an interview with an accused person might be peripheral to the issues in the trial or even irrelevant by the end of the trial (such as where the accused gives evidence to the same effect). By contrast, an assessment of the credibility or reliability of the evidence of a central witness might be essential to the reasoning of the jury. In short, in any particular case, it may well be that the jury should be taken to have treated any particular recorded evidence as credible and reliable.

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**94** See *SKA v The Queen* (2011) 243 CLR 400 at 410 [28] (which concerned a recorded interview).

80 In the Court of Appeal of the Supreme Court of Victoria in *Pell v The Queen*,[95] Weinberg JA described the case as "unusual" in that it depended entirely upon the relevant aspects of the complainant's evidence being accepted beyond reasonable doubt as credible and reliable without independent support.[96] All members of the Court of Appeal watched an audio-visual recording of the complainant's evidence which had been played at the trial.[97] The majority was plainly impressed by the clarity, cogency, and authenticity of the complainant's evidence.[98] By contrast, the minority was not "prepared to say, beyond reasonable doubt, that the complainant was such a compelling, credible, and reliable witness that I would necessarily accept his account beyond reasonable doubt".[99]

81 Unlike the Court of Appeal, no member of this Court in *Pell* watched the recording of the complainant's evidence. This Court decided the case on the assumption that the jury had assessed the complainant's evidence to be thoroughly credible and reliable.

82 Proceeding on that assumption, this Court in *Pell* concluded that: (i) in relation to the first alleged incident, the "compounding improbabilities" caused by unchallenged evidence, relating to three matters arising from the complainant's evidence, required the jury, acting rationally, to have entertained a reasonable doubt as to guilt;[100] and (ii) in relation to the second alleged incident, unchallenged evidence that was inconsistent with the complainant's account also required the jury, acting rationally, to have entertained a reasonable doubt as to guilt.[101] That assumption took the prosecution case at its highest. If the other unchallenged evidence at trial had not been as strong, that assumption might not have been made.

83 As the Court of Appeal of the Supreme Court of Victoria has quite rightly said, *Pell* does not require an intermediate appellate court "to commence from the position that the jury did not accept any of the evidence" of an accused person

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**95** [2019] VSCA 186.

**96** [2019] VSCA 186 at [410].

**97** *Pell* [2019] VSCA 186 at [32].

**98** See *Pell* [2019] VSCA 186 at [87], [91].

**99** *Pell* [2019] VSCA 186 at [929].

**100** (2020) 268 CLR 123 at 164 [119].

**101** (2020) 268 CLR 123 at 166 [127].

who was convicted.[102] Likewise, *Pell* does not require an intermediate appellate court to commence from the position that the jury accepted the entirety of the evidence of a complainant. In both instances, there are many cases where such an assumption would be both an obvious fiction and contrary to the common direction to juries that it is open to them to accept some aspects of a witness's evidence and to reject others.

84 In *R v Baden-Clay*,[103] this Court said that it is "fundamental to our system of criminal justice in relation to allegations of serious crimes tried by jury that the jury is 'the constitutional tribunal for deciding issues of fact'". When this Court referred in *Pell*[104] to the "'constitutional' demarcation between the province of the jury and the province of the appellate court", the Court was not suggesting that the jury's function of finding facts based upon the evidence of witnesses was constitutionally independent from its function of finding facts based upon hearing evidence contained in electronic records of interview or recordings of telephone intercepts. The context in *Pell* in which this Court referred to the jury as a constitutional tribunal concerned the evidence of witnesses. The Court did not suggest, and could not suggest, that the jury has separate constitutional fact-finding roles based upon whether the evidence is given by an accused person in court or as a recorded exhibit of an interview.

85 The grave dangers in demeanour assessments of credibility and reliability are the central reason for the usual approach described in *Pell*. There will usually be no justification for courts of criminal appeal to be required to view or listen to video or audio recordings in circumstances (such as those in *Pell*) where they consider that there should have been a reasonable doubt as to guilt on the assumption that a jury accepted the credibility and reliability of that evidence. So too, there will usually be no justification for courts of criminal appeal to adopt an approach that requires them to view or listen to video or audio recordings in circumstances where they consider that there should otherwise have been no reasonable doubt as to guilt.

86 But there will be cases where it might be necessary for a judge on an appellate court to view a video recording or listen to an audio recording. No fixed list of such cases can be prescribed. One obvious example, which is outside the rationale which describes the usual cases, is where the value of the video or audio recording does not lie in an assessment of demeanour, such as

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**102** *Bangoura v The King* [2024] VSCA 292 at [71].

**103** (2016) 258 CLR 308 at 329 [65].

**104** (2020) 268 CLR 123 at 145 [38].

CCTV footage of a charged incident. Another is where, on appeal, one or both of the parties rely upon some aspect of the video or audio recording that cannot be discerned from the transcript. It will then be necessary for the court to consider at least that aspect of the recording.

87 Another example is cases where the judge considers that the result of the case will depend upon the extent of the jury's advantage over that of the appellate court. These cases will not be usual. In many cases where issues such as credibility and reliability are central, it will not be necessary to view or listen to a recording in order for an appellate judge to recognise that some doubt (or potential doubt) as to guilt that they may have can be resolved by the recognition of the advantages of the jury[105] and consequently the undesirability of an appellate court effectively seeking to "duplicate the function of the jury".[106] Similarly, an appellate court can readily account for the jury's other advantages in decision-making without viewing audio-visual exhibits.[107] But in those cases which depend upon the *extent* of the jury's advantage over that of the appellate court, it might be necessary for a judge to view or listen to a recording in order to assess the extent of that advantage.

88 In sum, there is no impediment to an appellate court viewing or listening to any exhibit or testimony which is recorded. The question is when it is required to do so. The observation in *Pell*[108] that cases where there will be a real forensic purpose in the appellate court viewing or listening to exhibits or testimony "will be exceptional" is not an absolute prohibition but merely a statement as to the usual lack of necessity to view or listen to that evidence. Generally, there will not be a real forensic purpose that requires the appellate court's examination of the recorded evidence.

89 There is no practical or legal distinction between different types of recorded evidence. *Pell* did not suggest any such distinction. The test to be applied to determine whether an appellate court is required to view or listen to an exhibit in circumstances such as those in this case is whether the appellate court considers that the doubts about guilt that it has might be resolved by watching or listening to the recording. If the appellate court has such a level of doubt that it considers that

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**105** See *Hofer v The Queen* (2021) 274 CLR 351 at 394 [133], citing *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23].

**106** *Pell* (2020) 268 CLR 123 at 145 [37].

**107** See *Pell* (2020) 268 CLR 123 at 145 [37].

**108** (2020) 268 CLR 123 at 144 [36].

any jury advantages could not resolve that doubt, then the appellate court is not required to watch or listen to the recording *unless* procedural fairness to the submissions of one of the parties requires that course.

90 In this case, the background of which we gratefully adopt from the reasons of Gageler CJ, Gleeson, Jagot and Beech-Jones JJ, the relevant recorded evidence was alleged admissions in intercepted phone calls and in video recorded interviews. Those recordings were not viewed or listened to by the majority in the Court of Criminal Appeal of the Supreme Court of New South Wales. In the majority, Kirk JA (with whom Sweeney J agreed) effectively concluded that the jury, acting rationally, should have entertained a reasonable doubt. His Honour said of both types of recording that no part of his reasoning depended "in any material way on what impression would have been conveyed by what the jury heard and saw in that regard".[109] Otherwise, his Honour treated the recordings of the police interviews and the telephone intercepts separately. As will be explained, the majority in the Court of Criminal Appeal applied the proper test in relation to the video recorded police interviews but not to the recordings of the telephone intercepts.

91 As to the police interviews, Kirk JA considered that the versions of the events given by ZT in the police interviews were "replete with falsehoods and lies" and that his Honour could "not see how watching the interviews would be likely to alter that conclusion".[110] In this Court, the appellant did not point to any submission that had been made to the Court of Criminal Appeal concerning any matter to be deduced from watching or listening to the police interviews. Kirk JA explained that the overwhelming inference to be drawn from all of the evidence was that the jury must, acting rationally, have entertained a doubt as to guilt even assuming the real advantages of the jury.[111] There is no error in such reasoning. Particularly in light of the "difficulties and inaccuracies involved in assessing credibility and reliability",[112] there would have been no utility in his Honour performing an exercise of viewing or listening to the recordings of the police interviews to consider issues of demeanour where his Honour had already concluded that demeanour could make no difference to his conclusion and it was

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**109** *ZT v The King* [2023] NSWCCA 241 at [128].

**110** *ZT* [2023] NSWCCA 241 at [128].

**111** *ZT* [2023] NSWCCA 241 at [124]-[131].

**112** *Fennell* (2019) 93 ALJR 1219 at 1233 [81]; 373 ALR 433 at 452.

not submitted that any particular submission had been made to the Court of Criminal Appeal about demeanour in the police interviews.

92 As to the telephone intercepts, however, it is not clear that his Honour took the same approach. His Honour acknowledged the submissions of the Crown to the Court of Criminal Appeal that matters such as "the tone of his voice" could have a real impact upon whether ZT was "being dramatic" (fabricating a story) or "bragging".[113] The Crown also relied upon the tone of voice used in a recording of a "very early conversation" that ZT had had with his father. His Honour rejected these submissions, referring to ZT's tendency to tell lies and the unchallenged evidence of ZT's mother that, in his Honour's words, ZT "had always been prone to making up stories, twisting the truth and telling lies".[114] His Honour said that he did not consider that listening to the intercepts gave the jury any significant advantage in assessing their significance to the case.[115] It may be that his Honour was suggesting that the Court of Criminal Appeal should conduct the assessment of whether the verdict was unreasonable or could not be supported by the evidence without regard to the real advantage that the jury was said by the Crown to enjoy on the basis of some exclusionary rule in circumstances where the advantage of the jury was said to be "slight".[116] If that is the proper understanding of his Honour's reasoning, then it was in error.

93 The respondent relied in this Court upon the transcript of the hearing before the Court of Criminal Appeal, in which counsel for ZT expressed the view that the Court of Criminal Appeal should view and listen to the recordings of the intercepted telephone calls "if there is a concern that that might make a difference". In response, Kirk JA expressed the view that to listen to the recordings of the intercepted telephone calls and to view ZT's interviews with police would be contrary to this Court's decision in *Pell*. His Honour might, understandably, have been influenced by the reference in *Pell* to the viewing of recordings as "exceptional". But, as has been explained, the decision in *Pell* did not prevent him from watching and listening to the recordings, and it might have been necessary to do so in circumstances in which issues of tone had been relied upon by the Crown and the jury possessed a real advantage in that respect.

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**113** *ZT* [2023] NSWCCA 241 at [129].

**114** *ZT* [2023] NSWCCA 241 at [130].

**115** *ZT* [2023] NSWCCA 241 at [130].

**116** *ZT* [2023] NSWCCA 241 at [125], quoting *Dansie v The Queen* (2022) 274 CLR 651 at 661 [17].

94 In circumstances in which there is much force in other aspects of the reasons of Kirk JA, to make orders allowing this appeal and remitting the matter to the Court of Criminal Appeal may ultimately lead to the same result. But the appeal must nevertheless be allowed in circumstances in which: (i) submissions of the Crown had relied upon the tone of voice in the telephone intercepts; and (ii) the jury enjoyed a real advantage in this respect and, without a conclusion that even assuming that advantage the jury must, acting rationally, have entertained a doubt as to guilt, consideration of whether that advantage might have resolved any doubts held by the Court of Criminal Appeal required viewing and listening to, at least part of, the recordings. It is unnecessary to address the appellant's alternative ground of appeal.

95 Orders should be made as proposed by Gageler CJ, Gleeson, Jagot and Beech-Jones JJ.