HIGH COURT OF AUSTRALIA

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

Matter No C2/2026

MICHAEL O'CONNELL — APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS — RESPONDENT

Matter No C3/2026

DIRECTOR OF PUBLIC PROSECUTIONS — APPELLANT

AND

MICHAEL O'CONNELL — RESPONDENT

O'Connell v Director of Public Prosecutions
Director of Public Prosecutions v O'Connell
[2026] HCA 41
Date of Hearing: 12 May 2026
Date of Judgment: 4 November 2026
C2/2026 & C3/2026

ORDER

Matter No C2/2026

Appeal dismissed.

Matter No C3/2026

1. Appeal allowed.

2. *Set aside the orders made by the Court of Appeal of the Supreme Court of the Australian Capital Territory on 27 June 2025 and the orders made by that Court on 29 September 2025.*

3. *Remit the matter to the Court of Appeal of the Supreme Court of the Australian Capital Territory for determination according to law.*

On appeal from the Supreme Court of the Australian Capital Territory

Representation

V Engel SC with N A Wootton for the respondent in C2/2026 and the appellant in C3/2026 (instructed by Office of the Director of Public Prosecutions (ACT))

B W Walker SC with G E L Huxley and C G Brain for the appellant in C2/2026 and the respondent in C3/2026 (instructed by Legal Aid ACT)

M G Hinton KC with W M Scobie for the Director of Public Prosecutions (SA), intervening in both matters (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

O'Connell v Director of Public Prosecutions
Director of Public Prosecutions v O'Connell

Criminal practice – Appeal – Unreasonable verdict – Circumstantial case – Where victim dislodged from outside of moving vehicle – Where Court of Appeal set aside verdict of guilty of murder and substituted verdict of guilty of manslaughter – Whether determination of unreasonable verdict on hypothesis raised by Court of Appeal inconsistent with adversarial process – Whether reckless indifference was an issue at trial – Whether failure to make full allowance for advantages enjoyed by jury – Whether failure to consider combined effect of all circumstances and evidence in respect of circumstantial case – Whether Court of Appeal may substitute a verdict of an alternative offence under s 37O(1)(d) of *Supreme Court Act 1933* (ACT) – Whether proceedings should be remitted to Court of Appeal.

Words and phrases – "advantages enjoyed by the jury", "adversarial process", "all the circumstances", "alternative offence", "alternative verdict", "circumstantial case", "combined effect", "full allowance", "jury advantage", "*M v The Queen*", "manslaughter", "murder", "piecemeal approach", "probability of causing death", "*R v Baden-Clay*", "real and substantial chance", "reckless indifference", "remittal", "unreasonable or cannot be supported", "whole of the evidence".

Crimes Act 1900 (ACT), ss 12(1)(b), 15, 49, 297.
Supreme Court Act 1933 (ACT), ss 37E, 37O.

1 GAGELER CJ, GORDON, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ. In all Australian jurisdictions a court must allow an appeal against conviction if the court is satisfied that the verdict of guilty should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence.[1] The definitive statement of the approach appellate courts must adopt in determining such a ground is in the judgment of Mason CJ, Deane, Dawson and Toohey JJ in *M v The Queen*.[2] In determining such a ground, the appellate court must 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".[3] In doing so the appellate court must make "full allowance for the advantages enjoyed by the jury"[4] in witnessing the evidence unfold at the trial.[5] Further, in considering whether a guilty verdict in a circumstantial case was unreasonable, the appellate court, like the jury, must consider *all* the circumstances established by the evidence and weigh them in determining whether an inference consistent with innocence was reasonably open on the evidence.[6]

2 In this case, in upholding a contention that a conviction for murder was unreasonable, the majority of the Court of Appeal of the Supreme Court of the Australian Capital Territory erred in failing to make full allowance for all the advantages enjoyed by the jury. The majority of the Court of Appeal also erred in failing to consider *all* the circumstances established by the evidence and to weigh

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1 *Federal Court of Australia Act 1976* (Cth), s 30AJ(1)(a); *Criminal Appeal Act 1912* (NSW), s 6(1); *Criminal Procedure Act 1921* (SA), s 158(1)(a); *Criminal Appeals Act 2004* (WA), s 30(3)(a); *Criminal Procedure Act 2009* (Vic), s 276(1)(a); *Criminal Code* (Qld), s 668E(1); *Criminal Code* (Tas), s 402(1); *Supreme Court Act 1933* (ACT), s 37O(2)(a)(i); *Criminal Code* (NT), s 411(1).

2 (1994) 181 CLR 487.

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

4 *M v The Queen* (1994) 181 CLR 487 at 494.

5 *R v ZT* (2025) 281 CLR 137 at 145 [9] ("*ZT*").

6 *R v Hillier* (2007) 228 CLR 618 at 637 [46], 638 [48] ("*Hillier*").

them in determining whether an inference consistent with innocence was reasonably open on the evidence.[7]

Background and outcome

3 Following a trial before a jury in the Supreme Court of the Australian Capital Territory, Michael O'Connell was found guilty of the murder of Danielle Jordan between 14 April 2022 and 18 April 2022. Mr O'Connell was sentenced to a substantial term of imprisonment.[8]

4 Mr O'Connell appealed his conviction to the Court of Appeal on various grounds, including that the verdict was unreasonable, or could not be supported, having regard to the evidence ("Mr O'Connell's unreasonable verdict ground").[9]

5 In a judgment delivered on 27 June 2025 ("the first judgment") a majority of the Court of Appeal (Loukas-Karlsson and Taylor JJ, McCallum CJ dissenting) upheld Mr O'Connell's unreasonable verdict ground, set aside the verdict of guilty of murder and the sentence imposed by the trial judge, and ordered the entry of a verdict of not guilty of murder. Their Honours reserved the question of whether another verdict should also be entered. McCallum CJ rejected Mr O'Connell's unreasonable verdict ground and would have dismissed his appeal.

6 In a further judgment delivered on 29 September 2025 ("the second judgment") the same majority of the Court of Appeal (Loukas-Karlsson and Taylor JJ, McCallum CJ dissenting) ordered that a verdict of guilty of manslaughter be entered against Mr O'Connell and remitted the proceedings to the trial judge for Mr O'Connell to be resentenced. McCallum CJ would have ordered a retrial on the offence of manslaughter. Mr O'Connell was subsequently resentenced for manslaughter.[10]

7 The respondent in the Court of Appeal, the Director of Public Prosecutions for the Australian Capital Territory ("the DPP"), was granted special leave to

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7 *Hillier* (2007) 228 CLR 618 at 637 [46], 638 [48].

8 Being a term of 15 years imprisonment with a non-parole period of 10 years: *DPP v O'Connell [No 5]* [2024] ACTSC 17.

9 *Supreme Court Act 1933* (ACT), s 37O(2)(a)(i).

10 *DPP v O'Connell [No 6]* [2025] ACTSC 529.

appeal from the orders in the first judgment allowing Mr O'Connell's appeal to the Court of Appeal and setting aside the verdict of guilty of murder, and entering a verdict of not guilty to murder ("the DPP's appeal"). Mr O'Connell was granted special leave to appeal from the orders in the second judgment entering a verdict of guilty of manslaughter and remitting the proceedings for sentencing ("Mr O'Connell's appeal"). The Director of Public Prosecutions for South Australia intervened to make submissions that were broadly consistent with those made by the DPP in the DPP's appeal.

8 For the reasons that follow, the DPP's appeal must be allowed and the orders of the Court of Appeal setting aside Mr O'Connell's conviction for murder and entering a verdict of not guilty to that offence must be set aside and the proceedings remitted to the Court of Appeal to reconsider Mr O'Connell's unreasonable verdict ground in accordance with this Court's reasons. As the first judgment is the premise of the second judgment, the orders made in the second judgment, including the entry of a verdict of guilty to manslaughter, must be set aside.

9 Mr O'Connell's appeal will be dismissed without consideration of the substance of his grounds of appeal save for an issue of statutory construction which is not dependent on the subsistence of the orders made in the first judgment or the reasoning that supports those orders. The resolution of that issue of statutory construction is that s 37O(1)(d) of the *Supreme Court Act 1933* (ACT) ("the SCA") confers on the Court of Appeal power to set aside a conviction for an offence the subject of a conviction appeal and order the entry of a verdict of guilty to an alternative offence which the jury could have found the appellant guilty of on the indictment presented at their trial.

The evidence at trial

10 Mr O'Connell and Ms Jordan were in a relationship that was described by the Court of Appeal as "tumultuous". On the evening of 14 April 2022, Mr O'Connell stayed at Ms Jordan's home at 6 Coutts Place, Melba. At around 2.00 am the following morning Mr O'Connell and Ms Jordan argued and, following a physical struggle, Mr O'Connell left Ms Jordan's home.

11 Mr O'Connell was alleged to have then returned to the home at around 4.00 am and started arguing with Ms Jordan again. Mr O'Connell attempted to leave but Ms Jordan tried to prevent him from doing so by placing herself on the bonnet of Mr O'Connell's car. The prosecution contended that Mr O'Connell nevertheless drove off at speed and turned left out of Coutts Place and drove down Alfred Hill Drive. The prosecution contended that Mr O'Connell drove

approximately 200 m down Alfred Hill Drive when Ms Jordan fell from the bonnet of the vehicle, suffering fatal head injuries. Ms Jordan was taken to hospital by Mr O'Connell. She was declared deceased on 17 April 2022.

12 Crucial to the prosecution case was the evidence of Ms X, who was 13 years old at the time of the incident and present at Ms Jordan's home during the confrontation. Although there were said to be variations in Ms X's accounts of what happened, the effect of her evidence was that, when Ms Jordan would not remove herself from the bonnet, Ms X stood in front of Mr O'Connell's car to stop him driving away. Ms X stated that Mr O'Connell drove slowly along Coutts Place with Ms Jordan on the bonnet towards Ms X in the direction of the intersection with Alfred Hill Drive while she (Ms X) walked backwards. Ms X said that when Mr O'Connell's car reached the top of Coutts Place near the intersection with Alfred Hill Drive, he reversed back down Coutts Place past Ms Jordan's place before accelerating up the street towards Ms X at a speed which caused Ms X to jump out of the way. Ms X said that Mr O'Connell then turned left at the intersection of Coutts Place and Alfred Hill Drive with Ms Jordan still on the bonnet of his car.

13 Ms X said that although she could not see Mr O'Connell's car after it turned into Alfred Hill Drive, she heard it and ran after the car before stopping to walk and catch her breath. Ms X said she then heard "a screech and, [a sound] like, a doof", which Ms X perceived to be the noise of a body falling on the ground. Ms X did not see Ms Jordan fall from the car. Ms X said that, as she approached Mr O'Connell's car on Alfred Hill Drive, she saw him leave the vehicle, walk to the back of the car, collect Ms Jordan from the roadway and put her in the passenger seat. Ms X recalled Mr O'Connell saying, amongst other things, "I'm sorry, mate, I didn't mean to do it" and "I'm sorry Bub, I'm so sorry, I didn't mean to do that". Ms X said she told Mr O'Connell to take Ms Jordan to the hospital.

14 Ms X said that when Mr O'Connell returned to Ms Jordan's house at 6.00 am he told Ms X that Ms Jordan was in hospital and said "I shouldn't have done it. Like, how did it get this far? I love her. I love her. I shouldn't have done it." In closing submissions the prosecutor submitted that the reference to "it" in that statement was to Mr O'Connell "deliberately driving down the road with Ms Jordan on the bonnet".

15 Mr O'Connell did not give evidence at the trial, but the jury viewed a recording of his interview with the police on 16 April 2022. In that interview he denied that it was his driving that injured Ms Jordan. He said that he attempted to leave and started his vehicle but Ms Jordan "jumped on the bonnet" and damaged

the windscreen wipers. Mr O'Connell said he then turned the engine off, took his keys and left the vehicle before returning and attempting to drive away. He said that he repeated his unsuccessful attempts to drive away with Ms Jordan jumping on the bonnet of his car "[a]t least twice". Mr O'Connell said that at one point Ms X "was at the front of the car grabbing ... onto the bull bar". He said that the "last time" he attempted to leave Ms Jordan was standing on the lawn calling to him to come inside. He said he drove his car out of the driveway and onto the road and Ms Jordan (unsuccessfully) "tried to jump" on the car again. He said he drove off, turned the corner and drove "slowly" along Alfred Hill Drive before stopping "somewhere" to check whether he had "everything" in the car. Mr O'Connell said that Ms Jordan then caught up to him and jumped on the back of the canvas-covered tray at the back of the vehicle but fell, hitting her head. Mr O'Connell said he stepped out of the driver's seat, picked up Ms Jordan and drove her to the hospital.

16 A telephone conversation between Mr O'Connell and his son on 22 April 2022 was recorded and played to the jury. In that conversation, Mr O'Connell claimed that Ms Jordan had jumped on the back of his vehicle without his knowledge, that he had noticed Ms Jordan while driving away and then started slowing the car down, after which point Ms Jordan lost her footing and fell. Mr O'Connell's trial counsel referred to this account in his closing address.

17 At the trial, the prosecution tendered Closed Circuit Television ("CCTV") footage, which included sound, taken from a camera located on the outside wall of a house positioned on the corner of Flower Place and Alfred Hill Drive. That corner is located near the intersection of Coutts Place and Alfred Hill Drive in the direction that Mr O'Connell drove after he turned left at the corner of Coutts Place and Alfred Hill Drive.

18 Both the jury and the Court of Appeal viewed the CCTV footage. In the first judgment McCallum CJ described the footage as follows. Her Honour explained that the angle of the camera was such that the intersection of Coutts Place and Alfred Hill Drive was visible in the background of the footage "albeit mostly obscured behind [a] courtyard wall and a considerable amount of foliage". Her Honour noted that the relevant parts of the footage occupy only a small portion of the whole screen and that the quality of the images was poor. Her Honour also noted that, during the first five seconds of the relevant part of the footage, the car's headlights could not be seen but sound could be heard, including what her Honour described as "the sound of car tyres screeching slightly as the car lurches forward". According to her Honour, the headlights then appear "very faintly, as tiny pinpoints", following which the car can then be seen and heard "lurching forward

before stopping again" in the intersection between Coutts Place and Alfred Hill Drive, "at which point the sound of an engine starting is heard". The headlights then appear to move backwards down Coutts Place towards Ms Jordan's home and disappear completely from the footage for about five seconds. The headlights then reappear and the engine sound becomes louder, and the vehicle turns left into Alfred Hill Drive and moves out of sight to the right of the camera's frame. About 10 seconds later the footage records a "sudden screech" and exclamations accepted to have been made by Mr O'Connell. McCallum CJ said that a further 10 seconds later Ms X is seen in the CCTV footage running in the direction of the car.

19 The prosecution also adduced evidence from a police officer trained in collision reconstruction, Leading Senior Constable Smorhun ("LSC Smorhun"). In his evidence-in-chief, LSC Smorhun stated that he concluded that the average speed of Mr O'Connell's car as it crossed the field of view of the CCTV was 42.5 km/hr and its speed immediately prior to braking in Alfred Hill Drive was 63 km/hr. In cross-examination LSC Smorhun conceded that, allowing for various factors affecting the margin for error, the speed as it crossed the field of view of the CCTV could have been 35 to 40 km/hr and possibly lower. LSC Smorhun also recalculated the pre-braking speed as 53 km/hr and as low as 51.5 km/hr.

20 Two further aspects of the evidence relevant to the issues that arise on the DPP's appeal should be noted.

21 First, a forensic pathologist gave evidence that Ms Jordan's injuries, specifically injury to the back of her head and grazes to her face and other parts of her body, were not injuries consistent with a fall when the vehicle was stationary or moving at less than 2 km/hr. He accepted that he "favour[ed]" the proposition that the vehicle must have been moving at the time of the fall, although he could not say how fast the car was travelling other than that it was moving "at some speed". He also accepted that the vehicle could have been decelerating at the time of the fall.

22 Second, the jury conducted a view of the scene where the incident occurred, including Coutts Place.[11] In doing so, the jury were entitled to draw any reasonable inference from what they saw, heard or otherwise noticed during the inspection.[12] During his final address, trial counsel for Mr O'Connell reminded the jury that they

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11 *Evidence Act 2011* (ACT), s 53.

12 *Evidence Act 2011* (ACT), s 54.

had visited the scene and that "one of the reasons for you to do a view was because you would be able to see exactly what field of vision the CCTV camera had and the various other fields of vision of where [Ms X] was on the road and so on and so forth".

The trial judge's directions to the jury

23 The prosecution case on murder alleged that Mr O'Connell's act caused the death of Ms Jordan and that in so acting Mr O'Connell was recklessly indifferent to the probability of causing death.[13] In the alternative, the prosecution contended that Mr O'Connell committed manslaughter by an unlawful and dangerous act.[14]

24 Reflecting the manner in which the prosecution put its case, the trial judge identified the relevant "act" of Mr O'Connell for each of murder and manslaughter as his "deliberately [driving] the vehicle with Ms Jordan on the vehicle's bonnet, knowing of Ms Jordan's presence on the bonnet". The trial judge also directed the jury that, if they found Mr O'Connell guilty of murder, they "do not consider the statutory alternative of manslaughter".

25 In respect of murder, the trial judge directed the jury that the prosecution was required to prove beyond reasonable doubt that Mr O'Connell was recklessly indifferent to the probability of causing Ms Jordan's death. In this context, "'probable' [and probability] means likely to happen" as distinct from the possibility of death happening.[15] In respect of manslaughter and insofar as the prosecution had to prove that Mr O'Connell's act was unlawful, the trial judge directed that the prosecution had to prove, beyond reasonable doubt, that Mr O'Connell "intentionally drove the vehicle with the intention that Ms Jordan would fall from the vehicle and collide with the roadway". The trial judge told the jury that "as a matter of law, this conduct committed with th[at] intention, would constitute an assault, which is an unlawful act".

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13 *Crimes Act 1900* (ACT), s 12(1)(b); see *Royall v The Queen* (1991) 172 CLR 378 at 395, 416, 430-431, 455-456.

14 *Crimes Act 1900* (ACT), ss 15, 49; table 49, item 1.

15 *R v Crabbe* (1985) 156 CLR 464 at 469; *Boughey v The Queen* (1986) 161 CLR 10 at 19-20; *Royall v The Queen* (1991) 172 CLR 378 at 395, 416, 430-431, 455-456.

26 In respect of both murder and manslaughter, the trial judge directed the jury that they could not be satisfied that Mr O'Connell's "act" caused Ms Jordan's death unless satisfied beyond reasonable doubt "that Ms Jordan was on the bonnet of the vehicle at the time that she fell from the vehicle and sustained her fatal injuries".[16] For that fact to be established, the jury had to accept Ms X's evidence that Ms Jordan was on the bonnet of the vehicle as it left Coutts Place and turned into Alfred Hill Drive. The trial judge directed the jury that they could convict Mr O'Connell only if "hav[ing] carefully examined [Ms X's] evidence" they were satisfied "that it is reliable and honest beyond reasonable doubt".[17]

The first judgment

27 The original focus of Mr O'Connell's unreasonable verdict ground was the alleged unreliability of the evidence of Ms X and the sufficiency of proof of the presence of Ms Jordan on the bonnet of Mr O'Connell's car when he was driving and she fell. However, after the Court of Appeal had initially reserved its judgment, the Court invited submissions from the parties addressing three questions, namely: (i) if it was accepted that it was open to the jury to find that Ms Jordan was on the bonnet of the vehicle when she fell and suffered fatal injuries, ought the jury have entertained a reasonable doubt as to Mr O'Connell's reckless indifference to the probability of death; (ii) was proof of Mr O'Connell's reckless indifference in those circumstances an issue that arose at the trial; and (iii) was the sufficiency of the proof of Mr O'Connell's reckless indifference an issue raised in the appeal? The parties filed submissions addressing those issues.

28 In relation to Ms X's evidence, notwithstanding the assumption that the jury assessed Ms X's evidence to be reliable and credible,[18] McCallum CJ was not persuaded that "the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of [Mr O'Connell's] guilt". By contrast, Taylor J doubted whether the evidence, including that of Ms X, established beyond reasonable doubt that when Mr O'Connell was driving along Alfred Hill Drive and Ms Jordan fell, she was on the vehicle's bonnet. Taylor J concluded, however, that this was a doubt that "[could] be explained by the advantage of the jury in seeing

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16 See *Royall v The Queen* (1991) 172 CLR 378 at 401, 420, 458.

17 See *R v Murray* (1987) 11 NSWLR 12.

18 Citing *Pell v The Queen* (2020) 268 CLR 123 at 145 [39] ("*Pell*").

and hearing the evidence, which included a view of the scene where the incident occurred".[19]

29 Taylor J also had a reasonable doubt as to whether the prosecution proved that Mr O'Connell was recklessly indifferent to the probability of causing death and concluded that this was "not a doubt that ... can be explained by the advantage of the jury" (in seeing and hearing the evidence during the trial). Taylor J therefore concluded that the evidence did not exclude the reasonable inference that when Mr O'Connell drove the vehicle with Ms Jordan on the bonnet he did not know or realise that her death was probable. Her Honour's reasoning to that conclusion is described below.[20]

30 McCallum CJ disagreed with Taylor J's conclusion in respect of Mr O'Connell's reckless indifference for four reasons. First, her Honour considered that the hypothesis that Mr O'Connell did not foresee the probability of death had not been raised, "or at best ... only barely raised, as an issue in the trial". Second, her Honour considered that, to the extent this was raised as a hypothesis, it was not a reasonable hypothesis. Third, her Honour considered that Mr O'Connell's version of events (that Ms Jordan was on the rear of the vehicle, not the bonnet) meant that it was not open to consider on appeal, as a hypothesis consistent with innocence, a case in which Ms Jordan was on the bonnet of Mr O'Connell's vehicle but he did not foresee the probability of death.[21] Fourth, her Honour considered that the manner in which this issue arose in the Court of Appeal was inconsistent with the adversarial nature of an appeal.[22] Taylor J rejected all four of those propositions.

31 As noted, Loukas-Karlsson J agreed with Taylor J.

The second judgment

32 In the second judgment, the Court of Appeal addressed three issues of relevance to Mr O'Connell's appeal.

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19 See *M v The Queen* (1994) 181 CLR 487 at 494-495; *Dansie v The Queen* (2022) 274 CLR 651 at 658 [9].

20 See below at [51]-[59].

21 Citing *R v Baden-Clay* (2016) 258 CLR 308 ("*Baden-Clay*").

22 Citing *ZT* (2025) 281 CLR 137 at 146 [11].

33 The first issue was whether, as Mr O'Connell contended and the DPP denied, s 297 of the *Crimes Act 1900* (ACT) precluded the Court of Appeal from ordering a new trial for the offence of manslaughter (or ordering the entry of a verdict of guilty to manslaughter). All members of the Court of Appeal held that s 297 does not have that effect. Their Honours further held that s 297 does not have that effect despite the Court of Appeal entering a verdict of not guilty to murder in the first judgment. The second ground of Mr O'Connell's appeal to this Court challenges that holding.

34 The second issue was whether, as the DPP contended and Mr O'Connell denied, the Court of Appeal had power under s 37O(1)(d) of the SCA to order that a verdict of guilty of manslaughter be entered. All members of the Court of Appeal held that the Court had that power and that its exercise was governed by the same principles as apply to the entry of an alternative verdict under the appeal provisions of other jurisdictions,[23] including those stated in *Spies v The Queen*.[24] As part of his first ground of appeal in this Court, Mr O'Connell contends that s 37O(1)(d) does not confer power on the Court of Appeal to order the entry of a verdict of guilty to an alternative offence.

35 The third issue was whether, as the DPP contended and Mr O'Connell denied, in applying the approach in *Spies* the Court of Appeal should enter a verdict of guilty of manslaughter or order a new trial for that offence. Loukas-Karlsson and Taylor JJ held that a verdict of guilty to manslaughter should be entered. McCallum CJ disagreed and would have ordered a new trial for manslaughter. The balance of Mr O'Connell's first ground of appeal to this Court contends that, even if the Court of Appeal had power to enter a verdict of guilty to manslaughter, it erred in exercising that power given the basis upon which it upheld Mr O'Connell's unreasonable verdict ground in the first judgment.

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23 *Federal Court of Australia Act 1976* (Cth), s 30BB(3); *Criminal Appeal Act 1912* (NSW), s 7(2); *Criminal Procedure Act 1921* (SA), s 160(2); *Criminal Appeals Act 2004* (WA), s 30(5)(c); *Criminal Procedure Act 2009* (Vic), s 277(1)(c); *Criminal Code* (Qld), s 668F(2); *Criminal Code* (Tas), s 403(2); *Criminal Code* (NT), s 412(1).

24 (2000) 201 CLR 603.

The DPP's appeal

36 As the DPP's appeal challenges the basis upon which the Court of Appeal overturned Mr O'Connell's conviction for murder it will be addressed first.

The DPP's first ground of appeal: hypothesis not raised at trial or on appeal

37 The DPP's first ground of appeal from the first judgment contends that the majority of the Court of Appeal erred in allowing the appeal to it "on a basis not raised at trial nor on appeal, and in relation to a hypothesis which was not open on the evidence". In substance, this ground of appeal seeks to raise the first, third and fourth points relied on by McCallum CJ in rejecting so much of Mr O'Connell's unreasonable verdict ground concerning reckless indifference.[25] None of those points should be accepted.

Not inconsistent with adversarial nature of an appeal

38 Both a criminal trial[26] and a criminal appeal[27] are adversarial contests. Ordinarily, where no question of the competence of counsel or any similar circumstance arises,[28] the issues raised at a criminal trial define the outer boundary of the issues that may be pursued on appeal.[29] While the court's function in considering an unreasonable verdict ground is to make its own independent assessment of the evidence and "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",[30] that function does not impose a duty on the intermediate

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25 See above at [30].

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

27 *ZT* (2025) 281 CLR 137 at 146 [11].

28 See *TKWJ v The Queen* (2002) 212 CLR 124 at 134 [31], 150 [80]-[81], 158 [107]-[108]; *Nudd v The Queen* (2006) 80 ALJR 614 at 618-619 [9]; 225 ALR 161 at 164-165.

29 *Baden-Clay* (2016) 258 CLR 308 at 324 [48], 327-329 [59]-[64]. See also *Doggett v The Queen* (2001) 208 CLR 343 at 346-347 [3], [5], 349 [16].

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

appellate court to consider parts of the record of the trial not placed by the parties before it or to search the trial record for any error requiring the quashing of a conviction where the appellant "has not relied on an issue or on evidence"[31] that points to or suggests that error. Instead, it is for the parties to the appeal "to identify the evidence [from the trial] that the appellate court must review and assess and the features of that evidence that support their respective cases on appeal".[32]

39 That said, it is one thing to state that an intermediate appellate court is not *bound* to search the record of the trial for any error requiring the quashing of a conviction notwithstanding that the appellant has not argued there was such an error. However, it is another thing to say that such a court is not *permitted* to raise with the parties for their consideration an issue which the court identifies as potentially affecting the conviction that arises from the trial and is apparent on the material placed before the appellate court by the parties to the appeal.[33] If one of the parties then takes up the point and the other affected party (or parties) is afforded procedural fairness, and if the point is otherwise capable of being raised on the appeal, then an appeal court will not fall into error by considering the point.

40 That is what occurred here. There was no infringement of the adversarial process of an appeal arising from the Court of Appeal raising its concern with the parties that the jury's verdict of guilty of murder was unreasonable or could not be supported having regard to the evidence insofar as it rested on a finding that Mr O'Connell was recklessly indifferent to the probability of Ms Jordan's death, even if Ms Jordan was on the bonnet of the car when Mr O'Connell was driving. When that point was raised by the Court of Appeal with the parties, Mr O'Connell relied on it and the DPP was given the opportunity to make submissions. As the discussion below explains, there was nothing that otherwise precluded the point from being considered.

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31 *Gipp v The Queen* (1998) 194 CLR 106 at 125 [55], see also at 151-152 [130]-[131].

32 *ZT* (2025) 281 CLR 137 at 146 [11].

33 See, for example, in a civil context, *Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 at 386 [100]; *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 at 293 [127] fn 350; *Plaintiff M27/2025 v Minister for Immigration and Multicultural Affairs* (2025) 99 ALJR 1495 at 1498 [2], 1502 [36]; 425 ALR 481 at 483, 489.

Recklessness was an issue at Mr O'Connell's trial

41 The majority of the Court of Appeal did not err in concluding that whether the prosecution proved Mr O'Connell was recklessly indifferent to Ms Jordan's probable death, even if it was proved that she was on the bonnet of the car when he was driving, was an issue at the trial. Throughout the trial the prosecution bore the burden of proving beyond reasonable doubt that Mr O'Connell was recklessly indifferent to Ms Jordan's probable death. As noted by Taylor J, there was no express or implied admission by or on behalf of Mr O'Connell that, if it was proved beyond reasonable doubt that just prior to Ms Jordan's fall he was driving with her on the bonnet of his car, reckless indifference was established.

42 Thus, while the contest over Ms X's evidence was the primary focus of the trial, Mr O'Connell's trial counsel submitted to the jury that the prosecution had not proven that, in driving with Ms Jordan on the bonnet, his client was recklessly indifferent to the probability of her death. For example, trial counsel for Mr O'Connell told the jury:

> "My primary submission to you is, of course, that you'll have a doubt about whether [Ms Jordan] was on the bonnet at the relevant time, and of course, if that's the case, then it's not guilty on both charges. I don't want to weaken that submission by referring to other possible scenarios, because they're not borne out, in our submission, on the evidence. But I will say this: I submit that on the evidence – the evidence doesn't *on any view* support Michael O'Connell having a reckless indifferent state of mind." (emphasis added)

43 This submission reflected the principal focus of Mr O'Connell's case at the trial, being the challenge to Ms X's evidence that Ms Jordan was on the bonnet of his vehicle. The submission also reveals a reluctance on behalf of Mr O'Connell's counsel to "weaken" the force of the challenge to Ms X's evidence by inviting the jury to consider alternatives in the event that Ms X's evidence was accepted. Even so, counsel overcame that reluctance by submitting that the jury could not, "on any view" of the evidence, be satisfied that his client had a "reckless[ly] indifferent state of mind". That necessarily included a view of the evidence that involved an acceptance of Ms X's version of events.

No analogy with Baden-Clay

44 No relevant analogy can be drawn between the approach taken by the majority of the Court of Appeal in the first judgment, in considering whether the evidence proved that Mr O'Connell was recklessly indifferent to the probability of

Ms Jordan's death, and the approach taken by the Court of Appeal of the Supreme Court of Queensland in *R v Baden-Clay* that was rejected in this Court.

45 In *Baden-Clay*, the respondent was convicted of the murder of his wife. At his trial the respondent gave evidence denying that he had anything to do with his wife's death or the disposal of her body.[34] The Court of Appeal upheld a ground of appeal contending that the murder conviction was unreasonable, and substituted a verdict of guilty to manslaughter.[35] The Court of Appeal concluded that the prosecution had not disproved a reasonable hypothesis that the respondent was guilty of manslaughter but not guilty of murder, namely, that in a physical confrontation with his wife, the respondent "delivered a blow which killed her (for example, by the effects of a fall hitting her head against a hard surface) without intending to cause serious harm; and, in a state of panic and knowing that he had unlawfully killed her, he took her body to Kholo Creek in the hope that it would be washed away, while lying about the causes of the marks on his face which suggested conflict".[36]

46 In *Baden-Clay*, this Court held that, in circumstances where there was no evidence led at the trial that suggested that the respondent killed his wife in a physical confrontation without intending to do so, the hypothesis identified by the Court of Appeal was not based on the evidence but was mere speculation or conjecture.[37] Further, this Court held that even though the jury had rejected the respondent's evidence, the fact that his evidence was inconsistent with the hypothesis identified by the Court of Appeal was still of significance because "it was open to the jury to consider that the hypothesis identified by the Court of Appeal was not a reasonable inference from the evidence when the only witness who could have given evidence to support the hypothesis gave evidence which necessarily excluded it as a possibility".[38]

47 Thus, in *Baden-Clay*, the Court of Appeal identified a factual scenario different from that contended for by the prosecution and the accused (and

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34 *Baden-Clay* (2016) 258 CLR 308 at 315 [5], 319 [32].

35 *Baden-Clay* (2016) 258 CLR 308 at 314-315 [2].

36 *Baden-Clay* (2016) 258 CLR 308 at 325-326 [53].

37 *Baden-Clay* (2016) 258 CLR 308 at 326 [55].

38 *Baden-Clay* (2016) 258 CLR 308 at 327 [57].

otherwise not supported by any evidence), and found that factual scenario had not been excluded by the prosecution. In this case, and unlike *Baden-Clay*, the possibility that Mr O'Connell drove with Ms Jordan on the bonnet of his vehicle, without him being recklessly indifferent to the probability of her death, was not a hypothesis comprising a different (and inconsistent) set of primary facts from that for which the prosecution contended, and nor was it merely speculative. Instead, it was a hypothesis that arose on the very same set of primary facts for which the prosecution contended as to Mr O'Connell's acts and the circumstances of Ms Jordan's death. The only difference between that hypothesis and the prosecution case was whether the prosecution had established, beyond reasonable doubt, an inference from those primary facts to the effect that in so driving Mr O'Connell was recklessly indifferent to the probability of Ms Jordan's death.

48 Further, unlike *Baden-Clay*, Mr O'Connell did not give evidence at his trial. The fact that in his interview with the police he denied that Ms Jordan was on the bonnet of the car said nothing about whether the prosecution proved beyond reasonable doubt that he was recklessly indifferent to the probability of Ms Jordan's death, if it was proved that he was driving with Ms Jordan on the bonnet of his car just prior to her fall.[39]

49 The DPP's first ground of appeal is rejected.

The DPP's second ground of appeal: failure to apply M v The Queen and the proper approach to a circumstantial case

50 The DPP's second ground of appeal contends that, in upholding Mr O'Connell's unreasonable verdict ground, the majority of the Court of Appeal failed to apply so much of *M v The Queen*[40] as required the Court to make "full allowance for the advantages enjoyed by the jury"[41] and failed to properly address the prosecution's circumstantial case that Mr O'Connell drove his vehicle with reckless indifference to the probability of Ms Jordan's death. Both of these contentions should be accepted.

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39 Cf *Baden-Clay* (2016) 258 CLR 308 at 327 [57].

40 (1994) 181 CLR 487.

41 *M v The Queen* (1994) 181 CLR 487 at 494.

51 To address this ground it is necessary to describe the reasons given by Taylor J for upholding Mr O'Connell's unreasonable verdict ground. Her Honour's analysis commenced by identifying what the prosecution needed to prove concerning Mr O'Connell's state of mind to establish that he was recklessly indifferent to the probability of causing Ms Jordan's death, namely "a realisation that death would probably occur" and a "decision to [drive] with Ms Jordan on the bonnet regardless of his realisation of that likelihood". Her Honour distinguished that state of mind from the state of mind necessary to prove manslaughter, which her Honour noted "did not require the prosecution to establish any specific intention on [Mr O'Connell's] part to bring about an outcome beyond an intention to dislodge Ms Jordan from her position on the vehicle". Her Honour observed that was "a perhaps fine but necessary distinction".

52 Taylor J noted that the prosecution sought to prove its case on reckless indifference by reference to circumstantial and direct evidence. In that context her Honour analysed five matters reflecting the circumstantial and direct evidence relied on by the prosecution.

53 The first matter was the alleged admission by Mr O'Connell to Ms X that "I shouldn't have done it". Consistent with the prosecution submission noted earlier, Taylor J treated that as an admission that Mr O'Connell drove with Ms Jordan present on the bonnet of the vehicle.[42] Her Honour noted that Ms Jordan's presence on the bonnet was "neutral" as to proof of Mr O'Connell's reckless indifference; it did "not admit of any matter that might distinguish" between that state of mind and the state of mind necessary to prove manslaughter. Her Honour noted that the prosecution did not rely on the admission as to the "establishment of reckless indifference". Her Honour gave no further consideration to the alleged admission.

54 The second matter was the nature and manner of Mr O'Connell's driving. Her Honour noted that the prosecution sought to characterise his driving as having been "at speed". Her Honour noted that the prosecution did not contend that Mr O'Connell exceeded any applicable speed limit. Her Honour reviewed the evidence of the forensic pathologist Professor Duflou, Ms X and LSC Smorhun as to the speed of the vehicle, and noted that this evidence was to be assessed alongside the CCTV footage which captured Mr O'Connell driving the vehicle. Her Honour described that CCTV footage as "poor in quality", but her Honour

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42 See above at [14].

nevertheless concluded that Mr O'Connell's vehicle was neither "crawling along or very slow" nor travelling "fast".

55 Her Honour concluded that the "acceleration [of Mr O'Connell's vehicle] back up Coutts Place and movement around the corner onto Alfred Hill Drive, given the speed the evidence revealed the vehicle achieved as it moved through the CCTV footage, was not a dramatic or aggressive escalation of [his] driving, bearing in mind the evidence as to the speed the vehicle could have achieved over that distance". Otherwise, her Honour found that the CCTV footage "did not demonstrate a dramatic escalation ... in the manner of driving such that it appeared uncontrolled, erratic or more intense as to the risk it presented".

56 The third matter was the probability of Ms Jordan's death if it was proved that she was on the bonnet of Mr O'Connell's vehicle as he drove away from her home and turned into Alfred Hill Drive. Her Honour addressed whether the act of driving with Ms Jordan on the bonnet "presented a 'high' risk of probable death or a risk of probable death". After reviewing Professor Duflou's evidence and noting that there was no other evidence bearing on the factors which might influence the risk or severity of harm to Ms Jordan, her Honour concluded:

> "A *probability* of death could not be said to be present on every occasion a person is present on the bonnet or elsewhere on the outside of a moving vehicle. The presence of slightly built Ms Jordan on the bonnet of the utility vehicle and the fact that it was moving did not evidence a probability or a 'high' probability of death, nor [Mr O'Connell's] advertence to it." (emphasis in original)

57 The fourth matter was the significance of the evidence of the conflict between Mr O'Connell and Ms Jordan, including Mr O'Connell's "frustration and anger" at Ms Jordan. Her Honour observed that Mr O'Connell's "desire to leave the scene ... could not be conflated" with a "realisation" that, in driving with Ms Jordan on the bonnet, "the result would probably be her death". Taylor J also noted that the evidence suggested that Mr O'Connell's anger, and the conduct reflecting that anger, varied over the hours of the conflict and that while it was "one thing" for him to be angry at Ms Jordan's refusal to get off the bonnet of his car, "it was another thing for him to drive intending to dislodge her". Her Honour stated that neither Mr O'Connell's "anger nor that intention [ie to dislodge Ms Jordan] *alone* fulfilled the necessary mental element for murder based on reckless indifference" (emphasis added). Her Honour referred to the risk of substituting Mr O'Connell's anger or intention to dislodge Ms Jordan for the requisite state of mind of reckless indifference to the probability of Ms Jordan's death, and held that "[a] preparedness

[of Mr O'Connell] to 'ignore' the consequence because of anger did not *necessarily, or only*, admit of a realisation of probable death" (emphasis added).

58 The fifth matter was the evidence of Mr O'Connell's conduct in the immediate aftermath of Ms Jordan's fall. Her Honour considered that the "expressions, tone and reaction of [Mr O'Connell], captured in part by the CCTV footage" were "not compatible" with an actual realisation on Mr O'Connell's part that as a result of his driving her death would probably occur and a determination by him to continue driving in any event.

59 Having reviewed these matters, and noting (correctly) that Mr O'Connell's (rejected) version of events did not have the significance that was attached to the rejected evidence of the respondent in *Baden-Clay*, her Honour concluded that "[o]n the whole of the evidence" the "reasonable inference that when [Mr O'Connell] drove the vehicle with Ms Jordan on the bonnet, he did not know or realise that her death was *probable*, was not excluded" (emphasis in original).

60 Two errors of principle are evident in this approach.

Ignoring the jury's advantage

61 The first error of principle is that the majority of the Court of Appeal failed to properly identify and make "full allowance for the advantages enjoyed by the jury" in seeing and hearing the evidence at the trial,[43] especially the advantage the jury derived from their view of the scene. *M v The Queen* requires an appellate court, in deciding an unreasonable verdict ground, 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".[44] In doing so 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",[45] including "seeing and hearing the evidence as it unfolds when evaluating factual matters".[46] Instead, the appellate court "must pay full regard to

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43 *M v The Queen* (1994) 181 CLR 487 at 494.

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

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

46 *ZT* (2025) 281 CLR 137 at 145 [9].

those considerations"[47] and make "full allowance for the advantages enjoyed by the jury".[48] To that end the appellate court should "identify the existence, nature and scope" of those advantages.[49] In some cases involving (say) electronic exhibits, it will sometimes be necessary for the appellate court to view or listen to that exhibit to ascertain the existence, nature and scope of the advantage enjoyed by the jury in seeing and hearing that evidence in the context of the trial.[50]

62 While acknowledging the jury's advantage in relation to the proof of the indispensable fact of Ms Jordan's presence on the bonnet of Mr O'Connell's car while he was driving, depending as it did on an acceptance of Ms X's evidence, Taylor J did not accept that the jury enjoyed any "discernible advantage" over the Court of Appeal in drawing inferences from the direct evidence as to Mr O'Connell's state of mind.[51] However, in evaluating what followed or did not follow from the speed and manner of his driving in both Coutts Place and Alfred Hill Drive, her Honour repeatedly referred to what could be discerned from observing the CCTV footage. This included drawing conclusions from the "expressions, tone and reaction of [Mr O'Connell], captured in part by the CCTV footage", and finding that the footage did not demonstrate an aggressive or dramatic escalation when he drove past Ms X in Coutts Place even though Ms X testified to the contrary.[52] An analysis of the "expressions, tone and reaction" of Mr O'Connell as captured in part by the CCTV footage was a matter in which the jury, possessing a breadth of understanding of how different people speak and behave, enjoyed a distinct advantage over the Court of Appeal.[53]

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

48 *M v The Queen* (1994) 181 CLR 487 at 494.

49 *ZT* (2025) 281 CLR 137 at 149 [17].

50 *ZT* (2025) 281 CLR 137 at 149 [18], 150 [21], 167 [87].

51 Citing *Dawson v The King* [2025] NSWCCA 85 at [134].

52 Ms X gave evidence that Mr O'Connell "put his foot down all the way on the pedal and went so fast" that she thought Mr O'Connell was going to hit her and so she jumped out of the way, and that Mr O'Connell "then just like zoomed".

53 *ZT* (2025) 281 CLR 137 at 146 [10].

63 More importantly, concerning the manner and nature of Mr O'Connell's driving, it is apparent from McCallum CJ's description of the CCTV footage that the footage had its limitations.[54] As was reflected in trial counsel's address to the jury noted above, the view of the scene undertaken by the jury, which included viewing the location from where the footage was taken, provided the jury with some and perhaps a significant advantage in evaluating the effect of the CCTV footage. The view likewise afforded the jury an advantage in evaluating the other evidence at the trial that bore upon the nature and manner of Mr O'Connell's driving, including Ms X's evidence on that topic – evidence which the jury also saw and heard. The majority of the Court of Appeal erred in not properly identifying, and then affording full allowance to, all of those advantages.

"Piecemeal" approach to prosecution case on intention

64 The second error of principle on the part of the majority of the Court of Appeal was the failure to consider the combined effect of the evidence and circumstances relied on by the prosecution to establish its case of reckless indifference.

65 As Taylor J recognised, the prosecution case of reckless indifference was at least partly circumstantial. A jury cannot be satisfied of guilt beyond reasonable doubt based on circumstantial evidence unless no explanation other than guilt is reasonably compatible with the proved circumstances.[55] In considering a circumstantial case, all of the circumstances established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence.[56] No doubt when an appellate court considers a circumstantial case it will often start with a consideration of each circumstance and, commonly in such cases, an individual circumstance considered in isolation may yield an inference or hypothesis consistent with innocence.[57]

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54 See above at [18].

55 *Peacock v The King* (1911) 13 CLR 619 at 634; *Barca v The Queen* (1975) 133 CLR 82 at 104.

56 *Hillier* (2007) 228 CLR 618 at 637 [46]; *Baden-Clay* (2016) 258 CLR 308 at 324 [47].

57 See, eg, *Hillier* (2007) 228 CLR 618 at 639 [49].

However, "a circumstantial case [is not] to be considered piecemeal"[58] and ultimately it is the accumulation of the evidence that may prove guilt.[59]

66 It was orthodox for Taylor J to commence the analysis by breaking down and considering the individual circumstances of the case in the manner in which her Honour did.[60] However, in doing so, her Honour considered only whether in isolation each circumstance demonstrated or supported an argument that Mr O'Connell was recklessly indifferent to the probability of death, as opposed to having a "mere" intention to dislodge Ms Jordan. Once her Honour concluded that a circumstance when considered in isolation did not have the former quality, her Honour put that circumstance aside and did not consider it further. While, at the conclusion of Taylor J's analysis, her Honour referred to the "whole of the evidence",[61] there was nothing to suggest that there was any assessment of what was demonstrated by the totality of the circumstances proved by the evidence.

67 Thus, for example, even if Mr O'Connell's "anger" or "intention" to dislodge Ms Jordan "alone" did not fulfil the necessary mental element for murder based on reckless indifference, and even if a preparedness to "ignore" the consequences because of anger did not "necessarily, or only, admit of a realisation of probable death",[62] it was the task of the appellate court to consider whether those circumstances could or could not in combination with other circumstances support a finding of reckless indifference.

68 Similarly, whether or not it is correct to say that "a probability of death could not be said to be present on *every occasion* a person is present on the bonnet or elsewhere on the outside of a moving vehicle", the fact that death may or might follow from falling from the bonnet of a moving vehicle is still relevant to determining whether in the circumstances of a particular case the person driving that vehicle was aware of a probability of death from driving with a person present

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58 *Hillier* (2007) 228 CLR 618 at 638 [48].

59 *Plomp v The Queen* (1963) 110 CLR 234 at 242; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 535.

60 See above at [52]-[58].

61 See above at [59].

62 See above at [57].

on the bonnet.[63] That circumstance had to be considered with all the other circumstances, such as Mr O'Connell's knowledge of the build, physique and strength of Ms Jordan, as well as Mr O'Connell's emotional state at the time of driving and the speed and manner of driving. However, in the passage set out above,[64] her Honour considered the fact that a slightly built person was on the bonnet of a moving car in isolation from the other circumstances in determining whether a probability of death was established. It is unnecessary to determine whether Taylor J also erred in assessing only the objective risk of death posed by Mr O'Connell's act of driving with Ms Jordan on the bonnet, as opposed to the risk that Mr O'Connell subjectively appreciated. What is clear is that Taylor J's analysis did not address the totality of the demonstrated circumstances. In that respect, her Honour erred.

69 The DPP also submitted that Taylor J erred in requiring proof of each individual circumstance relied on beyond reasonable doubt. The principal support for this contention is a passage in her Honour's reasons to the effect that, in light of the concessions made by LSC Smorhun in cross-examination, "it was not open to the jury to be satisfied beyond reasonable doubt that [Mr O'Connell] was driving 63 kilometres per hour when the brakes were applied after Ms Jordan fell from the vehicle". On its face, this statement involves error, as proof of his driving at that speed at that time was not an indispensable fact that had to be proved beyond reasonable doubt to establish the prosecution's circumstantial case of reckless indifference.[65] However, this isolated passage does not demonstrate that Taylor J imposed a general requirement of proof beyond reasonable doubt with respect to every circumstance relied on by the prosecution to prove reckless indifference. There is nothing in the balance of her Honour's reasons that suggests that her Honour adopted such an approach. Further, this passage is not material to her Honour's reasoning, in that at trial the prosecution accepted that there was "some margin for error" in LSC Smorhun's calculation that Mr O'Connell's car was travelling at 63 km/hr at the time Ms Jordan fell.

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63 See above at [56].

64 See above at [56].

65 Cf *Shepherd v The Queen* (1990) 170 CLR 573 at 576, 581-585.

Conclusion on Ground 2 of the DPP's appeal

70 Ground 2 of the DPP's appeal must be upheld.

Disposition of the DPP's appeal

71 Having found that the majority of the Court of Appeal erred in upholding Mr O'Connell's unreasonable verdict ground, the question arises as to whether this Court should determine that ground or remit the proceedings to the Court of Appeal to be redetermined in accordance with this Court's reasons.

72 Relying on *Pell v The Queen*,[66] the DPP contended that if error on the part of the majority of the Court of Appeal was demonstrated, this Court should proceed to pronounce the judgment or order which the Court of Appeal should have pronounced or made. The DPP submitted that the parties had a full opportunity to place sufficient material before the Court to enable the grounds to be determined and the orders the DPP sought to be made, and that, in any event, all relevant material was before the Court.

73 Mr O'Connell denied that the grant of special leave extended to arguing the outcome of his appeal and contended that the appeal only concerned alleged error in the approach of the majority of the Court of Appeal. He also submitted that the Court was not in a position to assess the whole of the evidence, pointing to the absence in the materials before this Court of the CCTV footage, including screenshots, and footage of Ms X taken by the police at the scene during which Ms X was said to be "showing the police officer various things that she says happened" by "pointing and gesturing to different things". Watching that footage was said to enable a court to see "the particular things that [Ms X] is referring to, directions and movements on the bonnet of the car and so on".

74 In circumstances where it is found that an intermediate appellate court has erred in determining an unreasonable verdict ground, whether this Court will determine that ground for itself or remit the proceedings to the appellate court will depend on an assessment of various factors that inform what the "interests of justice" require.[67] Those factors include the nature of the appellate court's error, what the particular case requires in reviewing the record of the trial in accordance

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66 (2020) 268 CLR 123 at 137-138 [10].

67 *Hillier* (2007) 228 CLR 618 at 640 [53]-[54].

with *M v The Queen*,[68] and the extent and type of materials that have been or must be placed before this Court to undertake that review.

75 Thus, in *R v Hillier* this Court allowed an appeal from an intermediate appellate court's finding of an unreasonable verdict and remitted the appeal to that court for redetermination.[69] In doing so, Gummow, Hayne and Crennan JJ noted that it was "in the interests of the administration of justice, both generally and in this particular case, that the error be corrected".[70] The error of the intermediate appellate court in *Hillier* was considering the significance of circumstantial evidence consistent with the accused's innocence in isolation from the evidence as a whole.[71] Gummow, Hayne and Crennan JJ observed that the nature of that error required that the "*whole* case be reviewed" to determine whether it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty,[72] and thus the "interests of justice" were best served by remitting the matter to the intermediate appellate court for rehearing such that it would be open to the parties "to canvass the whole of the evidence at trial ... in light of this Court's identification of the error made by the majority of the Court of Appeal".[73]

76 In *R v ZT*, this Court upheld a contention that an intermediate appellate court had erred in upholding an unreasonable verdict ground in circumstances where that court had not listened to recordings of intercepted telephone calls for the purpose of identifying the existence, nature and scope of any advantages that the jury may have enjoyed and affording full allowance to any such advantages.[74] Those proceedings were remitted to the intermediate appellate court for the redetermination of the unreasonable verdict ground in accordance with this Court's

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68 (1994) 181 CLR 487. See also *Hillier* (2007) 228 CLR 618 at 640 [55].

69 *Hillier* (2007) 228 CLR 618 at 625 [5], 640 [54].

70 *Hillier* (2007) 228 CLR 618 at 640 [54].

71 *Hillier* (2007) 228 CLR 618 at 635 [38], 639 [49]-[52].

72 *Hillier* (2007) 228 CLR 618 at 640 [54] (emphasis in original), in accordance with *M v The Queen* (1994) 181 CLR 487 at 494-495.

73 *Hillier* (2007) 228 CLR 618 at 640 [54]-[55].

74 *ZT* (2025) 281 CLR 137 at 149 [17], 150 [21], 169-170 [92]-[94].

reasons.[75] While the grant of special leave to appeal in *ZT* did not extend to this Court determining whether the respondent's conviction was unreasonable,[76] remittal may have been, in any event, necessary in circumstances where this Court concluded that the proper disposition of the proceedings required, or, at least, may have required, the court to listen to those recordings for the purposes stated above.[77] It would be a rare circumstance in which this Court would undertake that task.

77 By contrast, *Baden-Clay* was a prosecution appeal but the nature of the error of the Court of Appeal of the Supreme Court of Queensland and the material placed before this Court meant that, once the hypothesis consistent with innocence identified by the Court of Appeal was rejected as conjecture,[78] the respondent's contention that his conviction was unreasonable could be determined (and rejected) in accordance with law and without difficulty.[79] For the reasons already explained,[80] there is no relevant analogy between *Baden-Clay* and this case. As for *Pell*, that was an appeal by the convicted person against an intermediate appellate court's rejection of his unreasonable verdict ground.[81] Once this Court held that the appeal could be decided on the assumption that the jury assessed the principal prosecution witness' evidence to be credible and reliable,[82] and that there was no "real forensic purpose" to viewing the recordings of the witness' testimony,[83] it

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75 *ZT* (2025) 281 CLR 137 at 144 [5].

76 *ZT* (2025) 281 CLR 137 at 144 [5].

77 *ZT* (2025) 281 CLR 137 at 149 [17], 150 [21], 169-170 [92]-[94].

78 *Baden-Clay* (2016) 258 CLR 308 at 326 [55].

79 *Baden-Clay* (2016) 258 CLR 308 at 329 [64], 329-333 [65]-[79].

80 See above at [44]-[48].

81 *Pell* (2020) 268 CLR 123 at 137 [7].

82 *Pell* (2020) 268 CLR 123 at 145 [39], 150 [58], 164-165 [119].

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

followed that this Court could determine the appellant's contention in that case that his conviction was unreasonable in accordance with law and without difficulty.[84]

78 Comparably to *Hillier*, the majority of the Court of Appeal in this case erred in its assessment of a circumstantial case, and the nature of that error requires that the "*whole* case" be reviewed in accordance with the principles stated in *M v The Queen*.[85] Comparably to *ZT*,[86] the majority of the Court of Appeal in this case erred in, amongst other matters, failing to assess and afford full allowance to the jury's advantages. Compliance with *M v The Queen*, as further explained in *ZT*, would, or at least may, require the Court of Appeal in this case to view the CCTV footage shown to the jury at the trial, even if only for the purpose of considering the extent to which the jury's view of the scene afforded them an advantage in assessing the effect of that footage. That task, along with a consideration of the balance of the evidence that was placed before the Court of Appeal for the purpose of considering Mr O'Connell's unreasonable verdict ground, can be undertaken by the Court of Appeal "to an extent greater than reasonably possible in this Court".[87] The proceedings will be remitted to that Court to redetermine Mr O'Connell's unreasonable verdict ground according to law.

Mr O'Connell's appeal

79 The outcome of the DPP's appeal is that the orders made in the first judgment will be set aside, Mr O'Connell's conviction for murder will be restored and his appeal against that conviction will be remitted to the Court of Appeal to be redetermined according to law. As Mr O'Connell's appeal is against the orders made in the second judgment, and the second judgment is premised on the first judgment,[88] the making of orders to that effect renders it unnecessary to address any of the grounds of Mr O'Connell's appeal.

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84 *Pell* (2020) 268 CLR 123 at 137-138 [10].

85 *Hillier* (2007) 228 CLR 618 at 640 [54], quoting *M v The Queen* (1994) 181 CLR 487 at 494-495.

86 (2025) 281 CLR 137 at 149 [17], 150 [21], 169-170 [92]-[94].

87 *Hillier* (2007) 228 CLR 618 at 640 [55].

88 See above at [33]-[35].

80 There is, however, a question of statutory construction that was fully debated on Mr O'Connell's appeal, the resolution of which is not dependent on the subsistence of the orders made in the first judgment or the reasoning which supports those orders, namely, whether the power conferred on the Court of Appeal by s 37O(1)(d) of the SCA to "set aside the verdict and order in a trial on indictment and order a verdict of not guilty (or another verdict)" confers a power on that Court to set aside a conviction for a principal offence (such as murder), and order the entry of a verdict of guilty to an alternative offence that was before the jury (such as manslaughter). Given the potential significance of that issue of construction, it is appropriate to address that issue.

81 Part 2A of the SCA concerns the jurisdiction and powers of the Court of Appeal. It provides that, when exercising appellate jurisdiction under that Part, the Supreme Court of the Australian Capital Territory is to be known as the Court of Appeal.[89] Amongst other matters, the Court of Appeal can hear appeals in relation to orders of the Supreme Court (other than from the Court of Appeal itself).[90]

82 Some provisions of Pt 2A do not expressly distinguish between civil and criminal appeals while others do. Of present relevance are the following parts of s 37O:

> "**Orders on appeal**
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> (1) The Court of Appeal has the following powers in relation to the order appealed from:
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> …
>
> (d) to set aside the verdict and order in a trial on indictment and *order a verdict of not guilty (or another verdict)* to be entered;
>
> (e) to order a new trial, with or without jury, on any appropriate ground;
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> …

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89 *Supreme Court Act 1933* (ACT), s 37E(1).

90 *Supreme Court Act 1933* (ACT), s 37E(2)(a).

(2) The Court of Appeal on an appeal against conviction must—

(a) allow the appeal if it considers that—

(i) the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence; or

(ii) the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law; or

(iii) on any other ground there was a miscarriage of justice; or

(b) dismiss the appeal.

(3) However, the Court of Appeal may also dismiss an appeal against conviction if it considers that—

(a) the point raised by the appeal might be decided in favour of the appellant; but

(b) no substantial miscarriage of justice has actually occurred.

…" (emphasis added)

83 Mr O'Connell contended that the power conferred by s 37O(1)(d) permits the substitution of another verdict for the offence the subject of the appeal against conviction but does not permit the substitution of a verdict of guilty for a different offence, including an alternative offence. Mr O'Connell contended that this construction is supported by the presence of the word "or" before the phrase "another verdict". In sum Mr O'Connell contended that, in a given case, the Court of Appeal can either enter a verdict of not guilty to the offence the subject of the appeal against conviction "or" enter another verdict in respect of that offence, but cannot enter a verdict of "not guilty" to the offence the subject of the appeal against conviction "and" enter "another verdict", being a guilty verdict to an alternative offence.

84 Mr O'Connell's contention should be rejected. On that construction, the only "other verdict" that the Court of Appeal could possibly order to be entered on an appeal against conviction is a verdict of not guilty because of mental impairment.

However, even a verdict of not guilty by reason of mental impairment is a form of "not guilty" verdict,[91] such that Mr O'Connell's construction renders the phrase "(or another verdict)" redundant. The ordinary meaning of "another verdict" in this context is a verdict different from "not guilty" and plainly includes a verdict of guilty. Provisions granting powers to or conferring jurisdiction upon a court such as s 37O should not be construed as subject to limitations that are not apparent on their terms.[92]

85 Further, insofar as alternative offences are concerned, no constraint or limit on s 37O(1)(d) follows from the fact that the appeal is against the conviction for the offence listed on the indictment. Where an accused pleads not guilty to the offence listed on the indictment, the alternative offence is necessarily put in issue before the jury. If the Court of Appeal sets aside the conviction for the offence listed on the indictment and enters an acquittal for that offence, the prosecution case for the alternative offence "remains unresolved"[93] and will need to be addressed by the Court of Appeal either by entering a verdict for the alternative offence or ordering a retrial with respect to that alternative offence. In such circumstances the alternative offence is part of the subject matter of the appeal against conviction for the offence listed on the indictment.[94]

86 The conclusion that the power to order the entry of "another verdict" includes the power to order the entry of a verdict of guilty to an alternative offence is consistent with the legislative history of Pt 2A. Prior to the introduction of Pt 2A in 2002,[95] appeals from the Supreme Court of the Australian Capital Territory lay to the Federal Court of Australia.[96] At that time the *Federal Court of Australia Act 1976* (Cth) ("the FCA Act") did not specify any grounds for appeal against

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91 *Criminal Code 2002* (ACT), s 28(7); *R v Porter* (1933) 55 CLR 182 at 185.

92 See *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 420-421. See also *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 283-284, 290; *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313, 316.

93 *AJS v The Queen* (2007) 235 CLR 505 at 514 [19].

94 See *AJS v The Queen* (2007) 235 CLR 505 at 510 [5].

95 By the *Supreme Court Amendment Act 2001 (No 2)* (ACT).

96 *Federal Court of Australia Act 1976* (Cth), s 24(1)(b), as at 13 October 2002.

convictions such as those found in the "common form" appeal provision which governs the determination of appeals against convictions on indictment in most Australian jurisdictions.[97] Section 28 of the FCA Act provided that the Full Federal Court "may, in the exercise of its appellate jurisdiction", "set aside the verdict and judgment in a trial on indictment and order a verdict of not guilty or other appropriate verdict to be entered".[98] In *Chamberlain v The Queen [No 2]*[99] Gibbs CJ and Mason J observed that, in failing to state the grounds or principles upon which the Full Federal Court was to determine criminal appeals, Parliament conferred on that Court "a wide discretion to ensure that justice is done in criminal cases"[100] and the power to set aside a verdict "was intended to extend at least as widely as [that] of the State Courts of Criminal Appeal".[101]

87 Part 2A of the SCA was modelled on the provisions of the FCA Act considered in *Chamberlain [No 2]*.[102] Thus, at the time of its enactment Pt 2A also did not specify the grounds or principles on which the Court of Appeal was to determine criminal appeals against convictions. The new s 37O(1)(d) of the SCA differed only slightly from the former s 28 of the FCA Act, in that s 37O(1)(d) confers power on the Court of Appeal to "order a verdict of not guilty (or another verdict)" to be entered, whereas s 28 conferred a power to "order a verdict of not guilty or other appropriate verdict".[103] In *Hillier* it was observed that there was "no

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97 See *MDP v The King* (2025) 99 ALJR 969 at 974 [1]; 423 ALR 204 at 206.

98 *Federal Court of Australia Act 1976* (Cth), ss 25(1), 28(1)(e), as at 13 October 2002.

99 (1984) 153 CLR 521.

100 *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 529; see also at 569-570, 615.

101 *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 529.

102 Australian Capital Territory, Legislative Assembly, *Supreme Court Amendment Bill 2001*, Explanatory Memorandum at 5.

103 At the time of its enactment, s 37O(1)(e) conferred a power to "set aside the verdict and judgment in a trial on indictment and order a verdict of not guilty (or another verdict) to be entered". In 2002, the paragraphs within s 37O(1) were renumbered such that s 37O(1)(e) became s 37O(1)(d): *Civil Law (Wrongs) Act 2002* (ACT), amend [3.41]. In 2006, "order" was substituted for "judgment": *Justice and Community Safety Legislation Amendment Act 2006* (ACT), amend [2.193].

persuasive reason to read the provisions of Pt 2A of the [SCA], spare as they are, as giving to the Court of Appeal of the Australian Capital Territory duties *and powers* in criminal appeals narrower than those described in *Davies and Cody* and held in *Chamberlain [No 2]* to apply in criminal appeals from Territories regulated by earlier, equally spare, legislative provisions".[104]

88 In response to this Court's observations in *Hillier*, in 2008 s 37O(2) and (3) were introduced into Pt 2A of the SCA, specifying grounds and principles for determining criminal appeals against convictions ("the 2008 Amendments").[105] The 2008 Amendments introduced grounds that corresponded to those provided for in the "common form" criminal appeal provisions.[106] The Explanatory Statement to the 2008 Amendments stated that "[d]espite the lack of explicit provision, the High Court [in *Hillier*] determined that the criminal appeals jurisdiction in the ACT is as broad as that of equivalent courts of appeal in other jurisdictions, and interpreted pt 2A accordingly. This amendment brings the appeals jurisdiction in line with that of all other Australian jurisdictions".[107] All those "other Australian jurisdictions", including New South Wales, have provisions conferring on the appellate court a power to substitute a verdict of guilty to the offence on the indictment with a verdict of guilty to another offence.[108]

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104 *Hillier* (2007) 228 CLR 618 at 632 [25] (emphasis added), citing *Davies and Cody v The King* (1937) 57 CLR 170 and *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521.

105 *Court Legislation Amendment Act 2008* (ACT), s 22, inserting s 37O(1A) and (1B) (which were later renumbered as s 37O(2) and (3)).

106 *MDP v The King* (2025) 99 ALJR 969 at 974 [1]; 423 ALR 204 at 206.

107 Australian Capital Territory, Legislative Assembly, *Court Legislation Amendment Bill 2008*, Explanatory Statement.

108 *Criminal Appeal Act 1912* (NSW), s 7(2); *Criminal Procedure Act 1921* (SA), s 160(2); *Criminal Appeals Act 2004* (WA), s 30(5)(c); *Criminal Procedure Act 2009* (Vic), s 277(1)(c); *Criminal Code* (Qld), s 668F(2); *Criminal Code* (Tas), s 403(2); *Criminal Code* (NT), s 412(1); see also *Federal Court of Australia Act 1976* (Cth), s 30BB(3).

89 Although the statements in *Chamberlain [No 2]*, *Hillier* and the Explanatory Statement to the 2008 Amendments were principally directed to the grounds or principles which an appellate court applies in determining whether to set aside a conviction, they apply with equal force to the construction of the scope of a provision conferring power on such a court to order the entry of "another verdict". As McCallum CJ observed, "[i]n light of [the] history [of s 37O], it should not be concluded that the Legislative Assembly in the Territory did not intend [the Court of Appeal] to have power to enter a verdict of guilty for some other offence of which the jury could on the indictment have found the appellant guilty".

90 Lastly, Mr O'Connell contended that the absence of specification of any criteria in s 37O(1)(d) for the substitution of another such verdict suggests that the provision is not intended to permit the substitution of a verdict for an alternative offence. Mr O'Connell also drew a contrast between s 37O(1)(d) and provisions such as s 7(2) of the *Criminal Appeal Act 1912* (NSW), which enables the Court of Criminal Appeal to substitute a verdict of guilty to another offence where the "jury could on the indictment have found the appellant guilty of some other offence, and on the finding of the jury it appears to the court that the jury must have been satisfied of facts which proved the appellant guilty of that other offence". However, as the above passage from *Chamberlain [No 2]* indicates, the absence of an express statement of grounds or principles governing the exercise of a power conferred on an appellate court is not of itself a basis for construing the power narrowly, as Mr O'Connell seeks to do.

Conclusion

91 The DPP's appeal from the first judgment must be allowed and the orders of the Court of Appeal in the first judgment setting aside Mr O'Connell's conviction for murder and entering a verdict of not guilty to that offence must be set aside. Orders should also be made in the DPP's appeal setting aside the orders made by the Court of Appeal in the second judgment. The proceedings will be remitted to the Court of Appeal to rehear Mr O'Connell's appeal against his conviction for murder in accordance with this Court's reasons. Mr O'Connell's appeal to this Court should be dismissed. It will be a matter for the Court of Appeal to determine what can and should be done in respect of the sentence subsequently imposed on Mr O'Connell for manslaughter.

92 The following orders should be made:

In Matter No C2 of 2026:

(1) Appeal dismissed.

In Matter No C3 of 2026:

(1) Appeal allowed.

(2) Set aside the orders made by the Court of Appeal of the Supreme Court of the Australian Capital Territory on 27 June 2025 and the orders made by that Court on 29 September 2025.

(3) Remit the matter to the Court of Appeal of the Supreme Court of the Australian Capital Territory for determination according to law.

EDELMAN J.

Concurrence

93 I agree with the orders in the joint judgment. I also agree with the reasons in the joint judgment concerning both appeals, including their Honours' conclusion that the majority of the Court of Appeal of the Australian Capital Territory, in reasoning that the verdict of the jury was "unreasonable" or unable to be "supported, having regard to the evidence",[109] (i) failed to make full allowance for the advantages enjoyed by the jury, and (ii) erroneously treated evidence in a piecemeal manner. These separate reasons address matters relating to the principle of jury advantage and its application in this case, in particular by reference to a potentially serious error in directions to the jury which was raised during oral submissions in this Court. In short, the existence of jury advantage is not the same as the extent and relevance of, and the weight to be afforded to, any jury advantage.

Appellate doubt and jury advantage

94 In her Honour's reasons (with which Loukas-Karlsson J agreed), Taylor J explained that she entertained doubt about matters including whether Mr O'Connell "possessed the mens rea for murder ... namely, reckless indifference to death".[110] In particular, one of the matters recounted by Taylor J, which might be thought difficult to reconcile with a mental state of reckless indifference to death in the moments immediately preceding when Ms Jordan fell from the vehicle, was a description of the immediate, almost instantaneous, aftermath:[111]

> "[Mr O'Connell] got out of the vehicle and yelled words which included 'you dickhead', 'you fucking idiot' and 'why did you do this to me?' immediately after Ms Jordan fell from the vehicle. [Mr O'Connell] picked Ms Jordan up from the road, placed her in the vehicle and transported her to hospital."

Although that matter should have been considered and assessed together with all of the evidence as a whole, it was the most contemporaneous conduct relevant to whether an inference could be drawn beyond reasonable doubt that Mr O'Connell's state of mind at the requisite time was one of reckless indifference to death.

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109 *Supreme Court Act 1933* (ACT), s 37O(2)(a)(i).

110 *O'Connell v Director of Public Prosecutions* (2025) 22 ACTLR 177 at 226-227 [259].

111 *O'Connell v Director of Public Prosecutions* (2025) 22 ACTLR 177 at 229 [270(x)]. See also at 190 [53].

95 Taylor J was correct to consider and to express her doubt before turning to whether it was a doubt that could be explained by the advantages of the jury over the Court of Appeal. As this Court explained in *Coughlan v The Queen*,[112] the existence of advantages of the jury in relation to the consideration of some evidence does not relieve an appellate court of assessing that evidence for itself. It is only once a doubt is identified and expressed that it falls to the appellate court to consider whether the doubt can be resolved by the advantages of the jury. As Mason CJ, Deane, Dawson and Toohey JJ acknowledged in *M v The Queen*:[113]

> "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."

96 In such circumstances, an appellate court might dismiss an appeal despite its doubts as to guilt by reasoning: "Since the jury that saw and heard all the evidence decided to convict the appellant, my doubt is resolved by making full allowance for the jury's advantages over me." Whether the advantages of a jury are capable of resolving the doubt of an appellate court will depend upon the importance of the evidence in relation to which the jury has an advantage and the extent of the jury's advantage in relation to that evidence.

97 Other than in cases where an error is immaterial, the premise of reliance upon jury advantage in this way is that the jury convicted the appellant by the proper application of the law.[114] Usually an allegation that the jury did not properly apply the law will be raised as a separate ground of appeal and decided on its own merits. But what happens if such an allegation is raised but not decided on its merits? There is an important issue, which was not agitated on these appeals, concerning whether the premise that the jury convicted the appellant by the proper application of the law can be questioned by an argument that was raised as a separate ground of appeal but dismissed for reasons distinct from whether the jury applied the correct law. There may be powerful reasons of justice which should permit the premise to be questioned in this way.

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112 (2020) 267 CLR 654 at 673-674 [52].

113 (1994) 181 CLR 487 at 494.

114 See also, in relation to substantial miscarriage of justice, *Weiss v The Queen* (2005) 224 CLR 300 at 318-319 [50].

An issue concerning the scope of jury advantage in this case

98 The offence of murder for which Mr O'Connell was convicted is established by s 12(1)(b) of the *Crimes Act 1900* (ACT). That paragraph provides that "[a] person commits murder if he or she causes the death of another person ... with reckless indifference to the probability of causing the death of any person". The offence of murder in s 12(1)(b) departs in two significant respects from some common law formulations which were based upon "[k]nowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person".[115] First, the mental state in s 12(1)(b) concerns reckless indifference to the probability of causing the death of a person, not knowledge of that probability. Secondly, the relevant outcome is death, rather than either death *or* grievous bodily harm.

99 During a break in the trial judge's summing up to the jury, the foreperson sent two notes to the trial judge. The first note to the trial judge contained two questions:

> "May we have clarification or definitions for the term 'reasonable doubt'. How much doubt is reasonable?
>
> ...
>
> Can you also expand on recklessly indifferent. How is it distinct from mere indifference?"

100 In answering the first of those questions, the trial judge followed a conventional approach and did not proffer a definition or synonyms for reasonable doubt, saying only that the term "reasonable doubt" is "deliberately designed to be left to you" and that "beyond reasonable doubt is the highest standard known to law".[116] In answering the second question, the trial judge relevantly said that reckless indifference "will be satisfied if at the time the accused committed the act that caused the death of Ms Jordan he foresaw or realised that this act would probably cause the death of Ms Jordan, but the accused continued to commit that act regardless of that consequence". The trial judge said that another way of putting this was that "in order for that element of reckless indifference to be satisfied the prosecution must prove beyond reasonable doubt that the accused himself actually knew that the probable result of his act, that is the act of driving with Ms Jordan

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115 Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* (1877), Art 223. See the discussion in *R v Crabbe* (1985) 156 CLR 464 at 468.

116 Compare *Farshchi v The King* (2025) 100 ALJR 6; 426 ALR 185.

on the bonnet, would cause Ms Jordan's death and, knowing that probable consequence, he went ahead and did the act regardless".

101 The second note to the trial judge contained a compound question consisting of a third and fourth question:

> "I would like any amount of clarity you are able to give about the terms 'reasonable' and 'probable' within the context of your legal direction. Does 'probable' mean more likely than not? Is something very likely nonetheless still reasonable?"

102 There is a powerful argument that the correct answer to the third question was "Yes". That answer would have been consistent with what this Court said in *R v Crabbe*,[117] in the context of rejecting an equation of "probable" with "possible" for common law murder based upon knowledge of the probability of death or grievous bodily harm and treating knowledge of a probability as part of the "near moral equivalence"[118] with an intention to kill or cause grievous bodily harm:

> "The conduct of a person who does an act, knowing that death or grievous bodily harm is a probable consequence, can naturally be regarded for the purposes of the criminal law as just as blameworthy as the conduct of one who does an act intended to kill or to do grievous bodily harm."

103 That "near moral equivalence" necessarily requires that death or grievous bodily harm be a consequence of the accused's act that is at least more probable than not. As Lord Goff wrote extrajudicially:[119]

> "[I]s it right that a person who consciously and unreasonably risks another man's life, and so kills him, should necessarily be a murderer? I do not think so, for the very reason that this could embrace many situations which frequently occur in ordinary life, such as the reckless driver who overtakes on a blind corner, realising that his action may result in a head-on collision and the death of the driver of the on-coming car, but optimistically hoping that no such thing will happen—which none of us would regard as a case of murder. Recklessness, even in the subjective sense of consciously and

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117 (1985) 156 CLR 464 at 469.

118 *Aubrey v The Queen* (2017) 260 CLR 305 at 329 [47]. See also *Boughey v The Queen* (1986) 161 CLR 10 at 43 per Brennan J (not in dissent on this point): "so probable or likely that the doing of the fatal act is as heinous as if the accused had wished that result".

119 Goff, "The Mental Element in the Crime of Murder" (1988) 104 *Law Quarterly Review* 30 at 52.

unreasonably incurring a risk of death, cannot of itself constitute the mental element in murder."

104 A similar view of near moral equivalence seems to have been the premise of the introduction of s 12(1)(b) of the *Crimes Act*. The Explanatory Statement to the Ordinance which introduced the provision treated intention and recklessness together in describing the provision as "a new section [that] ... limits murder to the intentional or (advertently) reckless causing of death".[120] The inclusion of a requirement that reckless indifference relate to the "probability of causing the death of any person" must have been intended to minimise the departure from the near moral equivalence of the two types of murder by excluding those who take risks upon events that are more likely not to occur.

105 If the correct answer, "Yes", had been given to the third question, the fourth question should have been answered with an explanation that even if the jury thought death to have been a likely consequence, the question for the jury was whether that consequence was more likely than not as a result of Mr O'Connell's conduct *and* whether Mr O'Connell, knowing that this consequence was more likely than not, unreasonably went ahead and engaged in the conduct anyway.

106 Those were not the answers given by the trial judge. Instead, the trial judge said of the compound question containing the third and fourth questions that "hopefully the two answers that I've just given will answer that question". There was, therefore, a real prospect that the jury might have thought that reckless indifference to "the probability of causing ... death" was reckless indifference to a real or substantial chance, or a possibility, of causing death.

107 Before the Court of Appeal, Mr O'Connell sought leave to rely on a new (additional) ground of appeal that "the judge erred in failing adequately to direct the jury on the meaning of 'probability' within s 12(1)(b) of the *Crimes Act*". The Court of Appeal refused Mr O'Connell leave to raise this ground of appeal for reasons relating to the manner in which the point was addressed in oral submissions before the trial judge by counsel for Mr O'Connell. As McCallum CJ explained, in reasons with which the other members of the Court agreed on this proposed ground of appeal, the reason that the trial judge did not give the simple answer, "Yes", to the third question was that counsel for Mr O'Connell had urged the trial judge not to answer the question.[121]

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120 See Australian Capital Territory, *Crimes (Amendment) Ordinance (No 2) 1990*, Explanatory Statement at 1.

121 *O'Connell v Director of Public Prosecutions* (2025) 22 ACTLR 177 at 220 [223], 221 [230], 226 [257], [258].

108 Although an answer "Yes" to the third question would plainly have been in the interests of Mr O'Connell, it appears that the reason that counsel for Mr O'Connell had urged the trial judge not to answer the question was that counsel was labouring under the misconception, arising from a decision of the Court of Criminal Appeal of New South Wales in 2002[122] based upon a different provision (concerned with "reckless indifference to human life", not "reckless indifference to the probability of causing the death of any person"), that a probability of death was a "substantial or real chance as distinct from a mere possibility".

109 Despite the use of the expression "substantial chance" when dealing with the flexible concept of a "likely" consequence,[123] it might be seriously doubted whether, in the context of a test for "reckless indifference to human life", the Court of Criminal Appeal was correct to equate a requirement for a "probable result" with a "substantial or real chance as distinct from a mere possibility".[124] But whether or not the Court of Criminal Appeal was correct, that expression of a substantial or real chance should not be transplanted to dilute the terms of s 12(1)(b) of the *Crimes Act*.

110 An illustration of how broadly expressions such as "real and substantial chance" can be understood, and the danger of using that expression to a jury to describe a requirement of a "probability" of causing death, can be seen in English civil decisions in a different context that have suggested that chances of only ten per cent might be real and substantial.[125] Equally, in Australia, in other contexts, a "real and valuable"[126] chance — being a "substantial" prospect[127] — and a "real and substantial" chance have been treated as encapsulating any possibility that is

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122 *R v Grant* (2002) 55 NSWLR 80 at 89 [33].

123 *Boughey v The Queen* (1986) 161 CLR 10 at 21.

124 *Boughey v The Queen* (1986) 161 CLR 10 at 20; *Royall v The Queen* (1991) 172 CLR 378 at 395, 416-417.

125 *Thomas v Albutt* [2015] PNLR 29 at 695-696 [461]; *Harding Homes (East Street) Ltd v Bircham Dyson Bell (a firm)* [2015] EWHC 3329 (Ch) at [167]; *PCP Capital Partners LLP v Barclays Bank Plc* [2021] EWHC 307 (Comm) at [559]-[561]; *Matière SAS v ABM Precast Solutions Ltd* (2025) 220 ConLR 170 at 252 [297].

126 *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 118. See also at 125.

127 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 364; *Badenach v Calvert* (2016) 257 CLR 440 at 454 [39].

more than "negligible"[128] or more than "merely minimal".[129] As explained above, it could not have been intended by s 12(1)(b) that a person would commit murder if they acted with reckless indifference to only a non-negligible possibility of causing death.

111 Although Mr O'Connell's application for leave to rely upon this ground of appeal was refused and cannot be reagitated on the remitter by this Court, the substantive content of that ground has never been decided. The substantive content of that ground could have a significant effect when assessing the weight to be given to any relevant jury advantage.

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128 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 355. See also *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151 at 170 [29]; *Cessnock City Council v 123 259 932 Pty Ltd* (2024) 281 CLR 39 at 107 [157].

129 *New South Wales v Holschier [No 3]* [2019] NSWSC 341 at [54]; *New South Wales v Wainwright (Final)* [2020] NSWSC 104 at [199].