HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN: **PETER REX DANSIE**
Appellant

and

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification for publication

1. This submission is in a form suitable for publication on the internet.

Part II: Concise statement of the issue or issues presented by the appeal

2. Did the majority of the Court of Criminal Appeal of South Australia (**'the CCA'**), err in the approach they took to determining whether the verdict of the trial judge was unreasonable or could not be supported having regard to the evidence?

3. In particular, did the majority incorrectly approach the appellate task by declining to independently assess and weigh the inferences that ought to have been drawn from the circumstantial evidence, including as to the appellant's guilt?

Part III: Certification that the appellant has considered whether any notice should be given in compliance with section 78B of the Judiciary Act 1903

4. The appellant does not consider that such notice is required to be given.

Part IV: A citation of the authorised report of the reasons for judgment of both the primary and the intermediate court in the case

5. *R v Dansie* [2019] SASC 215 and *Dansie v The Queen* [2020] SASCFC 103.[1]

Part V: A narrative statement of the relevant facts

6. The Crown alleged the appellant intentionally killed his wife of 44 years by drowning her in a pond in the South Parklands of Adelaide on Easter Sunday, 16 April 2017. The appellant's wife was wheelchair bound following a stroke 22 years earlier. It was the defence case that, whilst attempting to manoeuvre his wife's wheelchair away from the edge of the pond where she had been positioned to allow her to watch ducks, the wheelchair's movement was impeded or obstructed and, for reasons the appellant could

[1] References to paragraph numbers contained in brackets after 'CCA' relate to paragraphs in the CCA's judgment.

not fully comprehend, the wheelchair entered the pond. The appellant's efforts to save his wife were unsuccessful.

7. In view of the complexity of the circumstantial case, the appellant seeks an order upholding the appeal and remitting the matter to the CCA for determination of the appeal in accordance with this Court's order. A necessarily brief factual summary follows to outline the key factual issues which emerged at the trial.

8. Mrs Dansie suffered from a variety of physical and cognitive disabilities after suffering from a stroke in 1995. After lengthy periods in hospital and rehabilitation, she remained unable to weight bear without assistance, essentially becoming wheelchair bound. Her condition, including her strength and mobility were noted to be deteriorating in early 2017. Until September 2015, when Mrs Dansie became an inpatient and later full-time resident at a nursing home, the appellant had principal responsibility for her care at their suburban Adelaide home (CCA[19] CAB115, CCA[272] CAB191). The prosecution case was that Mrs Dansie had become both a personal and financial burden and that the appellant killed her to liberate himself financially and romantically (CCA[22] CAB 117, CCA[166]-[219] CAB162-175, CCA[491] CAB294).

9. On the day of her death, the appellant had collected Mrs Dansie from her nursing home. In the early evening, he took his wife to the South Parklands, ultimately positioning her wheelchair on a rock overlooking a small pond. It was the prosecution case that at around 6pm, the appellant deliberately pushed Mrs Dansie's wheelchair into the pond, intending to kill her. There was no dispute at trial or in the CCA that the appellant had hold of the wheelchair at the time that it entered the pond (CCA[15] CAB114). It was the defence case that Mrs Dansie died from accidental drowning after her wheelchair unintentionally entered the water as the appellant attempted to manoeuvre it away from the pond.

10. A majority of the CCA (Parker and Livesey JJ) dismissed the appeal. Nicholson J, in dissent, found that the prosecution had failed to exclude the hypothesis of accidental drowning. After a careful examination of the topography of the pond and the appellant's explanations, his Honour found that the prosecution had failed to exclude the hypothesis that as the appellant attempted to manoeuvre the wheelchair away from the pond, the front left wheel may have become lodged in a depression between two rocks, causing the path and movement of the wheelchair to be impeded, resulting in accidental entry into the water (CCA[360]-[386] CAB222-228).

(i) The circumstances of Mrs Dansie's death and the appellant's responses

11. At the time of Mrs Dansie's death in April 2017, the appellant, who was between 1.82-1.85m and weighed 130kg, was 68 years old. Mrs Dansie was 1.74m, 117kg and 67 years old (CCA[19] CAB115, CCA[35] CAB122, CCA[43]-[44] CAB123-124, CCA[235] fn176 CAB180). Mrs Dansie had limited physical capabilities and could only weight bear on her legs, with assistance, for a short time (CCA[34] CAB121).

12. On 16 April 2017 Mrs Dansie had been in the company of her husband throughout the afternoon. They travelled by car to the Parklands. A later search of the appellant's car uncovered a change of clothes for himself but not for Mrs Dansie; his wallet, containing $400, and an Armani watch (CCA[53] CAB128). The trial judge held that the presence of these items in the car evidenced pre-meditation (CCA[60] CAB129).

13. The pond in which Mrs Dansie drowned was no deeper than 1.15m (CCA[41] CAB123). The pond was roughly circular, with its southern end nestled into a rocky mound. Access to and egress from the pond was only practical from the northern edge (CCA[39]-[41] CAB122-123). A sealed walking path orientated east to west ran along the northern side of the pond and was separated from the water's edge by a grass verge of some 10m wide (CCA[40] CAB122-123).

14. On the northern edge of the pond was a rock ("Rock B"), which was 1.6m in length and 800mm at its widest point (CCA[45]-[46] CAB124-125). The rock had a "drop that goes away into the pond" (CCA[46] CAB126). The appellant had told police that he had parked Mrs Dansie's wheelchair on Rock B so that she could watch for ducks (CCA[45] CAB124) and that when trying to manoeuvre the wheelchair (which was in a reasonably poor state of repair) (CCA[48] CAB126-127) away from the pond, and off of Rock B, the wheelchair entered the water (CCA[45] CAB124).

15. Of note, on the north-eastern corner of Rock B – the appellant's stated direction of egress – there was a depression between the edge of Rock B and the adjacent Rock C. It was, as Nicholson J found, quite possible that in attempting to move the wheelchair away from Rock B, the front left wheel may have fallen into the depression and obstructed the path and movement of the wheelchair, causing it to accidentally tip into the pond (CCA[344]-[385] CAB214-227).

16. The appellant called Emergency Services at 6:26pm (CCA[70] CAB 135). Ambulance officers arrived at 6:29pm and police officers arrived minutes later (CCA[63] CAB130,

CCA[73] CAB136). Mrs Dansie's body was still in the pond, face down. The appellant was described as seeming calm; a bit exhausted and wet to his belly button (CCA[74] CAB136).

17. The appellant participated in three conversations with police: (1) between 6:57pm and 8:56pm on 16 April; (2) between 8:55pm and 12:12am; and (3) between 2:57am and 4:12am (CCA[77]-[108] CAB137). These conversations set out the appellant's version of events and were said by the prosecution to expose his lack of distress.

18. The detail of the appellant's explanations was important to both parties at trial and on appeal. However for present purposes the gravamen of the appellant's account was as follows (CCA[78] CAB137):

> It was about 6.00 pm when we went to leave. The wheelchair was resting on a flat rock. I told Helen to take the brakes off but she took them off a bit quick for me. I was already pushing against the chair because I thought it was stuck and didn't realise the brakes were on, so when Helen took off the brakes the chair rolled into the water face first and her head was down. I grabbed my phone and keys out of my pocket and threw them aside. I got into the water which came up to my chest, I tried to roll her over but wasn't able to. I pushed her closer to an edge to try and get her in a position that I could get her out but I couldn't. I could feel her arms moving but I don't really recall much else that happened. I was in the water trying to help her for maybe 15 – 20 minutes when I then got out of the water and called 000 and asked for the ambulance. I waited on the side of the water until the ambulance and police arrived. Helen was no longer moving. The guy on the phone asked me to get back into the water but I was worried if I did I wouldn't be able to get out. I remained on the phone the whole time.

19. In a third interview, which again took place at the scene between 2:57am and 4:12am, the appellant provided a "broadly similar" account to his earlier written statement (CCA[99] CAB143). Of significance, Nicholson J noted that when the appellant explained how the wheelchair entered the water, his response was "redolent of the [appellant] seeking to formulate or hypothesise, at the time, an understanding of how the accident happened and appearing to engage in reconstruction" (CCA[103] CAB143). This was particularly relevant to whether the appellant's answers could be described as inaccurate or knowingly inaccurate (CCA[103] CAB143) or were, for example, the mere product of a response to a traumatic and unexpected event.

20. The trial judge made adverse findings about the appellant's interactions with police (and others), concluding that he had lied about his watch (CCA[143] CAB155); that his explanation of how the wheelchair entered the water and the ensuing events including his inability to rescue Mrs Dansie, was implausible (CCA[146] CAB155-156, CCA[232]-[236] CAB179-181); that his lack of distress or concern for Mrs Dansie when dealing

with police (and during the Emergency Services call) showed a "callous attitude; and that, in the [appellant's] mind, Mrs Dansie had been 'taking up his time'" (CCA[149] CAB157, CCA[151] CAB157, CCA[263]-[265] CAB189-190, CCA[269]-[280] CAB190-193).

21. As Nicholson J's reasons indicate, many of these criticisms were answered by reference to the sudden and shocking nature of the incident (CCA[357] CAB218); the plausibility of unexpected and unintended movement of the wheelchair given the topography (CCA[382] CAB227); that reliance on the appellant's presentation and *outwardly* indifferent emotional response was incautious, particularly in circumstances where the appellant had been caring for his disabled wife for 22 years (CCA[357] CAB218); and that the appellant's extensive co-operation with the police in the investigative process, including his admission to having charge of the wheelchair when it entered the water, contraindicated a guilty mind (CCA[357] CAB219). The police interviews illustrated a positive and caring attitude towards his wife as could be seen in passages extracted by Nicholson J at CCA[69], AB133-135.

22. The appellant had given a reasonable explanation about the spare clothes in his car and, in any event, their potential use as a "post murder" outfit made little sense given that they were not used and he would have had to remain in wet clothes to give the impression of an attempted rescue, if murder was his plan all along (CCA[357(xvi)] CAB220). Moreover, it was not unreasonable for him to leave his belongings in his locked car.

(ii) Motives

23. It was the prosecution case that the appellant had both financial and personal reasons for wanting his wife dead (CCA[22] CAB117-119, CCA[159]-[161] CAB159-160, CCA[162]-[163] CAB161, CCA[173] CAB163). In particular, the prosecution pointed to an increase in care costs following Mrs Dansie taking up permanent residence at the nursing home; the loss of his carer's pension; ongoing litigation with the Public Advocate about management of Mrs Dansie's finances and care; and accidental death insurance, and that the appellant wanting to pursue a sexual relationship with a woman or woman in China. Against this, there was evidence that the appellant was "asset rich" (CCA[168]-[169] CAB162) and that his wife's condition meant that the appellant was effectively free to travel and act as he pleased, particularly after she became a full-time resident of the nursing home (CCA[491] CAB294-296).

(iii) The lie and funeral searches

24. The third topic of circumstantial evidence relied upon by the prosecution concerned, first, the appellant's lie as to the time at which he removed his watch (CCA[53]-[59] CAB128-129) – a lie found by the trial judge to be relevant to assessment of the credibility of the accounts given to police but not relevant to consciousness of guilt; and, secondly, that in the months leading up to his wife's death, the appellant had searched the internet for "cheap funerals" (CCA[125]-[128]; CAB149).

25. As to the "funeral" searches, Nicholson J observed (CCA[357(xx)] CAB221) that "only weeks before the searches there had been two deaths and funerals in Mrs Dansie's wider family".

26. In conclusion, there was little dispute at trial as to the factual evidence or the credibility of prosecution witnesses. The defence case was that there were innocent inferences or explanations for the core planks of the prosecution case. The central contest involved the inferences to be drawn from the undisputed facts and the assessment of the plausibility of the explanations provided by the appellant in his series of police interviews (Lovell J at CCA[369] CAB80).

27. The merits of these possible explanations – and, indeed, the inferences drawn by the trial judge – were critical to an independent assessment of the whole of the evidence. As will be developed below, part of the task reposed in the Court of Criminal Appeal by virtue of s. 158(1)(a) of the *Criminal Procedure Act 1921* (SA) was to consider for itself these features of the evidence and the inferences that could and should be drawn therefrom. The relevant exercise was not merely to identify how the trial judge reasoned but, rather, for judges of the appellate court to consider how they reasoned from the evidence and whether they were left with a doubt as to the appellant's guilt.

Part VI: The appellant's argument

Overview

28. The majority took a narrow and ultimately erroneous approach to the unreasonable verdict complaint, treating previous statements of this Court concerning the advantages often enjoyed by triers of fact and the division of responsibility between fact finders and appellate courts as restraining the CCA from reaching its own view about the arguments advanced and inferences to be drawn from the circumstantial evidence. This approach is contrary to principle and authority.

29. It is well established that the first limb of the common form appeal provision requires an appellate court to conduct an independent assessment of the evidence, weighing its sufficiency *and quality*, to establish guilt to the criminal standard.[2] This requires the appellate court to evaluate *for itself* the cogency and persuasiveness of competing arguments and inferences said to arise on the evidence, unencumbered by findings made or inferences drawn by a trial judge (save for those dependant on advantage enjoyed by the trial judge).[3]

30. Having conducted that independent examination, the appellate court must determine *for itself* whether the verdict was unreasonable. The incorporation of the word "open" in the commonly adopted formula applied when considering this ground of appeal is not to be treated as implying that the dispositive question for the appellate court is merely to ask whether there was evidence to support the verdict or whether the findings or reasoning of a trial judge were "open".

31. The unthinking use of the word "open" when discussing an unreasonable verdict complaint promotes an approach that wrongly looks to whether there was a "case to answer" and in doing so diverts attention from the evaluative exercise required of an appellate court. It may also suggest that instead of undertaking its own independent assessment of the evidence, arguments and inferences to be drawn, the appellate court has instead inquired only whether there was a basis upon which the trier of fact might have reached certain conclusions.

32. Whilst an appellate court is required, in certain circumstances, to defer to the natural advantages enjoyed by the trier of fact[4] and to acknowledge that the appellate exercise is carried out in a context that reposes primary responsibility for fact finding in first instance triers of fact,[5] the statements of principle enunciated by this Court emphasise the need for an independent assessment of a case and reinforce that appellate courts should not consider their role unduly circumscribed by the findings and inferences made and drawn by the trier of fact. To the contrary, to treat the findings and inferences drawn by primary decision makers as enjoying special protection from appellate review risks undermining the virtue of the common form appeal provision which is that appellate courts have an

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[2] *Morris v The Queen* (1987) 163 CLR 454, 473; *SKA v The Queen* (2011) 243 CLR 400, [14].
[3] *SKA v The Queen* (2011) 243 CLR 400, [20]-[23].
[4] *M v The Queen* (1994) 181 CLR 487, 493.
[5] *M v The Queen* (1994) 181 CLR 487, 493.

active role as a check and balance against miscarriages of justice. Undue deference to triers of fact is apt to erode the importance and functionality of that role.

33. That is so whether the trial was had before a jury or judge alone, as this Court explained in *Filippou v The Queen* (2015) 256 CLR 47 at [6], [9]-[12]. In the latter case, the appellate court will have the advantage of a statement of reasons for the trial judge's verdict, but the appellate exercise does not change or, for that reason, convert into one that demands uncritical deference to the approach taken by the trial judge.

34. For this reason, it was incumbent on the CA to form its own view about whether the inference of guilt was not just an available inference but, rather, was an inference that *should* have been drawn because the evidence permitted of no conclusion other than that the accused was guilty of the offence charged. That is, the inquiry was whether the appellate court considered the appellant's guilt to have been proved in the manner required in a circumstantial case.

35. Put another way, the CCA's task was to ask whether, having assessed the evidence for itself, it had a doubt as to the appellant's guilt that could not be put aside or answered on account of an advantage enjoyed by the primary judge. The CCA could not decide whether it had a doubt in this circumstantial case unless and until it determined for itself whether the evidence was sufficiently cogent and persuasive to defeat any hypothesis consistent with innocence – in this case, the hypothesis of accidental drowning.

36. These submissions will adopt the following structure. First, they address the majority judgments (that is, the decision of Livesey J, with whom Parker J agreed). In particular, it is submitted that analysis of the judgment of Livesey J demonstrates his Honour conceived of the appellate role as limited and supervisory in nature and demonstrates that his Honour did not conduct an independent examination of the evidence. Second, these submissions address the decision of Nicholson J in dissent. It is submitted that Nicholson J approached the appellate task by way of an independent examination of the evidence. Having conducted such an examination, his Honour concluded that he had a reasonable doubt as to guilt. Finally, these submissions address questions of principle, by way of analysis of authorities of this Court. Those authorities demonstrate that the CCA was required to undertake an independent examination of the evidence and reject any species of judicial deference to the drawing of inferences by the trial judge.

The majority judgment

37. It is convenient to commence the analysis of the approach of the majority with the lengthy introductory passage by Livesey J in which his Honour describes the role of the appellate court in a circumstantial case (at CCA[413]-[471] CAB253-271.) Early in this passage Livesey J referenced the decision of Hayne J in *Libke v The Queen* (2007) 230 CLR 559 at CCA[415]-[417] CAB254-255: A4/2022

> As to whether the verdict was "unreasonable", the question for this Court remains "whether it was open to the [judge] to be satisfied of guilt beyond reasonable doubt", which is to say **whether the judge "must, as distinct from might, have entertained a doubt about the appellant's guilt"**. The review required of this Court is undertaken recognising that it is primarily for the trial court to determine guilt or innocence. **It is primarily for the trial court whether inferences tending towards guilt should or should not be drawn, as well as whether the only rational inference on the whole of the evidence is that the appellant is guilty of murder.** It is a "serious step" to set aside a verdict of guilty on the ground that it is "unreasonable"
>
> Having reviewed the evidence before the trial Judge, I do not doubt the guilt of the appellant. **It cannot be said that the various inferences suggestive of guilt should not have been drawn, or that it was wrong to conclude that the only rational inference is that the appellant is guilty of murder.** Amongst many other matters, the appellant had financial and relationship (or sexual) motives for desiring the death of his disabled wife, and there was no credible explanation for why Mrs Dansie and her wheelchair came to be at the water's edge and then fall into the pond. Likewise, there was no credible explanation for the failure to rescue Mrs Dansie.
>
> In my opinion, it was open to the Judge to be satisfied beyond reasonable doubt that the appellant was guilty, and to convict him, of murder. **The evidence, taken as a whole, did not require that the Judge entertain reasonable doubt about the appellant's guilt.**

38. These passages indicate an understanding of the appellate task which is supervisory in nature. His Honour did not refer to the need to conduct an independent assessment of the evidence and inferences and the task of assessing inferences is described as one primarily for the trial court. Livesey J 's statement that "I do not doubt the guilt of the appellant" occurs only after his Honour disavowed a role for the appellate court in drawing and assessing inferences, including the ultimate assessment as to whether the only rational inference on all the evidence is guilt, and precedes a statement finding the conclusion of the trial judge to be open.

39. This feature of Livesey's J approach is carried through the reasons. Each statement of agreement with the trial judge, or expression of an absence of doubt, occurred in the context of his Honour having first characterised the appellate role as being limited to

determining if the conclusion was "open" or whether the trial judge was "required" to reach a different view. A4/2022

40. Importantly, Livesey J repeated the injunction against an appeal court engaging with inferences at [422]:

> **In a case depending on circumstantial evidence, it is not for this Court to determine whether the only rational inference to be drawn from the circumstances was guilt beyond reasonable doubt. That was a matter for the trial court.** It is not for this Court to try the case. Our task is different. Our task is concerned with the identification of error and guarding against the risk of any miscarriage of justice. …

41. During this analysis, his Honour described three features "to be borne in mind" in conducting an independent assessment pursuant to s. 158(1)(a) of the *Criminal Procedure Act* (SA). These included (at CCA[425]-[426] CAB256-257):

> The first is the necessity for the appeal court to undertake an independent assessment of the whole of the evidence "both as to its sufficiency and its quality" when evaluating whether the verdict can be supported for the purposes of determining whether the verdict was, as it is sometimes said, unsafe or unsatisfactory. This requires an analysis of the whole of the record, not merely any "point of principle". As will be seen, I have done that.
>
> **The second feature is that the independent assessment must be undertaken by the appeal court in a manner which recognises that it is the trier of fact, here the trial Judge, who is entrusted with primary responsibility for determining guilt or innocence.** Notwithstanding the need for independent review by the appeal court, that does not become a trial by the appeal court.

42. Accordingly, his Honour's ostensibly correct statement of principle at CCA[425] (CAB256) was undermined by the statement at CCA[426] (CAB256-257), which emphasises the primary responsibility of the trial judge in determining guilt or innocence. That passage must, in turn, be read alongside his Honour's statement in CCA[422] (CAB256), which held that only the trial court could determine "whether the only rational inference to be drawn from the circumstances was guilt beyond reasonable doubt".

43. The structure of the remainder of Livesey's J judgment further confirms the limited supervisory approach. In particular, his Honour treated the drawing of inferences and the weight to be afforded to inferences as within the province of the trial court. For example, in a section headed "The evidence and findings of this case" Livesey J

repeated his invocation against an appellate court engaging in inferences at CCA[472] (CAB272):

> The trial Judge performed the important task of determining what evidence was admissible and whether it should be admitted. However, having determined what evidence was relevant to facts in issue, and potentially probative of guilt, no "doubtful facts" were to be considered. **It was then a matter for the trial Judge, as the trier of fact, to decide whether to draw the various inferences the prosecution urged should be drawn from the facts that were not in doubt, as well as what weight should be given to those inferences.**

44. Thereafter, in what is described as "for the purposes of my own review" Livesey J outlines the findings of the trial judge in 77 paragraphs commencing at CCA[473] (CAB272) before moving to the adverse credibility findings made by the trial stating at CCA[476] (CAB291):

> "I am satisfied there is a proper basis for these findings, they were open to the trial judge and with respect I agree with them".

45. When reviewing the trial judge's rejection of the appellant's account of the events at the pond – the crux of the defence case – Livesey J used a similar formulation stating at CCA[488] (CAB294):

> "I am satisfied that there was a proper basis for these findings. All were open on the evidence led at the trial. Respectfully I agree with them"

46. After reviewing the inferences drawn by the trial judge when reasoning to guilt at CCA[489]-[493] (CAB294-295), his Honour then commented at CCA[493] (CAB296):

> "These inferences were open to him because they arise on an independent review of the evidence **and demonstrate there was a clear pathway to proof of guilt beyond reasonable doubt**".

47. Similar endorsements of the trial judge's reasoning occur at CCA[499] (CAB297) and CCA[504] (CAB298).

48. In a critical passage towards the end of the judgement Livesey J returned to his injunction against the appellate court engaging in drawing and weighing inferences at CCA[494]-[496] (CAB296-297):

> Though the various, potentially conflicting, inferences in respect of each piece of evidence considered by Nicholson J were arguable, **it is not suggested by the appellant that the various inferences tending towards guilt were not**

> **open or could not be drawn by the trier of fact. He contends for different inferences. The potential for argument about inferences does not necessarily generate a basis for concluding that the trier of fact must, as distinct from may, have entertained reasonable doubt.** For example, any suggested "improbability" that the appellant might resort to murder is undoubtedly a relevant matter. It is extremely unlikely that the trial Judge overlooked this and other "quintessential jury questions".
>
> Many of the more important matters were raised before the trial Judge and before this Court. **It is neither necessary nor appropriate for this Court to dwell upon what might be regarded as arguments for the defence about inferences. Our task is concerned with the identification of error and guarding against the risk of any miscarriage of justice**. We do not try the case, even when reviewing the evidence with the benefit of arguments for the defence and prosecution so as to determine whether the verdict was "unreasonable" for the purposes of the first limb of the common form criminal appeal provision.
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> **Whether the inferences tending towards guilt should or should not be drawn, and the weight to be given to each, as well as the whole of the evidence, were primarily and classically matters for the trier of fact.** So, even if a piece of evidence is capable of being viewed in a manner consistent with innocence, that will not require that this Court intervene unless, for example, it has been erroneously addressed by the trial judge (so as to lead to error), or its role as part of the whole necessarily raises scope for reasonable doubt.

49. The reference by Livesey J at CCA[494] (CAB296) to whether the trier of fact "must" as distinct from "may" have entertained a doubt, invokes for a second time the phraseology of Hayne J in *Libke* and is suggestive of a misreading of the effect of that formulation. This Court's decision in *Pell* made clear that Hayne J's formulation did not depart from the long-standing test in *M* (at 24) (as Nicholson J observed in his dissent at CCA[293] (CAB197-198), the formulation by Hayne J was a logical restatement not a narrowing of the test).

50. Justice Livesey introduced his conclusion at CCA[505] (CAB298) with the statement:

> **The Court of Criminal Appeal does not decide whether inferences tending towards guilt should or should not have been drawn following a verdict of guilty where proof depends on circumstantial evidence.** It decides whether it was open to the jury in a jury trial, or the trial judge in a trial by the judge alone, to draw those inferences and, ultimately, whether it was open at trial to conclude that the only rational hypothesis is guilt beyond reasonable doubt.

51. Parker J adopted an approach similar to Livesey J. His Honour expressly adopted Livesey J's analysis of the role of the appellate court from CCA[421]-[442] (CAB255-262) which

included the statement that it was not for the appellate court to determine whether the only rational inference to be drawn from the circumstances was guilt beyond reasonable doubt. His Honour went on to observe at CCA[387] (CAB249) (see also CCA[407] CAB252-253):

> After independently weighing and reviewing the evidence as a whole, **and the inferences drawn from that evidence by the trial Judge**, I agree with Livesey J that the appeal should be dismissed for the reasons stated by his Honour.

52. Respectfully, the inferences drawn by the trial judge were not to the point. The question for the CCA was not whether the trial judge's reasons or reasoning process were defensible but, rather, whether having independently weighed and reviewed the evidence *and determined for itself* what inferences could and should be drawn, the appellate court was left with any doubt as to the appellant's guilt (that could not be dispelled after considering any advantage held by the trial court).

53. Some further comments can be made. *First*, it can be accepted that, at various points in his reasons, Livesey J adverted to the correct approach or said he did not have a doubt as to the appellant's guilt. However, there is an irreconcilable tension between Livesey J's various statements of principle and the structure and content of his reasons as a whole. When the judgment is read as a whole, it is apparent that his Honour perceived the existence of an injunction preventing the CCA from reviewing for itself the inferences that could, and could not, and should and should not, be drawn from the evidence.

54. That, in turn, begs the question: if his Honour refrained from considering for himself whether the intermediate and ultimate inferences should have been drawn, how could his Honour have satisfied himself that it was open to the trial judge to find guilt proved beyond reasonable doubt? It is a necessary incident of the obligation imposed on an appellate court to determine whether it was open to the trier of fact to find the accused guilty beyond reasonable doubt that the appellate court considers for itself whether it is satisfied that guilt was established on its review of the evidence.

55. *Secondly* and relatedly, even if it was appropriate to adopt intermediate findings made by the trial judge, it remained incumbent on Livesey J to deal himself with the hypothesis of accidental drowning based on his own independent assessment of the evidence.[6] Having reiterated that whether inferences tending towards guilt should be drawn was a matter for the trier of fact, Livesey J said that whilst the appellant's explanation might

[6] *Filippou v The Queen* (2015) 256 CLR 47, [83] (Gageler J).

have allowed for the possibility of accident (CCA[471] CAB271-272, CCA[483]; AB293),[7] that was of no moment because "**the trial judge might reasonably have concluded** that it put an 'incredible strain on human experience' to say that Mrs Dansie died as a result of an accident, notwithstanding [the appellant's] proved financial and relationship…motives and the absence of any credible explanation as to how Mrs Dansie entered the water" (CCA[497] AB297). A4/2022

56. At no point in his reasons did Livesey J explain how *he* reached the conclusion that (1) the appellant's account of the events at the pond was implausible or ought otherwise to be rejected, noting that his Honour said he agreed with the trial judge's adverse credibility findings, "lack of distress" findings and the judge's rejection of the appellant's explanation (including the finding that accidental drowning was "highly unlikely") (CCA[476]-[488] CAB291-294, CCA[500]-[504] CAB298); and (2) how the hypothesis of accident was, on his analysis of the evidence, excluded – as Nicholson J observed, rejection of the appellant's account did not exclude accident (CCA[352] CAB217).

57. Identifying a trial judge's reasoning on various topics and the inferences that were *available* or open to the trial judge, does not constitute an independent assessment of the evidence for the purpose of the appellate court considering whether *it thinks* it was open to find an accused guilty to the criminal standard. The question was whether the CCA thought that it was open to find the appellant guilty beyond reasonable doubt having assessed for itself the evidence and, by necessity, the inferences *to be drawn* from it. The reasons do not contain such an explication because, in the appellant's submission, his Honour considered it to be outside the purview of the CCA's task to determine whether the ultimate inference should have been drawn.

58. *Thirdly*, the limited conception of the appellate role appears to be based on misreading of authority. As noted above, while it was made clear in *Pell* that *Libke* did not narrow or change the test in *M*. The judgment of Livesey J is bookended with the notion that the appellant is required to establish that the trier of fact *must*, as distinct from *may*, have entertained reasonable doubt (see CCA[415] CAB254 and CCA[494] CAB296). Further, the critical passage at CCA[422] (CAB256) in which it is stated "it is not for this Court to determine whether the only rational inference to be drawn from the circumstances was guilt beyond reasonable doubt" cites the decision of Menzies J in *Plomp* without

[7] It should be noted that Parker J, in his separate reasons, substantially misstated the finding made by the trial judge as to accident being "extremely unlikely" (CCA[392] AB249).

mentioning that Dixon J's agreement with Menzies J was subject to his observation at [8] that passages drawn from *Peacock* could be doubted after the introduction of common form appeal provisions.

The dissenting opinion of Nicholson J

59. Nicholson J concluded it would be dangerous to let the conviction stand. His Honour meticulously examined and rejected each of the defence complaints about the trial judgment, determining that all findings were open to the trial judge (at CCA[1]-[290] CAB110-195). However, having done so, Nicholson J engaged and weighed the inferences contended for by both parties and addressed *for himself* the persuasiveness of hypotheses consistent with innocence (CCA[337]-[386] AB212-228). In particular, his Honour addressed whether the prosecution had discharged its burden in a manner that was mindful of any advantage which the trier of fact may have had in seeing and hearing the evidence unfold. While his Honour noted those advantages were more limited than in typical appeals against conviction (given the largely uncontested nature of the evidence, the absence of a jury and the availability of the videos of the appellant's discussions with police), his Honour gave specific deference to the adverse credibility findings made about the appellant by the trial judge (at CCA[310]-[313] CAB206, CCA[330]-[331] CAB209-210).

60. The approach taken by Nicholson J was markedly different from the majority. His Honour took it to be part of his obligation to revisit the inference of guilt (and indeed its antecedent integers) outside the findings of the trial judge and ask whether he was independently satisfied that guilt was the only rational inference to be drawn from the evidence. That was not to conduct a re-trial of the case. Rather, it was to conduct an independent assessment of the evidence to determine whether there was a significant possibility that an innocent person may have been convicted.

61. Nicholson J was careful to eschew any intermediate conclusions preferring to address the ultimate issue (namely "was the appellant's account reasonably possible") only after reviewing all of the evidence (CCA[240]-[241] CAB182-183 and CCA[378] CAB226). His Honour correctly identified the risk in the trial judge's intermediate conclusion that accidental drowning was "highly unlikely" as bordering on dismissing the defence case before concluding a review of the evidence. While his Honour rejected a defence submission that referring to the improbability of accident reversed the onus, he observed

"how probable is it that it was an accident" would be an incorrect question to address at the ultimate stage and potentially misleading if it formed part of jury instructions (CCA[241] CAB182). Respectfully, such a question ought not have been posed at any stage of the inquiry as it was apt to distract attention from a correct application of the burden of proof.

62. Both Livesey J (CCA[470]-[471] CAB271-272) and Parker J (CCA[392] CAB249) saw no difficulty with the intermediate conclusion that accident was "highly unlikely" or, as Parker J incorrectly put it, "extremely unlikely".

The correct approach to a ground of appeal that alleges that a conviction is unreasonable

63. An inquiry into whether a verdict of guilty is unreasonable does not invite an appellate court to conduct a re-trial *de novo*; equally, it does not permit of a mere examination of whether there was a pathway[8] to or evidence upon which a finding of guilt *could have* been returned, nor whether findings made by the court below were "open". The task for the appellate court is to examine the *sufficiency and quality* of the evidence to sustain the verdict of guilty.[9]

64. That is to say, evaluating and weighing the evidence and the inferences to be drawn therefrom is an integral part of the appellate exercise. Thus, in *Miller, Presley and Smith v The Queen* (2016) 259 CLR 380 at [79], the failure of the appellate court to engage in an analysis of the evidence and asserted deficiencies at trial – that is, to conduct an evaluative review – meant that the court had not discharged its function correctly when addressing an unreasonable verdict complaint.

65. In *Coughlan v The Queen* (2020) 94 ALJR 455 at [55][10] – a circumstantial case –the responsibility of the appellate court to examine the sufficiency of the evidence to exclude any innocent hypothesis reasonably open was reinforced:

> An assessment of the sufficiency of the evidence to support a verdict of guilt in a circumstantial case such as this one **requires the appellate court to weigh all the circumstances in deciding whether it was open to the jury to draw the ultimate inference that guilt has been proved to the criminal standard.** That inference will not be open if the prosecution has failed to exclude an inference consistent with innocence that was reasonably open.[11] [Emphasis added]

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[8] *BCM v The Queen* (2013) 88 ALJR 101, [31]; *GAX v The Queen* (2017) 91 ALJR 698, [25]; *Dickson v The Queen* (2017) 94 NSWLR 476, [85].
[9] *M v The Queen* (1994) 181 CLR 487, 493; *Morris v The Queen* (1987) 163 CLR 454, 473.
[10] See also *Fennell v The Queen* (2019) 93 ALJR 1219, [82].
[11] See also *Fennell v The Queen* (2019) 93 ALJR 1219, [82].

66. The exercise requires more than identifying *a pathway* to conviction arising on the evidence.[12] A pre-requisite to discharging this function is evaluation by the appellate court of the competing arguments and inferences arising on the evidence.[13] If the appellate court merely summarises or identifies findings, or reasoning, open to the trier of fact, without engaging in its own weighing of the evidence and competing arguments and inferences, the appellate court fails to perform the duty required of it by s. 158(1)(a).[14] This point was made recently by the Queensland Court of Appeal: A4/2022

> …as was accepted in *Coughlan v The Queen*, it is not sufficient that there is a pathway to conviction. The question is whether on all of the evidence it was open to the jury to convict. It is necessary for this court to perform an independent examination of the evidence and to determine whether it was open to the jury to convict the appellant or, in other words, whether it was open to the jury to be satisfied of his guilt beyond reasonable doubt.

67. The appellate court must turn its mind to whether, on its independent assessment of the evidence, the inference of guilt was the only rational inference. *Ex hypothesi*, if the appellate court concludes that guilt was not the only rational inference, it was not open to the trier of fact to find guilt proved to the criminal standard. An appellate court cannot reach the required state of satisfaction unless it has engaged for itself in evaluating the cogency of competing arguments and inferences arising on the evidence.

68. Express statements of principle must be viewed together with the implications arising from other observations made by this Court. In *GAX v The Queen* (2017) 91 ALJR 698 at [25] it was said that although the appellate court had identified a basis upon which the trier of fact might have rejected a defence argument, it was less clear whether the appellate court had itself engaged with the merits of that argument:

> [The appellate court judge's] view, that the jury had been entitled to reject the possibility of reconstruction, was a matter which her Honour took into account in identifying a rational explanation for the differing verdicts. **It is less clear that her Honour was expressing an independently formed conclusion about the capacity of the evidence to exclude the possibility of reconstruction**. There is force to the contention that the reasons do not disclose **her Honour's own assessment of the sufficiency and quality** of the evidence of the particularised touching.[15] [Emphasis added]

69. To similar effect, it was said in *SKA v The Queen* (2011) 243 CLR 400 at [20]:

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[12] *R v Hanley* [2020] QCA 276, [6]-[7].
[13] See, eg, *GAX v The Queen* (2017) 91 ALJR 698, [25]; *Miller, Presley and Smith v The Queen* (2016) 259 CLR 380, [79]; *SKA v The Queen* (2011) 243 CLR 400, [20]-[25].
[14] *SKA v The Queen* (2011) 243 CLR 400, [20].
[15] See also *Miller, Presley and Smith v The Queen* (2016) 259 CLR 380, [79].

> To the extent that [the appellate court judge] considered whether she was satisfied that it was open to the jury to be satisfied beyond reasonable doubt as to the guilt of the appellant, it appears that this consideration was undertaken **without any weighing of the competing evidence; an exercise which the Court of Criminal Appeal was required to undertake** to determine whether the verdicts of guilty were unreasonable or could not be supported. [The judge's] reasons **do not demonstrate that her Honour weighed the conflicting evidence** respecting the 2006 offences and therefore it appears that the **Court of Criminal Appeal failed to perform the duty required of it by the Criminal Appeal Act**. [Emphasis added]

10 *70.* The approach taken in *Pell v The Queen* (2020) 268 CLR 123, and the analytical steps involved in reaching the conclusions there arrived at, also suggest that it plainly was for the CCA to address the arguments for the defence about inferences and issues of plausibility. As noted earlier, the Court observed that the oft-cited phrase of Hayne J in *Libke v The Queen* (2007) 230 CLR 559 that "…the question for an appellate court is whether it was open to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *must* as distinct from *might*, have entertained a doubt about the appellant's guilt" was not a departure from the principles applied in *M v The Queen.*

71. Accordingly, notwithstanding the functional or constitutional demarcation[16] that is said to separate the responsibilities of a trier of fact and appellate court, it remains a core
20 component of an appellate court's role to analyse and weigh the evidence and decide for itself whether the accused's guilt was proved beyond reasonable doubt. In the context of a circumstantial case, it is axiomatic that discharging this duty will necessarily require the appellate court to re-evaluate the inferences it is prepared to find, i.e. those that can and should have been drawn from the evidence, including of course, the final inference.

72. Following a trial by judge alone, the appellate exercise is not, therefore, one that merely looks to the cogency of the trial judge's reasons, or whether the process of reasoning adopted, or inferences drawn, by the judge were available. The appellate exercise requires independent assessment and *weighing*. This is so, even where it is appropriate for the appellate court to act upon uncontentious intermediate findings made by a trial
30 judge.[17] As Gageler J explained in *Filippou v The Queen* (2015) 256 CLR 47 at [83]:

> But having adopted the intermediate findings of fact of the trial judge about which no complaint is made, and having arrived at its own conclusion on the evidence to the extent necessary to engage with the particular argument, the question for the Court of Criminal Appeal in such a case will remain whether or not the Court of Criminal Appeal has a

[16] *Pell v The Queen* (2020) 268 CLR 123.
[17] *Filippou v The Queen* (2015) 256 CLR 47, [83] (Gageler J).

> reasonable doubt about the ultimate finding of guilt which cannot be resolved by taking into account the trial judge's advantage in seeing and hearing the evidence.

The errors in the majority judgment

73. The majority in the CCA failed to correctly apply the above principles. Instead of conducting an independent assessment of the sufficiency and quality of the evidence to sustain the inference of guilt to the criminal standard, Livesey J (with whom Parker J agreed) largely confined the Court's task to assessing whether findings made by the trial judge were "open" and certain inferences "available".

74. The majority unduly narrowed the scope of the appellate inquiry that was to be conducted to a consideration of whether there was "evidence to support the finding of murder". Having repeatedly framed the task of the CCA in this way, the approach taken by Livesey J was to summarise the evidence (interspersed with reference to findings and analysis of the trial judge (CCA[473.1-77] AB272-291) and identify those findings made by the trial judge that he agreed with (CCA[474]-[476] AB291). His Honour approached the credit findings made by the trial judge as, essentially, unreviewable due to the purported demarcation between the roles of the appellate and trial court (CCA[433]-[435] CAB 258-259, CCA[502] AB298).

75. Justice Livesey's approach, particularly at CCA[495] (CAB296-297) and CCA[505] (CAB298), places an embargo on appellate courts reconsidering "jury points" when dealing with an unreasonable verdict complaint. With respect, and as Nicholson J said (CCA[380] CAB226-227):

> At one level, the various considerations relied on by the defence (and the prosecution for that matter) and discussed thus far might be characterised as "jury points" to be assessed by the jury or, in this case, the Judge when addressing the overall strength of the prosecution case. **But this is an unhelpful and potentially misleading approach when deployed at the appeal stage. It can encourage the wrong question on appeal – was there evidence to support the verdict. Rather, they are matters to be weighed by each Judge on appeal as part of their own independent assessment of the evidence.**

76. Whilst Livesey J said, early on in his reasons, that he did not have a doubt as to the appellant's guilt (CCA[416] CAB254-255), the reasons do not contain an explication as to how his Honour arrived at that conclusion. That is because his Honour considered it to be outside the purview of the CCA's task to determine whether the ultimate inference *should have* been drawn. The survey of principles above establishes, however, that it remained incumbent on the CCA to independently engage with the hypothesis of

accidental drowning, based on its own independent assessment and weighing of the evidence.[18]

77. It was not sufficient for the CCA to identify the primary judge's reasoning on various topics and the inferences that were *available* or open to the primary judge. An exercise of that character does not constitute an independent assessment of the evidence for the purpose of the appellate court considering whether *it thinks* it was open to find an accused guilty to the criminal standard.

78. If the task of the appellate court is to conduct an independent assessment of the evidence to determine whether guilt was not just an available inference (i.e., not that there was a "pathway" to guilt – CCA[493] CAB296) but was the only rational inference, the appellate court must engage with and weigh the arguments and competing inferences arising on the evidence and form a view for itself about the sufficiency and quality of the evidence to support the finding of guilt.

Part VII: Orders sought

1. The appeal is allowed.

2. Set aside the order of the Court of Criminal Appeal dismissing the appellant's appeal against conviction.

3. Remit the matter to the Court of Criminal Appeal for re-hearing in accordance with the orders of this Court.

Part VIII: Estimate of time to present oral argument

1. The appellant estimates that 1½ hours will be required to present his oral argument.

Dated: 8 April 2022

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[18] *Filippou v The Queen* (2015) 256 CLR 47, [83] (Gageler J).

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN:

PETER REX DANSIE
Appellant

and

THE QUEEN
Respondent

ANNEXURE TO THE APPELLANT'S SUBMISSIONS

LIST OF PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS

STATUTES

1. *Criminal Procedure Act 1921* (SA) section 158 (as at 2.11.2020) (immaterial amendment commenced on 1.1.2021 to substitute "Full Court" with "Court of Appeal".)