**IN THE HIGH COURT OF AUSTRALIA**
**BRISBANE REGISTRY** **No. B20 of 2017**

**BETWEEN:** **CHRISTOPHER CHARLES KOANI**
**Appellant**

**and**

**THE QUEEN**
**Respondent**

# APPELLANT'S SUBMISSIONS

## Part I INTERNET PUBLICATION

1. The appellant certifies that this submission is in a form suitable for publication on the internet.

## Part II ISSUES ON APPEAL

2. Where s 23(1)(a) of the Criminal Code (Queensland) ('the Code') otherwise provides an excuse, can a breach of duty under s 289 result in a conviction for murder under s 302(1)(a) rather than manslaughter, under s 300.

## Part III SECTION 78B OF THE *JUICIARY ACT 1903 (Cth)*

3. The appellant considers that notice is not required to be given pursuant to s78B of the *Judiciary Act 1903 (Cth)*.

## Part IV CITATION OF JUDGMENT APEALED FROM

4. The judgment of the Court of Appeal has not been reported. The judgment has the internet citation of *R v Koani* [2016] QCA 289.

## Part V RELEVANT FACTS

5. The appellant, Christopher Koani, was charged with murdering his de facto partner, Natalie Leaney. It was common ground at the trial the deceased died from wound to the head from being shot by single gunshot from a shotgun between 8.00 pm and 8.30 pm on 10 March 2013 at the home she had shared with the appellant. The prosecution case was that the appellant shot the deceased in the course of an argument whilst he was handling a modified shotgun. When arraigned the appellant entered a guilty plea before the jury on the basis that he was criminally negligent under s 289 of the Code in handling the



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weapon and this had caused Ms Leaney's death. This guilty plea was not accepted by the prosecution and the trial proceeded on the charge of murder (QCA at [1] and [4])

6. On Thursday 7 March 2013, an acquaintance of the appellant had visited the appellant's unit. The appellant showed him a cut down shotgun. The appellant demonstrated how it locked back and the barrel opened up. On Friday 8 March, the deceased told her former boyfriend's sister Ms Sekona that she had had a fight with the appellant who told her to pack her things. She thought their relationship was over and she wanted to leave him but was concerned that, if she did, he would take her property. On Saturday 9 March, she told Ms Sekona that she was having a friend put new locks on the unit and that the appellant had been staying in a motel. She asked Ms Sekona's father if she could stay at his house and move her belongings; she planned to wait until the appellant was home as he took her unit key (QCA at [5] and [6]).

7. A friend of both the appellant and the deceased, Megan Elphick, said that the couple's relationship worsened close to the time of the deceased's death. Ms Elphick spent Friday night with the appellant at a motel. He said he was having problems with the deceased talking to her former boyfriend; he had "caught her out" and "found out about her screwing around." She had previously seen the appellant pull apart a sawn-off shotgun (QCA at [7])

8. On Saturday 9 March, the deceased told a work colleague that she and the appellant had had a huge fight the previous day and he had moved out and taken the house keys and her mobile phone. The following day she sent a text message to the same work colleague stating that she would not be in on Monday and to let her employers know (QCA at [8]).

9. Shane Writer and his partner Jennifer Pollitt were friends of both the appellant and the deceased. They stayed at their unit on Saturday and they all used illicit drugs. They did not use drugs on Sunday. Ms Jessica Quinn also stayed at the unit on the Saturday night during which she smoked methylamphetamine. She assumed the appellant was smoking methylamphetamine. She said the deceased was in her room most of the night (QCA at [9] – [10]).

10. At about 4.00 pm on Sunday afternoon, the deceased went outside for a smoke and Ms Pollitt followed her. She told Ms Pollitt that she planned to leave the appellant. She was crying and said she had had enough; she had no friends and no longer saw her family. Later that afternoon, the appellant, Mr Writer and Ms Pollitt went to the Springwood Hotel. The deceased had planned to visit a doctor to obtain a certificate but she rang Ms Pollitt and told her that the appellant had locked her in the unit. The deceased and the appellant then exchanged mutually abusive and angry text messages that showed that the deceased was concerned that she was unable to get to the police station to sign the bail book as required under the terms of her bail. She emphasised that the unit lease was in her name and she had paid the bond. The appellant returned to the unit ahead of Mr Writer

and Ms Pollitt. By the time they arrived outside the unit, the door was closed and they heard the appellant and the deceased arguing. Mr Writer sent a text message to the appellant telling him to "take it easy, bro" (QCA at [11]).

11. Earlier that evening the deceased had sent a text message to Shea Fenton asking him to pick her up from the unit. Mr Fenton then called the appellant and discussed the purchase of drugs. He arrived at the unit to buy drugs about 20 minutes after that text message. When he arrived at the unit he knocked on the door but was not let in for about 10 minutes. Mr Fenton and Mr Writer entered the unit while Ms Pollitt waited outside. As Mr Fenton entered, he saw the deceased move to sit at the end of a table towards the rear of the unit. The appellant was sitting on a couch near the front door. A broken vase was on the floor. He heard the appellant say that he would rather "go back to jail or something, I'll shoot you." He saw the appellant pick up a sawn-off shot gun and cartridges from some shelving, open the barrel and load the gun. The appellant and the deceased continued to argue and the appellant said, "I don't give a fuck, I'll kill you. ... I'll go back to jail".

12. The appellant then walked towards the table out of Mr Fenton's sight. Mr Fenton heard a gun shot. He walked into the lounge and saw the deceased had been shot. The appellant had dropped the gun and was yelling for help. In cross-examination about his oral evidence at the committal hearing he agreed that what had been said was just "I don't care if I go back to jail." In re-examination, Mr Fenton agreed that in his original police statement he had said that appellant had said, "I don't give a fuck anymore. I am going back to jail anyway. I don't care, I will shoot you (QCA at [12-13]).

13. Mr Writer gave evidence that, immediately prior to the shooting, there was a bullet on the floor which the appellant put in the shotgun. The appellant lifted the gun up and it "just went off." He could not remember what the appellant and the deceased were saying at that time, but they were yelling and swearing. The appellant had raised the gun up and it went off "straight ahead" in the direction of the deceased. There was just a single bang. The appellant screamed, jumped up and down and was hysterical (QCA at [14]).

14. Ms Pollitt was outside the unit when the shotgun discharged. She heard the appellant screaming and looked through the door. His hands were on his head. He was jumping up and down and spinning in circles. Neighbours also gave evidence that the appellant was distressed after the shooting. They described the appellant as yelling for help, crying, panicking; he was emotional and distraught. One neighbour saw him holding the deceased's head in his hands and screaming, apparently trying to stop the bleeding. Another neighbour heard him say, "Fuck. Just breathe. Please help. Breathe." The appellant rang 000 but he was so distressed that another neighbour completed the call (QCA at [15]).

15. Police and ambulance officers arrived at about 8.30pm. The appellant was still hysterical at this time. He told police he did not know who had shot the deceased

but it was over drugs. During field recordings at the scene, the appellant asked police about the deceased's welfare. He said that he had accidently locked her in the unit when he went out and denied that they were fighting. He claimed that two men arrived at the unit. He did not know them but one had previously robbed him. This man entered, armed with a gun, and told the deceased to sit on the table. The appellant said he tried to take the gun and it discharged. The appellant said that he was dealing in drugs and that these men stole the drugs and money. He again said that it was all his fault (QCA at [16] & [17]).

16. There was uncontested expert evidence in relation to the operation of the firearm. The spur of the hammer on the gun, usually pulled back by the thumb, had been shortened. That made it more difficult to control the cocking of the gun and reduced the grip on the hammer. The gun failed the hammer slip test. A hammer is usually designed with a built-in safety measure so that, if the hammer slips whilst being pulled back, the gun does not discharge. This gun was prone to discharge when the hammer was, accidentally or not, released before fully cocked. The hammer was required to be pulled back 16.8 millimetres to fully cock. This gun would discharge when the hammer was only partly cocked and drawn back as little as 10 millimetres. Another built-in safety mechanism, the rebound safety, which prevents the hammer from falling unless the trigger was simultaneously depressed, was also compromised. This meant that the gun could be deliberately fired by fully cocking the hammer and then pulling the trigger, but it would also fire if the hammer was partially pulled back and a finger slipped on the shortened spur. Scientific testing of the firing pin impression on the discharged cartridge which killed the deceased showed that the cartridge may have been fired from the fully or almost fully cocked position. At the time it was discharged, the gun was between 15 centimetres and 1.25 metres from the deceased, but most likely between 45 and 75 centimetres (QCA at [18]).

17. Police found the sawn-off shotgun, a spent cartridge and a knife on the unit floor. They also found, on the other side of a neighbouring fence, two shotgun cartridges matching the discharged cartridge from the projectile that killed the deceased. One had DNA consistent with that of the appellant and the deceased. Police also found dust marks, the same size and shape as the three cartridges, on a shelf in the appellant's unit. There was a blood smear across one mark (QCA at [19]).

**Part VI ARGUMENT**

18. The appellant was convicted of the offence of murder under s 302(1)(a) of the Code which relevantly provides:

*302 Definition of murder*

*(1) Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say—*

*(a) if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm;*

....

*is guilty of murder*

19. Unlike the law in some non-Code jurisdictions[1], s 302 of the Code does not (without more) permit conviction for murder where a person causes death by an act done with reckless indifference to human life.

20. Section 302 of the Code does provide that acts done without an intention to kill or cause grievous bodily harm can in certain circumstances constitute murder. It does so under s 302(1)(b), (d), and (e). Those subsections prescribe the circumstances in which an act done without an intention to cause death or grievous bodily harm can constitute murder. Each of these subsections essentially provides that for the doing of a dangerous act that causes death to constitute the offence of murder, the prosecution must prove that the dangerous act was for the purpose of, or formed part of the prosecution of an unlawful purpose.

21. Section 302(1)(b) is of particular relevance:

*(1) Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say—*

*(b) if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;*

....

*is guilty of murder.*

**The Crown case as put**

22. It would have been open to the prosecution to rely upon s 302(1)(b) in the circumstances of the present matter.[2] Instead of doing so, the Crown adopted a

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[1] *Royall v The Queen* (1990) 172 CLR 378 and *Ryan v The Queen* [1967] HCA 2;(1967) 121 CLR 205 at 217-218 both involved the definition of murder in s 18(1)(a) of the *Crimes Act 1900 (NSW)* which provides "murder shall be taken to have been committed where the act of the accused, or thing by him omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm."

[2] In the trial ruling in this matter, Dalton J noted that the Crown could have relied upon 'felony murder' under s 302(1)(b) to resolve what her Honour described as the "apparent difficulty" created by reliance upon s 289, but that the trial having been run on a different basis, it was not open to the Crown to rely upon it: *R v Koani* [2016] 2 Qd R 373 at 375 [6]. Under s 302(1)(b), it would have been open to the Crown to have alleged that the appellant had held the deceased captive in the house (an unlawful purpose) and in

novel approach and contended that the offence of murder could be established under s 302(1)(a) where the act causing death was an unwilled act (under s 23(1)(b) of the Code) by a person who had a duty of care in relation to a dangerous thing (s 289 of the Code).

23. There was no contest at trial or on appeal that the way s 23(1)(a) operated in this case was, as described by McMurdo P, that if "the jury considered his finger may have slipped on the shortened spur, releasing the hammer, then subject to s 289, he was not criminally responsible under s23(1)(a)".[3] That is, the relevant act was identified as a slip of a finger causing the discharge of the firearm, rather than some earlier act such as presenting a loaded shotgun in the direction of the deceased while partially cocking it. Therefore some of the complexities of *Murray v The Queen* (2002) 211 CLR 193[4] (***Murray***) are not present in this case.

24. The Crown's method of combining ss 289 and 302(1)(a) is best described by setting out the particulars advanced by the Crown at trial as being sufficient to prove murder under s 302(1)(a). Those particulars were that the appellant murdered the deceased by either:

> "1. (a) deliberately causing a gun to discharge; and
> (b) as a result, the deceased suffered injuries which resulted in her death; or
>
> 2. breaching a duty required of him in that –
> (a) he was in charge of and/or control of a dangerous thing, namely a gun; and
> (b) he failed to use reasonable care and/or take reasonable precaution in relation to the use and/or management of the gun; and
> (c) as a result of his failure the gun discharged; and
> (d) the deceased suffered injuries which resulted in her death;
>
> and in either case he did so with intent to cause the death of or grievous bodily harm to the deceased."[5]

**The directions given to the jury**

25. The jury was not instructed in accordance with the terms of those particulars. Rather the jury was instructed that for pathway two a temporal coincidence was required between the requisite intention and the unwilled act, namely the discharge of the firearm. They were not instructed that the requisite intention had

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the prosecution of that purpose had used the firearm in a way that constituted an act that was "of such a nature as to be likely to endanger human life."

[3] *R v Koani* [2016] QCA 289 at [33]

[4] Per Gaudron at 196-202 and Gummow and Hayne at 205 to 212

[5] *R v Koani* [2016] QCA 289 at [3]

to coincide (even just in a temporal sense) with the failure to use reasonable care and take reasonable precautions (as proposed by the particulars).

26. The discordance between the particulars relied upon and the way the jury was directed is illustrative of the problematic nature of the Crown's novel construction.

27. The way in which the jury were directed by the trial judge is at [23] to [24] of the decision of McMurdo P in the Court of Appeal. The final paragraph of the summing up quoted in [24], sets out the way the trial judge summarised what the jury were required to find necessary under the second route to conviction:

> "So the remaining instructions that I have to give you are about, then, this third question in column 2. And that is because the Crown says, as I said to you at the beginning, if you are following this through, if you ended up looking at this third question in column 2, you have done it because you had a reasonable doubt about the willed act. You are satisfied that the gun was dangerous. You are satisfied there was not proper care taken. You are satisfied that caused death. And then the Crown case is, well, <u>if at the time the gun discharged there was an intention to kill or do grievous bodily harm</u>, that still results in a murder conviction. Okay. Do you see how that works? All right. And as I say, that question in – the third question in the second column's almost the same as the intention question in the first column. So I am certainly not going to go through all that evidence again, but it is the same question really except that the question in the second column, the time you have to be satisfied – and this is very important – <u>is the time the gun discharged</u>. Okay. <u>So that is the time you are looking at to find an intention</u>. So it might just be split seconds after, but it is after the cocking of the gun." (emphasis added)

**The reasoning in the Court of Appeal**

28. This reasoning was upheld by the majority of the Court of Appeal. Both the learned trial judge and the majority of the Court of Appeal were in error in concluding that it is possible to combine an intention to kill or do grievous bodily harm with an unwilled act amounting to a breach of s 289.

29. There are four different but related lines of reasoning that demonstrate the error. They are captured in the following propositions:

    a. Consistent with the unanimous decision of this court in *Myers v The Queen* (1997) 71 ALJR 1488 (***Myers***) it is not possible for a specific intention to attach to an unwilled act.

    b. Section 23(1) of the Code on its proper construction does not permit a conviction for murder based on an unwilled act.

c. The reasoning of the Court of Appeal is incompatible with the reasoning of the majority in this court in *Murray*.

d. Regardless of whether an act is willed or unwilled, the Code does not permit a conviction for murder where the basis for the unlawfulness of the killing is negligence.

**(a) It is not possible for a specific intention to attach to an unwilled act**

10 30. Mere temporal coincidence between the unwilled discharge of the firearm and an intention to kill or cause grievous bodily harm is not sufficient to found liability for murder.

31. Rather, it is necessary that the act that causes death be done with an intention that *the act* will cause death or grievous bodily harm. In the unanimous decision of *Myers* at 1489, the High Court held:

> "An accused person who unlawfully kills another is not guilty of murder unless he does the particular act which causes the death with one of the
20 specific intents that is an essential element of the crime of murder. The particular act and the intent with which it is done must be proved by the prosecution beyond reasonable doubt. Act and intent must coincide.[6] If the circumstances of a fatal altercation are such that the prosecution can prove that some acts were done with the necessary intent but cannot prove that other acts were done with that intent, no conviction for murder can be returned unless there is evidence on which the jury can reasonably find that the act which caused the death was one of those done with the necessary intent." (footnotes as in the original)

30 32. It is not logically possible for an unwilled act to be done with a specific intent. By its very nature, an unwilled act is one that is done without any intent. The majority of the Court of Appeal in the present case failed to grapple with this problem.

33. At [73] the majority held that "[i]f there is an unlawful killing coupled with the relevant intent then the killing is murder and not manslaughter." At [76], the majority also held:

> "Under s 289, the failure to take reasonable care and precaution in the use
40 of a dangerous thing renders the offender criminally culpable for the consequences of that failure. Where death results, the killing is unlawful. If the unlawful killing is accompanied by the intent of which s 302(1)(a) speaks, the killing is murder."

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[6] *Ryan v The Queen* [1967] HCA 2 (1967) 121 CLR 205 at 217-218; *Royall v The Queen* [1991] HCA 27; (1991) 172 CLR 378 at 393, 401, 414, 421, 453.

The decision of the majority fails to acknowledge the necessity for the act causing death *to be done* with the requisite intent rather than there simply being a temporal coincidence. The use of the phrases "coupled with" in [73] and "accompanied by" in [76] are an implicit acknowledgment of the difficulties of combining an element of specific intention to an unwilled act.

**(b) Section 23(1) of the Code on its proper construction does not permit a conviction for murder based on an unwilled act**

34. Section 23(1) of the Code creates a general rule that a person is not criminally responsible for an unwilled act (s 23(1)(a)) or an unforeseen and unforeseeable act (s 23(1)(b)). The only exception is found in the opening words "Subject to the express provisions of this Code relating to negligent acts and omissions".

35. At [38] of the present case, McMurdo P concluded, and we do not challenge, that s 298 is such an "express provision":

> "There are no longer any provisions of the *Criminal Code* which in express terms relate to "negligent acts and omissions" but it is uncontentious that those exact words need not be used in order for the provisions to be "express provisions relating to negligent acts and omissions".[7] The phrase includes criminally negligent breaches of duty under Chapter 27 and has long been construed as applying to s 289."[8]
>
> (footnotes as in the original)

36. The majority in the Court of Appeal reasoned in this way:

a. Section 289 is an "express provision...relating to negligent acts and omissions".

b. Section 289 declares that a person who fails to take reasonable precautions when in charge of a dangerous thing is held to have caused any consequence to life or health of any person by reason of that failure.

c. Pursuant to s 293 a person who causes the death of another person is deemed to have killed that person.

d. Pursuant to s 300 where that killing is unlawful it will be either murder or manslaughter depending on the circumstances of the case.

e. Pursuant to s 302 an unlawful killing will be murder if the offender intends to cause death or grievous bodily harm.

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[7] *R v Young* [1969] Qd R 417, 441-443 (Lucas J); 444 (Hoare J).

[8] See *Murray* (2002) 211 CLR 193, [18] (Gaudron J); [88], [90] (Kirby J); [137] (Callinan J). See also *Ugle* (2002) 211 CLR 171, [5] (Gaudron J); [24] (Gummow and Hayne JJ); [55] (Kirby J); [74] – [75] (Callinan J).

f. It follows that s 289 can form the basis for a conviction for murder so long as the breach is accompanied by the requisite intention.

37. In this way, the majority treated s 289 as unlocking access to the cascading homicide provisions permitting a conviction for murder for an unwilled act.

38. However, the majority did not grapple with how a person can be convicted of murder under s 302 based on an unwilled act given that:

a. The only exception to the prohibition on an unwilled act acting as the foundation for criminal liability is "the express provisions of this Code relating to negligent acts and omissions"; and

b. On no reading can s 302 be described in that way. Indeed, s 302 is the antithesis of a provision "relating to negligent acts and omissions" given that it creates an offence based only on the existence of a specific intent.

39. By contrast, the use of s 289 as a foundation for a conviction for manslaughter occurs in way that is harmonious with the reference in s 23(1) to provisions "relating to negligent acts and omissions".

40. Section 289 in its terms only declares that a person is "held to have caused" the consequences of breach of the duty that it creates. Section 293 then defines "killing" by reference to causing, directly or indirectly, the death of any person.

41. Section 300 declares any unlawful killing to be murder or manslaughter according to the circumstances of the case. Section 302 then defines murder and s 303 makes any unlawful killing that is not murder manslaughter.

42. Where the "circumstances of the case" involve unlawfulness based on an alleged breach of s 289 (i.e. in circumstances of negligence) there is no difficulty in recognising s 300 as a provision to which s 23(1) refers, but only to the extent that it provides a pathway to conviction for manslaughter based on negligence.

43. This approach leads to the entirely coherent outcome that an unwilled act can provide the basis for a conviction for negligent manslaughter i.e. for an offence that does not require recklessness or intention, but not to murder which requires a specific intent.

44. Indeed, this is the likely purpose of the exception in s 23(1). If offences based on negligence were not excluded from s 23(1) then those offences would always be able to be defended on the basis either that the act or omission was accidental or unwilled – undermining the essence of negligence as a standard of conduct.

45. Permitting a conviction for the intentional offence of murder based on an exception directed to protecting the operation of offences based on negligence is at odds with that apparent purpose.

46. As Kirby J explained in *Stevens v The Queen*:

> "...a consideration of manslaughter will often be required when s 23(1) of the Code is invoked. The opening words of s 23(1), with their cross-reference to 'express provisions of this Code relating to negligent acts and omissions,' makes this inevitable. If such other provisions apply, the total exemption from criminal responsibility provided by s 23 does not operate. Moreover, the references in s 23(1) to acts and omissions occurring independently of the exercise of the person's will...direct the mind to the possibility of manslaughter by criminal negligence."[9]
>
> (footnotes as in the original)

47. While care must be taken in deploying common law principles in relation to the construction of the Code[10] it should be recalled that the proposition that a person is not criminally responsible for an unwilled act (other than for offences based in negligence only) is fundamental and of long standing: *Ryan v The Queen* [1967] HCA 2 (1967) 121 CLR 205, 216-217 per Barwick CJ.

48. The conclusion that a person could be convicted of murder carrying mandatory life imprisonment[11] for an unwilled act should only be reached on the clearest of statutory language.

49. A similar concern not to extend liability for homicide beyond that which was well understood by the common law caused the High Court in *Callaghan v The Queen* (1952) 87 CLR 115 at 124 to hold that the common law standard of criminal negligence was required for liability under the Western Australian equivalent of s 289:

> "The conclusion we have formed is that the expression "omission to perform the duty to use reasonable care and take reasonable precautions" which in effect is that of ss 266 and 291A must be regarded from the point of view of the context where it occurs. It is in a criminal code dealing with major crimes involving grave moral guilt. Without in any way denying the difficulties created by the text of The Criminal Code, we think it would be wrong to suppose that it was intended by the Code to make the degree of negligence punishable as manslaughter as low as the standard of fault sufficient to give rise to civil liability. The standard set both by ss 266 and by 291A should, in our opinion, be regarded as that set by the common law in cases where negligence amounts to manslaughter"

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[9] (2005) 227 CLR 319, 342 [67].

[10] *Brennan v The Queen* (1936) 55 CLR 253 at 263 per Dixon and Evatt JJ, *Boughey v The Queen* (1986) 161 CLR 10 at 30; *R v Barlow* (1997) 188 CLR 1 at 31-33 and *Charlie v The Queen* (1999) 199 CLR 387 at 393-394 [14] as cited by Kirby J in *Murray* (supra) at 218 [78]

[11] S 305(1) of the Code

**(c) The reasoning of the Court of Appeal is incompatible with the decision of the High Court in *Murray***

50. The conclusion that an unwilled act cannot provide a basis for a murder conviction is at least implied by the decision of the High Court in *Murray*. In a case with remarkable factual similarities to this one, the jury had not been directed on s 23(1)(a) at all. The majority (Gaudron, Kirby and Callinan JJ) held that the question of whether or not death was caused by a willed act required separate consideration from the question of whether the specific intention required for murder had been proved. A new trial was ordered.

51. If the Court of Appeal here is correct, then the jury would treat the act causing death in precisely the same way regardless of whether it was willed or unwilled i.e. to ask whether the specific intention required for murder existed at the same time as the act.

52. There would then be no point in separate directions being given to a jury as to whether the act causing death was unwilled because the distinction would make no difference to the verdict.

53. The holding in *Murray* only makes sense if the inability of the prosecution to prove that the act causing death was willed provided a defence to murder. If this were not so then, it can be asked, why would the majority in *Murray* have ordered a re-trial on the basis of the failure to direct the jury on the unwilled act?

54. Gaudron J was explicit about the effect of the requirement to separately direct as to an unwilled act. At 199 [15] of *Murray* her Honour held that:

> "Unlike s 18(1) of the Crimes Act 1900 (NSW), as it stood at the time of the decision in *Ryan*, the definition of murder in s 302(1) of the Code contains no provision permitting a person to be convicted of murder simply for an act done with reckless indifference to human life or done in an attempt to commit or during or immediately after the commission of an act obviously dangerous to human life. Thus, if the act causing death in this case were to be identified as simply presenting the loaded shotgun, that might constitute manslaughter by negligent act, but it would not constitute murder."

55. Gaudron J then went on to observe at 200 [18]:

> "The second area for the jury's consideration was intention. If, but only if, the prosecution excluded the possibilities identified above, the jury had to consider whether the prosecution had established beyond reasonable doubt that the appellant had discharged the shotgun with the intention of causing death or grievous bodily harm. If not so satisfied, the third question, namely, manslaughter would then have fallen for consideration. That question could arise either by reference to the voluntary discharge of

the gun without an intention to kill or do grievous bodily harm or, if not satisfied that it was voluntarily discharged, on the basis of a negligent act constituted by the presentation of the loaded gun."

56. Kirby J also discussed the significance of s 23(1) to cases of murder, in terms that are incompatible with the majority's decision in the present case:

> "Addressing the attention of the jury to the provisions of s 23(1)(a) had certain advantages for the appellant beyond those deriving from the accurate instruction which the trial judge gave to them about the need to be satisfied beyond reasonable doubt of the intent necessary to find the appellant guilty of murder. Properly addressed, s 23(1)(a) would have sharply focused the jury's attention on the question that the appellant's conduct of his case posed. This was whether the prosecution had proved beyond reasonable doubt that the final "act" that caused the death of the deceased was done in the exercise of the appellant's will. Or whether the prosecution had failed to negative the real possibility that the discharge of the gun was the result of an act unaccompanied by the requisite will."[12]

57. The conclusion that an unwilled act would have provided a defence to murder is also implicit in Callinan J's reasoning as the third member of the majority at [151] – [153].

58. It is true that the issue in this case was not squarely before the court in *Murray* and on that basis the above reasoning is not strictly binding.

59. However, for the reasons noted above, the Court of Appeal's reasoning in this case would render the holding in *Murray* ineffective and should therefore not be accepted as correct.

**(d) Regardless of whether an act is willed or unwilled, the Code does not permit a conviction for murder where the basis for the unlawfulness of the killing is negligence**

60. The submissions made earlier in relation to whether a specific intention can attach to an unwilled act apply also to the difficulties in attaching a specific intention to a failure of the kind contemplated by s 289. In summary, there is a fundamental conceptual problem with attaching a specific intention to breach of a duty.

61. The jury in this case was only called upon to consider a breach under s 289 if s 23(1)(a) otherwise operated to excuse the appellant's conduct.[13] At that point criminal liability was solely established by demonstrating the existence of a duty under s 289 and a breach of that duty resulting in a death.

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[12] *Murray* (supra) at 223 [92]

[13] Section 289 is a provision that relates to "negligent acts and omissions" as referred to in s 23(1)(a): *R v Young* [1969] Qd R 417, 441-443 (Lucas J); 444 (Hoare J);*R v Koani* [2016] QCA 289 at [38] per McMurdo P.

62. The relevant act in s 289 is constituted by a failure "to use reasonable care and take reasonable precautions" to which no specific intention could logically attach, even if it might be possible to contemplate 'free floating' intention co-existing with the failure, but not being acted upon.

63. The text of s 289 is not compatible with the purpose to which the prosecution sought to use it. The terms of s 289 do not allow for an overlay of an additional specific intention such as to permit a conviction for murder under s 302(1)(a), or some other offence with a specific intent such as malicious acts with intent under s 317 of the Code. As McMurdo P noted at [37] of the decision of the Court of Appeal:

> "A breach of duty under s 289 is commonly referred to as "criminal negligence" and I have difficulty in apprehending how a criminally negligent act can result in a conviction for an intentional offence. As Keane JA (as his Honour then was) explained in *R v Clark*:[14]
>
> > 'a contravention of the duty imposed in s 289, does not depend upon an intention to cause harm: the gravamen of the contravention lies in the failure to use 'reasonable care and take reasonable precautions to avoid' danger to life, safety and health. Whether there has been a failure in this sense on the part of an accused person does not depend upon an intention to cause harm but upon a failure to take reasonable steps to avoid danger.'"

64. McMurdo P was correct to conclude that a breach of a duty under s 289 of the Code can only result in a conviction for manslaughter, not murder.[15] Her Honour's conclusion is consistent with Gaudron J's reasoning in *Murray v The Queen*[16] discussed above.

**Part VII APPLICABLE STATUTORY PROVISIONS**

65. The applicable statutory provisions are attached.

**Part VIII ORDERS SOUGHT**

i. Appeal allowed.
ii. Set aside the order of the Court of Appeal of Queensland dated 11 November 2016 and, in lieu thereof, order that:
iii. The appellant's appeal to that Court be allowed; and
iv. The appellant's conviction be set aside and a new trial be had.

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[14] [2007] QCA 168
[15] *R v Koani* [2016] QCA 289 at [42]
[16] (2002) 211 CLR 193; in particular Gaudron J at [15]-[18]

**Part IX TIME ESTIMATE**

66. It is estimated that the appellant's argument will take approximately one hour.

Dated:

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.....
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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B20 of 2017

**BETWEEN:**

**CHRISTOPHER CHARLES KOANI**
**Appellant**

**and**

**THE QUEEN**
**Respondent**

## APPELLANT'S ANNEXURE A

**Statement of currency:**

Reproduced below are the legislative provisions relevant to this case and to the argument the appellant will advance. They are reproduced in the form in which they were at time the offence was committed. With the exception of section 291A of the *Criminal Code 1913* (WA) which was repealed in 1974.

**Commonwealth Legislation:**

***Judiciary Act 1903* (Cth)**

**78B Notice to Attorneys-General**

(1) Where a cause pending in a federal court including the High Court or in a court of a State or Territory involves a matter arising under the Constitution or involving its interpretation, it is the duty of the court not to proceed in the cause unless and until the court is satisfied that notice of the cause, specifying the nature of the matter has been given to the Attorneys-General of the Commonwealth and of the States, and a reasonable time has elapsed since the giving of the notice for consideration by the Attorneys-General, of the question of intervention in the proceedings or removal of the cause to the High Court.

(2) For the purposes of subsection (1), a court in which a cause referred to in that subsection is pending:
(a) may adjourn the proceedings in the cause for such time as it thinks necessary and may make such order as to costs in relation to such an adjournment as it thinks fit;
(b) may direct a party to give notice in accordance with that subsection; and
(c) may continue to hear evidence and argument concerning matters severable from any matter arising under the Constitution or involving its interpretation.

(3) For the purposes of subsection (1), a notice in respect of a cause:
(a) shall be taken to have been given to an Attorney-General if steps have been taken that, in the opinion of the court, could reasonably be expected to cause the matters to be notified to be brought to the attention of that Attorney-General; and
(b) is not required to be given to the Attorney-General of the Commonwealth if he or she or the Commonwealth is a party to the cause and is not required to be given to the Attorney-General of a State if he or she or the State is a party to the cause.

(4) The Attorney-General may authorize the payment by the Commonwealth to a party of an amount in respect of costs arising out of the adjournment of a cause by reason of this section.

(5) Nothing in subsection (1) prevents a court from proceeding without delay to hear and determine proceedings, so far as they relate to the grant of urgent relief of an interlocutory nature, where the court thinks it necessary in the interests of justice to do so.

**Queensland Legislation:**

***Criminal Code Act 1899 (Qld)***

**23 Intention – Motive**

(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for—
(a) an act or omission that occurs independently of the exercise of the person's will; or
(b) an event that—
(i) the person does not intend or foresee as a possible consequence; and
(ii) an ordinary person would not reasonably foresee as a possible consequence.

*Note—*
Parliament, in amending subsection (1)(b) by *the Criminal Code and Other Legislation Amendment Act 2011*, did not intend to change the circumstances in which a person is criminally responsible.

(1A) However, under subsection (1)(b), the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness, or abnormality.

(2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

### 289 Duty of persons in charge of dangerous things

It is the duty of every person who has in the person's charge or under the person's control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health, of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger, and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.

### 293 Definition of *killing*

Except as hereinafter set forth, any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person.

### 300 Unlawful homicide

Any person who unlawfully kills another is guilty of a crime, which is called murder or manslaughter, according to the circumstances of the case.

### 302 Definition of *murder*

(1) Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say—

(a) if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm;

(b) if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;

(c) if the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime;

(d) if death is caused by administering any stupefying or overpowering thing for either of the purposes mentioned in paragraph (c);

(e) if death is caused by wilfully stopping the breath of any person for either of such purposes;

is guilty of ***murder***.

(2) Under subsection (1)(a) it is immaterial that the offender did not intend to hurt the particular person who is killed.

(3) Under subsection (1)(b) it is immaterial that the offender did not intend to hurt any person.

(4) Under subsection (1)(c) to (e) it is immaterial that the offender did not intend to cause death or did not know that death was likely to result.

(5) An indictment charging an offence against this section with the circumstance of aggravation stated in the *Penalties and Sentences Act 1992*, section 161Q may not be presented without the consent of a Crown Law Officer.

### 303 Definition of *manslaughter*

(1) A person who unlawfully kills another under such circumstances as not to constitute murder is guilty to ***manslaughter***.

(2) An indictment charging an offence against this section with the circumstance of aggravation stated in the *Penalties and Sentences Act 1992*, section 161Q may not be presented without the consent of a Crown Law Officer.

### 305 Punishment of murder

(1) Any person who commits the crime of murder is liable to imprisonment for life, which can not be mitigated or varied under this Code or any other law or is liable to an indefinite

sentence under part 10 of the *Penalties and Sentences Act 1992*.

## NEW SOUTH WALES LEGISLATION:

### *Crimes Act 1900 (NSW)*

**18 Murder and manslaughter defined**

(1)

(a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.

(b) Every other punishable homicide shall be taken to be manslaughter.

(2)

(a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.

(b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only.

## WESTERN AUSTRALIA LEGISLATION:

### *Criminal Code Act Compilation Act 1913* (WA)

**266. Duty of person in charge of dangerous thing**

(1) In this section –

***anything*** includes a source of ignition and a fire.

(3) It is the duty of every person who has in his charge or under his control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.

*[Section 266 amended by No. 43 of2009 s. 8]*

*[291A. Deleted by No 58 of1974 s 5]*

## REPEALED LEGISLATION:

### *Criminal Code (1913)* (WA)

(Approved for reprint 29th June. 1955.)

**291A.** (1) Any person who has in his charge or under his control any vehicle and fails to use reasonable care and take reasonable precautions in the use and management of such vehicle whereby death is caused to another person is guilty of a crime and liable to imprisonment with hard labour for five years.

(2) This section shall not relieve a person of criminal responsibility for the unlawful killing of another person.