IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M1 of 2018

BETWEEN:

THE QUEEN

Appellant

– and –

DENNIS BAUER (A PSEUDONYM) (NO. 2)

Respondent

RESPONDENT'S REPLY

Part I: Suitability for publication on the internet

1. These submissions are in a form suitable for publication on the internet.

Part II: Respondent's reply – cross-appeal

2. The appellant's reply reveals that, as between the parties, there is no dispute as to:

   (a) the correctness of the proposition that there is not in law a rebuttable presumption in favour of ordering a new trial upon a conviction appeal being allowed; or

   (b) the facts and circumstances that the respondent relies upon in submitting that the overall justice of the case leads to a conclusion that acquittals should be entered.

Filed on behalf of the respondent
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3. Critically, the Court below said:[1]

> In *Rabey*, it was observed:
>
> > Once justice has miscarried it is not always easy to maintain the scales in precise equipoise on a second occasion. The public interest in securing a fair trial of an alleged wrongdoer must be weighed against the public inconvenience and expense, and against the possible oppression upon a member of the public who is placed in jeopardy twice for the same offence, has already spent some time in prison and who has already been through one trial and an appeal.
>
> But as Winneke P said in *Bartlett*:
>
> > In normal circumstances it would be proper to direct a new trial if there is evidence upon which a reasonable jury could, assuming a trial in accordance with law, convict. However the court has a discretion not to order a re-trial if there are circumstances which would render it unjust to require the applicant to stand his trial again…

4. Contrary to the appellant's submission, in not only citing the above passage from *Bartlett* but in introducing that passage with the words '**But** as Winneke P said in *Bartlett*' (emphasis added), it is plain that the Court below considered there to be (and applied) a rebuttable presumption in favour of ordering a new trial.

5. The appellant's reliance on the Court's statement that 'in exercising the discretion whether to direct a new trial or to order an acquittal, the interests of the community as well as the interests of the accused need to be brought into balance' is misplaced, given that observation was preceded by the words 'as the authorities recognise', and thus incorporated the Court's acceptance of the fallacious presumption identified in *Bartlett*.

[1] *Bauer (a Pseudonym) v The Queen (No 2)* [2017] VSCA 176, [117]-[118] (citations omitted).

6. Moreover, that statement was followed immediately by a passage containing further confirmation of the Court's application of a rebuttable presumption in favour of ordering a new trial:[2]

> The circumstances in which the discretion will be exercised **so as not to order a new trial** will vary, there being no fixed criteria. Length and complexity of a re-trial, together with inadequacies in the way in which the case has been presented, **may militate against ordering a new trial**. The advanced age and ill health of a successful applicant of previously good character, coupled with the fact that much of the sentence had been served, **might militate against an order for re-trial**. So, too, several trials and long periods of custody **might also dictate there be no re-trial**.

7. In applying a rebuttable presumption in favour of ordering a new trial instead of exercising its discretion simply in accordance with the interests of justice in the particular case, the Court erred.

Dated this 3rd day of April 2018

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[2] *Bauer (a Pseudonym) v The Queen (No 2)* [2017] VSCA 176, [120] (citations omitted and emphasis added). **CAB 192**