IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S308 of 2017

BETWEEN:

Paul Ian Lane
Appellant

and

The Queen
Respondent

10 **APPELLANT'S SUBMISSIONS**

Part I: Certification

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

Part II: Statement of the issues

2. Section 6(1) of the *Criminal Appeal Act 1912* (NSW) allows that "the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred" ("**the proviso**"). Where, as a
20 result of the evidence adduced at trial, it is necessary to direct the jury that they must be unanimous as to the factual basis of their verdict, does a failure to give the direction amount to a substantial miscarriage of justice so as to deny the application of the proviso in s 6(1) of the *Criminal Appeal Act* irrespective of the strength of the prosecution case?

3. Where an appellate court is engaged in an assessment of the evidence adduced at trial for the purposes of the determining whether "no substantial miscarriage of justice has actually occurred" to what extent must that court consider the nature of the error, its

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impact on the weight to be given to the verdict of the jury and the limitations inherent in making a determination based on the record of trial?

4. Did the majority of the New South Wales Court of Criminal Appeal err in applying the proviso in s 6(1) of the *Criminal Appeal Act* to the appellant's appeal against conviction?

Part III: Notice

5. The appellant considers that no notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

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Part IV: Citation

6. The internet citation of the reasons for judgment of the New South Wales Court of Criminal Appeal is *Lane v R* [2017] NSWCCA 76 ("**CCA**").

Part V: Narrative statement of the facts

7. The appellant was tried before Campbell J and a jury in the Supreme Court of New South Wales for the murder of Peter Morris on 24 September 2012. The trial commenced on 7 October 2014. On 27 October 2014 the jury returned a verdict of not guilty of murder, but guilty of manslaughter. The alternative verdict of manslaughter
20 was left to the jury as being available on two legal bases: manslaughter by unlawful and dangerous act and manslaughter by way of excessive self-defence. The appellant was sentenced (on the former basis of liability) to imprisonment, with a non-parole period of six years and four months and an additional term of two years and two months (**CAB** at 179.50-180.10, 200.32). The non-parole period expires on 26 January 2020.

8. The relevant events giving rise to the offence occurred late in the evening of 15 September 2012. The appellant and the deceased had been drinking at the Commercial Hotel in Barker Street, Casino. Both men were aged in their mid fifties and were intoxicated to some degree. They were not previously known to each other. After leaving the hotel the appellant was joined by his son Ryan Lane. The deceased left the

hotel at about closing time with a friend named Mr Schwager (CCA at [6], **CAB** at 211).

9. An altercation between the men occurred on the footpath and roadway outside a dental surgery, which was the fifth shopfront to the west of the hotel. The altercation was captured by a bank's CCTV security camera situated further to the west (CCA at [7], **CAB** at 211). The CCTV footage[1] captured four interactions. The deceased is seen to fall to the road after two of these interactions. Issue was joined at trial as to whether the CCTV footage depicted the appellant striking or punching the deceased (**CAB** at 49.21-49.49).

10. In the first interaction the deceased turned the appellant around and forced him against the shopfront of the dental surgery (**CAB** at 184.50-185.10). In the second interaction the deceased then retreated towards the roadway with the appellant in pursuit. The deceased fell backwards onto the roadway and struck his head (**CAB** at 185.10). This was generally referred to in the proceedings as the "first fall". After the first fall, there was a third interaction, this time between the appellant and Mr Schwager. Mr Schwager approached the appellant, who then punched Mr Schwager, causing him to fall to the ground near a telegraph pole (**CAB** at 189.48). Meanwhile, the deceased rose to his feet and faced the appellant. There was a fourth interaction, involving the deceased and the appellant, in which the head of each man is seen to move backwards. The deceased then fell to the road a second time and lost consciousness (**CAB** at 185.45). This was generally referred to in the proceedings as the "second fall".

11. There were a number of witnesses to the altercation, who gave somewhat inconsistent evidence about what they observed. None of the witnesses saw everything that is depicted on the CCTV footage (**CAB** at 46.40, 106.38, 183.26). Each of the witnesses had consumed alcohol in the period leading up to the altercation. A brief summary follows.

12. Mr Barry Cupitt did not see the first fall. His attention was drawn to the altercation when he heard yelling and raised voices. He saw the appellant punch a first male (Mr Schwager), causing him to fall to the ground near the telegraph pole. He then saw the appellant punch the second male (the deceased), who fell backwards onto the road, hitting his head on the bitumen. The witness initially denied that there was pushing and

[1] A DVD containing the CCTV footage was admitted as exhibit C in the trial (T48.3, **AFM** V1 at 49).

shoving between the appellant and the deceased before the latter was punched, but then accepted this happened after he was cross-examined on a prior inconsistent statement he made to the police. He thought the punch was delivered with the left hand and that it landed somewhere in the deceased's face. Mr Cupitt consumed beer and then rum-based beverages from lunchtime onwards. He estimated consuming about fourteen or fifteen drinks during a "pretty big day out" and accepted that he was affected by alcohol.[2]

13. Mr David Marsh was in the company of his friend, Mr Cupitt. He also did not see the first fall. He saw the appellant take a swing at one of the males (Mr Schwager), who went down and fell against a power pole. He did not see the punch connect with Mr Schwager. He then saw another confrontation, in which the appellant took a swing at the deceased, who fell backwards off the footpath and hit his head on the bitumen. He also did not see this punch connect with the deceased. He did not see all of the incident. He thought the punch was thrown with the appellant's right hand. Mr Marsh estimated that he could have drunk about ten schooners of full strength beer, although he did not keep a tally of the drinks he consumed.[3]

14. Mr Jai Perkins consumed six or seven schooners of full strength beer over dinner and then had a "few more drinks" after attending a different venue at about 9.00 pm. He did not hear yelling or shouting. He gave evidence of hearing a noise that sounded like someone being hit and then landing (possibly, the first fall). He turned around and the first thing he saw was a person getting hit and landing on the street (possibly, the second fall). He could not recall where the hit landed. He could not recall which hand was used. He could not recall whether he saw the person actually fall. He could not recall whether there was anything in the victim's hand (the CCTV footage depicted the deceased holding a bag at the time of the second fall). He then saw the appellant punch the second man in the face, who fell backwards onto the telegraph post (Mr Schwager). In cross-examination, the witness appeared to suggest that he heard the noise (of someone being hit), saw the fellow fall down backwards and assumed this was caused by a punch; the victim did not get back up. Then the second man (Mr Schwager) was hit

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[2] T273-308, **AFM** V1 at 274-309. The trial judge summarised Mr Cupitt's evidence in the summing up at **CAB** 49.20-60.18.

[3] T309-319, 326-327, 335-343, **AFM** V1 at 310-320, 327-328, 336-344. The trial judge summarised Mr Marsh's evidence in the summing up at **CAB** 60.19-66.49.

directly, ended up at the telegraph pole, which was the last thing he saw.[4] The trial judge commented to the jury that they should reject any suggestion that the witness saw the deceased being punched (**CAB** at 102.12-102.20).

15. Ms Alisha Livingstone was drinking during the night. She could not recall what she was drinking, although she usually drank "Vodka cruisers or something like that". She did not see the first fall or the assault on Mr Schwager. The first thing she saw was the appellant hit the deceased, who fell and hit the gutter. The appellant then walked away. She indicated that the punch struck the deceased's left forehead, near the temple region. It happened really fast. She could not recall seeing the deceased holding a bag at that time, although she had seen him with the bag earlier in the evening. She accompanied Mr Schwager to the hospital. Under cross-examination, she could not recall telling a police officer at the hospital that she saw an earlier altercation between Mr Schwager and the appellant, during which the deceased stepped in to help. She denied seeing this occur, notwithstanding the inconsistent statement she made to the police officer. She also told the police officer that she saw the appellant "throw his left arm out hitting" the deceased. She maintained in evidence that the appellant used a fist, but changed her evidence by saying that the deceased was struck to his right side. The witness could not see the alleged punch (to the deceased) depicted on the CCTV footage.[5]

16. Mr Jeremy Armstrong was in the company of Mr Perkins. He consumed about six or seven stubbies of beer from about 5.00 pm. He had a "glass of beer" earlier in the day. He consumed approximately six mixed rum beverages from about 8.00 pm. He saw the deceased and his mate (Mr Schwager) sitting on the gutter (this was contradicted by the CCTV footage). As they were starting to stand he saw the appellant punch the deceased. He could not recall where the punch landed. The deceased was stunned, looked "a bit wobbly" and the witness thought he went to the ground at this stage (presumably, the first fall). Under cross-examination the witness said he could not remember whether the deceased fell on this occasion. He then saw the appellant punch Mr Schwager's right cheek. He thought Mr Schwager went to the ground. Although his view was obstructed, he then heard sounds consistent with the appellant punching the deceased and the deceased hitting his head. The deceased fell to the ground (the second fall). He told a

[4] T344.1-363.26, **AFM** V1 at 345-364. The trial judge summarised Mr Perkin's evidence in the summing up at **CAB** 96.28-102.20.
[5] T379.1-397.50, **AFM** V1 at 380-398. The trial judge summarised Ms Livingstone's evidence in the summing up at **CAB** 102.20-106.40.

police officer that this punch was directed to the deceased's upper body. He also thought the appellant hit Mr Schwager a second time on the chin and Mr Schwager fell down. The appellant then walked away. The witness had "industrial deafness" and could not hear whether words were spoken between the men.[6]

17. The deceased died at Southport Hospital on 24 September 2012 (hence the terms of indictment). A forensic pathologist, Dr Little, gave evidence of two areas of head injury that could have caused death. There was an abrasion on the left rear of the scalp with possible contrecoup injury to the frontal and temporal lobes, which were typical of a person falling backwards and hitting their head. There was also an injury to the left side of the head (bruising with an underlying fracture) with a "little bit" of contrecoup injury to the right side of the brain.[7] Dr Little could not determine the sequence of the injuries due to the lack of quality in the CCTV footage. The pathologist agreed that it was "possible" that both of the injuries contributed to death. She opined: "I think – overall obviously it's a combination but…either injury could have led to death on its own."[8]

18. The Crown ultimately relied on the acts of the appellant immediately before *each fall* as a deliberate act or acts that could found his liability for murder or manslaughter (CCA at [28]-[30], [41]-[42], [125]-[130], **CAB** at 217-218, 222, 251-253). The appellant put in issue whether the Crown had proved beyond reasonable doubt whether a voluntary act of the appellant caused *either* of the deceased's falls (CCA at [31]-[32], [133], **CAB** at 218-219, 253-254). The appellant also took issue with the following matters: whether the Crown had proved an intention to cause death or grievous bodily harm; whether the Crown had negatived both limbs of self-defence; whether the Crown had established the elements of manslaughter by unlawful and dangerous act.

Part VI: Argument

The Appeal to the Court of Criminal Appeal

19. The appellant appealed against his conviction for manslaughter upon a number of grounds of appeal, which included the following:

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[6] T460.1-481.50, **AFM** V2 at 461-482. The trial judge summarised Mr Armstrong's evidence in the summing up at **CAB** 81.38-96.26.
[7] T524.26-525.8, **AFM** V2 at 525-526.
[8] T533.10-533.27, **AFM** V2 at 534.

> The trial judge erred in failing to direct the jury that in their consideration of the charge of manslaughter they were to be unanimous in their deliberations as to the factual basis on which they might convict the [appellant] of manslaughter.

20. The Court of Criminal Appeal granted leave to appeal and unanimously found that the trial judge erred as asserted in this ground of appeal. That is, all members of the Court agreed that the trial judge erred by failing to direct the jury that, to return a verdict of guilty, it was necessary that they be unanimous as to (at least) one of the two acts of the appellant upon which the Crown relied to prove the appellant's guilt (CCA at [44], [108], **CAB** at 222-223, 244). However, by majority (Meagher JA and Davies J, Fagan J dissenting), the Court dismissed the appeal on the basis that "no substantial miscarriage of justice *actually* occurred" within the meaning of s 6(1) of the *Criminal Appeal Act* (CCA at [61], **CAB** at 228, emphasis in the original). Fagan J would have allowed the appeal and ordered a new trial, finding that the established error was of a kind to which the proviso could not be applied (CCA at [108], [194], **CAB** at 244, 278).

21. The Court was unanimous in dismissing the remaining grounds of appeal (CCA at [86], [105]-[107], **CAB** at 236, 243-244).

The reasoning of the majority

22. The majority accepted that in relation to the charge of murder, and each of the manslaughter alternatives left to the jury, it was necessary that the voluntary act causing death be identified with precision. This was "because proof of the elements of the offence charged, and any available alternative verdict, directed attention to the act said to constitute the crime; the appellant's intention at the time that act was done; whether it was done in self-defence; and, to whether it was dangerous" (CCA at [24], **CAB** at 216). The majority reasoned as follows.

    a. "[O]n the Crown case as left to the jury there were two discrete acts which were said to have been deliberate and to have caused death. Each may have been sufficient to establish murder or manslaughter and accordingly was an alternative factual basis of liability" (CCA at [42], **CAB** at 222).

    b. "[I]n such circumstances the jury could not convict of murder or manslaughter unless they were agreed as to whether one or both of those acts was a criminal act of the appellant" (CCA at [42], **CAB** at 222).

    c. "[I]n the absence of any direction to that effect it remained possible that some jurors might reason to a verdict of guilty of murder or manslaughter by being satisfied that

the appellant's voluntary act caused the first fall while others might reason to the same conclusion by reference to his voluntary act having caused the second fall" (CCA at [43], **CAB** at 222).

d. "To remove that possibility the jury should have been directed that they could not convict unless they were agreed as to the voluntary act which resulted in their being satisfied that there should be a verdict of guilty of murder or not guilty of murder but guilty of manslaughter. The trial judge erred in not giving such a direction" (CCA at [44], **CAB** at 222).

23. Their Honours further observed that the error "was not trivial and a substantial miscarriage of justice may have occurred", such that it was in the interests of justice that leave be granted pursuant to rule 4 of the *Criminal Appeal Rules* (NSW) to rely on the ground (objection not having been taken at first instance) (CCA at [44], **CAB** at 222-223). The majority then turned to consider the application of the proviso to s 6(1) of the *Criminal Appeal Act* (CCA at [45]-[61], **CAB** at 223-228). Reference was made to the "negative proposition" contained in *Weiss v The Queen* (2005) 224 CLR 300 at [44]. The majority also acknowledged that there may be cases in which the proviso cannot be applied, notwithstanding the appellate court is satisfied as to the inevitability of conviction. Reference was made to several decisions of this Court, including *Filippou v The Queen* (2015) 256 CLR 47 at [15] (CCA at [46]-[47], **CAB** at 223-224).

24. The majority observed that the appellant would have been denied a chance of acquittal "unless this Court concludes from its review of the record that in the absence of the omission to give the unanimity direction his conviction was inevitable; or to put it another way, assuming that direction had been given, that it would not have been open to the jury to entertain a reasonable doubt as to his guilt". On this basis, their Honours thought it necessary to consider "the possible effect of the omission of that direction on the outcome of the trial" (CCA at [48], **CAB** at 224).

25. This produced the following analysis. Had the direction been given, the jury would have had to determine whether they were unanimously satisfied beyond reasonable doubt that one or other, or both, of the deceased's falls were caused by a voluntary act of the appellant. Upon its review of the evidence, the majority concluded that the jury "*necessarily* should have entertained a doubt" in respect of the first fall (CCA at [50], **CAB** at 224; emphasis in the original), while it was not open to the jury to have any reasonable doubt that the second fall was caused by a punch thrown by the appellant

(CCA at [52], [54], **CAB** at 225, 226). The implication is that irrespective of the way in which the Crown put its case, had the jury been properly directed, the evidence only allowed for one (reasonable) outcome in respect of manslaughter.

26. After determining, to their own satisfaction, the guilt of the appellant, their Honours turned to the question of whether there was a departure from trial according to law of a kind which precluded application of the proviso. Their Honours, firstly, expressed the view (CCA at [57], **CAB** at 227) that the error did not come within any of the examples referred to in *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at [31] or in *Krakouer v The Queen* (1998) 194 CLR 202 at [23]-[24] and [74]-[75]. This view, however, in circumstances where no taxonomy for the application of the proviso is available,[9] said little. For reasons further addressed below, it may also be doubted that the error was not of a kind contemplated in the passages from *Baiada Poultry Pty Ltd v The Queen* and *Krakouer v The Queen* referred to by the majority.

27. The next step in their Honours' reasoning was to find that any theoretical possibility the jury was not unanimous did not give rise to a [substantial] miscarriage "because the evidence was not capable of supporting a finding beyond reasonable doubt that a deliberate act of the appellant caused the first fall" (CCA at [58], **CAB** at 227). In other words, their Honours found there was no substantial miscarriage, not because of the nature of the error (the defect in the process), but based on a view the error did not affect (or, at least, in their Honours' view, should not have affected) the outcome.[10]

28. The appellant submits that the majority erred in determining the present case was one to which, having regard to the nature of the error, the proviso could apply. Further, the majority were wrong to conclude that, based on the record of trial, they could be satisfied as to the guilt of the appellant with respect to one of the cases brought by the Crown (or that the appellant did not lose a chance of acquittal fairly open to him). These errors are addressed, in turn, below.

<u>The proviso had no application to the present case having regard to the nature of the error</u>

Application of the proviso begins with identification of the nature of the error

29. As was explained in *Baiada Poultry Pty Ltd v The Queen* (at [30]) "...consideration of the application of the proviso begins from identifying the error that was made at trial."

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[9] *Baiada Poultry v The Queen* (2012) 246 CLR 92 at [31].
[10] See, for example, *Nudd v The Queen* (2006) 80 ALJR 614 per Gleeson CJ at [3]-[8].

This is because the relevant error or miscarriage is the "premise" for consideration of the proviso.[11]

30. Once identified, the question arises as to whether the particular error precludes application of the proviso. That is, as all members of the Court of Criminal Appeal recognised (CCA at [46], [175], **CAB** at 223-224, 271), there may be cases in which the proviso cannot be applied even though the court may be satisfied of the appellant's guilt.[12] Fagan J further observed, correctly it is respectfully submitted, that if the possibility of such a case —

> "... is ever to be realised, then the present is a case for it. It is difficult to conceive of a more serious error of this nature than one which resulted in the jury not having identified to them for their unanimous determination a factual question which was central to an element of the charge of murder and which the accused had put in issue."

31. Fagan J, again correctly, it is submitted, acknowledged that in such a case there was no need for the Court to go further and examine the whole of the trial record in order to consider for itself whether the guilt of the appellant had been proved (CCA at [176], **CAB** at 271-272). Nor was there a requirement to consider the whole of the record in order to determine to what extent, if any, the error may have affected the verdict in the sense that the appellant may have lost a chance of acquittal fairly open to him.[13]

Error or miscarriage amounting to a substantial miscarriage of justice

32. As was observed in *Evans v The Queen* (2007) 235 CLR 521 (at [39]) since, at least, *Quartermaine v The Queen* (1980) 143 CLR 595 and *Wilde v The Queen* (1988) 164 CLR 365, this Court has contemplated cases in which a substantial miscarriage of justice may arise because of an irregularity resulting in a serious departure from the essential requirements of a trial according to law,[14] or a "radical or fundamental" error that "goes to the root of the proceedings".[15] In the latter case, it was also recognised that

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[11] *AK v Western Australia* (2008) 232 CLR 438 per Gummow and Hayne JJ at [55], [58].
[12] *Weiss v The Queen* (2005) 224 CLR 300 at [45]-[46].
[13] See, for example *Filippou v The Queen* (2015) 256 CLR 47 at [48]; see also the observations of Gageler J in *Filippou v The Queen* at [78] and in *Baini v The Queen* (2012) 246 CLR 469 at [50].
[14] *Quartermaine v The Queen* (1980) 143 CLR 595 per Gibbs J at 601. See also *Andrews v The Queen* (1968) 126 CLR 198 where this Court observed, at 209, "It is not pedantry to insist that an accused be tried for the crime for which he is charged: and the function of the proviso to s. 6 of the *Appeal Act,* 1912 is not to provide a Court of Criminal Appeal with a refuge from the performance of the exacting duty imposed in the interests of the due administration of the law ...".
[15] *Wilde v The Queen* (1988) 164 CLR 365 per Brennan, Dawson and Toohey JJ at 372-372.

such defects do not admit to categorical description: no "rigid formula" or "mechanical approach can be adopted and each case must be decided on its own circumstances".[16]

33. The possibility of errors or miscarriages of justice which preclude application of the proviso, irrespective of the strength of the prosecution case, has been repeatedly affirmed in subsequent decisions of this Court.[17] In *Weiss v The Queen* (at [45]) it was acknowledged that there will be cases in which "it would be proper for an appellate court not to dismiss the appeal" irrespective of the court's view as to whether the evidence properly admitted at trial proved the appellant's guilt beyond reasonable doubt. The existence of such cases was regarded as related to the question of whether some errors or miscarriages of justice may amount to such a serious breach of the presuppositions of a criminal trial as to deny application of the proviso (at [46]).

34. While examples of such cases have been cited from time to time, it has also been said that "it is neither possible nor useful" to consider application of the proviso by reference to some supposed category of "fundamental defects" in a trial. To do so "distracts attention" from the statutory requirement of determining whether there has been a "substantial miscarriage of justice" in the particular case under consideration.[18] That said, what constitutes a "substantial miscarriage of justice" can only be determined in the context of the attributes of a criminal trial on indictment.

35. *AK v Western Australia* (2008) 232 CLR 438 is an example of a case involving an error to which the proviso could not be applied, notwithstanding that the intermediate appellate court was able to articulate "a chain of reasoning... that would support, even require, the [guilty] verdict that was reached at trial" (at [58]). Gummow and Hayne JJ said (at 455-456):

> [53] In *Weiss*, the Court identified one circumstance in which the proviso to the common form criminal appeal statute cannot be engaged. The Court said that the proviso cannot be engaged "unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty". This negative proposition (about when the proviso cannot be engaged) must not be treated as if it states what suffices to show that no substantial miscarriage has occurred. To treat the negative

[16] Ibid. at 373; see also *Weiss v The Queen* (2005) 224 CLR 300 at [45].
[17] For example, in *Nudd v The Queen* (2006) 80 ALJR 614 at [6] (per Gleeson CJ); *Evans v The Queen* (2007) 235 CLR 521 at [117] (per Kirby J); *AK v Western Australia* (2008) 232 CLR 438 at [23] (per Gleeson CJ and Kiefel J) and [87] (per Heydon J); *Cesan v The Queen* at [81] (2008) 236 CLR 358 (per French CJ); *Baiada Poultry v The Queen* (2012) 246 CLR 92 at [22] (per French CJ, Gummow, Hayne and Crennan JJ).
[18] *Baiada Poultry v The Queen* (2012) 246 CLR 92 at [23].

> proposition in this way would be to commit the very same error which *Weiss* sought to correct, namely, taking judicial statements about aspects of the operation of statutory provisions as substitutes for the statutory language.
>
> [54] Likewise, what was said in *Wilde v The Queen* about the possibility that some errors or miscarriages of justice occurring in the course of a criminal trial may amount to such a serious breach of the presupposition of the trial as to deny the application of the proviso is not to be taken as if it were a judicially determined exception grafted upon the otherwise general words of the relevant statute. Rather, as both *Wilde* and *Weiss* acknowledged, the operation of the proviso in the common form criminal appeal statute will fall for consideration in a very wide variety of circumstances. What was said in *Wilde* did no more than advert to a particular class of such circumstances in which the error or errors at trial are properly seen as radical. (Footnotes omitted.)

The nature of the error in the present case and its consequences for the application of the proviso

36. Returning to the nature of the error, in the present case the failure to give the required unanimity direction left open the possibility the jury convicted the appellant without being unanimous as to the voluntary act constituting the manslaughter offence. As Maxwell P put it in *R v Klamo* (2008) 18 VR 644 at [77], failure to give the unanimity direction meant it was possible "there was no unanimity among the jurors as to which act founded the guilty verdict and, therefore, that the appellant was not lawfully convicted."

37. While, as observed above, "no single universally applicable criterion can be formulated which identifies cases in which it would be proper for an appellate court not to dismiss the appeal," despite satisfaction of the appellant's guilt to the requisite standard,[19] what constitutes a "substantial miscarriage of justice" draws attention to what justice requires in the context of trial on indictment. The decided cases illuminate the relationship between the requirements of criminal justice and the proviso.

38. In *Quartermaine v The Queen* Gibbs J (as his Honour then was) said (at 601):

> When a jury has returned a verdict of guilty of a particular crime without having considered whether that crime was committed, the verdict cannot, in my opinion, be sustained by holding that the jury would or should have returned the same verdict if they had considered the proper question. That would substitute trial by judge for trial by jury.

39. Here, the jury returned a verdict of guilty without specification of the particular crime where two possibilities were left to them. As the majority acknowledged, "[w]here there were two separate allegedly criminal acts left to the jury, the appellant was entitled to

[19] *Weiss v The Queen* (2005) 224 CLR 300 at [45].

have the jury determine unanimously whether he was guilty in relation to one or other or both of those acts" (CCA at [57], **CAB** at 227). Yet their Honours nonetheless proceeded to make their own determination. In doing so, their Honours in effect substituted (in the sense referred to by Gibbs J), trial by judge for trial by jury.

40. In *Krakouer v The Queen* (1998) 194 CLR 202 McHugh J said of the particular error in that case (at 226):

> [74] ...It substituted trial by judicial direction for trial by jury by instructing the jury that the law deemed the relevant intent to be present by virtue of the quantity of methylamphetamine at issue. Misdirections of law in a criminal trial can take many forms. Of few of them can it be said that, at all times and in all circumstances, they constitute a miscarriage of justice. Legal error must often give way to cogent evidence of guilt. But on such matters as the standard or onus of proof or the functions of the jury, the position is different. These matters go to the root of a criminal trial according to law. It is difficult to see how the weight of evidence can have any relevance as to whether or not a misdirection on such matters is a miscarriage of justice.
>
> [75] That is not to say that a misdirection as to one of those matters is always a miscarriage of justice. The error may be so trivial that a court of criminal appeal can properly conclude that there has been a trial according to law, notwithstanding the misdirection. But if a direction on the standard or onus of proof or the function of the jury is substantially wrong, I cannot presently conceive of a case where the weight of evidence against the accused could affect the conclusion that a miscarriage of justice has occurred. An accused person is entitled to a trial according to law. Where the law requires that an issue be tried by a jury, the accused does not have a trial in any meaningful sense where the jury is prevented by judicial direction from determining the issue. It is of no relevance in my opinion that a court of criminal appeal thinks that the evidence of guilt is overwhelming. An accused is entitled to be tried by the jury. That is the tribunal that is given the responsibility for determining the guilt of an accused person.

41. In the present case it was the jury's function to determine the appellant's guilt with respect to a particular offence. As a result of the misdirection the jury never performed this function.

42. While in *Krakaouer v The Queen* the other members of the Court did not accept that the error was such as to preclude application of the proviso, this was on the basis that issue was not joined in respect of the element the subject of the error (see at 213 [25]-[26]). In the present case, as pointed out by Fagan J (CCA at [134], **CAB** at 254), there were "live issues" in relation to each of the factual bases on which the Crown put its case.[20]

43. The importance of certainty of verdict has been the subject of consideration of this Court. In *S v The Queen* (1989) 168 CLR 266, a case in which, as here, the factual basis

[20] Subsequent support for McHugh J's approach in *Krakouer v The Queen* (1998) 194 CLR 202 was noted in *Hadchiti v R* (2016) 93 NSWLR 671 at [147]-[151], which was acknowledged by the Fagan J (CCA at [168]; **CAB** 268-269).

of the verdicts were uncertain (a situation sometimes described as "latent ambiguity or duplicity"), Dawson J said (at 276):

> The case having proceeded as it did, it is theoretically possible that individual jurors identified different occasions as constituting the relevant offences so that there was no unanimity in relation to their verdict. That, of course, would be unacceptable...

44. His Honour continued:

> Moreover, the law requires that there be certainty as to the particular offence of which an accused is charged, if for no other reason than that he should, if charged with the same offence a second time, be able to plead autrefois convict or autrefois acquit.

45. Gaudron and McHugh JJ said (at 284):

> There are a number of aspects to this consideration [the orderly administration of criminal justice]: a court must know what charge it is entertaining in order to ensure that evidence is properly admitted, and in order to instruct the jury properly as to the law to be applied; in the event of conviction, a court must know the offence for which the defendant is to be punished; and the record must show of what offence a person has been acquitted or convicted in order for that person to avail himself or herself, if the need should arise, of a plea of autrefois acquit or autrefois convict.

46. See also Toohey J at 283.

47. In *Johnson v Miller* (1937) 59 CLR 467, in what Kirby J described in *Walsh v Tattersall* (1996) 188 CLR 77 (at 105) as "a classic exposition", Evatt J said (at 497-498):

> It is of the very essence of the administration of criminal justice that a defendant should, at the very outset of the trial, know what is the specific offence which is being alleged against him...The defendant cannot plead unless he knows what is the precise charge being preferred against him. If he so chooses, a defendant has a right to plead guilty, and therefore to know what it is he is being called upon to answer.

48. See also *Walsh v Tattersall* (at 104-112), where Kirby J undertook a detailed analysis of the importance of certainty in criminal pleadings. The relevant principles were summarised with reference to *S v The Queen* in *Hamra v The Queen* (2017) 91 ALJR 1007 (at [20]):

> The common law principle upon which the appellant relied, which requires the prosecution to be able to identify from the evidence the particular occurrences or transactions which are the subject of the charge, is not based merely upon a concern with forensic prejudice to an accused person. It is based also upon ensuring certainty of the verdict including enabling a plea of autrefois convict or autrefois acquit, ensuring jury unanimity, and ensuring that the court knows the offence for which the person is to be punished. (Footnotes omitted.)

49. In determining that the proviso should be applied following their own assessment of the evidence (and its application to one of the two factual bases of liability advanced at trial), the majority purported to return a verdict of guilt with respect to the appellant's actions preceding the second fall, as distinct from relying on the proviso to uphold a

verdict given by the jury. In truth, the jury never returned a verdict "in the accepted sense".[21] When the nature of defect in the trial is properly understood, "it is evident that to examine, as the Court of [Criminal] Appeal did, whether a chain of reasoning could be articulated that would support, even require, the verdict that was reached at trial was not to the point in deciding whether there was a substantial miscarriage of justice."[22]

The majority erred in their application of the proviso based on their assessment of the evidence adduced at trial

The approach to the assessment of the record of trial

50. This Court said in *Weiss v The Queen* (at [43]):

> ... the appellate court's task must be undertaken on the whole of the record of the trial including the fact that the jury returned a guilty verdict. ...[T]here are cases in which it would be possible to conclude that the error made at trial would, or at least should, have had no significance in determining the verdict that was returned by the trial jury. The fact that the jury did return a guilty verdict cannot be discarded from the appellate court's assessment of the whole record of trial.

51. At [44] the Court continued:

> ... one negative proposition may safely be offered. It cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty.

52. Here, the point has been made above, there was no "offence on which the jury returned its verdict of guilty" for the Court to review. Even if review was appropriate, it is necessary to appreciate that the fact of the verdict said nothing as to the approach of the jury (or individual jurors) with respect to the alternative factual bases relied on by the Crown. As in *Handlen v The Queen; Paddison v The Queen* (2011) 245 CLR 282 the verdict was (albeit for different reasons) not a verdict with respect to a particular offence.[23]

53. Thus, addressing for themselves the evidence supporting each incident (at CCA [50]-[55]; CAB 224-226), their Honours were limited to the record of the evidence given at trial unassisted by the verdict. Not only did the majority fail to acknowledge this; their Honours failed to acknowledge the "natural limitations" which exist when an appellate

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[21] *S v The Queen* (1989) 168 CLR 266 per Gaudron and McHugh JJ at 288.
[22] *AK v Western Australia* (2008) 232 CLR 438 per Gummow and Hayne JJ at [58].
[23] See also, for example, *Cesan v The Queen* (2008) 236 CLR 358 at [127]-[129]. Note the related proposition, that the gravity of the error may affect the capacity of the appellate court to assess the evidence: *Evans v The Queen* (2007) 235 CLR 521 at [41]-[43].

court is assessing for itself the record of trial.[24] The limitations in this case were manifest. The CCTV footage did not show the appellant striking the deceased on the occasion of either fall. The eyewitnesses were all affected by alcohol. The accuracy of the various recollections was tested in cross-examination. The difficulty in arriving at a conclusion of guilt based on the evidence at trial is discussed further, below.

Error in the majority's assessment of the evidence at trial

54. The majority concluded, following its own assessment of the evidence, "the jury *necessarily* should have entertained a doubt" as to liability on the basis of the first fall (CCA at [50], **CAB** at 224). They later said that "because of the absence of sufficient evidence supporting a finding" that a voluntary act of the appellant caused the first fall, liability on this basis "was not required to be determined by the jury" (CCA at [59], **CAB** at 228). It is submitted that this reasoning involves error, both in terms of the overall approach taken and the assessment of the evidence.

55. The reasoning does not reflect the manner in which the trial was conducted. The Crown case advanced before the jury relied on both falls (CCA at [28]-[30], [41]-[42], [125]-[130], **CAB** at 217-218, 222, 251-253). The Crown presumably did so on the assumption that reliance on the circumstances of the first fall was to its advantage and was sufficiently supported in the evidence. The defence joined issue in respect of each fall (CCA at [31]-[32], [133], **CAB** at 218-219, 253-254). The summing up left both routes to liability open. As Fagan J observed, "there were...very significant live issues bearing upon whether there had occurred either of the two alleged acts of the appellant (that which caused the first fall and that which caused the second)" (CCA at [140], **CAB** at 257). In light of the joinder of issue and the directions, liability on the basis of the first fall was left for the jury's determination.

56. The majority said that "the evidence was not capable of supporting a finding beyond reasonable doubt that a deliberate act of the appellant caused the first fall" (CCA at [58], **CAB** at 227-228). On any view, the CCTV footage did not foreclose consideration of liability arising from the appellant's acts preceding the first fall. The majority summarised the footage in their reasons (CCA at [51], **CAB** at 225). Their Honours said that the "CCTV footage shows no punch or apparent or obvious contact between the two men." This did not accord with the manner in which the Crown Prosecutor

[24] *Weiss v The Queen* (2005) 224 CLR 300 at [41], referring to *Fox v Percy* (2003) 214 CLR 118 at [23].

presented the case at trial. In his closing address, the Crown Prosecutor, in the course of his summary of what could be seen in the CCTV footage immediately before the first fall, submitted: "The deceased takes six steps backwards and the Crown says that there is a blow on the way, on that route...".[25] In response, defence counsel acknowledged the Crown's submission, but said to the jury: "that is a matter for you. I can't see it with sufficient clarity, with respect, to be able to agree or disagree with the Crown."[26] By contrast, in his analysis of events leading to the second fall, the Crown Prosecutor did not suggest that a blow could be seen in the footage.[27]

57. The Crown case appears to have been that the appellant was guilty of murder by reason of "striking" the deceased, and various directions referred to this. However, other directions, most notably those in the "flowchart" provided to the jury,[28] simply directed the jury to ask:

> Are you satisfied beyond reasonable doubt that Mr Morris fell and struck his head because of a voluntary act of Mr Lane, in the sense of being deliberate, which was not a spontaneous, unintended reflex action?

Whilst the CCTV footage may not have depicted obvious contact between the appellant and deceased, it remained the case that the first fall may have been caused by the deceased's retreat, moving backwards, in the face of the appellant's advance. In these circumstances it was open to the jury to find that the fall was caused by the voluntary act of the appellant.[29] The evidence of the appellant's aggressive advance was also contrary to the defence raised by the appellant of self-defence, which also bore upon the prospects of the prosecution case in respect of the first fall.

58. Finally, the manner in which the majority dealt with the oral testimony was also unsatisfactory. The evidence of Mr Armstrong was rejected on the basis that it was inconsistent with the CCTV footage (CCA at [50], **CAB** at 224-225). This said little in the context of the trial in which no witness gave evidence entirely in accordance with the CCTV footage. Further, it was not correct to say that Mr Armstrong was the only witness to give evidence of the first fall. As set out above, Mr Perkins gave evidence of hearing a noise that sounded like someone being hit and then landing. This occurred

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[25] T614.4, **AFM** V2 at 623. See also the Crown's opening address (at T11.32-12.13, **AFM** V1 at 12-13), specifically the submission that the "accused made contact...with the deceased" before the first fall (at T12.11, **AFM** V1 at 13).
[26] T640.34, **AFM** V2 at 649.
[27] T614.34-614.42, **AFM** V2 at 623.
[28] MFI 15, **AFM** V2 at 720.11.
[29] See *Royall v The Queen* (1991) 172 CLR 378.

before his observations in respect of the second fall (T349.15, **AFM** V1 at 350). In view of the evidence of these two witnesses, it was also incorrect to speak of "the absence of *any* evidence of a punch or other contact by the appellant which could have caused the first fall" (CCA at [58], **CAB** at 227-228; emphasis added). The foregoing precluded the assessment that "the evidence was not capable of supporting a finding beyond reasonable doubt that a deliberate act of the appellant caused the first fall".

59. The majority's conclusion that it was "not open to the jury to entertain a reasonable doubt" in respect of the second fall (CCA at [54], **CAB** at 226) is, at least, questionable (particularly having regard to the natural limitations inherent in the process). The CCTV footage did not depict the punch or blow alleged by the Crown. The witnesses to the alleged punch did not give consistent evidence. There was a question about their reliability, given their respective levels of intoxication. Their Honours did not properly consider the question of self-defence in relation to the second fall. The fact that the appellant might have walked away did not exclude self-defence (c.f. CCA at [55], **CAB** at 227). Nor, in this context, did the majority have regard to the backward movement of the appellant's head at the relevant time captured by the CCTV footage (CCA at [33], [55]; **CAB** at 219, 226-227). Fagan J correctly concluded that there was a "live issue" about whether the appellant's liability was established in respect of the second fall (CCA at [140], **CAB** at 257).

60. When due attention is given to the effect of the error on the jury, it is not possible to know what impact the error had. For example, it is not possible to know whether or not one or more jurors were satisfied of the guilt of the applicant based on the first fall (even if such a finding might ultimately be considered unreasonable). Further, there is, it is submitted, an artificiality in separately focusing on what the jury would or should have done with respect to each of the discrete acts relied upon by the Crown. As this Court has recognised, the reasoning of a jury may be non-linear in the sense that the choices available to a jury may affect the determination made.[30] Similarly here, the availability of two discrete acts to found liability may have had an impact on the jury's consideration of the act causing death.

61. Two further observations are made about the majority's assessment of the record of trial. First, the majority's reasoning in respect of the first fall carries an implication that

[30] *Gilbert v The Queen* (2000) 201 CLR 414; *Gillard v The Queen* (2003) 219 CLR 1; *James v The Queen* (2014) 253 CLR 475 at [83].

there was a further irregularity in the trial. On the view taken by the majority, the Crown should not have been allowed to put a case to the jury on the first fall. To reason that there was no substantial miscarriage of justice on the basis of a further irregularity in the trial, for which the respondent was responsible, and which could only have worked to the appellant's disadvantage, only compounded the miscarriage. Secondly, the respondent never sought to maintain the verdict on the basis there was no case on the first fall. While there was an exchange about the relative strength of the evidence of the second fall, the respondent, at trial and on appeal, maintained that there was a case to go to the jury in respect of the first fall.[31]

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Part VII: Applicable provisions

Section 6(1), *Criminal Appeal Act 1912* (NSW)

The court on any appeal under section 5(1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the
20 appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

Part VIII: Orders sought

62. The applicant seeks the following orders:

1) The appeal is allowed.

2) Set aside the order of the Court of Criminal Appeal dismissing the appellant's appeal to that Court against his conviction and, in its place, order that the appellant's conviction is quashed.

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[31] Transcript of the Court of Criminal Appeal hearing at T14.1-14.23, 46.9-47.41, 53.6-53.11, **AFM** V2 at 805, 837-838, 844; Crown's Written Submissions in Reply at [29]-[31], [121]-[125], **AFM** V2 at 775, 789-790.

Part IX: Estimate

63. It is estimated that the appellant's oral argument will require 2 hours to present.

Dated: 2 February 2018

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