IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S308 of 2017

BETWEEN:

Paul Ian Lane
Appellant
and
The Queen
Respondent

10 **APPELLANT'S REPLY**

Part I: Certification

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

Part II: Reply to the respondent's argument

2. The issue stated at AS [2] is not based on an incorrect premise: cf. RS [3]. The authorities in relation to the requirement to direct on unanimity draw a distinction between "alternative factual bases of liability and alternative legal formulations of liability based on the same or substantially the same facts"[1] (CCA at [18]-[20], **CAB** at 20 214-215). The phrase "as a result of the evidence adduced at trial" refers to the former situation concerning alternative factual bases of liability. The majority understood that the relevant ground of appeal was argued on this basis and error was found accordingly (CCA at [22]-[23], [42]-[44], **CAB** at 215-216, 222-223).

3. Notwithstanding that the respondent put a case to the jury that the appellant's acts before the first fall supported liability for murder or manslaughter (and maintained this in the Court of Criminal Appeal), the respondent now submits that no such case was ever available and hence the proviso was properly applied. It is argued that the absence of *any* case in respect of the first fall means that the error found by the Court of Criminal Appeal had no impact on the verdict: RS [68], [77]. The respondent's 30 argument fails to have proper regard to the nature of the error in the context of the trial.

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[1] *Cramp v The Queen* (1999) 110 A Crim R 198 at [65], quoted at CCA [20], **CAB** 215.

Filed on behalf of the Applicant
Dated: 23 March 2018
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4. The appellant's argument does not depend on an approach to the proviso based upon the "categorisation of error": cf. RS [31]. The respondent acknowledges that the appellant expressly 'eschewed' such an approach but contends that the approach was nonetheless taken: see AS [32], [34]. This is incorrect. The appellant argues, consonant with established authority, that there may be errors (or miscarriages of justice) which preclude application of the proviso irrespective of the strength of the prosecution case: AS [33]. The present is such a case. This submission is founded upon consideration of the nature and effect of the established error, in light of the live issues in the trial. The appellant relies on a number of decisions[2] for the purpose of drawing out particular consequences of the error, especially in terms of the effect of the error on the verdict and the absence of resolution of the issues joined at trial.

5. The appellant's argument conforms with the majority's observations in *Kalbasi v Western Australia* [2018] HCA 7 (at [15]):

> ...*Weiss* requires the appellate court to consider the nature and effect of the error in every case. This is because *some errors will prevent the appellate court from being able to assess whether guilt was proved to the criminal standard.* These may include, but are not limited to, cases which turn on issues of contested credibility, cases in which there has been a failure to leave a defence or partial defence for the jury's consideration and cases in which there has been a wrong direction on an element of liability in issue or on a defence or partial defence. In such cases *Weiss* does not disavow the utility of the concepts of the lost chance of acquittal or inevitability of conviction: *regardless of the apparent strength of the prosecution case, the appellate court cannot be satisfied that guilt has been proved.* (Emphasis added.)

6. Reference is made in this context to the reasons of Gageler J at [69], Nettle J at [126]-[127] and Edelman J at [155] and [162].

7. The majority also said (at [56]), referring to *Quartermaine v The Queen* (1980) 143 CLR 595 at 601, that "[i]t may be accepted that in any case in which an appellate court concludes that an accused was "not in reality tried for the offences for which he was indicted" there will have been a substantial miscarriage of justice within the meaning of the proviso", noting that this was simply a "vivid way" of describing a conclusion (which may be the subject of contest) that there was a substantial miscarriage of justice.

8. The present case involved a wrong direction on an element of liability that was in issue, as referred to in *Kalbasi* at [15]. But the point is made that the error, however described

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[2] AS [36]-[49] and [52], referring to *R v Klamo* (2008) 18 VR 644 per Maxwell P, *Quartermaine v The Queen* (1980) 143 CLR 595 per Gibbs J, *Krakouer v The Queen* (1998) 194 CLR 202 per McHugh J; *S v The Queen* (1989) 168 CLR 266; *Johnson v Miller* (1937) 59 CLR 467 per Evatt J; *Handlen v The Queen* (2011) 245 CLR 282.

or "categorised": prevented the jury from returning a verdict which determined an essential issue (AS [40]); deprived the appellant of his entitlement to have the jury determine unanimously whether he was guilty (AS [39]); left open the possibility that there was no unanimity as to the act founding the guilty verdict so that the appellant was not lawfully convicted (AS [36]); and resulted in a verdict which did not quell the controversies in the trial (AS [43]-[49]). These matters are the result of the way in which the parties put their respective cases at trial and the manner in which the Crown case was left to the jury (as outlined by Meagher JA and Davies J at CCA [41]-[44], **CAB** 222-223). They prevented the appellate court from being able to be satisfied beyond reasonable doubt of the appellant's guilt.[3] The deficiencies in the trial process could not be overcome through a trial conducted by the appellate court.[4]

9. The respondent's argument requires that no significance should be accorded to the way in which the respondent put its case at trial. The case advanced by the respondent before the jury relied on both falls (CCA at [28]-[30], [41]-[42], [125]-[130], **CAB** at 217-218, 222, 251-253). It appears that the respondent does not dispute this: RS [19]. However, the respondent denies the significance of this circumstance on the basis this was (merely) a matter of submission, as distinct from evidence: RS [57]. The respondent's case—that the appellant "made contact…with the deceased" before the *first fall* and that the CCTV footage depicted "a blow on the way, on that route" preceding the *first fall*[5]—is deprecated on the basis that the Crown Prosecutor relied on the CCTV footage (the most important piece of evidence in the trial) rather than eyewitness testimony: RS [19].

10. This approach does not sit with the accusatorial and adversarial nature of a criminal trial. In *Doggett v The Queen* (2001) 208 CLR 343 Gleeson CJ observed (at [1]) that "the prosecution and the defence, by the form in which the indictment is framed, and by the manner in which their respective cases are conducted, define the issues which are presented to the jury for consideration", including "subsidiary issues which, subject to any directions from the trial judge, are said to be relevant to the determination of the ultimate issue". His Honour recognised (at [2]) that "the manner in which a trial is conducted, and in which the issues are shaped…has a major influence upon the way in which the case is ultimately left to the jury". The proviso question falls to be considered

[3] *Kalbasi v Western Australia* at [15].
[4] *Kalbasi v Western Australia* at [162] per Edelman J.
[5] T12.11, **AFM** V1 at 13; T614.4, **AFM** V2 at 623.

in this context.[6] *Kalbasi* is a recent example of a case in which the way the parties conducted the trial and defined the issues had a direct bearing on the applicability of the proviso.[7] The Crown, no less than a convicted person, is bound by the way it conducts its case at trial. This extends to the lines of argument it chooses to pursue.[8] Having advanced a case in respect of the first fall (which no one at trial suggested was not responsibly put, with the consequence that it was left to the jury by the trial judge), it is not possible for the respondent to now submit, based only on the record of the trial, that this case had no impact on the jury's deliberation and verdict.

11. In any event, the respondent's submission that there was no case on the evidence in relation to the first fall should not be accepted: cf. RS [26], [55], [63], [77]. The CCTV footage immediately preceding the first fall depicts the appellant chasing the deceased towards the roadway.[9] It was the respondent's case that the deceased was retreating backwards in the face of the appellant's advance.[10] The appellant is close to the deceased up to the moment the deceased reaches the kerb.[11] Although the video does not depict obvious contact between the appellant and the deceased, it is not inconsistent with such contact. The deceased is then seen to move off the kerb, falling away from the appellant and onto the roadway. Two competing inferences were available. The deceased was either knocked down by the appellant ("a deliberate application of force by way of a punch, or a push or some other striking"[12]) or he tripped and fell in the absence of such conduct. The respondent urged the former inference upon the jury, submitting that the footage showed the appellant landing a "blow on the way, on that route" towards the roadway.[13] It was open to the jury to choose between these competing inferences. In addition, Mr Armstrong and Mr Perkins gave some evidence supporting a strike before the first fall: AS [58]. There was a case to answer, even if it was tenuous or inherently weak or vague.[14]

12. Nor should the argument be accepted that it was "not open to the jury" to entertain a reasonable doubt in respect of the second fall: cf. RS [64]. The CCTV footage does not

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[6] *Pollock v The Queen* (2010) 242 CLR 233 at [70].
[7] *Kalbasi v Western Australia* at [57]-[58].
[8] *The Queen v Baden-Clay* (2016) 258 CLR 308 at [48].
[9] Exhibit C, **AFM** V2 at 670: the relevant portion commences at approximately 0.51 seconds into the recording; the deceased falls to the road at 0.55 seconds.
[10] T614.1-614.5, **AFM** V2 at 623.
[11] Exhibit C, **AFM** V2 at 670: at approximately 0.54 seconds.
[12] Written Jury Direction (No 2) at point 10, MFI 11, **AFM** V2 at 709.
[13] T614.4-614.14, **AFM** V2 at 623.
[14] *May v O'Sullivan* (1955) 92 CLR 655 at 658; *Doney v The Queen* (1990) 171 CLR 207 at 214.

depict the appellant striking the deceased before the second fall. It depicts the appellant, on the footpath, apparently remonstrating with open arms towards the deceased, who is on the roadway.[15] The appellant is shown to walk towards the deceased with his arms in a downward position.[16] It is noted in this context that it is not accepted that the appellant had both arms raised in a boxing stance: cf. CCA at [52], **CAB** at 225. The heads of both men can be seen to move backwards and the deceased falls to the ground.[17] The respondent's assertion that conviction on the second fall "accords entirely" with the CCTV footage does little to advance that case (or distinguish it from the first fall). The eyewitnesses all suffered from issues affecting the reliability of their evidence. Further, in circumstances where the jury's verdict did not assist, self-defence could not be excluded: AS [59]; cf. RS [65]-[66]. The respondent repeats the reasons given by the majority at CCA [55], **CAB** 226-227. As previously pointed out (AS [59]), the appellant was not obliged to walk away, however sensible that may have been. Having approached the deceased (apparently remonstrating with him), his head is seen to move back at around the same time (assuming the premise for self-defence) he struck the deceased.

13. The evidence in respect of both falls lacked the clear and unequivocal quality that would permit the conclusions urged by the respondent at RS [77]. More fundamentally, the attempt to analyse the evidence in the absence of a verdict "in the accepted sense"[18] only serves to illustrate the nature of that error, which had the consequence that it is not possible to conclude that "no substantial miscarriage of justice has actually occurred."

Dated: 23 March 2018

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[15] Exhibit C, **AFM** V2 at 670: at approximately 1 minute 02 seconds.
[16] Ibid.: from approximately 1 minute 02 seconds to 1 minute 05 seconds.
[17] Ibid.: at approximately 1 minute 05 seconds.
[18] *S v The Queen* (1989) 168 CLR 266 per Gaudron and McHugh JJ at 288.