IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. S308 of 2017

BETWEEN: **PAUL IAN LANE**

Appellant

and

THE QUEEN

Respondent

10 **RESPONDENT'S OUTLINE OF ORAL ARGUMENT**

Part I: INTERNET PUBLICATION

1. It is certified that this outline is in a form suitable for publication on the internet.

Part II: OUTLINE OF PROPOSITIONS

2. The CCA was correct to apply the proviso; the appellant has not established any error.

The evidence adduced at trial established only one factual basis for the jury verdict concerning the physical element of the offence

3. Despite the way in which the Crown Prosecutor closed his case, the evidence could, and did, only establish beyond reasonable doubt that there was a punch preceding the
20 second fall: RS [57]. There was no evidence capable of supporting any finding of contact immediately before the first fall: RS [8], [18], [50]. Fagan J's assessment of what the evidence was capable of establishing is consistent with the majority: RS [25]

4. Both falls can be seen on the CCTV footage: RS [7]. The accuracy of the description by the CCA of what is depicted on the CCTV is not challenged: CCA [51], [52] AB225, and see Fagan J [114] AB246.

5. In relation to the first fall, the footage shows no physical contact by the appellant upon the deceased immediately preceding this fall: CCA [51] AB225. The appellant accepts that: AR [11], RS [52]. The CCA correctly held that none of the eyewitnesses who gave evidence of the appellant striking the deceased saw the first fall: CCA [50] AB224-225,
30 Fagan J [114] AB246, RS [18], [58]-[63].

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6. In relation to the second fall, the CCTV footage is consistent with the appellant striking the deceased before the deceased falls backwards hitting his head: CCA [52] AB225; RS [7]-[8] and [64]. Eyewitness evidence confirms that conclusion: RS [8], [12]–[14], [16]. The post mortem examination revealed bruising of the jaw muscles consistent with a blow to the right side of the deceased's face: CCA [54] AB226.

The majority of the Court applied the correct legal principles to application of the proviso

7. The majority correctly approached the issue by determining whether the error in the trial *actually* occasioned a substantial miscarriage of justice: RS [24], [48]. This requires an assessment of the nature and effect of the error in the context of the evidence and issues at the trial: *Kalbasi* at [12]-[16] and [60], RS [49]-[50].

8. The jury was directed that it must be satisfied beyond reasonable doubt that the appellant struck the deceased before it could find the physical element of the offence made out: RS [27], [54]. Courts proceed on the assumption that juries follow the directions given: RS [28], [55].

9. The CCA correctly concluded that the evidence was not capable of supporting a finding beyond reasonable doubt that a deliberate act of the appellant caused the first fall: RS [58]-[63], and that it was not open to the jury to entertain a reasonable doubt in respect of the second fall: RS [64]. A proper analysis of the evidence reflects the jury verdict could only be based upon satisfaction beyond reasonable doubt that the appellant had punched the deceased causing him to fall on the second occasion that he fell.

10. Given the absence of evidence to support a verdict on the first fall, it is correct to conclude that the error had no impact on the jury verdict: RS [68], cf: AS [60]. To do otherwise would be to assume the jury acted contrary to the evidence, and the directions given. That must underpin the appellant's argument: AR [8]-[11]. A Crown submission is not evidence: RS [57], cf: AR [10]. The error did not affect the jury verdict in the sense which would preclude an appellate court taking account of the verdict in coming to its own satisfaction beyond reasonable doubt of the appellant's guilt: RS [67]-[70].

The error in this case does not preclude the operation of the proviso

11. Despite claiming to eschew the approach, the appellant's submission relies on characterising the error as falling within a category of cases to which the proviso may never apply: AS [34], [41], AR [41] cf: RS [31], absent any assessment of the evidence, or actual impact of the error: cf: RS [48]. The approach is inconsistent with authority:

Baiada Poultry at [23]; *Kalbasi* at [15]-[16], RS [24], [32]-[35], [41]-[50], The appellant's reliance on Fagan J: AS [30]-[31], is misplaced: RS [36]-[37].

12. When correctly analysed, it cannot be said that the error found by the CCA produced the result that the jury "*never performed its function*" of determining the appellant's guilt of a particular offence: RS [47], [50].

13. In the context of the evidence, the erroneous direction did not deprive the appellant of having the jury decide a question that had to be determined at his trial nor did it result in an inability to determine the basis upon which the jury had returned a verdict of guilt: RS [50], [76]-[77]. The CCA correctly concluded that the error was not one which prevented the application of the proviso: CCA [56]-[60] AB227-228, RS [29]

No substantial miscarriage of justice actually occurred

14. Applying the principles to the evidence, the majority correctly concluded that no substantial miscarriage of justice actually occurred: CCA [61] AB228. The assessment of the evidence by the majority of the Court is correct.

15. There was no evidence capable of establishing contact before the first fall to found conviction on that basis: RS [26]-[28], [56]-[66]. The evidentiary matters raised do not support that conclusion: RS [12]-[16] and [64], cf: ARS [11]-[12]. The appellant's reliance upon Mr Perkins and Mr Armstrong does not advance his case: RS [58]-[63], their evidence was properly rejected by the CCA and deprecated by the trial judge in summing up: RS [15], [16]). The CCA considered the issue of self-defence: RS [65]-[66], and correctly rejected it: CCA [55] AB226.

16. The evidence of the eyewitnesses is to be considered in the context of the CCTV. At least three eyewitnesses observed that the appellant punched the deceased causing the second fall (or actions consistent with that conclusion) which is supported by the CCTV footage (viewed by the CCA) and the medical evidence of the bruise to the jaw: CCA [52]-[55] AB225-227. The majority were satisfied of the guilt of the appellant. That conclusion is plainly open. It is correct.

17. No error has been demonstrated.

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Wendy Abraham QC

15/5/18

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Helen Roberts