IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S309 of 2017

BETWEEN:

DL
Appellant

and

The Queen
Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

Part I:

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

Part II:

Ground 1: Procedural Fairness

1. Sections 5(1) and 6(3) of the *Criminal Appeal Act 1912* (NSW) do not extinguish or limit any obligation to afford procedural fairness to an appellant. The authority to determine the s 6(3) question may be exercised only if procedural fairness is afforded: *Kentwell v The Queen* (2014) 252 CLR 601 (*"Kentwell"*) at [43] **JAB(2) 656-7**; Appellant's Written Submissions ("AWS") at [24], [26], [28], [34] and the cases cited therein; *Lehn v R* (2016) 93 NSWLR 205 (*"Lehn"*) at [65] **JAB(2) 669**.

2. The requirements of procedural fairness in the context of sentence appeals as appears in the AWS at [24]-[26], [29] will be outlined: see also summary in *Suleiman v The State of Western Australia* [2017] WASCA 26 ("*Suleiman*") [37]-[47] **JAB(2) 762-4**.

3. There was a breach of procedural fairness in circumstances where:
   i. Evidence was tendered in the event of re-sentencing on the "usual basis": *Betts v The Queen* (2016) 258 CLR 420 ("*Betts*") at [11] **JAB(2) 582**; CCA hearing T74.26 **AFM 196**.
   ii. The Crown expressly conceded that the factual findings of the sentencing judge were not challenged: Rothman J at [73] **CAB 81**; CCA hearing T74.11-.17 **AFM 196**.
   iii. The Crown conceded the sentence should be adjusted (but such adjustment should be minimal): CCA hearing T70.37-.39 **AFM 192**.

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iv. The Crown ultimately conceded that it did not take issue with the sentencing judge's assessment of criminality: CCA hearing T74.11-.15, **AFM 196**.

v. The appellant relied upon the concessions. The issues between the parties were thereby defined: *Collins v The Queen* [2018] HCA 18 at [31]-[32].

vi. Neither Leeming JA nor Wilson J raised with the appellant the prospect of revisiting the sentencing judge's findings of fact on psychosis, intention to kill, premeditation and risk of re-offending: CCA hearing **AFM 183-197**; cf. Leeming JA at [6], [11] **CAB 62-4**.

vii. Leeming JA and Wilson J proceeded regardless to make aggravated and adverse findings on psychosis, intention to kill and risk of re-offending: AWS [27]; Leeming JA at [20] [22]-[24], [36] **CAB 66-7, 70**; Wilson J at [141], [148], [150], [175] **CAB 97-9, 103**. Wilson J also found the attack was premeditated and no special circumstances existed: at [152] **CAB 99**; [176] **CAB 103**.

4. The appeal should be upheld and the proceedings remitted in circumstances where these findings of the majority had a bearing on the determination of the appeal under s 6(3) of the *Criminal Appeal Act*: Leeming JA at [36], [40] **CAB 70, 72**; Wilson J at [149], [151], [155], [157], [175]-[177] **CAB 99, 100, 103**; AWS at [31]. Rothman J would have allowed the appeal and imposed a lesser sentence: Rothman J at [115]-[117] **CAB 92-93**. On the basis of the unchallenged facts the Crown conceded that the appeal should be upheld and some lesser sentence should be imposed: above at [3](iii). The breach of procedural fairness deprived the appellant of the possibility of a successful outcome: *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145, 147 **JAB(2) 727, 729**; *Lehn* at [65] **JAB(2) 669**; AWS at [28].

Ground 2: Substitution of aggravated factual findings when determining the appellant's appeal under s 6(3) of the *Criminal Appeal Act*

5. Severity appeals are governed by principles (as summarised in AWS [42]-[47]) recognising appropriate restraint. *Kentwell, Betts* and *Lehn* did not in anyway qualify these principles: *Kentwell* at [42]-[43] **JAB(2) 655-6**; see also *Hitchcock v R* [2016] NSWCCA 226 at [28]-[29] **JAB(2) 630-1**; *Betts* at [10]-[12] **JAB(2) 581-2**; *Lehn* at [60], [68]-[70] **JAB(2) 668, 670**. These principles should have been observed in the appellant's appeal: AWS at [48]-[49].

6. The limited purpose of the admission and use of the evidence on the usual basis to inform the Court on the appellant's progress in custody since sentence does not re-open favourable factual findings of the primary judge as to intention, psychosis or premeditation when there is no ground of appeal addressed to them: AWS at [35], [38], [41], [48].

7. In addition to the above, it was erroneous for Leeming JA and Wilson J to substitute aggravated factual findings when considering the question posed by s 6(3) of the *Criminal Appeal Act* given that:

10 i. Neither party adduced evidence on the appeal concerning the appellant's mental state at the time of the offence: AWS at [15], [32], [33], [36], Appellant's Reply ("AR") at [7], [10]; cf. Leeming JA at [5](3) **CAB 62**.

ii. It was not correct that the evidence before the Court as to the appellant's mental state at the time of the offence was materially different to the evidence that was before the sentencing judge on that issue: AWS at [35]; AR at [7], [10]; *Betts* at [16], [59] **JAB(2) 584, 594**; Wilson J at [148] **CAB 98**; cf. Leeming JA at [9] **CAB 63**; Respondent's Written Submissions at [70]-[74].

iii. The Crown did not challenge the sentencing judge's factual findings having regard to considerations of fairness to the offender: see above at [3] (ii)-(iv).

20 iv. Leeming JA did not find that the sentencing judge's findings were not open, there was no finding that the sentencing judge's findings were not open by Wilson J and Rothman J found the sentencing judge's findings were open: Leeming JA at [19] **CAB 66**; Rothman J at [74], [95] **CAB 81, 87**.

v. The aggravated findings of Leeming JA and Wilson J were not open to them given the evidence of Drs Allnutt and Nielssen as to brief psychotic episode: AR at [11]; Rothman J at [78]-[95] **CAB 82-7**.

8. The argument advanced by the Crown that the approach of the majority was available is contrary to principle, contrary to the purpose of a severity appeal and would lead to
30 anomalies and a wholly new approach to severity appeals: AWS at [50]-[52]; AR at [5].

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