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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

BETWEEN: **No. M 30 of 2013**

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DANG KHOA NGUYEN

Appellant

and

15 **THE QUEEN**

Respondent

APPELLANT'S REPLY

20 **PART I – Certification that the reply is in a form suitable for publication on the Internet.**

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

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PART II – A concise reply to the argument of the Respondent.

Introduction

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2.1 The argument made by the respondent may be distilled into two basic contentions. First, in opposition to the argument made by the appellant, it is submitted by the respondent that there was no evidential basis for leaving the alternative verdict of manslaughter in the present
35 case. Secondly, in support of its Notice of Contention, the respondent seeks that this Court overrule its earlier decisions which require that a viable case for manslaughter be left to the jury as an alternative verdict to a verdict of guilty of murder in circumstances even where defence counsel has expressly disavowed any reliance on such an alternative.

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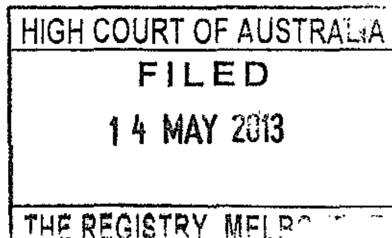

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Evidential basis for manslaughter in the appellant's case

10 2.2 This Court held that a viable case for manslaughter existed in the instance of Dang Quang Nguyen ("Nguyen"). The respondent argues that it was the version of events proffered by Nguyen in his record of interview that permitted the existence of a viable case for manslaughter in that instance. The respondent contends that as the
15 appellant proffered no version of events in a record of interview and stood mute at trial, there was no evidential basis for manslaughter in the appellant's case.[1]

2.3 The respondent's argument cannot be accepted. As the respondent has
20 noted in its written submissions, Nguyen said in his record of interview that he had no memory of being present at the scene when Hie Trung Luu ("Luu") was killed and Chau Minh Nguyen injured. The "three examples of findings of fact" offered by Nguyen in this Court in *The Queen v Nguyen* (2010) 242 CLR 491 ("*Nguyen*")
25 "which were open, and if made, would have led to a verdict of manslaughter"[2] were predicated on Nguyen being present, knowing of the existence of Ho's gun, knowing of the existence of the drug debt and acceding to the use of some violence (short of committing murder) to recover the money owed.[3]

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2.4 The version of events given by Nguyen in his record of interview was irrelevant, therefore, to this Court's assessment of whether there was a viable case for manslaughter in Nguyen's case. The viable case for manslaughter in the case of Nguyen arose, rather, by dint of the
35 potential for the jury to accept some but not all of the prosecution case. While the jury may have been satisfied beyond reasonable doubt that Nguyen was present, knew of the gun and drug debt and had agreed to, was aware of the possibility of and/or encouraged, acts of violence to ensure satisfaction of the debt, it was open to the jury nevertheless to
40 have a reasonable doubt that Nguyen possessed an appreciation of the level of harm that would or might befall Luu sufficient to make Nguyen guilty of murder.

2.5 Approaching, in a similar manner, the question whether there existed a
45 viable case for manslaughter in the appellant's case, it becomes apparent, for the reasons expressed in the Appellant's Submissions at

[1] See the Respondent's Submissions at paragraphs 6.6 to 6.13.

[2] The three "findings of fact" were instances of manslaughter based on the three forms of complicity: extended common purpose, concert and aiding and abetting.

[3] See *Nguyen* at 503[45].

5 paragraphs 6.20 to 6.24, that no meaningful distinction can be made between the appellant and Nguyen. Thus, the finding of a viable manslaughter in the case of Nguyen must apply, *mutatis mutandis*, to the appellant.[4] In truth, the appellant's case for manslaughter was stronger than Nguyen's. Nguyen's part in recovering the drug debt was
10 to wield a samurai sword and use the sword to injure occupants of the flat.

The Respondent's Notice of Contention: an attempt to re-open the decisions of
15 *this Court in Gilbert v The Queen (2000) 201 CLR 414 ("Gilbert") and Gillard v The Queen (2003) 219 CLR 1 ("Gillard)*

2.6 *Gilbert* stands for the proposition that in a murder prosecution it will constitute a wrong decision on a question of law productive of a
20 substantial miscarriage of justice for a trial judge to fail to direct the jury as to an alternative verdict of guilt of manslaughter where such an alternative verdict is viable and open on the evidence.

2.7 *Gillard* affirmed *Gilbert*. Mr Gillard successfully appealed to this
25 Court against two convictions of murder and a conviction of attempted murder on the basis that the trial judge had failed to leave to the jury a viable case of manslaughter as an alternative verdict to murder. This Court in *Gillard* applied *Gilbert,* notwithstanding that the practitioner representing Mr Gillard at trial had eschewed reliance on manslaughter
30 and had gone so far as to request that the trial judge not leave manslaughter for the jury's consideration.

2.8 The respondent contends in argument in support of its Notice of Contention that the rule in *Gilbert* as applied in *Gillard* is in error and
35 ought be abolished. The respondent, therefore, asks that that this Court overrule its earlier decisions. There is, however, only utility in considering the respondent's Notice of Contention if it be assumed that the respondent is wrong in its primary contention that no viable case of manslaughter exists in the appellant's instance. If no viable
40 manslaughter exists, the opportunity to reconsider *Gilbert* and *Gillard* does not arise.

[4] The tenor of the cross-examination of witnesses by the appellant's counsel at trial was not to suggest that that the appellant was not present at the scene, but to suggest that the appellant was not complicit in Ho's act of shooting. For instance, it was suggested that the appellant was not seated near the stereo but stood near the kitchen door (T 130-131, 220, 268, 275 & 533), that Ho did not consult with the appellant prior to Ho discharging his gun and, indeed, that the gun had discharged without warning (T 132 & ff, 221, 270, 533-534). If the jury accepted that there was some force in the matters put in this cross-examination, the jury may well have (a) doubted that the appellant's state of mind meant that he was guilty of murder, and (b) been satisfied, however, that the appellant was sufficiently aware of violence caused to occupants of the flat so as to justify a conviction of manslaughter only.

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2.9 Assuming, therefore, that a viable manslaughter existed in the appellant's instance, the respondent requires leave to submit that this Court should overrule its earlier decisions.[5]

10 2.10 Leave should be refused. The need to consider the respondent's Notice of Contention only arises if the appellant's position and that of his co-accused Nguyen are indistinguishable insofar as the viability of manslaughter is concerned. The respondent should, therefore, not be permitted to attempt to challenge the correctness of *Gilbert* and 15 *Gillard* now when the respondent did not make a similar attempt in the instance of Nguyen in circumstances where Nguyen not only sought in this Court to rely on those cases, but was permitted by this Court to rely upon those cases.[6] For the respondent, as a model litigant charged with a responsibility of administering the system of criminal justice in 20 the State of Victoria in the public interest, to treat each of Nguyen and the appellant differently in this manner is patently unfair and sits ill with the proper exercise of its duties.

2.11 Even if the respondent was granted leave to contend that *Gilbert* and 25 *Gillard* should be overruled, this Court should not accept that contention. This Court in *John v Federal Commissioner of Taxation* (1988-1989) 166 CLR 417 at 438 to 439 made observations concerning the circumstances in which it might depart from earlier authority. Noting that, generally speaking, "such a course is not lightly 30 undertaken", this Court specified four matters that might justify a departure from earlier decisions.

2.12 The first was that the earlier decisions did not rest on a principle worked out in a significant succession of cases. The second was a 35 difference between the reasons of the justices constituting the majority in one of the earlier decisions. The third was that the earlier decisions had achieved no useful result but, on the contrary, had led to considerable inconvenience. The fourth was that the earlier decisions had not been independently acted on in a manner which militated 40 against reconsideration.[7]

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[5] See, for instance, *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 at 316 per Gibbs CJ, Mason, Murphy, Wilson, Brennan and Dawson JJ, and *XYZ v The Commonwealth* (2006) 227 CLR 532 at 548[38] per Gummow, Hayne and Crennan JJ.

[6] See *Nguyen* at 501[41] to 505[51].

[7] A fifth consideration is identified by authors Harding and Malkin in *Overruling in the High Court of Australia in Common Law Cases* (2010) 34 MULR 519 at 547. This is that change is necessary to maintain a better connection with more fundamental doctrines and principles. Harding and Malkin suggest that this extra matter derives from *Imbree v McNeilly* (2008) 236 CLR 510 at 526[45] per Gummow, Hayne and Kiefel. JJ.

5 2.13 None of those conditions are satisfied in the present case. As the joint judgment of Gleeson CJ and Gummow J and the separate judgment of Callinan J in *Gilbert* recognise, the principle formulated by the majority in *Gilbert*, and upon which the appellant relies, derives from a series of decisions beginning perhaps with *Pemble v The Queen* 10 (1971) 124 CLR 107 ("*Pemble*"). It is a principle that is consonant with the approach of the Supreme Court of Canada in *R v Jackson* [1993] 4 SCR 573.[8] Moreover, one of the dissentients in *Gilbert*, Hayne J, applied *Gilbert* in *Gillard.*

15 2.14 There is no material difference between the reasoning of the majority justices in *Gilbert* and it cannot be contended that the application of *Gilbert* has led to considerable inconvenience.[9] Lastly, it must be noted that *Gilbert* has been applied by trial and intermediate appellate courts many times since it was decided. Indeed, as noted above, it was 20 applied by this Court in the instance of the appellant's co-accused Nguyen.[10]

2.15 The reasoning in *Gilbert* is correct. The grounds that appear in the respondent's Notice of Contention should be rejected.

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[8] The House of Lords referred to *Gilbert* with apparent approval in *R v Coutts* [2006] 1 WLR 2154 at 2166 [22] per Lord Bingham of Cornhill and 2177 [51] per Lord Hutton.

[9] Had the Legislature perceived any such inconvenience, it might have been expected that the *Criminal Trials Act* 1999 (Vic.) and the *Criminal Procedure Act* 2009 (Vic.) would have abolished the rule in *Pemble*. This did not occur: cf. the Respondent's Submissions at paragraphs 6.37 to 6.41.

[10] Additionally, it cannot successfully be maintained that *Gilbert* requires overruling in order to maintain a better connection with more fundamental doctrines and principles: see fn 7 above.