IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S59 of 2015**

BETWEEN: **CHRISTOPHER ANGELO FILIPPOU**
Appellant

and

THE QUEEN
Respondent

APPELLANT'S REPLY

Part I: Certification: This submission is in a form suitable for publication on the internet.

Part II: Reply

1 The respondent's submissions (RS) do not address the genesis of the first ground of appeal in this Court: that it is not clear from the Court of Criminal Appeal's (**CCA**'s) judgment how, if at all, it is purporting to dispose of the appeal pursuant to ss 5 and 6 of the *Criminal Appeal Act* 1912 (NSW) (***Criminal Appeal Act***), having regard to the terms of s 133(2) of the *Criminal Procedure Act* 1986 (NSW) (***Criminal Procedure Act***) and the guidance of this Court in *Fleming v The Queen* (1998) 197 CLR 250 (***Fleming***). On any view of the nature of the task imposed by the *Criminal Appeal Act* such a task was not undertaken in this case.

2 The appellant appealed to the CCA on three grounds: (1) that the verdict was unreasonable, (2) that the trial judge made errors of law, and (3) that there was, on the whole, a miscarriage of justice (the grounds were further particularised: see Appellant's Submissions (**AS**) [21]). However, the only statement of legal principle McClellan JA cited in relation to the task he was undertaking was what he referred to as 'the test to be applied when considering an appeal on the basis that a verdict was unreasonable or unsupported by the evidence' set out in *SKA v The Queen* (2011) 243 CLR 400 (***SKA***) at [11]-[14]; CCA [95] AB 476.23. His Honour then referred to the particularised grounds of appeal 1(a) and 2(a)-(c), relating to the inferences the trial judge drew from the statements the appellant made while in custody and her Honour's finding that these statements were 'ultimately determinative' of the question of loss of control: CCA [96]ff AB 477.31. His Honour held that the trial judge 'could not reason' that the fact the appellant made those statements calmly and did not raise his own loss of self-control was determinative of his state of mind at the time of the shooting, '[n]or could the statements of themselves negative loss of self-control': CCA [102] AB 479.20. Justice McClellan further held that he could 'not agree' with her Honour's finding that the appellant's statements were 'ultimately determinative' (upon either interpretation of that expression), and held that the statements did not even provide 'any significant assistance': CCA [103] AB 479.31.

3 Contrary to RS [6.5]-[6.7], [6.33] and [6.37], the appellant's statements in custody were plainly the determinative basis upon which her Honour found the appellant had not lost self-control. (She also did not find at JOC [90] AB 388.10 that the appellant's conduct immediately surrounding the shooting demonstrated that he had not lost self-control: cf RS [6.7]). However, even if the respondent is correct, her Honour would have fallen into error in any event by finding provocation negated merely on the basis that the appellant was an inherently angry person: RS [6.32].

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4 Moreover, whether or not the trial judge in fact erred, McClellan JA found error in her Honour's approach. His Honour did not, however, state whether that error, individually or collectively with other errors, gave rise to any of the grounds under the respective limbs of s 6(1), nor did he consider the proviso. Instead, his Honour referred to his 'reservations' with her Honour's 'approach': CCA [105] AB 480.16. Then, in language suggestive of a rehearing exercise, he held that he was not persuaded that her Honour's 'conclusion' was erroneous, and that 'having considered the evidence' he was satisfied that the 'Crown discharged the onus it carried to the criminal standard': CCA [105] AB 480.7.

5 The trial judge's finding about loss of self-control was a finding of fact found by an erroneous process as revealed by the reasons compelled by s 133(2). The CCA was not then permitted by s 6(1) to simply replace the erroneous finding with its own finding; it is not a court of rehearing.

6 Paragraph [105] may have been McClellan JA's approach to disposing of the unreasonable verdict ground of appeal, consistent with his earlier recitation of the principles in *SKA*. However, even on this view, his Honour failed to then consider the effect of the trial judge's erroneous inferential reasoning under ground 2 (where it had been particularised that her Honour failed to direct, and otherwise misdirected, herself as to the drawing of inferences and erred in law by failing to consider alternative inferences), and ground 3 (miscarriage of justice). The respondent concedes that if her Honour determined the question of provocation relying predominantly on the appellant's statements, this may have constituted a wrong decision on a question of law or a miscarriage of justice such that the proviso would fall to be considered: RS [6.64]. The appellant submits that her Honour did so determine, and that this constituted both an error of law and a miscarriage of justice.

7 His Honour did implicitly reject the aspects of grounds 1-3 which related to the failure of the trial judge to direct herself about the caution necessary in drawing inferences, on the basis that she was a 'very experienced trial judge' and there was 'nothing in her Honour's judgment which would suggest that the proffered criticism could be sustained': CCA [108] AB 481.10. This is incongruous with his earlier finding that the trial judge had made and used inferences in an impermissible way, and did not, in any event, address the other ways in which her Honour's inferential reasoning reflected misdirection. Moreover, this is contrary to the requirements in s 133(2) and (3) as explained by this Court in *Fleming* (at 262 [27], 263-264 [30]-[33] and 265 [39]. The obligation in a judge alone trial for the judge to state the findings of fact relied on makes the appellate court's task under s 6(1) different in kind to an appeal from an inscrutable jury verdict.

8 Justice McClellan also found error in her Honour's factual findings as to the sequence of the appellant's movements immediately surrounding the shooting: CCA [82] AB 470.7, AS [23]. Contrary to RS [6.51], this error was significant. The trial judge had herself described the issue as a 'significant factual question': JOC [91] AB 388.19. Contrary to the trial judge's findings, McClellan JA correctly concluded that there was no necessary inconsistency between the accounts of Mrs Glenda Filippou, the wife of the appellant, and Mr Brett Allen, the witness to the third shot. He found that her Honour had erroneously overlooked that Mr Allen was only alerted to the event by the first two shots and therefore could say nothing as to the appellant's movements prior to them. He concluded that her Honour's account of the sequence of events immediately surrounding the shooting could not be correct: CCA [78]-[81] AB 469-470. Having found this factual error, his Honour then proceeded, without comment as to what aspect of the appeal task he was conducting, to make his own findings of fact in respect of the sequence of events: cf s 133(2); s 6(1).

9 Based upon this substituted factual finding as to the appellant's movements, McClellan JA accepted that contrary to the trial judge's finding, the appellant was agitated after first seeing the brothers outside the front of his house and before the shooting, and that any 'calm' demeanor was displayed after the shooting: CCA [84] AB 470.39. His Honour did not go on to consider how this substituted factual finding impacted upon the reasoning to guilt, either on its own, or together with other findings such as the provoking conduct of being presented with a gun. Indeed, contrary this substituted factual finding, his Honour later held that 'There was nothing to suggest that having approached the brothers as he said in his ERISP "feeling nothing" he thereafter almost instantly changed his response and lost control': CCA [106] AB 480.34. His Honour also did not express any view as to how her Honour's error and his own contrary factual finding affected any of the grounds of appeal.

10 Finally his Honour made the ambiguous finding in respect of her Honour's reversal of the onus of proof in relation to s 23(2)(b): at CCA [110] AB 481.24, see AS [25]. In respect of this error only and not the whole of the trial judge's errors considered together, he concluded that he was 'completely satisfied that there has been no miscarriage of justice': CCA [111] AB 481.40. In so doing his Honour also applied an incorrect test of provocation to the appellant, made additional errors of law, and did not address further errors identified by the appellant: set out at AS [29]-[30].

11 The respondent does not address the errors in respect of the second limb of provocation (s 23(2)(b)) because 'the verdict was based on her Honour's "firm view" that the appellant had not lost self-control': RS [6.39]. This assumes, contrary to McClellan JA's judgment, that her Honour's reasoning in respect of the first limb of s 23(2) was sound, and, moreover, overlooks that the erroneous interpretation and application of s 23(2)(b) is the basis upon which McClellan JA states that he is 'completely satisfied that there has been no miscarriage of justice': CCA [111] AB 481.39.

12 Contrary to RS [6.54], the nature of the CCA's task on an appeal from a conviction by judge alone is altered by the disclosure of findings and reasons in the judgment on conviction, which would not be known in a jury trial. The 'verdict' in a trial by judge alone includes more than the pronouncement of guilt or innocence. For example, the steps taken by the trial judge in determining the provocation question are 'findings on the question of the guilt of the accused' which, by virtue of s 133, have 'the same effect as a verdict of a jury' for 'all purposes': *Fleming* 262 [25].

13 The Court in *Fleming* expressly left open whether the reasoning in *R v O'Donoghue* (1988) 34 A Crim R 397 (***O'Donoghue***) should be applied to limit the CCA's basis for intervention in a trial by judge alone under the first or third limbs of s 6(1) (unreasonable verdict or miscarriage), specifically having regard to the fact that the first limb of s 6(1) must now be seen through the prism of s 133: *Fleming* 262 [26]. The respondent appears to accept the appellant's submission that *O'Donoghue* should not be applied in this way: RS [6.62], cf the discussion in *AB v R* [2014] NSWCCA 339 at [44]-[58]. It does not appear to have been brought to the Court's attention in *Fleming*, nor in *O'Donoghue*, that the reasoning expressed in *O'Donoghue* at 401 relied upon reasoning in a judgment of the CCA in *R v Kyriakou* (1987) 29 A Crim R 50 (***Kyriakou***), which had at that time already been held to be erroneous by this Court. In *Kyriakou* at 57 Yeldham J (Carruthers and Grove JJ agreeing) held:

> This Court does not sit in judgment from factual findings made by trial judges on voir dire. If there is no evidence to support a finding, or if a judge has applied wrong principles, or if the evidence is all one way, then this court, in order to prevent injustice, will intervene, but I am far from satisfied that the present situation is a case of this nature.

Two months prior to the CCA's decision in *O'Donoghue*,[1] following a full hearing before a bench of five judges of this Court in the matter of *Kyriakou* a judgment of at least the majority was delivered by Mason CJ in which his Honour said 'the judgment of the Court of Criminal Appeal does not accurately express the role of an appellate court when a challenge is made to such a finding of fact by a trial judge': *Kyriakou v R* [1988] 9 Leg Rep SL 4 (refusing special leave to appeal on the basis that the CCA had not actually failed to examine the critical issue of fact for itself).

14 In opting for a trial by judge alone, an accused gives up the assurance of the requirement of unanimity or near-unanimity as to his guilt by 12 people. In exchange, the accused receives a judgment which serve the purpose of demonstrating that the single decision maker has adopted sound legal and factual reasoning. Independent of the operation of s 6(1), s 133(2) imposes a substantive obligation on the trial judge to give reasons which answer to the precepts of logic and reason (cf in an administrative law context *Minister for Immigration v Li* (2013) 249 CLR 332 per Hayne, Kiefel and Bell JJ at 363-367 and per Gageler J at 370). There is no basis in the Act for limiting the CCA's ability to correct error in the conviction process in the manner suggested in *O'Donoghue*, or in any manner that prevents the CCA from applying logical reasoning to consider whether the trial judge's reasons disclose error.

15 The CCA is not a court of rehearing; the nature of its jurisdiction is set out in ss 5 and 6. This does not restrict the CCA to consider only certain types of error. To the contrary the CCA must fully examine alleged errors for itself. Once a right of appeal exists or leave to appeal has been granted, there is no additional preliminary step of asking what types of error the trial judge was permitted to make or the CCA to consider. The CCA is required to apply the same logic to all errors said to give rise to grounds of appeal under s 6(1), deciding for itself whether the decision of the trial judge – as to fact, law or verdict – is wrong. Nothing in ss 5 or 6 of the *Criminal Appeal Act* requires the CCA 'after having carefully considered the judgment of the trial judge, [and deciding] that he was wrong... [to] nevertheless uphold his erroneous decision' (*Warren v Coombes* (1978-1979) 142 CLR 531 at 552); in such a case it can only dismiss an appeal if satisfied of the requirements of the proviso.

Sentence

16 There were four possible (although not necessarily available) findings that could conceivably have been made in respect of who brought the gun: (1) The appellant brought the gun; (2) It cannot be said who brought the gun; (3) The appellant did not bring the gun; (4) The deceased brought the gun. Contrary to RS [6.74] and [6.85], the respondent was not sentenced on the basis of the third proposition. If he was, a finding that he did not bring the gun would necessitate sentencing him on the basis of the fourth proposition that the deceased had brought it; the gun did not materialise from thin air. In fact, the sentencing judge purported to sentence the appellant on the basis of the second proposition above: JOS [22] AB 427. In the circumstances of this case, this proposition was not reasonably available, and it created a deep elision in her Honour's reasoning.

17 Her Honour purported to accept, without determining the provenance of the gun, that there was no planning or deliberation for the purposes of s 21A(3)(b) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW): JOS [20]-[22]. This can be no more than a further neutral finding if the provenance of the gun in unknown. The difference between the 'unplanned

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[1] *The judgment in O'Donoghue* at 401 cited *Kyriakou* at 60-61, however, this appears to be a typographical error and the passage cited should be *Kyriakou* 57.

act' of responding to the unannounced arrival of unarmed men with whom there is a dispute by arming oneself and proceeding to shoot them after a short confrontation, and the 'unplanned act' of having two men with whom you have a dispute arriving at your home and in close proximity demonstrating that they have a gun, at which point in a manner of seconds one disarms and shoots both men, is radical. It is meaningless to purport to take into account as a matter of mitigation that the act was 'unplanned' in this factual vacuum.

18 It is fundamental that a sentence must reflect the gravity of the offending and the moral culpability of the offender. The effect of her Honour's approach is to deprive the sentence of this essential element. The question(s) of gravity and moral culpability cannot be answered without determining whether the appellant was an 'inherently angry man' confronted at his home with two men carrying a gun, or an 'inherently angry man' who came armed with a loaded gun to an otherwise low level neighborhood dispute. In the present case, the sentencing task is also affected by the provision of reasons pursuant to s 133, as the 'distinctly raised and found' issue of who brought the gun was resolved in the appellant's favour by the judge's s 133(2) findings: cf *Mraz v The Queen [No 2]* (1956) 96 CLR 62 at 68-70 and *R v Wilkes* (1948) 77 CLR 511 per Dixon J at 518.

19 In any event, it is a consequence of the operation of the burden of proof that the finding at trial as to who brought the revolver must be arrived at in a similar manner on sentence. Contrary to RS [6.66] and [6.69], although her Honour considered it was 'probably the accused who brought the revolver into the confrontation', not being satisfied beyond reasonable doubt her Honour was required to and did proceed for the purposes of conviction on the basis that the deceased brought the gun: JOC [78] AB 384.29 and [111] AB 394.26. The burden of proof has the same effect on fact finding in sentencing, in the manner set out in *Cheung v The Queen* (200) 209 CLR 1 at 13 [14]. Although there may be instances in which extraneous factual findings cannot be made in respect of some aspect of the offending, this cannot be the case where the finding is central to moral culpability. Certainly, it cannot be the case where the Crown fails on a central issue leaving only one alternative scenario. The actual criminality involved in the offence must be established, and consistent with fundamental principles underlying the accusatorial system of justice, where the Crown fails to discharge its onus, the offender must be given the benefit of the doubt.[2]

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[2] This is consistent with the statutory and common law approaches to fact finding in New Zealand, the United Kingdom and Canada.