

**IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY**

No: B20/2017

BETWEEN:

CHRISTOPHER CHARLES KOANI

(Appellant)

-and-

THE QUEEN

(Respondent)

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RESPONDENT'S ANNOTATED SUBMISSIONS

PART I: PUBLICATION ON THE INTERNET

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

PART II: RESPONDENT'S STATEMENT OF PRESENTED ISSUES

2. Does a breach of duty under section 289 of the *Criminal Code Act 1899* (Queensland), such that a person is held to have caused the death of another, when coupled with an intention to cause death or grievous bodily harm, result in liability for murder pursuant to section 302(1)(a) of the *Criminal Code*?

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PART III: SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

3. The respondent considers that notice is not required pursuant to section 78B of the *Judiciary Act 1903 (Cth)*.

Annotated submissions filed on behalf of the
Respondent
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PART IV: CONTESTED MATERIAL FACTS

4. The appellant's narrative of facts is not contested. The following additions are however included:

a. between 7:05pm and 7:35pm on Sunday 10 March 2013, the deceased and appellant exchanged mutually abusive and angry text messages¹; AB499; AB500
AB501; AB502

10 b. at 8:01pm on 10 March 2013, Mr Writer who was outside the residence where the appellant and deceased could be heard arguing, sent the appellant a text message telling him to "*bro, take it easy*"²; AB505; AB506

c. the appellant and deceased continued to argue and swear at each other after Mr Fenton and Mr Writer had been invited into the apartment by the appellant³; AB215; AB216

d. the appellant retrieved the shotgun and cartridges from some shelving and sat down on the lounge to load it. Mr Fenton then heard the words "*go back to gaol or something, I'll shoot you*". Mr Writer said to him "*you don't have to do that*" as the appellant got up armed with the loaded gun;⁴ and AB218; AB276

20 e. The appellant spoke to police at the scene and made the statements set out paragraph 15 of the appellant's outline. He repeated that same false account at the Logan Police Station later that night⁵. AB565; AB566
AB567; AB568

PART V: APPELLANT'S STATEMENT OF APPLICABLE STATUTES

5. The statement of the applicable legislative provisions is accepted. Also relevant are sections 285 and 291 of the *Criminal Code*. A copy of these provisions is annexed.

PART VI: STATEMENT OF THE RESPONDENT'S ARGUMENT IN ANSWER

30 6. At trial it was contended that the relevant act for the purposes of section 23(1)(a) *Criminal Code* was the discharge of the gun. That was the act identified by both the trial

¹ Exhibit 12.

² Exhibit 13.

³ Transcript day 3 page 19-20.

⁴ Transcript day 3 page 22, day 4 page 12.

⁵ Exhibit 16; MFI 'E'.

judge⁶ and identified in the particulars provided by the Crown.⁷ The evidence giving rise to the potential dispute surrounding the penultimate death-causing act was the possibility of hammer slip, that is, the possibility that when the hammer was almost fully cocked, the defendant's thumb or finger slipped from the spur causing the hammer to be released and the gun to discharge.

7. The appellant raises four lines of reasoning he says demonstrates error by the Court of Appeal. For convenience they are addressed under their original headings.

(b) Construction of the Code

- 10 8. The relevant legislative provisions are found in the Queensland *Criminal Code*. As a Code it should be construed according to its natural meaning without any presumption that it was intended to do no more than restate the existing law.⁸ Its provisions should be capable of explanation to a jury by its own terms. Excessive subtlety or philosophical obscurity should be avoided⁹, as should an overly refined analysis of the facts¹⁰.
- 20 9. Section 289 is framed to impose a duty on those in control, or in charge, of a dangerous thing, to use reasonable care and take reasonable precautions to avoid danger to the life, safety or health of any person. Section 23(1)(a) does not create an offence or give rise to criminal responsibility, but rather provides that a person can be held to have caused any consequences which result to the life or health of a person by omitting to perform their duty in relation to the dangerous thing. Section 289 is contained within a chapter of the *Criminal Code* titled "Duties relating to the Preservation of Human Life".
10. It is accepted that section 289 is an express provision of the Code relating to negligent acts and omissions as referred to in section 23¹¹. Section 23(1)(a) excuses from criminal liability an act or omission which occurs independently of the exercise of the person's will. Section 289 is in different terms. It does not refer to or require identification of an unwilled act.
11. In the context of the appellant's trial, section 289 imposed a duty on the appellant to use reasonable care and take reasonable precautions with a gun to avoid danger to the life

⁶ Summing-Up page 8 line 28.

⁷ *R v Koani* [2016] QCA 289 at [3].

⁸ *Brennan v The King* (1936) 55 CLR 253 at 263; *Bouhey v The Queen* (1986) 161 CLR 10 at 30-31; *R v Barlow* (1997) 188 CLR 1 at 313-33; *Charlie v The Queen* (1999) 199 CLR 387 at 393-394 [14]; *Murray v The Queen* (2002) 211 CLR 193 at 218 -219 [78].

⁹ *Murray* (supra) at 218 [78].

¹⁰ *Murray* (supra) at 209-210 [49]-[50]; *Stevens v The Queen* (2005) 227 CLR 319 at 64.

¹¹ *Callaghan v The Queen* (1952) 87 CLR 115 at 119; *Evgeniou v The Queen* (1964) 37 ALJR 508 at 509, 511.

of any person. His breach of that duty was not limited to failing to prevent the hammer slipping. The appellant breached that duty by loading a firearm in the confines of a dwelling, manipulating the hammer of the firearm so it was “*fully cocked or very nearly fully cocked*”¹², walking towards the deceased whilst armed with the firearm and aiming it at her head a short distance from her. All of that conduct fell for consideration in determining whether the appellant had breached the duty imposed upon him under section 289 to use reasonable care or take reasonable precautions with the gun. AB365; AB366

12. The Crown case was that the appellant breached his duty in relation to the gun by a series of willed or purposeful or deliberate actions which culminated in the gun discharging. As was said by the majority in the Court of Appeal, nothing in section 289 precludes willed or deliberate actions from giving rise to a breach of duty.¹³ Assuming that the appellant’s breach of duty involved gross negligence, section 289 provides that he was then held to have caused the consequences of his breach of duty which was the death of the deceased. AB608; AB609

13. The way the Code operates to give rise to criminal liability for homicide was referred to by Gummow and Hayne JJ in *Murray v The Queen*¹⁴. By section 293, a person is deemed to have killed another when that person causes the death of another, directly or indirectly, by any means whatsoever. Section 291 provides that all killings are unlawful unless authorised, justified or excused by law. Section 300 states that any person who unlawfully kills another is guilty of a crime, which is called murder or manslaughter according to the circumstances of the case.

14. Section 302(1)(a) relevantly provides that a person who unlawfully kills another in the circumstances that he/she intended to cause the death or grievous bodily harm to the victim, is guilty of murder. This section does not discriminate between an unlawful killing by a deliberate act, or that caused by a breach of duty. It focuses attention upon the state of mind of the offender as the circumstance necessary to establish the conduct as murder. Objectively, there was a body of evidence which demonstrated that the appellant intended to kill (or at least cause grievous bodily harm to) the deceased from the point in time in which he grabbed and loaded the gun. The appellant’s actions from that point on were directed at achieving that course, namely walking towards the deceased, drawing the hammer on the gun to where it was almost fully cocked, and

¹² Transcript day 4 page 95 line 39 – page 96 line 6.

¹³ *R v Koani* [2016] QCA 289 at [71], [74]. See also *R v Young* [1969] Qd R 417 at 433 per Lucas and Hoare JJ; *Phillips v The Queen* [1971] Tas SR 99 at page 131-132 per Crawford J.

¹⁴ At 203 [29]-[30].

aiming the gun at her head at a close distance (likely between 45 centimetres and 75 centimetres¹⁵). AB364; AB365

15. Once the jury were satisfied that the appellant caused the death of the deceased and did so unlawfully (which was not in contention given the plea of guilty by the appellant to manslaughter at the commencement of the trial), the jury were then required to determine whether that unlawful killing amounted to murder or manslaughter. Relevant to that consideration was only the state of mind of the appellant at the time of the act which caused death. That act was particularised as the discharge of the gun.¹⁶ The jury AB590 were properly directed that in order to return a verdict of murder, they had to be satisfied at the time the gun discharged that the appellant held the necessary intention.
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16. The consideration of the conduct for the purposes of section 289, and the consideration of the state of mind of the offender for the purposes of section 302(1)(a), are two distinct and separate steps. The majority of the Court of Appeal recognised that at paragraph [72]. *Murray*¹⁷ also recognises that the determination of whether an act is willed AB608; AB609 requiring a direction under section 23(1)(a) is a separate and distinct step from determining whether the offender had an intent to kill.
17. *R v MacDonald and Macdonald*¹⁸ is authority for the use of a Chapter 27 duty (section 285 in that case) in aid of a prosecution for wilful murder. In that case, the appellants had breached a duty to provide the necessaries of life to a child. Their conduct involved neglecting to provide or secure medical assistance for a child in their care, intending to cause her death. Cooper CJ said:
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- “Wilful murder is the unlawful killing by any means of one person by another, with the intention to cause his death. The ways in which death may be produced are numberless and indefinable. If any person, intending to cause another person’s death, pursues towards him a course of conduct which causes his death, he is guilty of wilful murder...”*
18. The appellant deliberately undertook a series of steps which resulted in the discharge of the gun. He pursued a course of conduct directed at killing (or causing grievous bodily harm to) the deceased. If, at the time the gun discharged, the jury were satisfied that he intended to kill or cause grievous bodily harm then, on the construction of the Code set
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¹⁵ Transcript day 4 page 94 line 45 – page 95 line 5.

¹⁶ *Koani* (supra) at [3].

¹⁷ *Murray* (supra) at 200 [18] per Gaudron J; at 221-222 [86]-[87] per Kirby J; at 236 [151] per Callinan J.

¹⁸ [1904] St R Qd 151, 169-170, 174, 176.

out in the judgment of the majority in the Court of Appeal, the appellant was liable to be convicted of murder. As referred to at paragraph [77] of the judgment, it would be incongruous that a person holding a murderous intent, who picks up a gun to shoot another, and the gun discharges, but not in the precise same fashion as intended, as being guilty only of manslaughter. AB609

19. This construction of the Code achieves consistency with the common law States where death is intended and achieved but through a mechanism not expected by the killer¹⁹.

(a) Specific intention and unwilled act

- 10 20. The appellant argues that it is not possible for a specific intention to attach to an unwilled act, that there must be something more than temporal coincidence between the act which causes death and the intention. Once the appellant's conduct is considered as a series of purposeful acts directed at achieving a particular result, namely the death of the deceased, it becomes artificial to consider only the final act as relevant to a consideration of the appellant's intention at the time of the discharge of the gun. The jury were properly directed that they had to focus upon the time the gun was discharged.²⁰ They were also properly directed that they ought to look at the evidence both before and after the gun was discharged to determine the appellant's intention at the time the gun was discharged. That there was more than mere temporal coincidence in this case was recognised at paragraphs [76] and [77] of the judgment of the majority of the Court of Appeal. AB465 AB609
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(c) The reasoning in *Murray v The Queen*

21. The appellant argues that the reasoning of the Court of Appeal is incompatible with the decision in *Murray*. As was recognised by the majority in the Court of Appeal, the issue of whether a breach of a duty (under section 289 or otherwise) can lead to a conviction for murder if coupled with an intention to kill or cause grievous bodily harm was not raised before the court in *Murray* or as such, considered by it. The comments of Gaudron and Kirby JJ relied upon by the appellant need to be considered in that context. Further, those comments were made in a factually different case, where there was evidence of something properly occurring independently of the exercise of the will of that appellant, being the deceased throwing something which hit that appellant in the head causing the reflex action. Additionally, the appellant in *Murray* gave evidence that his intention was AB609; AB610
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¹⁹ *R v Demirian* [1989] VR 97 at 115; *Royall v The Queen* (1991) 172 CLR 378.

²⁰ Summing Up page 12 line 29 – 46.

only to frighten the accused. His evidence left open that the gun discharged without any pressure being applied to the trigger, or that the pressure was applied to the trigger by reflex action when the deceased's arm shot out and the appellant was hit on the head. Both Gaudron and Kirby JJ referred to the identification of what was the relevant act (and whether it was willed) as being a matter for the jury to determine.²¹

22. While concepts of criminal negligence are applied to assessing liability under section 289, that does not mean Chapter 27 duties cannot be breached by willed and deliberate conduct. Intention is not a prerequisite to proof of a contravention of section 289.²² If a person has acted wilfully, and with deliberation, and in doing so has breached the duty imposed to the criminal standard, they will be taken to have caused the death. If they acted while intending to bring about a specific result, such as death or grievous bodily harm, the result is murder.

(d) A conceptual problem?

23. The appellant argues that there is a fundamental conceptual problem attaching a specific intention to a breach of a duty. Whether a path to conviction is open will depend on the particular factual allegations. More often than not section 289 would be relied upon as an alternative path to proof of manslaughter only. What makes it is viable path to proof of murder in this particular case is that the means by which the weapon came to discharge was something the appellant was wholly responsible for; either by a deliberate discharge using the trigger or hammer, or by his failure to properly manage the weapon when loading it, cocking it and aiming it at the deceased. It stands in contrast to the possible scenario of the intervention by an outside agency over which he had little or no control causing the discharge, such as the victim throwing something at, and hitting, the shooter and/or the weapon in *Murray*, or the victim impaling himself on a knife in the course of a struggle as in *Ugle v The Queen*²³.

Section 302(1)(b)

24. The appellant suggests that it would have been open for the Crown to have relied upon section 302(1)(b) in the circumstances of this case. Whilst such a consideration has little or no impact on this appeal, it should be noted that in order to establish murder pursuant to section 302(1)(b), it must be shown that the act which causes death was separate from

²¹ *Murray* (supra) at 198 [13] per Gaudron J; at 222 [89] per Kirby J.

²² *R v Clark* (2007) 171 A Crim R 532, per Keane JA at [23].

²³ (2002) 211 CLR 171.

the overall unlawful purpose.²⁴ The presentment and discharge of the gun cannot constitute at once the unlawful purpose and the dangerous act.²⁵

25. The majority of the Court of Appeal was correct to hold that a breach of section 289, when accompanied by a specific intent, can result in a conviction for murder.

PART VII: STATEMENT OF THE RESPONDENT'S ARGUMENT ON THE NOTICE OF CONTENTION OR NOTICE OF CROSS-APPEAL

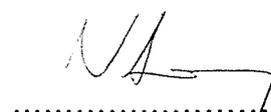
26. Not applicable.

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PART VIII: ESTIMATE OF TIME FOR PRESENTATION OF RESPONDENT'S ARGUMENT

27. The respondent considers that up to one hour may be required for presentation of the oral argument.

Dated 1 June 2017



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²⁴ *Stuart v The Queen* (1974) 134 CLR 426 at 438-9 per Gibbs J.

²⁵ The suggestion at footnote 2 of the appellant's outline that the Crown could have alleged the appellant held the deceased captive arose only from some evidence that the deceased was sending text messages that she was locked in the house at the time the appellant was at the nearby hotel. Once he returned to the house there was no evidence that he was holding her captive. Indeed at the time of the shooting the glass sliding door was open.