IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No: S 291 of 2019

BETWEEN:

WILLIAM RODNEY SWAN
Appellant

and

THE QUEEN
Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

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

Part II: Outline of propositions intended to advance in oral argument

1. *Overview*

1.1 This appeal is about conviction for murder where causation is based on a decision made by a third party to not repair a patient's broken hip - the patient having been the victim of a violent robbery 8 months earlier, found to have been committed by the appellant.

1.2 The violence inflicted during the robbery caused the deceased serious injuries amounting to grievous bodily harm. Death resulted from complications from a fractured hip not sustained during assault. The fracture and the decision made by a third party about treatment for it had the impact of changing grievous bodily harm to death.

1.3 Following the decision to not operate to repair the hip death resulted four days later. It was that decision that formed an important part of the Crown's argument at trial that the applicant had legally caused the patient's death although the hip was not fractured during the robbery. Despite the importance of that decision, there was no direct evidence about it from those involved in making the decision and the appellant contends there was insufficient evidence to draw inferences factually that were requisite to make a legally viable case on causation for murder.

2. *The appeal is about only one of the three potential pathways of causation*

2.1 The appellant does not invoke the first limb of section 6 of the *Criminal Appeal Act* (that the verdict was unreasonable). Instead, the appellant invokes the third limb of section 6 (that there was a miscarriage of justice): AWS [52]-[55].

2.2 There were two aspects of the evidence which potentially proved causation and were mentioned in the crown prosecutor's opening or closing address. These were lung vulnerability caused by the assault which was compounded by fat emboli from the fractured hip and caused death, and a heightened risk of falling caused by the assault which resulted in a fall on an unspecified occasion close to death which caused the fractured hip which caused death (this second body of evidence including dispute whether the fracture was pathological – metastasis of cancer causing fracture from no or low trauma – or traumatic): AWS [42]-[44].

2.3 A miscarriage of justice occurred because the jury was urged to convict (and may well have convicted) by following a third theory of causation even though such a pathway was not supported by evidence. This third theory is the one based on the decision to not operate.

2.4 Because the appeal is confined in this way, it is unnecessary to analyse the merits of the other two theories of causation.

3. *The impugned theory of causation is all about a decision*

3.1 The impugned theory of causation was all about a decision made to not repair a patient's fractured hip.

3.2 There is no question a decision was made to not repair the hip and that that decision resulted in death: AWS [35], [63].

3.3 The reason why that decision was made is central to this theory of causation.

4. *The Crown at trial and the CCA on appeal took contradictory approaches to that decision (Ground 2): AWS [56]-[58]*

4.1 Crown at trial and the CCA on appeal took contradictory approaches to that evidence.

4.2 The Crown argued at trial and maintains on appeal that the deceased's hip *could have been* surgically repaired and his life extended but a choice was made not to do so because his quality of life was low as a result of the assault.

4.3 By contrast, the CCA found the evidence showed surgery *could not be* undertaken because of the injuries suffered as a result of the assault. This is a different path of reasoning that was never put to the jury.

4.4 The factors relied on by the CCA were not related to any view of the deceased's son regarding incontinence, nourishment, mobility, cognitive decline (which were never going to improve): cf. RWS [44].

4.5 These two different approaches are not just inconsistent, they are mutually exclusive.

4.6 The CCA never asked itself if the Crown's theory of causation (as distinct from the CCA's own theory of causation) was supported by evidence.

4.7 Ground 2 should be upheld. The error by the CCA also shows the lack of cogency in the case the Crown presented at trial (ground 1).

5. *There was no evidence to support the Crown's impugned theory (Ground 1)*

5.1 In order to establish liability for murder via this path of reasoning, the Crown had to prove at least the following (AWS [59]-[60]):

i. Effective surgery was available that could save *this man*; and

ii. This man (or someone lawfully authorised to act on his behalf) made a decision to not undertake such surgery; and

iii. That decision to not undertake surgery was motivated by the (non-improving) low quality of life debilities, which were caused by the assault (as distinct from poor health, concerns about necessary preparation for surgery).

5.2 These were essential intermediate facts.

5.3 The Crown failed to present evidence capable of proving *any* of these three matters. It failed to call evidence from anybody involved in the decision making process. On appeal, the Crown has relied instead on the hospital notes tendered as Exhibit AG: CCA [28]-[29] CAB 153. They were not analysed at trial to lend support for the theory.

5.4 **Effective surgery for this man**: even though there was some evidence about a fractured hip being frequently successfully repaired for a healthy 78 year-old, there was no evidence about the likelihood of success for this particular man: AWS [38], [68]. The respondent has not pointed to cogent evidence about the likelihood of successful surgery for this particular man: cf. RWS [27](iii). There was no evidence as to what was required to stabilise the deceased medically before the surgery recommended by the orthopaedic surgeon: AWS [32].

5.5 **The decision maker**: it is not clear who actually made the decision to not undertake surgery. Exhibit AG does not indicate participation by the deceased. Nor did the evidence explain the deceased's non-participation: AWS [26], [63]. No evidence from those who may be expected to have discussed wishes of deceased with him (son, Rabbi) gave evidence on the topic: Reply [8]. The deceased was generally not pessimistic or depressed, and had interests: AWS [27]. Exhibit AG suggests participation by a medical practitioner and the deceased's son. No evidence was called from the medical practitioner. The son was called but not asked about the decision to not operate: AWS [64]. There were no

submissions at trial about any authority the son held, nor was there any analysis of the operation of the *Guardianship Act* : cf RWS [33]; Appellant's Reply "AR" [6]-[8].

5.6 **The reason for decision**: there were similar shortcomings in relation to the reason for not undertaking surgery. The medical practitioner was not called, and the son was not asked why the decision was made not to undertake surgery. The deceased had other serious health problems and there was probably a mistaken diagnosis of aspiration sepsis / pneumonia: AWS [66]. Properly analysed, Exhibit AG left open many possibilities: AWS [69]-[70], Reply [1]-[2]. The document proves as primary facts the matters discussed by the decision makers. The Crown contention that the reason for the decision was a matter different from the matters discussed is conjecture rather than a rationally drawn inference: Reply [4]-[5]. If such evidence was available it was peculiarly within the knowledge of the decision makers, and in an adversarial and accusatorial context would be expected to be called by the Crown: cf. *Weissensteiner*, *Dyers*, *Mahmood*, *Baden-Clay*. There is insufficient material to draw the inferences advocated by the Crown: AR [1]-[5]; RWS [27](iv). The Crown submission that the four quality of life issues were never going to improve was contrary to or not supported by the evidence: AWS [21]-[25]. The submission was misleading, and in a significant respect. As in *Royall* (established body of case law regarding when act of victim does not break chain of causation, including 'well-founded' fear, considerations of reasonableness and foreseeability) a minimum requirement would be proof quality of life debilities were never going to improve.

5.7 The case highlights the importance of integrity of Crown case theories / identification of issues – trials are not just about evidence and elements: *Anderson*, *Tran*, *Royall*.

6. *The trial judge did not provide adequate assistance to the jury in its task of determining whether or not causation was established (proposed ground 3)*

6.1 If this Court finds there was some evidence to support the Crown's impugned theory of causation, special leave is sought to raise a further ground about the inadequacy of the trial judge's summing up.

6.2 A trial judge must, at least, identify the real issues in any case and relate the law to those issues so that the jury can "dispose of the issues in the case": AWS [75]-[76].

6.3 The Crown's impugned theory of causation required proof of, at least, three matters (set out above). The trial judge never set out these three matters to the jury. In other words, the trial judge *did not identify the real issues* for the jury's determination. Nor did the trial judge explain the *consequences* of a failure of the Crown to prove, for example, one of the three matters: AWS [75]-[76].

6.4 The trial judge should have at least referred to the evidence at trial that bore on these issues.

7. *Why special leave should be granted to raise ground 3*

7.1 The power of this Court to grant special leave to raise fresh points is undoubted: AWS [74]; *Crampton*. Although this Court will only do so in "exceptional circumstances," it is not possible to exhaustively define the circumstances that will be regarded as sufficiently exceptional to justify a grant of leave. The impugned theory of causation is itself exceptional.

7.2 The defect in the trial identified by proposed ground 3 is closely allied to the defect identified in ground 1. Any enlargement of the appeal is slight. The respondent can adequately meet any argument raised under this new ground.

7.3 There has been a miscarriage of justice in the individual case, and important issues of general importance regarding the integrity of Crown case theories and their explanation to juries, are at stake. If ground 1 fails then special leave should be granted to pursue ground 3. Ground 3 should be upheld.

Belinda Rigg, Tom Quilter