IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S291 of 2019

BETWEEN:

WILLIAM RODNEY SWAN

Appellant

and

THE QUEEN

Respondent

Part I: I certify that the Appellant's Reply is in a form suitable for publication.

APPELLANT'S REPLY

10 **Ground 1**

1. The appellant's case is not that the inferences set out in paragraph [69] of the Appellant's Written Submissions ('AWS') are alternatives to an inference properly available to the Crown. Paragraph [69] sets out inferences properly able to be drawn from Exhibit AG. The document, in proving as primary facts the topics that were discussed by the decision makers, allows inferences to be drawn regarding those topics as prospective bases for the decision. The respondent does not point to any proved primary facts other than the existence of the four relevant disabilities. The Crown is contending that the decision was made by the son of the deceased for a reason not shown to have been discussed by him with the author of the notes.

20 2. The reference in Exhibit AG to the earlier note made while the deceased was still at St Vincent's Hospital does not offer support for the impugned theory: cf. Respondent's Written Submissions ('RWS') [27](iv). Rather, the reference to the decision at that earlier time to not resuscitate or intubate the deceased in the event of another event of aspiration sepsis / pneumonia supports the prospect that the mistaken diagnosis of aspiration sepsis on 5 / 6 December 2013 was instrumental to the decision to not repair the fractured hip.

3. The submission advanced by the respondent at RWS [27](4) is artificial. Inferences as to the order or weight of matters discussed in a conversation – based on the structure of notes made by an unknown person at an unknown time after the conversation – are not

30 tenably drawn. Taken literally, this would suggest that the son of the deceased indicated a wish to withhold consent for life-saving surgery prior to being told anything as to why the deceased was in hospital, that he had fractured his hip, the nature of his condition,

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the prospective surgery to be undertaken (and its risks and benefits) - or even the opinion that his father had aspiration sepsis (so as to invoke consideration of the earlier decision).

4. It is possible that Mr Zitserman held a belief (generally, or on 6 December 2013 in relation to his father) that a life with incontinence, significantly reduced mobility, need for nourishment by a PEG tube rather than by food, and with fluctuating (although improving) cognitive impairment is a life not worth living / saving. It is possible he held a completely contrary view. It is possible that his views were more complex than either of these. However they are all merely possibilities, requiring guesswork or conjecture to advance one over the other, rather than the legitimate drawing of an inference.

5. If there is an available reasoning process which permits description of the first of these possibilities to be regarded as an inference rather than speculation, it is submitted to be, in the highly unique circumstances of this case, an inference which is not reasonable or rational. Those circumstances are:

   - The adversarial and accusatorial nature of a criminal trial,
   - The requirement of the prosecution to act with fairness and with the objective of establishing the whole truth, and to call all available material evidence unless there is some good reason not to do so,
   - The son of the deceased was called by the Crown and gave no evidence in chief regarding his reasoning processes on 6 December 2013 nor about the earlier discussion which took place at St Vincent's Hospital,
   - Available inferences helpful to the defence can be drawn from Exhibit AG, and
   - Any contrary basis for decision making was peculiarly within the knowledge of Mr Zitserman. The premise that he could shed light on the subject and would ordinarily be expected to is appropriate.[1]

6. The above deals with the reason for the decision. As to authority for decision making, the respondent has raised for the first time in this court, since the filing of the appellant's submission, the *Guardianship Act* ('the Act'). It is submitted that this does not provide any support for the impugned theory. There was no evidence that as at 5 and

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[1] *Whitehorn* (1983) 152 CLR 657 at 663-664 (Deane J), 674 (Dawson J), *R v Apostilides* [1984] HCA 38; (1984) 154 CLR 563. *R v Kneebone* (1999) 47 NSWLR 450 at 462 [57] (Greg James J), *Weissensteiner v The Queen* (1993) 178 CLR 217 at 227-228, *RPS v The Queen* (2000) 199 CLR 620 *Azzopardi v The Queen* [2001] HCA 25 ; 205 CLR 50, *R v GEC* (2001) 3 VR 334 at 344 – 346 [41] – [50], *Dyers v The Queen* [2002] HCA 45; (2002) 210 CLR 285, *Mahmood v Western Australia* (2008) 232 CLR 397 at [25], [27] (where it was not immediately apparent what the prosecution witness could have said).

6 December 2013 the deceased was incapable of giving consent to the carrying out of medical treatment (see ss 33 and 34). There is evidence that he was capable of determining such issues for himself while in the nursing home.

7. The general principles of the Act include (s 4) that the duty of everyone exercising functions under the Act to ensure that the freedom of action of such persons should be restricted as little as possible, and the views of such persons in relation to the exercise of those functions should be taken into consideration, and such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs. There was a dearth of evidence on these issues.

8. Further, the purpose of s 33A is to allow essential treatment to be provided where consent cannot be obtained. It is not clear that consent was needed by the doctors in relation to life saving surgery. Simply being a close relative does not elevate responsibility to levels such as held by guardians, or those with an enduring power of attorney. The appellant does not contend as a matter of law that it would never be open to base causation on a decision by a relative of a victim – but in circumstances far removed from the facts of this case. The deceased was a conscious, communicative man. Although there was some evidence of physical agitation, the notes also showed enjoyment by the deceased of his life, no pessimism, no significant depression, and no evidence of discussions (with, for example his son who was called or Rabbi Jacob who was not) that he wished for the ending of his life.

9. Factual situations such as victims in a permanent vegetative state, in significant pain, or with prospective medical procedures likely to be distressing and uncomfortable, or exposing to great risks, may give rise to different considerations.

10. The respondent has still not indicated any evidence to support the proposition that surgery is expected to have saved the life of this man. The respondent has still not indicated any evidence to support the submission that the problems with mobility, continence, swallowing and cognition were never going to improve.

Ground 3

11. It is agreed that if ground 1 succeeds ground 3 is not necessary. However it is not agreed that if ground 1 is not established, ground 3 would likewise fail. Exposure of the absence of evidence is not the 'only mischief' to which proposed ground 3 is directed: cf. RWS [54]. The respondent is still maintaining that the impugned theory on causation

was open on the evidence. If this court accepts such a contention, it will be by the most meager of margins, supporting an extraordinarily complex case on causation. Yet the jury was given no assistance as to the issues they were required to determine in connection with the complex Crown theory / theories on causation.

12. The CCA was taken at length during the hearing through the relevant principles regarding the need for a coherent and cogent Crown case theory, based on evidence: Respondent's further material 214 – 218. Particularly, reliance was placed upon *Tran* (2000) 105 FCR 182, *Tangye* (1997) 92 A Crim R 545, *Wood v R* [2012] NSWCCA 21 and *Anderson* (1991) 53 A Crim R 421. The manner in which the argument was advanced was that the Crown had not adhered to these principles at trial, and that the Summing Up of the trial judge did nothing to ameliorate this problem. The Summing Up was accordingly addressed as an aspect of how the Prosecutor's address had caused a miscarriage of justice. The appellant maintains this is the correct focus – but seeks special leave in case there is a contrary finding.

13. Apart from the general law on causation, her Honour should have firstly directed the jury that the principal basis on which the Crown closed its case on causation was the decision on 6 December 2013 to not operate. The requirement to consider the essential intermediate circumstances discussed in connection with ground 1 should have been the subject of direction, with reference to the evidence that the jury may take as bearing upon those findings.

14. Secondly, her Honour should have reminded the jury of the submission made in the crown prosecutor's closing address that 'He was agitated, he couldn't communicate, you get the impression, and that made him a fall risk…'. Her Honour should then have reminded the jury of some of the evidence about the deceased's risk of falling and its possible connection with the assault (as outlined by both parties in the CCA, but not to the jury). Her Honour should have explained to the jury that it would seem that this possible basis for causation was why there was evidence placed before them about whether the fracture was traumatic or pathological in nature (that evidence was explained in the Summing Up, but its potential relevance was never explained).

15. Her Honour should have reminded the jury that the defence focused on the evidence suggesting that the deceased may have fractured his hip when he rolled from his low bed, 5 cm from the ground, on 5 December 2013 (for example by reference to the

transfer form cited at CCA [27], and the evidence of Professor Cordner that apart from the medical evidence he relied on the absence of evidence of any large, heavy fall, as supporting the reasonableness of the fracture being pathological: CCA [51]), and the relevant answers provided by the experts. Her Honour did refer to aspects of the evidence and submissions on this issue, but not with any explained connection to a potential basis for causation because the deceased was at risk of falling.

16. Her Honour should have reminded the jury that the Crown on the other hand submitted in closing that the fracture was not necessarily caused on 5 December, and that on the totality of the medical evidence the jury should be satisfied that the fracture was traumatic in origin.

17. Her Honour should have explained to the jury that a reasonable doubt about whether the fracture was pathological would leave this unavailable as a pathway to causation being proved; but that even if the jury was satisfied beyond reasonable doubt that the fracture was caused by trauma, they would need to be satisfied beyond reasonable doubt the original assault so significantly or substantially contributed to death following a trauma 8 months laser, so as to warrant criminal responsibility for murder. Reference to the availability of remedial surgery (according to the Crown's impugned theory) which was not provided would also have been required.

18. Thirdly, her Honour should have enquired of the Crown whether the theory of causation which was raised in the opening address but not in closing (based on Dr Bailey's evidence) was, in light of the concessions in cross-examination that this fracture was essentially fatal when untreated, regardless of any underlying respiratory vulnerability, still pressed – and directed the jury accordingly.

Dated: 20 December 2019

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