IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S291 of 2019

BETWEEN:

WILLIAM RODNEY SWAN

Appellant

10

and

THE QUEEN

Respondent

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RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Date of this document: 13 February 2020

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Part I: Certification

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

Part II: Outline of oral argument

Ground 1: Whether the impugned Crown Case theory was supported by the evidence

2. The primary causation pathway advanced by the Crown was that the fracture to the deceased's hip was traumatic in nature, resulting from the fall(s) sustained by the deceased whilst in the high care nursing facility. In particular, the Crown contended that the fall(s) occurred as a result of the brain injury that the deceased suffered as a consequence of the assault. As the CCA found, the deceased's lack of cognitive ability carried with it a propensity to fall: CCA at [91]; CAB at 175. [Respondent's Written Submissions ("RWS") at [13] and [21].]

3. The alternative causation pathway, which is the subject of the first ground of appeal, only arose if the jury were not satisfied beyond reasonable doubt that the fracture of the hip was caused by fall(s) resulting from the deceased's brain injury (that is, if the jury found that there was a reasonable possibility that the fracture was pathological in nature, resulting from cancer that was discovered in the deceased's kidney).

4. In particular, even if the fracture of the deceased's hip was not traumatic in nature, it was open to the jury to be satisfied of the element of causation if the jury found that a significant reason for the decision not to conduct available surgery was the enduring poor quality of life that had been forced on the deceased as a direct consequence of the assault. In such circumstances, the jury could be satisfied that the assault "*substantially*" or "*significantly*" contributed to the deceased's death. [RWS at [28]]. This pathway involved drawing inferences from the evidence in the trial.

5. To establish that this alternative pathway should not have been left to the jury, the appellant must demonstrate that the evidence, taken at its highest, is not capable of sustaining the inferences sought to be drawn by the Crown: ***Doney v The Queen*** [1990] HCA 51; 171 CLR 207 at 214 – 215. The question is one of capacity; it is not whether other inferences are available: ***Peacock v The King*** [1911] HCA 66; 13 CLR 619 at 651 - 652. Whether an inference should (as opposed to could) be found, is a question for the tribunal of fact. [RWS [28] and [30]].

6. The evidence presented at trial included evidence that surgery for the deceased's broken hip "*will require surgical intervention once stabilised medically*", but that such surgery would not be performed that weekend: CCA at [28]; CAB 153. The evidence also included a hospital record, dated the same day, 6 December 2013, documenting the decision not to operate on the deceased's hip. That clinical note, which was subheaded "*Decision re palliative v operative*", indicated that medical staff had contacted the deceased's son and that the son indicated that he felt that his father had deteriorated significantly since the deceased was admitted into the high care facility following his release from hospital. The note then stated that the deceased's son agreed with a previous decision that his father should not be the subject of any invasive treatment. The son was then updated on further confirmed and possible medical conditions. After receiving this information, the son confirmed that the

deceased should be provided with "*comfort care*" and that IV fluids should be withdrawn: CCA at [29] and [12]; CAB 153 and 148. [RWS at [27](iv).]

7. This clinical note must be viewed in the context of all of the evidence called at trial. The uncontested evidence was that the deceased's quality of life had dramatically declined as a direct result of the assault. Prior to the assault, the deceased was a robust, intelligent and independent 78 year old man: Core Appeal Book ("CAB") at 147; 149; RFM at 98. After the assault, the deceased lacked mobility; was no longer able to eat; was dual incontinent; was unable to undertake daily life activities or to mentally comprehend them; and was often frustrated and angry: CAB at 147 – 152; RFM at 84, 167. Expert evidence was that the severe cognitive decline caused by the deceased's brain injury was ongoing: RFM at 151 and 167. [RWS at [27(ii)]].

8. There was also evidence that, prior to release to the high care nursing facility, the deceased's son and medical staff had made a decision that the deceased was "*not for resuscitation and not for ICU/ intubation*" in the event of a similar episode: CCA at [12]; CAB at 148–149; RFM at 141. [RWS at [27(iv)]].

9. Viewed in its totality, the evidence called at trial had the capacity to support the inferences sought to be drawn by the Crown, and in particular, to support a finding that that a significant reason for the decision not to conduct available surgery was the enduring poor quality of life that had been forced on the deceased as a direct consequence of the assault. It is not to the point that one could envisage other evidence that could have been adduced in support of the relevant inference; cf Applicant's Reply Submissions at [5]. Where, as here, the evidence presented at trial, taken at its highest, is capable of sustaining the relevant inferences, the issue must be left for the determination of the tribunal of fact.

Proposed Ground 3: Whether the directions gave rise to a miscarriage of justice

10. The trial judge correctly directed the jury as to the law in respect of the element of causation. In particular, the trial judge directed the jury that the actions of the appellant and his co-accused must have "*substantially*" or "*significantly*" contributed to the death of the deceased; that their acts need not be the only cause of death; and that the jury should approach the question in a common sense and practical way, bearing in mind that they were considering criminal responsibility for homicide, and taking into account all of the facts, including the deceased's injuries, the evidence of the deceased's condition before and after the assault, and the evidence of the experts: CCA at [60]; CAB at 33. Her Honour drew the jury's attention to the evidence that there was more than one medical condition that was present at the time of death and emphasised to the jury that they must determine whether the act(s) of the appellant remained an "*operating and substantial cause of death*" as at the time that the deceased died: CCA at [60]; CAB at 33. [RWS at [56] – [57]].

11. The appellant does not contend that these directions were legally erroneous. Rather, the appellant contends that the trial judge erred in failing to "*adequately*" relate the issues and the evidence to those legal principles. It is necessary for the appellant to demonstrate that any such failure produced a miscarriage of justice.

12. The adequacy of the directions must be assessed against the issues raised in the trial. Defence counsel submitted that the primary pathway was not established because the injury was not traumatic (that is, that a cancerous fracture to the hip could not be excluded), and that the alternative pathway was not established because the reasons for the decision not to operate were not clear: CCA at [58]; CAB 165 - 166. These issues were both highlighted by the trial judge in the summing up: CAB at 72.

13. Further, the jury were correctly directed that the question was whether the ongoing injuries from the assault substantially or significantly contributed to death. Regardless of the pathway being considered by the jury, the application of these directions enabled the jury to correctly determine the element of causation. The appellant has not established that the directions gave rise to a miscarriage of justice.

Ground 2: Whether the CCA failed to address the appellant's sole ground of appeal

14. The alternative pathway was that a significant reason for the decision not to operate was the enduring poor quality of life sustained by the deceased as a direct consequence of the assault. In ground 2, the appellant contends that the CCA failed to address whether there was evidence to support this pathway, but rather erroneously proceeded on the basis that the deceased "could not" be surgically treated (that is, there was no choice to be made; surgery simply could not be undertaken).

15. The CCA's use of the terms "*could not*" be surgically treated (CCA at [93]; CAB at 176) and "*inability to surgically treat*" (CCA at [99]; CAB at 178), when read in context of the judgment as a whole, do not demonstrate the error alleged by the appellant. The CCA correctly summarised the respective arguments of each party, which were founded on the "decision" not to operate: CCA at [82] and [83]; CAB at 172 - 173. Further, the CCA's final conclusion referred to the "*ultimate decision not to operate at Prince of Wales Hospital which referred back to the earlier decision at St Vincents*": CCA at [100]; CAB at 179. It was by taking into account these "decisions" (amongst other evidence) that the CCA found that there was evidence capable of supporting the alternative pathway. [RWS at [40]–[46].]

16. When viewed as a whole, it is clear that the CCA's use of those terms simply referred to the inability of medical staff to operate once the deceased's son and medical staff had made the decision that there would be no surgical intervention. Once the decision had been made that there would not be surgical intervention there was an "*inability to surgically treat*".

Appropriate orders

17. The appeal should be dismissed for the reasons outlined above. If, contrary to the above, this Court found grounds 1 and/or 3 to be established, the appropriate order would be for the appeal to be allowed and for a retrial to be ordered. If this Court were to find that ground 2 alone is established, the appeal should be dismissed. There could be no purpose in remitting the matter to the CCA to consider the sufficiency of the evidence to support the alternative pathway when this Court has considered the sufficiency of the evidence itself.

Dated: 13 February 2020

L Babb SC
Director of Public Prosecutions (NSW)