

BETWEEN:

**Paul Ian LANE**  
Appellant

and

10 **The Queen**  
Respondent

### APPELLANT'S OUTLINE OF ORAL ARGUMENT

#### Part I:

1. This outline is in a form suitable for publication on the internet.

#### Part II:

20 **The error at trial**

2. The indictment alleged murder: **CAB2**. The jury found the appellant not guilty of murder and guilty of the alternative offence, manslaughter: **CAB174**.
3. The appellant's liability for manslaughter required proof beyond reasonable doubt that he did an act causing the death of the deceased: ss 18(1)(a) and (b), 24 *Crimes Act 1900* (NSW) **JBA6-7**. Identification of the act causing death fed into the other elements of the offence: Meagher JA and Davies J "the majority" at [24] **CAB216**, Fagan J at [134]-[140] **CAB254-8**.
- 30 4. The Crown prosecutor alleged in his opening that the act causing death was a deliberate blow or punch which caused the deceased to impact heavily with the ground: T12.10-.30 **AFM(1)13**, T13.49-14.38 **AFM(1)14-5**.
5. Dr Little's evidence at trial raised an issue as to which fall resulted in death: T524.26-525.8, T525.21-.24 **AFM(2)525-6**, T526.13-.16 **AFM(2)527**, T533.3-.27 **AFM(2)534**.
- 40 6. In closing the Crown prosecutor relied upon two discrete acts – an act of the appellant causing death by reason of the first fall and an act of the appellant causing death by reason of the second fall: the majority at [42] **CAB222**; Fagan J at [125]-[129] **CAB251-2**; T609.24-611.10 **AFM(2)618-20**, T613.15-614.42 **AFM(2)622-3**. Issue was joined on this basis: defence closing T631.1-.13 **AFM(2)640**, T640.31-641.5 **AFM(2)649-650**.
7. The jury were directed that either discrete act of the appellant could found criminal liability for murder or manslaughter: the majority at [37]-[41] **CAB220-2**; Fagan J at [145]-[152] **CAB259-61**; SU 32-35 **CAB36-9**, SU 39 **CAB43**, SU103-4 **CAB107-8**, SU109 **CAB113**, SU139 **CAB143**.

8. No direction was given that the jury had to be unanimous as to the actus reus. The unanimity direction that was given to the jury, if anything, suggested otherwise: the majority at [43] **CAB222**, Fagan J at [153]-[154] **CAB261-2**; SU 17-19 **CAB21-3**.

**Nature of the error and application of the proviso**

9. The trial judge's directions were erroneous because they enabled the jury to return a verdict of guilt without being unanimous as to the actus reus of the offence: the majority at [43]-[44], [57] **CAB222-3, 227**; Fagan J at [155] **CAB262**; *Klamo v R* (2008) 18 VR 644 at [76]-[77] **JBA340**, *S v The Queen* (1989) 168 CLR 266 at 276 **JBA400**, 287-8 **JBA411-2**, *AK v Western Australia* (2008) 232 CLR 438 at [102]-[104] **JBA49-50**; Appellant's Written Submissions ("AWS") at [36], [39].
10. The error resulted in uncertainty in the verdict: AWS at [42]-[49], Appellant's reply ("AR") at [8]; *S v The Queen* at 276 **JBA400**, 284 **JBA408**, 288 **JBA412**. This presents difficulties for the application of s 6(1) of the *Criminal Appeal Act JBA4* and satisfaction of the negative proposition in *Weiss v The Queen* (2005) 224 CLR 438 at [44] **JBA431**.
11. The error in the appellant's case meant that it could not be concluded no substantial miscarriage of justice had actually occurred notwithstanding the majority were satisfied of the appellant's guilt beyond reasonable doubt in respect of the second fall: Fagan J at [175] **CAB271**, [194] **CAB 278**; AWS at [29]-[49]; AR at [4]-[9]; cf. the majority at [56]-[59] **CAB227-8**.
12. *Weiss and Kalbasi v Western Australia* [2018] HCA 7 contemplate errors that involve substantial miscarriages of justice notwithstanding the appellate court is satisfied of the appellant's guilt beyond reasonable doubt: *Weiss* [45] **JBA431**, *Kalbasi* at [15], [16] **JBA264, 265**; see also *AK* at [23], **JBA19-20** [53]-[56] **JBA27-8**, *Evans v The Queen* (2007) 235 CLR 521 at [50], *Handlen v The Queen* (2011) 245 CLR 282 at [3], [42]-[47] **JBA195, 205-6**; AWS at [32]-[35], AR at [4]-[8].
13. The uncertainty in the verdict and the natural limitations of the record prevented the appellate court from being satisfied of the appellant's guilt beyond reasonable doubt: *Collins v The Queen* [2018] HCA 18 at [36]; *Kalbasi* at [15] **JBA264**; AWS at [52]-[53].

**The majority's erroneous application of the proviso**

14. The majority's conclusion that the application of the proviso was not precluded was based on satisfaction that there was no case on the first fall and they were satisfied beyond reasonable doubt of guilt on the second fall, an irrelevant consideration: the majority at [56]-[60] **CAB227-8**; cf. *Weiss* at [45]; AWS at [49].
15. The majority concluded there was no substantial miscarriage of justice by reasoning that a basis of liability which was put by the Crown and expressly left by the trial judge was not open to be put and could not, as a matter of law, sustain a verdict of guilt (in respect of the first fall): the majority at [41]-[44], [49]-[55], [58]-[60] **CAB222-8**, AWS at [61]; *Handlen v The Queen* (2011) 245 CLR 282 at [3] **JBA195**, [47] **JBA206**, *Cooper v The Queen* (2012) 87 ALJR 32 at [28]-[30].

16. The majority purported to return their own verdict of guilt in respect of the second fall: AWS at [49].
17. The majority's analysis involved speculation as to how the jury or a hypothetical jury would or should have reasoned to guilt had there been no error: the majority at [49]-[55], [57]-[60] **CAB224-8**; cf. *Weiss* at [35], [36], [39], [43] **JBA428-9, 431**, *Kalbasi* at [12] **JBA263**, *Baini v The Queen* (2012) 246 CLR 469 at [33]; AWS at [60].
- 10 18. In considering the proviso, the majority failed to consider the evidence adduced at trial in the context of the Crown case, the joinder of issue and the trial judge's directions: *Kalbasi* at [57]-[58], [60] **JBA278-9**, *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at [28] **JBA70**; AWS at [55], [56], AR at [3], [9]-[10]; see above at [2]-[8].
19. The majority failed to acknowledge the limitations of the verdict in light of the error and the natural limitations of proceeding wholly on the record: *Weiss* at [41], [43] **JBA430-1**, *Kalbasi* at [15] **JBA264**, *Baiada* at [28], **JBA70**; AWS at [52]-[53].
- 20 20. The majority failed to consider whether the appellant did an act causing death given their Honours' conclusion that a case based on the first fall was not open: see T517.21-.28 **AFM(2)518**, T524.26-525.8, T525.21-.24 **AFM(2)525-6**, T526.13-.16 **AFM(2)527**, T533.3-.27 **AFM(2)534**, SU 32-33 **CAB 36-37**, SU 35-39 **CAB 39-43**, the majority at [37] **CAB220**, [54] **CAB226**, [59], [60] **CAB228**.
21. In the alternative, it was erroneous for the majority to conclude that a case based on the first fall was not open as a matter of law and that it was not open to the jury to entertain a doubt as to the appellant's guilt in respect of the second fall: the majority at [50]-[55], [59]-[60] **CAB224-8**, AWS at [56]-[59], AR at [11]-[13].

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