IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY No. S308 of 2017

BETWEEN: **PAUL IAN LANE**
Appellant

and

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Part I: CERTIFICATION

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

Part II: STATEMENT OF ISSUES

2. Was the majority of the Court of Criminal Appeal (CCA) correct to apply the proviso to dismiss the Appellant's appeal against his conviction?

3. The issue (AS [2]) identified by the Appellant is based on an incorrect premise. The CCA did not conclude that the direction as to unanimity was necessary "*as a result of the evidence adduced at the trial*". Rather, that conclusion was based on the manner in which the Crown presented its case, without any consideration of the evidence.

Part III: NOTICE UNDER s 78B OF THE *JUDICIARY ACT 1903*

4. The Respondent considers that no notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

Filed on behalf of the Respondent by:
C Hyland, Solicitor for Public Prosecutions (NSW)
Level 17, 175 Liverpool Street
Sydney NSW 2000
DX 11525 Sydney Downtown

Date of this document: 1 March 2018
Ref: Marley Zelinka
Telephone: (02) 9285 8681
Facsimile: (02) 9285 8964
Email: mzelinka@odpp.nsw.gov.au

Part IV: FACTUAL MATTERS IN CONTENTION

5. The facts are accurately summarised in the judgment of Meagher JA and Davies J, the majority in the CCA below (CCA [6]–[17], [51]–[53], AB 211–214, 225–226 and see CCA [114] AB 246 in the judgment of Fagan J).

6. The way in which the evidence at trial is described is important to the respective submissions of the parties (AS [52]–[59]).

7. The CCTV footage of the incident was viewed by the CCA. What is depicted on the footage is accurately summarised by the Court below (first fall: CCA [51] AB 225, [114] AB 246; second fall: CCA [52] AB 225, CCA [114] AB 246). Those descriptions are not challenged.

8. The CCTV footage of the first fall shows there was no physical contact by the Appellant immediately preceding that fall. There was also no eyewitness evidence of any physical contact by the Appellant with the deceased which could have led to the first fall. However, in relation to the second fall, two eyewitnesses, Mr Cupitt and Ms Livingstone, gave evidence that they saw the Appellant punch the deceased. Mr Marsh gave evidence that he saw the Appellant swing his arm at the deceased and then saw the deceased fall backwards and hit his head on the roadway, although he did not see the arm connect. The evidence is consistent with the CCTV footage of this incident. Mr Perkins described hearing the sound of a punch and turned to see one of the men falling backwards (CCA [53] AB 226, and see CCA [114] AB 246 per Fagan J). Whilst Mr Armstrong gave evidence that he saw three punches (the second of those to Mr Schwager), his evidence is inconsistent with the CCTV footage, his view was obscured and his observations limited, and he only saw the deceased fall for the second time.

9. At the post mortem, two significant head injuries to the deceased were described. In the opinion of the forensic pathologist, Dr Little, the injuries to the left side of the face and head, and separately to the back of the head, were each consistent with two separate falls on to the roadway.[1] There was no externally visible injury to the right side of the face, however upon post mortem examination there was bruising of the masseter (jaw) muscles consistent with a blow to the right side of the deceased's face.[2]

10. The Respondent agrees with the Appellant's narrative statement of the facts subject to the matters set out below. In particular, in so far as the Appellant attempts to attribute some

[1] TT 524.37–526.16 AFM 525–527; CCA [54] AB 226.
[2] TT 520.26–521.30 AFM 521–522; CCA [54] AB 226.

evidence as acts relating to the first fall (e.g. AS [14], [16]), that is inconsistent with the eyewitness evidence, the CCTV and all members of the Court below. Moreover, some suggestions that witnesses have been inconsistent such that their account cannot be relied upon (e.g. AS [12]) are not borne out by a proper reading of the evidence.

The evidence

11. As noted above, two witnesses, Mr Cupitt and Ms Livingstone, gave clear evidence of seeing the Appellant hit the deceased in the face, immediately prior to his second fall to the roadway.[3]

12. Mr Cupitt saw the Appellant walking down the road before the incident began and described him with his arms outstretched as though he was putting on a jacket.[4] In terms of the incident itself, his attention was drawn to it by yelling or raised voices.[5] He did not see the first fall. He saw the Appellant punch Mr Schwager in the face, and Mr Schwager fall against the telegraph pole.[6] He saw the deceased (who was standing on the road) and the Appellant move towards one another and he saw the Appellant punch the deceased in the face and "*he went backwards onto the ground and I heard his head hit the bitumen with a rather loud crack*".[7] This witness did not see him attempt to break his fall. Contrary to the Appellant's contention (AS [12]), this witness did not "*deny*" seeing "*pushing and shoving*" before the punch but stated that he could not remember clearly.[8] In cross examination, when the terms of his statement were put to him, he adopted them.[9] The witness demonstrated the punch to Mr Schwager using his right hand.[10] When he was asked in cross examination which arm the Appellant used to punch the deceased he initially said "*I am not too sure*" and then "*left, I think*" and then "*either left or right*".[11] He did not express any uncertainty about seeing a punch to the face of the deceased which caused him to fall onto his back and hit the back of his head on the road (cf: AS [12]).[12]

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[3] The assertion that it was before the second fall is not made by the witnesses, who did not necessarily see the first fall, but by inference drawn from all of the evidence.
[4] TT 276.45–277.35 AFM 277–278.
[5] TT 280.12-35 AFM 281.
[6] TT 280.40-45 AFM 281.
[7] TT 284.1-23 AFM 285.
[8] TT 281.29-50 AFM 282.
[9] TT 299 AFM 300.
[10] TT 282 AFM 283.
[11] TT 305–307 AFM 306–308.
[12] TT 307 AFM 308.

13. Ms Alicia Livingstone was acquainted with both the Appellant and the deceased, as well as with Mr Schwager.[13] The first thing she saw was the Appellant hit the deceased, the deceased "*fall and hit the gutter*", and the Appellant "*walk away*".[14] She did not see the deceased move at all after this.[15] She therefore saw the second fall. Ms Livingstone did not "*change her evidence*" concerning the way in which the deceased was struck by the Appellant (cf: AS [15]). In her evidence in chief, the witness gave a demonstration of a closed fist strike, using her left hand, and connecting with the left temple area of her own face.[16] In cross examination it was put to her that she had given evidence that the Appellant had hit the deceased on the left temple area. The witness clarified that she had intended to convey that the Appellant had used his left hand but that because of their relative positions, namely, opposite one another, the Appellant's fist contacted the deceased on the right side of his face.[17] In her statement to police she had described the Appellant using his left arm to hit the deceased.[18]

14. Mr Marsh saw the Appellant when he was walking down the road. He saw him swing at Mr Schwager, and Mr Schwager fall against the telephone pole. He described seeing the Appellant take a "swing" at the deceased, but did not see the punch connect.[19] He saw the deceased fall backwards onto the road and hit his head, and not move after this. He therefore saw the deceased's second fall. He maintained this account in cross examination.[20] He did not recall seeing the interaction by the shop front or the first fall.[21]

15. Mr Armstrong recognized the deceased as *"Pete from Repco"*. He recalled seeing him and Mr Schwager sitting on the gutter as the events commenced.[22] The trial judge told the jury that the CCTV footage "*is directly contradictory of how Mr Armstrong has described the events starting in that passage, and you might think that the only conclusion that you can come to about that is that he must be wrong when he says he saw the whole of the event from the outset.*"[23] Although Mr Armstrong referred to the deceased receiving "*the third*

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[13] TT 379–382 AFM 380–383.
[14] TT 382.42-50 AFM 383.
[15] TT 387.8-12 AFM 388.
[16] TT 383.9-32 AFM 384.
[17] TT 395.32-40 AFM 396.
[18] TT 393.49–394.41 AFM 394–395.
[19] TT 312.44-50 AFM 313.
[20] TT 342.6-48 AFM 343.
[21] TT 338.23–339.7 AFM 339–340.
[22] TT 461.7-34 AFM 462.
[23] SU 82 AB 86.

punch",[24] the trial judge commented in the summing up that in fact Mr Armstrong didn't actually see that punch connect, nor did he see the deceased fall, but that he heard a noise that sounded like he fell. He saw the Appellant walk away. The trial judge told the jury "*it is a matter for you to assess ... [but] the only punch he clearly describes is the one on Mr Schwager*".[25]

16. Mr Perkins was 18 years old at the time of the events and was in the company of Mr Armstrong. He gave evidence that his attention was first attracted by "*a noise, like of someone being hit*".[26] Whilst in evidence in chief he did at some point appear to assert that he saw the Appellant strike the deceased,[27] he could give no further detail,[28] and it was clear after cross examination that he did not see the punch, but only saw the deceased fall to the ground.[29] He saw Mr Schwager struck by the Appellant.[30] He did not see the deceased get up after he fell to the ground.[31] In summarising Mr Perkins' evidence to the jury, the trial judge said:[32]

> "*...it is a matter for you and your judgment, but if one even looks at that evidence-in-chief from Mr Perkins, then fitting it in with the other evidence that you have heard in the case and I will get back to it, including exhibit C, then you might think at the very best, Mr Perkins heard the sound of Mr Morris falling the second time, when some witnesses have said there was a loud crack and that when he turned around he saw that second interaction between Mr Schwager and the accused with Mr Schwager going back down against the post. ...*
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> *Now, looking at the nature of that evidence, it is probably not necessary to go through Mr Young's cross-examination, but for completeness sake, I should ...*
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> *... you are entitled to assess that evidence for yourselves but looked at objectively and in the light of all the other evidence, I suggest to you, by way of comment, that that is evidence you should reject. That is to say you should reject any suggestion that Mr Perkins saw Mr Morris being punched.*"

17. The Appellant did not give evidence.

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[24] TT 20 AFM 465.
[25] SU 83–84 AB 91–92.
[26] TT 349.13-15 AFM 350.
[27] TT 349.25-39 AFM 350.
[28] TT 351.17-45 AFM 352.
[29] TT 359.1–359.49 AFM 360.
[30] TT 361.4-6 AFM 362.
[31] TT 359.30–360.8 AFM 360–361.
[32] SU 96.38-50 AB 100, SU 97.10-12 AB 101 and SU 98.12-20 AB 102.

18. The CCA correctly found that none of the eyewitnesses who gave evidence of the Appellant striking the deceased saw the first fall (CCA [50] AB 224–225, [114] AB 246). Fagan J (in dissent) also held at CCA [114] AB 246:

> *"In the present case the Crown's only evidence of how the deceased's head first came to strike the roadway was closed circuit television ("CCTV") footage. This was open to interpretation by the jury as not showing any physical contact from the appellant nor any other action on his part which led to the fall. There was no eyewitness to the first fall whose observations could support a conclusion that the appellant had caused it by a voluntary act. In contrast a later segment of the CCTV footage could sustain a jury finding that it showed the appellant delivering a powerful and well directed punch to the deceased's head, causing him to fall and strike his head on the ground the second time. Four eyewitnesses directly supported this ..."*

The course of the trial

19. While it is accepted that when the Crown closed its case, it was on the basis of an "*act or acts*" by the Appellant which caused the death (CCA [30] AB 218), an overall reading of the Crown Prosecutor's address supports a description of an ongoing incident in which the Appellant demonstrated continued aggression, culminating in a punch. During his closing address, the Crown Prosecutor reviewed the CCTV footage. With respect to the first fall, he asserted that there was "*a blow on the way, on that route*"[33] but did not identify any eyewitness to support that submission.

20. The tenor of the closing address on behalf of the Appellant is consistent with an understanding that the evidentiary question which needed to be most closely addressed was whether the Crown could prove a punch with the requisite state of mind preceding the second fall.[34] The Appellant submitted that the footage demonstrated that there was no physical proximity between the deceased and the Appellant at the time of the first fall, and that the only explanation for the first fall was that the deceased tripped.[35]

21. While the trial judge's oral directions referred to either fall, the detailed summing up of the trial judge made it plain that the evidence relating to the strike was referable to the second fall. Having reviewed in detail the evidence of the eyewitnesses, in the context of the CCTV footage, the trial judge said (CCA [39] AB 221):[36]

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[33] TT 614.5 AFM 623.
[34] TT 641.30-50 AFM 650.
[35] TT 640.30-43 AFM 649.
[36] SU 103 AB 107.

> *"The first issue is are you satisfied beyond reasonable doubt that it was a deliberate act of Mr Lane's that caused Mr Morris to fall on either occasion that he fell. The way it is put is that the Crown would say to you, well despite what might be said about the limitations of some of the witnesses, intoxication, disadvantage of their position, you have got at least three witnesses[37] as I said who say the fall, probably the second fall, was preceded by a punch and if you accept their evidence that is enough for the Crown to discharge their onus of proof provided you are satisfied beyond reasonable doubt that that is what happened. On the other hand the defence say or would say, how can you be satisfied that is what happened, how can you accept the evidence of those three witnesses when you look at all the detail of the evidence of all five eye witnesses. They are all over the shop, they are all intoxicated and not all of them see, or could see, what they said they saw."* [emphasis added]

Part V: ARGUMENT

22. The CCA concluded that, on the Crown case as left to the jury, there were two discrete acts which were said to have caused death (CCA [42] AB 222). On that basis, the Court concluded that the jury should have been directed that it was necessary for them to be unanimously agreed as to the voluntary act which resulted in their satisfaction of the Appellant's guilt (CCA [44] AB 222). In reaching that conclusion the Court did not address the evidence, or whether there was evidence in support of each act.

23. The Appellant's argument is twofold: *first*, that the nature of the error is one to which the proviso cannot apply (AS [28], [29]–[49]), and *second*, in the alternative, if the application of the proviso is available, that the assessment of the evidence by the majority is attended by error (AS [50]–[61]). Neither contention should be accepted.

24. The approach contended for by the Appellant is contrary to the authority of this Court which repeatedly states that when considering the application of the proviso, an appellate court should address itself to its statutory task, namely, to determine whether or not a "*substantial miscarriage of justice has actually occurred*".[38] Consideration of the application of the proviso begins by identifying the error that was made at trial.[39] In assessing the effect of the error, an appellate Court is not only entitled, but required, to assess the evidence at trial in

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[37] Earlier nominated by His Honour as Mr Cupitt, Ms Livingstone and Mr Armstrong (SU 102 AB 106).
[38] *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at [23]–[25]; *Reeves v The Queen* (2013) 88 ALJR 215 at [51].
[39] *Baiada Poultry Pty Ltd v The Queen* (supra) at [30].

the context of the true issues joined at trial. This approach was properly undertaken by the majority below.

25. For the reasons set out below, the conclusions by the majority as to the evidence at the trial (and the significance of that evidence to the jury verdict) were correct; it is to be observed that Fagan J's assessment of what the evidence was able to establish factually was consistent with that of the majority in the CCA.

26. Moreover, the Appellant cannot properly contend that there was evidence which was capable of establishing any act by the Appellant to found a conviction in relation to the first fall.

10 27. In that context, the contention which underpins the Appellant's submission (e.g. AS [36]), namely, that some jury members may only have been satisfied of guilt in relation to the first fall, must be based on the (unstated) premise that some of the jury did not follow the directions of the trial judge concerning the need to be satisfied beyond reasonable doubt that the Appellant struck the deceased before they could find the physical element of the offence made out. To put that another way, the submission is premised on the basis that the jury may have acted unreasonably.

28. There is no basis to conclude that the jury did anything other than follow the directions of the trial judge.[40] The assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge is fundamental to the system of trial by jury.[41]

20 Categorisation of the error as one to which the proviso cannot apply

29. The CCA correctly concluded that the failure to give the unanimity direction is not an error to which the proviso cannot apply.

30. Contrary to the Appellant's contention (AS [26]), the majority did not reach this conclusion by simply considering whether the error came within a particular list of "examples". Rather, they gave consideration to whether the error identified offended the principles expressed within the relevant authorities (CCA [57] AB 227). The majority adopted the correct approach to the application of the proviso, namely, by addressing whether there had been a

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[40] *Gilbert v The Queen* (2000) 201 CLR 414 at 425; *Dupas v The Queen* (2010) 241 CLR 237 at [26]–[29].

[41] *Gilbert v The Queen* (supra) at 425, in which McHugh J observed "*Put bluntly, unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials*"; *Dupas v The Queen* (supra) at [26]–[29].

"*substantial miscarriage of justice*" in the particular case under consideration.[42] This necessarily involved a consideration of the effect of the identified error in this case.

31. Despite eschewing the categorisation of errors (AS [34]), the Appellant's submission is dependent on adopting that very approach. The Appellant's characterisation of the error as one resulting in trial in which the jury has "*never performed its function of determining the appellant's guilt with respect to a particular offence*" (AS [41]) seeks to place the error into a category of cases to which the proviso can never apply. That approach is incorrect.

32. First, the approach is inconsistent with authority. In order to assess whether the proviso can apply it is necessary to "*put the particular misdirection into the whole context of the trial*".[43] As this Court observed in *Baiada Poultry v The Queen*:[44]

> "*... it is neither possible nor useful to attempt to argue about the application of the proviso by reference to some supposed category of 'fundamental defects' in a trial. To do so distracts attention from the necessary task of statutory construction. The question presented by the proviso is whether there has been a 'substantial miscarriage of justice.'*"

33. In *Baiada*, this Court affirmed the fundamental proposition from *Weiss v The Queen*[45] that the task of determining whether no substantial miscarriage of justice has actually occurred must be undertaken on the whole of the trial record including the jury's verdict, the significance of which is to be assessed with proper regard to the issues the jury were directed to decide.

34. In *Reeves v The Queen,*[46] this Court reaffirmed the correctness of the application of the proviso in circumstances in which the jury had been misdirected on a critical element of liability. In rejecting the Applicant's contention that a misdirection concerning an element of liability is necessarily productive of a substantial miscarriage of justice, French CJ, Crennan, Bell and Keane JJ said:[47]

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[42] *Baiada Poultry Pty Ltd v The Queen* (supra) at [23].
[43] *Krakouer* v *The Queen* (1998) 194 CLR 202 at [24].
[44] *Baiada Poultry Pty Ltd v The Queen* (supra) at [23] (French CJ, Gummow, Hayne and Crennan JJ).
[45] *Weiss v The Queen* (2005) 224 CLR 300; *Baiada Poultry Pty Ltd v The Queen* (supra) at [27]–[28] (French CJ, Gummow, Hayne and Crennan JJ).
[46] (2013) 88 ALJR 215.
[47] *Reeves v the Queen* (supra) at [51]; see also *Krakouer v The Queen* (supra) at [23]; and see *Darkan v The Queen* (2006) 227 CLR 373 at [84]–[85], [94]–[95] where the proviso was applied in circumstances where there was a misdirection in respect to one (of the three) bases of liability which was left to the jury.

> *"The modifier 'actually' makes clear that the appellate court is to determine whether the error in this trial 'in fact' occasioned a substantial miscarriage of justice. This requires consideration of the issues at the trial."*

35. The majority correctly approached their task on the basis that it was necessary for the appellate court to determine whether the error in this trial *actually* or *in fact* occasioned a substantial miscarriage of justice.[48] The approach that the majority of the CCA took in this case was in accordance with correct legal principle.

36. Second, the Appellant's reliance upon the approach taken by Fagan J (AS [30]–[31]) is misplaced. Fagan J concluded that it was appropriate to "*commence [a consideration of the proviso] by determining whether the error involved such a 'significant denial of procedural fairness' or such a 'serious breach of the presuppositions of the trial' that the proviso would not be applied*", and to omit what his Honour described as the "*intermediate step*" of examining the trial record for the purpose of concluding whether guilt was proved (CCA [174] AB 271). That approach is inconsistent with authority of this Court.[49]

37. The passages from *Baiada* cited by Fagan J (CCA [183], [186] AB 273–275) do not support the approach his Honour adopted. Indeed, his Honour's approach to *Baiada* ignores the Court's analysis of whether the proviso applied in that case, which reflected an assessment of the evidence, with the Court addressing the question of whether it could be satisfied on the record that the charge laid was proved beyond reasonable doubt.[50]

38. Third, the Appellant's attempt (AS [43]–[48]) to call in aid such cases as *S v The Queen*,[51] *Johnson v Miller*[52] and *Walsh v Tattersall*,[53] is misconceived. The uncontroversial propositions as to importance of certainty in pleadings and in the verdict, say nothing about whether, in this particular case, there has been a substantial miscarriage of justice.

39. The Appellant did not argue at trial that there was latent duplicity in the charge. Nor could a submission of latent duplicity or uncertain pleadings have been maintained. Moreover, the present case is not comparable to the circumstances in *S v The Queen* upon which the Appellant relies (cf: AS [47]–[48]). In *S*, the complainant asserted that her father had sexual

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[48] *Weiss v The Queen* (supra) at [35]; *Reeves v the Queen* (supra) at [51]; *Baiada Poultry Pty Ltd v The Queen* (supra) at [23]–[25].
[49] *Baiada Poultry Pty Ltd v The Queen* (supra) at [23]–[25]; *Reeves v The Queen* (supra) at [51].
[50] *Baiada Poultry Pty Ltd v The Queen* (supra) at [30]–[39], in particular at [39]. Fagan J stated he was applying [21] and [22] of *Baiada* (CCA [189] AB 276).
[51] (1989) 168 CLR 266.
[52] (1937) 59 CLR 467.
[53] (1996) 188 CLR 77.

intercourse with her numerous times over the periods provided for in the indictment but was unable to provide details or dates of any one occasion, and despite an application at trial, the trial judge did not require the Crown to particularise the acts upon which it relied.[54] The gravamen of the error was what flowed from that in terms of the admission of evidence, the appellant's difficulty in presenting a defence or testing the Crown case and a real likelihood that the jury could or did convict without being satisfied beyond reasonable doubt of one particular act, but rather a general disposition to commit the acts alleged.[55]

40. In reaching their conclusions on the question of whether there was a substantial miscarriage of justice in *S*, their Honours did not apply a bare principle (namely, where there is or may be latent ambiguity the proviso cannot apply), but rather analysed the evidence and addressed themselves to whether the various unfairness that may occur as a result of inadequate particulars did manifest in the circumstances of that case.

41. Fourth, similarly, the Appellant's reference to *AK v Western Australia*[56] and *Krakouer v The Queen*[57] does not advance his argument. Indeed, each case reflects that, in contrast to the manner in which the Appellant presents his argument, the application of the proviso turns on the particular circumstances of the given case.

42. For example, the decision of this Court in *AK v Western Australia* concerned the failure of a trial judge, sitting alone, to give adequate reasons for a verdict of guilt. The conclusion of the majority as to why the proviso could not apply was expressed by Gummow and Hayne JJ:[58]

> *"In every case it will be necessary to consider the application of the proviso (and here s 30(4)) taking proper account of the ground or grounds of appeal that have been made out and which, but for the engagement of the proviso, would require the appellate court to allow the appeal. In the present case there were two features of the error identified as occurring at trial which are important in deciding whether the Court of Appeal could conclude 'that no substantial miscarriage of justice has occurred'. First, s 120(2) of the Criminal Procedure Act required the reasons to articulate the connection identified between the relevant legal principle (in this case, proof beyond reasonable doubt) and the relevant findings of fact. Second, the*

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[54] *S v The Queen* (supra) at 268.
[55] Dawson J at 276, Toohey J at 283, Gaudron and McHugh JJ at 287-288; also Brennan J who, although dissenting in the result, carried out a similar analysis to come to a different conclusion at 271.
[56] (2008) 232 CLR 438.
[57] (1998) 194 CLR 202.
[58] *AK v Western Australia* (supra) at [55]. Heydon J agreeing in a separate judgment that the proviso could not apply at [110]; Gleeson CJ and Kiefel J would have dismissed the appeal and did not agree that the proviso could not apply at [26]–[27].

> *particular failure that was identified related to the central issue in the appellant's trial on the counts of indecent dealing and was constituted by the complete failure to articulate any of the reasoning by which the trial judge reached the ultimate conclusion that the appellant was guilty of each of those charges."*

43. The circumstances in which the Court in that case concluded that the error to which the proviso could not apply were the importance of the statutory requirement for reasons in a judge alone trial,[59] and the evidentiary significance of the issue upon which the trial judge completely failed to provide any reasons for his conclusion. Although the Court determined that the proviso could not apply in that case, it was not on the basis of it falling into a particular category.

44. In relation to *Krakouer*, the Appellant relies upon statements in the dissenting judgment of McHugh J to support his contention that the error in this case is to be characterised as one in which, by reason of the misdirection, the jury never performed its function of determining the appellant's guilt with respect to a particular offence (AS [41]). However, that reasoning was not accepted by the plurality. Rather, the decision of the plurality in *Krakouer* confirms the appropriateness of the approach of the CCA in the present case.

45. In *Krakouer* the jury was erroneously directed as to an element of the offence (namely, told that a relevant "deeming" provision was applicable to a charge of conspiracy to supply prohibited drugs). Gaudron, Gummow, Kirby and Hayne JJ concluded:[60]

> *"We do not accept that the proceedings against the appellant were fundamentally flawed or 'have so far miscarried as hardly to be a trial at all'. Each of the matters which we have mentioned (the fact that the misdirection concerned an element of the offence, occurred at the end of the trial and reversed the onus of proof) may invite the most careful attention to whether the proviso can be applied; each of these matters may be said to suggest that the jury may have been led into a false or unsafe chain of reasoning."*

46. The majority did not apply the proviso, but only after a detailed analysis of the impact of the erroneous direction upon the evidence and the issues at the appellant's trial.[61]

47. The error to which the question in the present case is directed is the failure of the trial judge to direct the jury that they must be unanimous as to the act causing death, in circumstances in which the case had been left on the basis of either fall. Contrary to the Appellant's

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[59] As to which see *AK v Western Australia* (supra) at [104]–[105] per Heydon J.
[60] *Krakouer v The Queen* (supra) at [23].
[61] *Krakouer v The Queen* (supra) at [24] and [36]–[37].

submission, this error did not produce the result that the jury "*never performed [its] function*" of determining the Appellant's guilt with respect to a particular offence in the sense in which Gibbs J made that finding in *Quartermaine*[62] (AS [38]). In *Quartermaine* the jury were directed as to the elements of a different offence from the one for which the accused was tried.

48. The majority of the CCA in the present case correctly approached its task on the basis that it was necessary for the appellate court to determine whether the error in the trial *actually* or *in fact* occasioned a substantial miscarriage of justice.[63]

49. Placing the error into context requires an analysis of the evidence as well as the issues which were joined at trial. For example, in *Reeves,* the erroneous misdirection concerned the meaning of "*informed consent*" in circumstances in which proof of the complainant's consent to the medical procedure performed was the central issue at the trial and about which the jury had asked a question during their deliberations.[64] This Court held that the error in the directions lay in the risk that the jury might incorrectly reason to guilt even if the jury considered that it was reasonably possible that the complainant understood in broad terms the nature of the operation, on the basis that the appellant had not explained the possible major consequences of the surgery or any alternative treatments to her.[65] Despite this, the appeal was dismissed on the basis that the NSW CCA had correctly applied the proviso. The plurality concluded:[66]

> *"[Bathurst CJ] noted that the prosecutor had referred in her closing address to the fact that [the complainant] was not told of the difficulty that she may have with urination in consequence of the surgery. His Honour continued: 'but it does not seem to me that that cross-examination or that reference would lead to a real likelihood that the jury convicted on the grounds that although [the complainant] was informed of the nature and extent of the operation, she was not informed that subsequent to it she would have difficulties in urination.'"*

50. A proper analysis of the evidence at this trial makes it clear that there was no reliable evidence of a strike or blow by the Appellant with respect to the first fall, and where the CCTV reflects there was no relevant contact, the Crown Prosecutor's references to "*a blow*"

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[62] (1980) 143 CLR 595.
[63] *Weiss v The Queen* (supra) at [35]; *Reeves v The Queen* (supra) at [51]; *Baiada Poultry Pty Ltd* (supra) at [23]–[25].
[64] *Reeves v The Queen* (2013) 88 ALJR 215 at [4], [41].
[65] *Reeves v The Queen* (supra) at [39].
[66] *Reeves v The Queen* (supra) at [40], and see [52]–[58].

and "*an act or acts*" were not such as to lead the jury to reason to guilt based on the first fall in the absence of evidence of a punch or strike at trial.[67]

The application of the proviso by the majority

51. The assessment of the evidence and the application of the proviso by the majority of the Court is correct. Indeed, the assessment of what the evidence was able to establish, undertaken by Fagan J, is consistent with that of the majority.

52. The Appellant accepts that the CCTV footage does not depict contact between the Appellant and the deceased prior to the deceased's first fall (AS [57]). As noted above, the Appellant at first instance submitted that the footage demonstrated that there was no physical proximity between the deceased and the Appellant at the time of the first fall, and that the only explanation for the first fall was that the deceased tripped.[68] That submission was repeated in the CCA.[69]

53. The Appellant now contends that the jury might have reasoned to guilt on the basis that the first fall was caused by the deceased's retreat, moving backwards, in the face of the Appellant's advance (AS [57]).

54. It may have been the case that the jury found that the deceased tripped and fell in the course of his retreat from the Appellant's advance. However, there was no basis upon which the jury could have found the "*appellant's advance*" to constitute a voluntary act for the purposes of satisfying an element of the offence. The Crown did not present a case in the nature of a "*Royall*" case[70] (AS [57]), nor were the jury directed in these terms. The jury were directed both orally and in writing in terms of a "*strike*".[71] Furthermore, the required "*voluntary act*" was expressly limited to a strike. For example, in written directions under the heading "The legal elements of murder",[72] the trial judge stated:

> *"8. You must acquit Mr Lane unless you are satisfied beyond reasonable doubt that he caused the death of Mr Morris by voluntarily striking him down, not in self-defence, intending to inflict really serious physical injury....*

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[67] *Reeves v The Queen* (supra) at [58].
[68] TT 640.30-43 AFM 649.
[69] AFM 724, 796.
[70] *Royall v The Queen* (1991) 172 CLR 378.
[71] MFI 11 AFM 708–712 at [8], [10]–[11], [14], [17]; SU 103–105 AB 107–109.
[72] MFI 11 AFM 709; SU 104 AB 108.

> *10. In the way in which the issues have been presented for your decision you may not find a voluntary act unless you are satisfied that Mr Lane knocked Mr Morris down by the deliberate application of force by way of a punch, or a push or some other striking. I will refer to this as a strike. This is the first dispute for you to resolve."* [emphasis added]

55. There is no basis to contend that the jury did anything other than follow those directions given. However, relying on this factual scenario reflects an acceptance that neither the CCTV or eyewitness evidence could support any finding as to the first fall.

56. The Appellant's criticism of the approach of the majority is without foundation.

57. First, the submission (AS [55]) that the reasoning of the majority did not reflect the manner in which the trial was conducted by the Crown, ignores that the application of the proviso involves an assessment of the evidence. The submissions of the Crown prosecutor are not evidence. The jury were directed accordingly.[73] That the description of the CCTV by the majority in respect of the first fall (AS [56]) does not accord with the Crown submission, does not alter the evidence. Indeed, as noted above, the Appellant accepts the description of the CCTV as accurate (AS [57]). A submission cannot create evidence, where that evidence does not exist. The jury were directed that they were to act on the evidence. Again, there is no reason to suggest the jury did not follow the directions given.

58. Second, the submission (AS [58]) that the majority did not satisfactorily address the oral evidence by reference to the evidence of Mr Armstrong and Mr Perkins is incorrect.

59. That Mr Armstrong's evidence is inconsistent with the CCTV footage of the incident, as it plainly is, is obviously relevant to an assessment of his evidence. His evidence, and that of the other eyewitnesses, must be considered in the context of the CCTV footage, which relevantly (for this aspect of the Appellant's argument) showed the first fall with no obvious contact between the Appellant and the deceased.

60. The majority was correct to reject the evidence of Mr Armstrong on the basis that it was directly contradicted by the CCTV footage as to how the events commenced (CCA [51] AB 225). He could not have been reliably describing the commencement of the physical altercation. His evidence was also inconsistent with the evidence of the other eyewitnesses.

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[73] TT 608.7-21 AFM 617.

In so far as it is suggested by the Appellant that his evidence related to the first fall, it is inconsistent with the CCTV recording.

61. In relation to Mr Perkins, it would not be open to regard his description of a hit (which he did not in any event see, but only heard) as being referable to the first fall (cf: AS [14]). Mr Perkins' account did not provide any basis upon which the jury could have been satisfied that there was a punch preceding the first fall (cf: AS [58]).

62. Indeed, in his closing address, senior counsel for the Appellant used the evidence of Mr Armstrong and Mr Perkins as to the origins of the incident (which was plainly incorrect) as an example to demonstrate the unreliability of the eyewitnesses in the trial.[74] This is consistent with the Appellant's cross-examination of these two witnesses at trial which was directed at demonstrating the unreliability of their evidence, and that they ought not be relied on.

63. Contrary to the Appellant's contention (AS [58]), the majority correctly concluded that "*the evidence was not capable of supporting a finding beyond reasonable doubt that a deliberate act of the appellant caused the first fall*" (AS [58], [59]). Nothing in the evidence of Mr Armstrong or Mr Perkins affects the correctness of that conclusion. Fagan J also concluded that the only evidence in relation to the first fall relied upon by the Crown was the CCTV (which was open to the interpretation of not showing any physical contact), and that no eyewitnesses to the first fall could support the conclusion it was caused by a voluntary act (CCA [114] AB 246).

64. Third, the majority correctly concluded that it was not open to the jury to entertain a reasonable doubt in respect of the second fall (cf: AS [59]). That conclusion accords entirely with the CCTV footage and the eyewitness evidence (CCA [54] AB 226). While the CCTV footage did not depict the blow, it was, as Fagan J described, capable of sustaining a finding that it showed "*the appellant delivering a powerful and well directed punch to the deceased's head, causing him to fall and strike his head on the ground the second time. Four eyewitnesses directly supported this*" (CCA [114] AB 246).

65. Contrary to the Appellant's contention (AS [59]) the majority did properly consider the question of self-defence in reaching their conclusion. The Court set out the Appellant's case on self-defence (CCA [33] AB 219). The CCA had accepted the factual matters upon which the Appellant relied, finding that: the CCTV footage showed an initial scuffle on the footpath

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[74] TT 648 AFM 657.

between the deceased and the Appellant in which the deceased pushed the Appellant back against a shopfront (CCA [51] AB 225); the deceased stumbled and fell to the roadway, with no obvious contact between the men before the first fall (CCA [51] AB 225); and that with respect to the second fall "*the appellant's head appears to move back*" at the same time as the deceased fell backwards and hit his head on the roadway (CCA [52] AB 225). Having considered all of that evidence, the CCA then expressed its finding concerning self-defence in the following terms (CCA [55] AB 226–227):

> *"Finally, we are satisfied beyond reasonable doubt that in punching the deceased on this second occasion the appellant did not act in self-defence. More specifically we are satisfied to that standard that the appellant did not believe that his conduct in punching the deceased was necessary to defend himself; and that his doing so was not a reasonable response in the circumstances as he perceived them. That is so whether one has regard to all of the circumstances, or only to those immediately preceding the second fall. In each case we do not consider it was open to the jury to have concluded otherwise. After the first incident the deceased did not represent any threat to the appellant. There was nothing that prevented him from walking away. Yet he did not do so. Instead, having punched Mr Schwager he turned his attention back to the deceased, moved towards him and punched him to the ground."*

66. This was a proper consideration of the matters raised in the context of this trial. The Appellant's decision to not only remain, but also punch Mr Schwager and move towards the deceased and then punch him, were clearly matters capable of excluding self-defence. There was no evidence that the deceased had struck the Appellant or threatened him in some way prior to the punch, causing the Appellant to believe it was necessary to defend himself. The backward movement of the Appellant's head depicted in the footage was relied upon by the Appellant as indicating that the deceased may have done "*something*" to the Appellant (CCA [33] AB 219). Even if this was so, this was at the same moment as the deceased went straight backwards to the ground, suggesting that the deceased's action (if there was one) was reactive or at the very least simultaneous with the Appellant's punch. The CCA did "*properly consider*" the question of self-defence and arrived at the correct conclusion.

67. Fourth, contrary to the Appellant's contention (AS [52], [53]), the Court in conducting its assessment on the record was not limited to the evidence at trial, excluding reference to the verdict. This case is plainly distinguishable from *Handlen v The Queen*[75] where the trial was

[75] (2011) 245 CLR 282.

conducted on the basis of a principle of criminal responsibility not provided for by the *Criminal Code (Cth).*

68. Given the absence of evidence to support a verdict on the first fall, it is correct to conclude that the error had no impact on the jury verdict (cf: AS [60]). As noted above, to do otherwise would be to assume that the jury acted contrary to the evidence, and the directions given.

69. In applying the proviso, the significance to be placed upon the jury verdict in this context is discussed in *Baiada*[76] where this Court said:

> *"...the significance to be given to the fact that the jury has returned a guilty verdict must be assessed paying proper regard to what were the issues that the jury were directed to determine in order to arrive at a verdict of guilt. In the present case, it is of the first importance to recognise that the jury were not directed to consider whether the prosecution had established beyond reasonable doubt that Baiada's engagement of [the subcontractors] was not sufficient to discharge Baiada's obligation so far as was reasonably practicable to provide and maintain a safe working environment ... It follows that the verdict returned by the jury said nothing about that question."*

70. In the present case, by contrast, the jury were clearly directed not only that they needed to find a voluntary act but that the act must be a strike (or punch). The verdict returned by the jury therefore says that the jury were satisfied beyond reasonable doubt that the Appellant deliberately struck the deceased, causing him to fall and sustain a fatal injury. All of the evidence concerning a punch related to the second fall. The verdict was clearly a verdict "*with respect to a particular offence*" (cf: AS [52]).

71. Fifth, it was unnecessary for the majority to expressly refer to what are the natural limitations in assessing the evidence on the record (cf: AS [53]). The Court referred to the authorities it was applying (CCA [45]–[48], AB 223–224) in relation to the relevant principles applicable to considering the application of the proviso. In particular, the Court discussed *Weiss*, which explains the correct approach to the assessment, including the limitations thereto. There is no reason to suggest the Court did other than to adopt that approach.

72. The majority approached their assessment of the evidence with a careful review of what was available to them on the record of the trial, including viewing the footage for themselves. The footage provided a source of as much benefit to an appellate court as to the jury at trial, against which to test the reliability of the witnesses' accounts.

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[76] *Baiada Poultry Pty Ltd v The Queen* (supra) at [28].

73. Finally, the two further 'observations' made by the Appellant (AS [61]) do not assist the Appellant. That the conclusion of the majority means the first fall should never have been left to the jury does not affect whether the proviso can be applied in this case. This submission accepts that there was no evidence of the first fall. If that is the case, the proviso was correctly applied. The erroneous direction could not have had any effect on the case.

74. The approach taken by the Respondent in the CCA is irrelevant as to whether the proviso has been correctly applied in this case.[77] Nothing the Respondent said in the CCA can alter the evidence, or render the application of the proviso inappropriate.

75. No eyewitness provides any evidence of contact between the Appellant and the deceased impacting on the first fall. The CCTV reflects there was no contact between the Appellant and the deceased causing that fall. That was the conclusion of the CCA having viewed the footage. That is consistent with what the Appellant argued at first instance in the CCA and accepted (AS [57]) in this Court. In the CCA the Appellant submitted that the CCTV showed that, in relation to the first fall, he had not touched the deceased, was not in close proximity to him, and that the deceased simply tripped.[78]

Conclusion

76. The CCA correctly approached the question of the proviso by considering whether, notwithstanding the error which was established on appeal, namely, the omission to give a specific unanimity direction, "*no substantial miscarriage of justice has actually occurred*" (CCA [45] AB 223). It is well established that an erroneous direction on the elements of an offence does not, of itself, lead to the unavailability of the proviso. Rather, it is necessary to assess the error in the context of the evidence called at trial.

77. The CCA correctly held that, when assessed in the context of the evidence called at trial, the erroneous direction did not deprive the Appellant of having the jury decide a question that had to be determined at the Appellant's trial, nor did it result in an inability to determine the basis upon which the jury had returned a verdict of guilt (CCA [59] AB 228). Upon a review of the record of the trial, the CCA correctly concluded that the evidence was incapable of

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[77] The assertion as to the approach taken by the Respondent in the CCA is not supported by the references cited (AS fn 31). The Respondent's case was that the direction was not required because the assault was a course of conduct: CCA Transcript 40–44 AFM 831–835. In the context of the proviso argument counsel did initially submit that either the first or second fall was available: CCA T 47 AFM 838, but it was ultimately submitted that, due to the "*substantially stronger position put in relation to the punch*", that if given the unanimity direction "*that would have been the unanimous path that the jury would have gone down*": CCA T 47 AFM 838.

[78] CCA T 5 AFM 796; and see the written submissions filed in the CCA consistent with this: AFM 724.

establishing guilt based on the first fall (CCA [50], [51] AB 224–225) and correctly held that it was not open to a reasonable jury to acquit the Appellant based upon the second fall (CCA [54]–[55] AB 226–227). Accordingly, and applying the correct principles, the CCA held (CCA [60]–[61] AB 228) that in all the circumstances, "*no substantial miscarriage of justice has actually occurred*".

78. The appeal should be dismissed.

Part VI: Estimate

79. It is estimated that the Respondent's oral argument will require 1.5 hours to present.

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W. J. Abraham QC
Tel: (02) 8029 6319
Email: wendy.abraham@12thfloor.com.au

H. Roberts
Tel: (02) 9285 2575
Email: hroberts@odpp.nsw.gov.au

20 Counsel for the Respondent