IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S309 of 2017



BETWEEN:

**DL**
Appellant

and

**The Queen**
Respondent

## APPELLANT'S REPLY

### Part I: Certification for Publication

1. I certify that this submission is in a form suitable for publication on the internet.

### Part II: Reply

2. The respondent's summary of the evidence as to psychosis before the sentencing judge at [11]-[24] is incomplete and is addressed further at paragraph [10] below.

3. The respondent's contention at RS [41]- [55] that Leeming JA and Wilson J were entitled to conclude on re-sentence, despite there being no contention as to any such error by the sentencing judge, that the appellant was not suffering from a psychosis at the time of the offence and to rely on that conclusion to make additional aggravated factual findings on re-sentence is in conflict with the decision of this Court in *Betts v The Queen* (2016) 258 CLR 420 ('**Betts'**) at [59]:

> "… there is no principled reason for holding that a finding that was not open to challenge on the appeal is susceptible of challenge on new evidence in the event the appellate court comes to consider re-sentencing."

4. The unanimous judgment in *Betts* recognised at [2] that additional evidence was admissible on a re-sentencing exercise in an intermediate court where that evidence was regarding an offender's progress towards rehabilitation since the sentence hearing. Where there is fresh or new evidence sought to be led or tendered in order to avoid a miscarriage of justice, there would need to be articulation that the evidence was tendered on that basis, a ruling to so admit it and reliance on it to that effect in the court below: cf. *Betts* at [10]. This did not occur in the appellant's case: cf. RS [45]-[55]; see AS [32]. The

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respondent's reply does not address the conflict between the principles set out in *Betts* and the approach taken by the majority in their judgments. Further, the reply does not address the inconsistency of the majority approach with any of the well-established restraints on consideration of an offender's appeal on severity outlined at AS [42]-[47].

5. If the respondent's submissions are correct, for the reasons detailed at AS [49]-[52], it would mean that all offenders' appeals would proceed on a de novo type basis, with all factual findings, whether in dispute or not between the parties, able to be revisited in the event that an offender establishes error and tenders evidence of 'post-sentence events' on re-sentencing: cf. RS [45]-[46]. This includes whenever there is evidence read on re-sentencing that includes summaries of material since sentence that 'details...treatment and management in custody for health issues': cf. RS [45]. Adverse findings of fact could be made without notice or the opportunity to be heard. Current established appellate processes for determining whether a lesser sentence is warranted would no longer apply. The respondent's submissions in this respect should be rejected, as where factual findings such as state of mind, mental health and premeditation at the time of the offence are not disputed by the grounds of appeal, the process does not permit a respondent in the intermediate court an "opportunity for a second bite of those issues" on re-sentence where there is no proper basis (such as evidence admitted as fresh evidence) to do so: *Betts* at [4].

6. In the appellant's severity appeal both parties proceeded on the basis that the original findings of fact as to psychosis, intention and premeditation were not in dispute. The original submissions filed by the appellant in support of the appeal stated: "The findings of the sentencing judge are otherwise not challenged on this appeal...." (RFM 17.12 at [56]). This was reinforced from the outset in the appellant's oral submissions: AFM 184.27-.29. The respondent's written (RFM 27-29) and oral submissions before the intermediate court did not challenge the sentencing judge's findings as to the existence of psychosis, the appellant's intention at the time of the offence or risk of re-offending. As was acknowledged in response to a question from Rothman J (set out in full at AS [18] and in part at RS [65]), the respondent expressly disavowed any challenge to the sentencing judge's findings of fact. A forensic choice was made by both parties: *Betts* at [14]. The sentencing judge's findings of fact as to psychosis, intent to kill and premeditation were never joined as issues to be resolved by the intermediate court.

7. There was no current psychiatric opinion before the Court of Criminal Appeal (**CCA**) or "expert psychiatric evidence as to DL's current...mental state": cf. Leeming JA at CAB62 [5(3)]. The Crown made no attempt to obtain any up to date review by an appropriately qualified forensic psychiatrist of the appellant's mental health over the eight years that had passed since he had been sentenced, or as to his state of mind at the time of the offence. No opinion had been sought from either party as to whether the appellant's mental state over the period or close to the time of the appeal was capable of undermining (or excluding as not open) the factual finding of "some psychosis" at the time of the offence: cf. CAB51 [38]. The report of Dr Chan, Psychiatric Registrar of September 2014 that requested the scheduling of the applicant in 2014 for a limited period on the basis of psychosis at that time was the only psychiatric report in evidence. None of the appellant's material revisited his psychiatric status at the time of the offence. As detailed at AS [43], concessions were appropriately made by the respondent so as to confine the issues before the court to the real issues between the parties.

8. Reliance by the parties on *Kentwell v The Queen* (2014) 252 CLR 601 at [35], [40]-[43] (RFM 22 at [7], 27 at [19]) was not an invitation to the majority to ignore the limits of that exercise, as authoritatively determined by this Court in *Betts,* a decision relied on by the parties, but not referred to by the CCA: cf. RS [41]-[45]. *Lehn v R* (2016) 93 NSWLR 205 did not in any way qualify *Betts* or the cases relied on by the appellant at [24]-[29]: cf. RS [42]. *Lehn* reinforced those requirements. The respondent's submissions on re-sentence, in keeping with the appellant's submissions, referred to the need for the Court to revisit the objective seriousness of the offence, error as to the determinative significance of the 25 year standard non-parole period having been conceded, there now being no standard non-parole period for a young offender and the age of the victim being a relevant consideration. The submission made on the appellant's behalf quoted at RS [47] is to be understood on this basis and followed directly an express reliance on the Crown concession as to no dispute as to either the facts found by the sentencing judge or his assessment of criminality and specific reference to *Betts*: AFM 196.26-34.

9. It is contended at RS [57]-[72] that the appellant was afforded procedural fairness, despite the clear submission on the appellant's behalf as to the limited way that the further evidence on re-sentence was to be used, the express acceptance by the Crown of the first instance findings, the absence of further expert evidence on the question of psychosis, intention and premeditation and the absence of any indication by the Court

that it was contemplating revisiting the sentencing judge's factual findings on these issues. The respondent notes that Leeming JA considered (at CAB63-64 [9]) the express concession made by the Crown may have been a slip: RS [66]. This explanation should be rejected given: the express and clear statement by the Crown; the further confirmation of the concession in the next answer of the Crown (not reproduced by the respondent at RS [65]); the Crown's earlier concession that the sentence should be "adjusted" (AFM 192.37); the principled way in which the Crown conducted the severity appeal; Leeming JA not raising the possibility of a slip with counsel at the time (AFM 196.23-75.41); Leeming JA not bringing this to the attention of the appellant at any time; and neither Rothman J nor Wilson J adopting this aspect of Leeming JA's reasoning.

10. Although not raised or argued below, it is now contended at RS [70]-[73] that the introduction by the appellant of the summary of Justice Health records "in respect of the appellant's management and treatment in the intervening years" since sentence opened these issues up for reconsideration by the CCA. At RS [70] it is submitted that the absence of evidence of the development of schizophrenia over the eight years since sentence was a "material change" in the nature of the evidence that had been before the sentencing court. However, the accuracy of the appellant's summary of the evidence read on re-sentence (at AS [11]-[13]) is not challenged by the respondent. As set out above at paragraph [6], there was no "materially different" evidence as to mental state at the time of the offence before the CCA (cf. Leeming JA at CAB62 [5(3)], CAB63-64 [9]). Wilson J did not so find, rather she found that the evidence stayed the same before and after sentence: cf. CAB97 [141], CAB98 [148]. Rothman J made no finding of materially different evidence, instead noting no challenge to the factual conclusions: CAB81 [73], CAB81-82 [75]. The evidence read on re-sentence did not change the evidence that schizophrenia had not emerged as was ventilated before the sentencing judge in 2008. The primary judge already had the benefit of three years of observations of the appellant, analysed by three forensic psychiatrists in both written reports and further in oral evidence given before him. There was a sound basis for his finding of "some psychosis" at the time of the murder: CAB51 [38]. It was not a finding necessarily based on schizophrenia or conditional on its later emergence. Rothman J considered that the absence of evidence that the appellant had developed schizophrenia in the three years between the offence and the sentencing hearing did not establish that the appellant was not psychotic at the time of the murder: CAB83-85 [81]-[83].

11. Even if it was permissible for the CCA to revisit the factual findings of RS Hulme J on resentence in order to make aggravated findings on matters not raised by any member of the intermediate court with the parties, the findings of the majority are unsustainable. Leeming JA did not hold that the sentencing judge's findings were not open: CAB66 [19]. In relation to his rejection of psychosis, his Honour simply found he did not accept that the applicant was in the prodromal phase of schizophrenia in 2005, without dealing at all with the evidence of brief psychotic episode or making findings beyond reasonable doubt at CAB66-7 [20]-[21]. His later finding under the heading intention to kill (at CAB67 [24]) that there was no evidence sustaining the possibility of a temporary psychosis that precluded an intention to kill did not take into account Dr Nielssen's evidence that the appellant may have suffered from a brief psychotic episode at the time of the murder: AFM 41. 49-44.43, AFM 50.7-.17, AFM 53.35. Dr Nielssen considered it was possible the psychotic episode could have remitted without treatment: AFM 50.12, AFM 42.2. There was no other explanation for all of the signs and symptoms the applicant had exhibited as summarized by Dr Nielssen: AFM 41.49-42.26. Furthermore, Dr Allnutt was not prepared to exclude the possibility of psychosis that had resolved: AFM 23.1, 25.0-.5. Leeming JA and Wilson J effectively usurped the role of an expert witness in reaching their conclusion that the appellant had not been affected by psychosis at the time of the offence. Their conclusions were reached without any further expert evidence as to the significance of the appellant's mental health since the time of sentence as disclosed in the material tendered on resentence. Their conclusions were also reached with almost no analysis of or reference to the primary material or the actual evidence on re-sentence now said to be so materially different.

12. The respondent has not answered the appellant's submissions at [26]-[29], [42]-[48] and [50]-[52].

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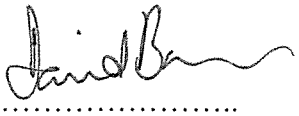

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