IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

No. M105 of 2016

BETWEEN:

THE QUEEN

Appellant

-v -

YAVAZ KILIC

Respondent

RESPONDENT'S ANNOTATED REPLY TO THE APPELLANT'S RESPONSE TO THE NOTICE OF CONTENTION

Part I: Suitability for publication on the internet.

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

Part II: Reply to Appellant's response to notice of contention

2.1 The difficulty with relying on NSW murder authorities to inform the meaning and significance of the phrase "worst case category" is that the classification of the objective gravity of the offending in those cases serves a particular statutory purpose in connection with whether life imprisonment is mandatory and whether a discretion to impose a determinate sentence exists[1]. In each of the murder cases cited by the Appellant, a life sentence was mandatory unless there existed factors diminishing the prisoner's blameworthiness for the offending, in which case there was discretion to impose a determinate sentence. Samuels JA described the operation of the statutory proviso as follows:

> "[it] requires the trial judge first to consider whether the accused's culpability for the murder is significantly diminished. If his conclusion is negative, the

[1] Presently, s61(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). Similarly, the authorities cited from Queensland were concerned with statutory preconditions for the imposition of life sentences.

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provisions of s442 are excluded, and the sentence must be penal servitude for life[2]".

2.2 This has two important consequences. First, a finding of "worst case" (ie that culpability was not significantly diminished) in such cases functions as a finding of fact because it is a finding as to whether or not the particular terms of the statute are met. In Victoria, no such "finding" is required in the exercise of the sentencing discretion or the determination of a ground of appeal alleging manifest excess.

2.3 Second, the legislative focus on culpability narrows the range of matters to be considered in determining whether the proviso applies such that only matters causally connected to the offending are regarded as relevant and matters customarily regarded as relevant to the exercise of the sentencing discretion are excluded[3].

2.4 The passage in *R v Twala* on which the Appellant relies must be seen in this context[4]. The exclusion of the subjective features mitigating penalty from the assessment of whether a case falls within the "worst case category" derives from the legislative focus on culpability. It does not derive from the common law. The limitation was not expressed in *R v Garforth*[5] *or in Veen v R (No 2)*[6], which, of course, involved a charge of manslaughter. Nor does it seem consistent with the requirement in *R v Tait and Bartley* to consider both the nature of the crime and the circumstances of the criminal[7]. Before the Court of Appeal, the Appellant did not rely on *R v Twala,* instead submitting that "All of the circumstances need to be considered" in determining whether the present case was an example of "worst case offending"[8].

2.5 Even within the limited range of matters relevant to whether a case falls in the "worst case category" according to the NSW authorities, consideration of matters personal to the accused which bear upon blameworthiness of the offending is not precluded and it is correct to bring such considerations to bear in the assessment of

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[2] With whom Lee J agreed, *R v Bell* (1985) 2 NSWLR 466 p29 -30
[3] *ibid* p31
[4] Paragraph [2.18] of the Appellant's reply.
[5] Unreported, Court of Criminal Appeal, NSW, No 60500 of 1993, 23 May 1994
[6] (1988) 164 CLR 465
[7] (1979) 24 ALR 473, 484 - 485
[8] [AB 175 line 29]

level of culpability for the offence[9]. It follows that, even according to the formulation in *R v Twala*, the Respondent's relative immaturity, his lack of prior convictions for violence and the fact the offending was unplanned and there were efforts to put out flames and call an ambulance would, it is submitted, place the Respondent's case outside the worst case category.

2.6 The Respondent contends that the approach to the determination of "worst case category" in Victoria is not that described in *R v Twala* and is that described in *R v Tait and Bartley* and adopted in *R v Ibbs*[10] and *Veen v R (No 2)*. However, even if the approach is that described in *R v Twala*, the Respondent contends it was still not open to the Court of Appeal to conclude his offending fell within the "worst case category".

Part III: Applicable statutory provisions

3.1 The applicable statutory provisions, which are still in force in the same form at the date of these submissions are:

***Crimes (Sentencing Procedure) Act 1999* (NSW) (current version)**

S61(1) A court is to impose a sentence of imprisonment for life on a person who is convicted of murder if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.

Dated 6 October 2016

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[9] *R v Harris* (2000) 121 A Crim R 342, 351 – 352 [60]
[10] (1987) 163 CLR 447, 451 - 452