IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S59 of 2015

BETWEEN:


**CHRISTOPHER ANGELO FILIPPOU**
Appellant

and

**THE QUEEN**
Respondent

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## APPELLANT'S SUBMISSIONS

### Part I: Certification

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

### Part II: Issues Presented by the Appeal

2 **Issue One:** What is the nature of the exercise the Court of Criminal Appeal is engaged in under s 6(1) of the *Criminal Appeal Act* 1912 (NSW) when determining an appeal against conviction by judge alone pursuant to s 133 of the *Criminal Procedure Act* 1986 (NSW)?

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3 **Issue Two:** If the Crown fails (at trial) to prove beyond a reasonable doubt an aspect of offending that is integral to the determination of the moral culpability of the offender, and there is only one alternative finding possible on the factual scenario, is it open to the sentencing judge to decline to make that alternative finding because the offender has not proved it to the balance of probabilities?

### Part III: Considerations of s78B Notices

4 The appellant is of the view that notices under s 78B Judiciary Act 1903 are not required.

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### Part IV: Citation of the Reasons for Judgment

5 The citation of the reasons for judgment of the intermediate court is *Filippou v R* [2013] NSWCCA 92 (**CCA**). The citation of reasons for judgment of the primary judge (Mathews AJ) are *R v Filippou* [2011] NSWSC 1379 (conviction '**JOC**') and *R v Filippou* [2011] NSWSC 1607 (sentence, '**ROS**').

### Part V: Narrative statement of the relevant facts

6 In October 2011, the appellant stood trial by judge alone before Mathews AJ charged with two counts of murder, being that on 27 June 2010 at Mayfield he murdered Samuel and

40 Luke Willis. The appellant pleaded not guilty to murder but guilty to manslaughter in

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respect of both counts. The sole issue at trial was provocation. On 18 November 2011, Mathews AJ found the appellant guilty of both counts of murder: JOC [114]. On 22 December 2011, her Honour sentenced him to an effective head sentence of 31 years imprisonment with an effective non-parole period of 25 years: ROS [50].

7 In June 2008, the appellant purchased a home in Mayfield NSW, which shared a back fence with the home of William Willis (the **Willis home**): CCA [6]. William Willis was away from the Willis home between 4 April and 20 June 2009, during which time his son, Sam Willis, had a party or 'drinking session' on a Sunday night. There was an open fire and very loud music continuing well into the early hours of the morning. A neighbour (not the appellant) yelled out at the partygoers, called the police (who did not attend), hosed them with water and later commenced a verbal exchange of abuse. The appellant at some point entered his yard and joined in the abuse, however the most offensive language came from the partygoers: CCA [7].

8 A few days later a handwritten letter, found to have been written by the appellant, was left at the Willis home: CCA [12]-[13]. The letter complained that noise was bothering the author's mother (the appellant did not live with his mother), and threatened to call the police and report hidden 'dope' at the Willis home and the home of Sam Willis' mother (who lived at a different location) if the author's mother call him again: CCA [12]-[13]. Sam Willis canvassed the neighbourhood to see if anyone knew anything about the letter: CCA [14]. His Father gave evidence that Sam told him that the appellant denied writing the note but said: 'If you come around and threaten me again I'll shoot you': CCA [14]. Sam told his mother that the appellant had threatened to kill him: CCA [14].

9 A few days later William Willis raised the issue with the appellant over the back fence. According to William Willis, the appellant told him that Sam had come to his house without a shirt on, very upset, angry and threatening. William Willis said appellant told him, 'I was upset Sam was upset we just let off a little bit of steam... I just don't want to be threatened by Sam again' (CCA [16]) and also that the appellant said to Sam 'if you come around again, I will shoot you': CCA [17]. Mr Willis responded that he would 'talk to Sam and sort it out': CCA [16]. Her Honour accepted this evidence: CCA [19]. Following this conversation, there were amicable exchanges between the two households, including in relation to the erection of a common fence: CCA [20-[21].

10 Early in January 2010, hypodermic syringes were scattered on the pavement outside of the Willis house, which William Willis took to be 'just part of living in Mayfield': CCA [23].

11 Luke Willis moved into the Willis house with his father and brother temporarily in December 2009. In late January 2010 on the eve of Luke moving out, they had a barbeque and played music in the back garden of the Willis house until about 11pm: CCA [25]. The next day, the front gate of the Willis house was found sprayed with shiny grey paint, with paint splatters leading to an empty paint tin about 4 houses from their home: CCA [26].

12 A few days later a second letter, found to have been written by the appellant, was left on the Willis house front lawn complaining about noise and rubbish, telling them to move and threatening to make their stay unbearable if they owned the home: CCA [27]-[28]. Sam Willis and his father canvassed the neighbours about this letter. All neighbours, including the wife of the appellant, said they had no problems with them: CCA [29]-[30]. Between February and 11 April 2010, when William Willis went overseas, there were no further incidents. William Willis was in contact with his sons until a few days before the shooting, and they told him that there had been no problems at the Willis house: CCA [33].

13 On Saturday 26 June 2010, Sam and Luke Willis, Luke's girlfriend and Alex Best had a barbeque at Luke's home where they drank beers. At around 9pm, Sam and Mr Best went to the Willis home, buying a bottle of bourbon on the way. They found a plastic bag on the Willis house lawn containing a mass of dried leaves and a piece of cardboard on which was written "Cheers you Dope from Alex", which may have been there fore some weeks: CCA [1] (*sic*, paragraph between [34] and [35]). Her Honour was unable to determine whether it was the appellant or Alex Best who wrote this note: CCA [39]-[40]. Sam and Alex determined that the appellant had left the bag and went to his home and poured the contents of the bag onto the white ute in the driveway, and left the note: CCA [35]. Mr Best scratched the words 'Suck me' onto the back of the ute: CCA [35].

14 On Sunday 27 June 2010 at around 11am, the appellant's wife found the leaves and note and called the appellant: CCA [37]. When he saw what had happened, he called out abusively over the back fence, but there was no response: CCA [37]. The appellant went out briefly around midday, pulling up outside the Willis house on his way home, but found no one there: CCA [38]. At 5.50pm, the Willis brothers were seen standing outside the Willis house inspecting the lounge room window which had been broken by a plastic bag containing phone books: CCA [43]-[44]. The appellant's son later admitted to having done this, and her Honour found she was bound to accept his sworn evidence: CCA [46].

15 The Willis brothers believed the appellant had broken the window and went to confront him: CCA [43] and [47]. At about 6pm Mrs Filippou heard male voices calling her husband and assumed it was the Willis brothers: CCA [48]. When she told him about the yelling, the appellant went straight down the hall and out the front door and (she thought) onto the footpath: CCA [48]. Shortly after the appellant ran back in and told her to call their son, which she did at 6.07pm. The appellant returned outside, and Mrs Filippou heard all the men yelling and made out the word 'police'. The appellant then came running back inside said 'I'm going', went out the backdoor and immediately reversed out in the ute which was parked in the driveway. The police came: CCA [48].

16 A single eyewitness, Mr Brett Allen, heard two popping noises and went to his window where he saw a silhouette on the ground, a man bending over slightly with an outstretched arm and then saw a flash come from the end of it with another popping noise: CCA [50]. Realising the noise was from a gun and that a person had been shot, he called police: CCA [50]. Most other neighbours corroborated that there were two shots in close succession and then a third shot after a few seconds: CCA [52]. The ballistics evidence was that two shots, one into the chest of each deceased, were discharged from a distance of approximately 800cm-1m, and a shot into the neck of Sam Willis was from a distance of 300mm: CCA [63]. Her Honour found that Sam had been shot first in the neck, Luke was then shot in the chest, and then Sam was shot a second time in the chest: CCA [60]-[61]. Ballistics investigation also determined that 2 of the 5 chambers of the firearm had been empty, and that there had been an attempt to discharge the firearm after the last shot had been fired: CCA [93].

17 After leaving the scene, the appellant went to his place of work and called a previous acquaintance named Margaret. He stayed with her that night, appearing on edge and restless, and called his young daughters from her phone the following morning: CCA [66]. He handed himself into police at 10.35am that morning, 28 June 2010: CCA [68].

18 Just before his ERISP on 28 June 2010 the appellant said, 'they pulled a gun on me and I took it off 'em and shot 'em. They're shit. If you're going to pull a gun on me, be prepared to use it. That's all I'm going to say': CCA [54]. In his ERISP he repeated the effect of this statement a number of times: CCA [85]. He said that the man he had not seen before (Luke) took a gun out of his pocket with his right hand and said 'I've got this': CCA [55]. The appellant immediately grabbed the gun, and shot Sam because he was still abusing the appellant: CCA [55]. He then pointed the gun at Luke and shot him. He estimated they were no more than a metre away from him: CCA [55]. He left the gun in the hand of one of the men (Sam, although he could not remember which at the time of the ERISP), 'because

it's theirs, they may as well keep it' and he then went back inside to change and left in his ute: CCA [55]. The police gave evidence that the gun was found in the hand of Sam with his hand in the trigger guard close to the trigger and the police moved it from this position: CCA [57]. The appellant said he might have shot someone on the ground but it all happened so fast he could not remember. He had 'just shot whatever bullets were there': CCA [56]. After his ERISP, during forensic procedures, the appellant said to an officer, 'I was always taught never bring a gun unless you are prepared to use it', and his demeanor changed and he clenched his fists and said, 'I'm fucking proud of what I done. Fucking proud of it': CCA [70].

19 The appellant was arrested and taken into custody, during which time telephone conversations with his wife were recorded: CCA [85]. In a call recorded on 18 August 2010 the appellant said, "They come around with a fucken gun we didn't' and 'Who the fuck do they think they are coming around like fucken would be gangsters... if they had of fucken brought a knife I would have cut their fucken heads off': CCA [85].

20 The appellant was convicted of the murders of Sam and Luke Willis on 18 November 2011, the trial judge having rejected the partial defence of provocation, and he was sentenced on 22 December 2011 (see [7] above). On 9 May 2013, the CCA (McClellan JA, Fullerton and Campbell JJ agreeing) dismissed his appeal against conviction and sentence.

**Part VI: Appellant's argument**

**(a) Conviction: Errors in the Court of Criminal Appeal**

21 The grounds of appeal on conviction in the CCA were in the following terms:

> **Ground 1:** Her Honour's verdict is unreasonable and cannot be supported having regard to the evidence, in particular, but not exclusively, upon the following bases:
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> a. that, in finding that there was no reasonable possibility that the applicant had lost self control within the meaning of s 23 *Crimes Act* 1900 at the time that he fired the shots causing death, her Honour:
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> i. misdirected herself as to the inferences to be drawn from statements made by the applicant while in custody;
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> ii. drew erroneous inferences from those statements; and
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> iii. failed to consider alternative inferences fairly available on the evidence; and
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> b. that, in finding as to the circumstances of the shooting and the explanation for the gap in time between the second and third shots, her Honour:
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> i. failed to direct herself as to the need to consider other inferences; and
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> ii. failed to consider other [inferences] fairly available on the evidence;
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> c. that, in dealing with the "ordinary person" test within the meaning of s 23 *Crimes Act* 1900 her Honour:
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> i. misdirected herself as to the question of proportionality;

ii. determined the reasonable person issue on the basis of that misdirection; and
iii. applied the wrong burden of proof.

**Ground 2:** Her Honour made the following errors of law:

a. misdirected herself as to the inferences available to be drawn from statements made by the applicant while in custody;
b. failed to direct herself with respect to such statements of the need to be satisfied that the inference proposed to be drawn is the only rational inference available;
c. failed, in that regard, to consider available alternative inferences;
d. with respect to the movements of the applicant at the time of the shooting and the sequence of shots failed to direct herself as to the need to be satisfied that the inference proposed to be drawn is the only rational available inference;
e. misdirected herself as to the role of "proportionality" in the issue of provocation;
d. in considering the issue of the reasonable person within the meaning of s 23 *Crimes Act* 1900, her Honour applied the wrong onus of proof.

**Ground 3:** in all the circumstances, a miscarriage of justice has occurred.

22 In addition to complaint about the verdict it is apparent that these grounds involved assertions of specific error within s 6(1) of the *Criminal Appeal Act* 1912 (NSW) (**Criminal Appeal Act**). Without making reference to the grounds of appeal or the nature of the errors for the purposes of ss 5 and 6 of the Criminal Appeal Act, the CCA appears to have found at least the following two, and possibly three, errors in her Honour's judgment. Further additional errors are identified from para [26] below.

23 First, the conclusion by Mathews AJ as to the sequence of the appellant's movements in and out of his house in relation to the shooting was held by McClellan JA to be 'not correct': CCA [81]-[82] and [84]. This error could fall within grounds 1(b), 2(d) and 3.

24 Second, Mathews AJ held that there was no reasonable possibility that a loss of self-control caused the appellant to fire the shots (a necessary element for provocation required by s 23(2)(a) of the *Crimes Act* 1900 (NSW), '**Crimes Act**'). Her Honour so held because she considered that the appellant's comments after the event, 'justify[ing] his conduct and indicat[ing] that he would do the same thing again', were inconsistent with the proposition that he experienced a 'temporary loss of self-control which caused him to act as he did': CCA [87]. Her Honour said that this was determinative of the question of provocation: CCA [87]. Justice McClellan held that this inferential reasoning, as well as treating it as 'determinative', was not open to her Honour: CCA [102]-[103]. This error could fall within grounds 1(a), 2(a)-(c) and 3.

25 Third, her Honour appeared to reverse the onus of proof in respect of the second limb of provocation under s 23(2)(b), holding that she was (at [112], repeated at CCA [92]): 'quite unable to accept that an ordinary person, confronted with [Luke Willis producing a revolver and saying 'We've got this'] could have lost self-control so as to form an intention to kill or inflict grievous bodily harm on the brothers.' Justice McClellan was not persuaded that this passage demonstrated that her Honour did in fact reverse the onus of proof, holding that she 'may have merely been intending to convey that in the circumstances she was satisfied beyond any doubt that an ordinary person could not have been induced to lose their self-control and kill the brothers': CCA [110]. His Honour does not appear to have finally determined whether this constituted error, saying later (prior to making his own findings) 'irrespective of whether her Honour should be understood as framing her conclusion in an inappropriate manner...': CCA [111]. It is submitted that, whatever her Honour may have been 'intending to convey', what her Honour did convey expressed a reversal of the onus of proof. Her Honour was required to be satisfied beyond reasonable doubt by the Crown that the ordinary person could not have been induced to lose control such as to form the relevant intent. It was for her Honour to make findings beyond reasonable doubt before the appellant could be convicted, and this error was not cured by the CCA discerning what her Honour might actually have intended to convey. This error falls within grounds 1(c)(ii) and (iii), 2(d) and 3.

26 Finally, two further specific legal errors were identified by the appellant before the CCA in relation to the second limb of provocation under s 23(2)(b). Justice McClellan did not address these errors, and in fact repeated them and made two further errors in respect of this provision.

27 Justice Mathews described s 23(2)(b) as an 'ordinary person' test, and cited from *Masciantonio v The Queen* (1995) 183 CLR 58 (***Masciantonio***) at 67 to the effect that the provocation must be put into context by reference to the attributes of the accused, and that having assessed the gravity of the provocation in this way, 'it is then necessary to ask the question whether provocation of that degree of gravity could cause an ordinary person to lose self-control and *act in a manner* which would encompass the accused's actions' (emphasis added). Her Honour then held that she was (at [112], repeated at CCA [92]):

> 'quite unable to accept that an ordinary person, confronted with [Luke Willis producing a revolver and saying 'We've got this'] could have lost self-control so as to form an intention to kill or inflict grievous bodily harm on the brothers. I am hesitant to use the word 'disproportionate', for there is no requirement of proportionality in relation to the defence of provocation as currently formulated. However, if the response is grossly disproportionate to the provocation, then it inevitably means that it will fail the 'ordinary person' test. And that, in my view, is clearly the situation here.'

28 As set out above, McClellan JA postulated that her Honour may have been intending to convey that she was satisfied beyond any doubt that an ordinary person could not have been induced 'to lose their self control *and kill the brothers*': CCA [110] (emphasis added). His Honour found that Mathews AJ's finding was reflected in the final sentences of the above cited passage, 'where she identifies the response as being *grossly disproportionate* to the provocation with the consequences that the Crown has proved its case to the criminal standard': CCA [110] (emphasis added). He then framed the 'ordinary person' test in terms of whether or not the 'ordinary person... would ... not have *acted* as the appellant did in the circumstances by taking his gun and forming the intention to kill': CCA [111] (emphasis added).

29 The additional errors, evident in the above reasons, are as follows. *Masciantonio*, relied upon by Justice Mathews, considered a Victorian provision that contained a different test to that in place in NSW. Unlike the provision considered in *Masciantonio,* the applicable NSW provision, s 23(2)(b), was concerned only with whether the conduct of the deceased was such as could have induced the ordinary person to have so far lost self control as to form the relevant intention. It did not in any way additionally encompass the *actions* of an accused person, let alone the *proportionate* actions of the accused. Indeed, s 23(3) of the *Crimes Act* expressly stated that there is no rule of law that provocation is negatived if there was no reasonable proportionality between the act causing death and the inducing conduct of the deceased. These errors fall within grounds 1(c)(i) and (ii), 2(e) and 3.

30 The test in NSW does not turn on whether the ordinary person *would* not have acted in that manner, "but on what the ordinary person *could* have been induced to intend": *Green v The Queen* (1997) 191 CLR 334 (***Green***) at 340. This additional error was introduced by McClellan JA, and is fundamental. The difference has been stressed by this Court on several occasions: *Green* at 340, 355, 373; *Johnson v The Queen* (1976) 136 CLR 619 at 639; *Masciantonio v The Queen* (1995) 193 CLR 58 at 66-7, 69. Finally, the test can be satisfied if the provoking conduct could have caused a person in the appellant's position to form the intention to inflict grievous bodily harm on the deceased, not merely to kill the deceased (the fourth error): cf CCA [110]-[111]. The CCA thus fundamentally misunderstood the test for provocation - the sole issue in the appellant's trial - and erred in applying a higher and incorrect test in dismissing the appellant's appeal.

31 Correctly understood, the relevant question for the purposes of s 23(2)(b) was whether coming in company to confront a person at that person's home, showing him a loaded gun and saying 'we've got this', in the context of an escalating dispute having previously

involved property damage, verbal abuse and threats of serious violence using a firearm, the most recent incidents of which the person is aware being an abusive sexual message scratched by the deceased into that person's vehicle, or possibly a false (as far as the person is aware) allegation of having thrown books through the deceased's window, could have caused (not would have caused) such an 'ordinary person' to form an intent to inflict grievous bodily harm upon the deceased. The question was not whether the provocation could or would have caused an ordinary person to kill the brothers. This correct, lesser test was never applied by the trial judge or the Court of Criminal Appeal. The appellant has never been tried in accordance with law.

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32 Even on the basis that his Honour accepted that only two errors had been established, the question for the Court of Criminal Appeal then became whether the verdict was unreasonable or unsupported, or whether the errors were errors of law which impugned the verdict, or whether the errors, individually or together, resulted in a miscarriage of justice. Then, assuming at the least that her Honour's failure to correctly address the first limb of the provocation test constituted an error of law or miscarriage of justice, the question was whether or not the proviso to s 6 of the *Criminal Appeal Act* should be applied. Instead, there appears to have been a complete failure to conduct the appellate process within the terms of s 6 of the *Criminal Appeal Act.*

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33 Justice McClellan appears only to have considered the first ground of appeal and first limb of s 6(1), that the verdict was unreasonable or could not be supported having regard to the evidence (which is suggested by his Honour's citation of the principles in *SKA v R* (2011) 243 CLR 400 (***SKA***)) and possibly, in a wholly general way, the third ground of appeal (suggested by his statement that he was 'completely satisfied that there has been no miscarriage of justice' at CCA [111]). However, in so doing his Honour does not consider how the errors, individually or together, may have impugned the verdict or resulted in a miscarriage. Instead, he appears to have proceeded as though he were conducting a rehearing (such as in civil proceedings under s 75A of the *Supreme Court Act* 1970
30 (NSW)), by determining that he was satisfied, in respect of the first limb of provocation, that the Crown discharged the onus it carried to the criminal standard 'having considered the evidence' (CCA [105]) and that, in respect of the second limb, he had 'no doubt that an ordinary person with the characteristics of the appellant, including his tendency to anger, would not have acted as the appellant did in the circumstances by taking the gun and forming the intention to kill: CCA [111] (again, applying the incorrect test). His Honour also either failed to address the proviso entirely, or failed to do so in accordance with the terms s 6(1) and established principles: CCA [105] and [111].

34 The orders ultimately made by the CCA granting leave on grounds 1 and 3 and not mentioning ground 2, are not explained by reference to his Honour's reasons.

**(b) applicable legislation and principles**

35 The nature of the exercise of an appeal court is a matter of statutory construction in each case: *Fox v Percy* (2003) HCA 22; (2003) 214 CLR 118 (***Fox v Percy***) at 124-125 [20] per Gleeson CJ, Gummow and Kirby JJ. The nature of the task for an appellate court under s 6(1) where the trial was conducted by judge alone is informed by the following provisions.

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36 Section 133 (formerly s 33) of the *Criminal Procedure Act* 1986 (NSW) (**CPA**) provides:

> (1) A Judge who tries criminal proceedings without a jury may make any finding that could have been made by a jury on the question of the guilt of the accused person. Any such finding has, for all purposes, the same effect as a verdict of a jury.
> (2) A judgment by a Judge in any such case must include the principles of law applied by the Judge and the findings of fact on which the Judge relied.
> (3) If any Act or law requires a warning to be given to a jury in any such case, the Judge is to take the warning into account in dealing with the matter.

20 37 Section 5 of the *Criminal Appeal Act* provides a right of appeal against conviction on any ground involving a question of law alone, and provides for leave to appeal to be granted on a question of fact or mixed fact and law. Section 6(1) provides:

> The court on any appeal under section 5 (1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it
> 30 considers that no substantial miscarriage of justice has actually occurred.

38 The interaction between s 133 (then s 33) of the CPA and s 6(1) of the *Criminal Appeal Act* was considered by this Court in *Fleming v The Queen* [1998] HCA 68; (1998) 197 CLR 250 (***Fleming***). That judgment makes clear that the steps taken by the trial judge in determining the provocation question are 'findings on the question of the guilt of the accused' which have 'the same effect as a verdict of a jury' for 'all purposes', and may attract the operation of one or more of the limbs of s 6(1) of the Criminal Appeal Act: *Fleming* 261-262 [24]-[25]. A principle of law erroneously formulated by the trial judge, or a failure to apply an applicable principle, attracts at least the second limb of s 6(1) (error
40 of law; *Fleming* at [29]-[30]) and arguably the third (miscarriage of justice; *AK v Western Australia* [2008] HCA 8; 232 CLR 438 at 454 [48]).

39 The *reasons* given by the trial judge, pursuant to s 133(2), as distinct from the findings on the question of guilt, are not equivalent to the jury's verdict, and their role in the appellate court's exercise will depend upon the limb of s 6(1) being addressed.

40 On an appeal following a jury trial, the Court of Criminal Appeal determines whether no substantial miscarriage has occurred in the same manner as it decides whether the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; namely on the whole of the record of the trial including the fact that the jury returned a verdict of guilty: *Baida Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 (***Baida***) 104 [27] citing *Weiss* 316 [41]. Where a jury is wrongly directed, the fact of their verdict may give little or no meaningful information: *Baida* 104 [28]. Applied to an appeal from a conviction by judge alone, it may be said that the Court of Criminal Appeal has regard to the whole of the record of trial including the findings on questions of guilt, being equivalent to the jury's verdict pursuant to s 133(1). However, where there has been an error of law (which constitute, or is akin to, a misdirection) the verdict is impugned and will normally give no useful information as to whether, upon the whole of the evidence, it was open to convict the appellant for the purposes of the first limb of s 6(1): *SKA* [14] (and whether the appellant should be acquittal on appeal). Such legal error also constitutes a potential successful ground of appeal for the purposes of the second limb of s 6(1), compelling a consideration of the proviso upon all of the evidence, without regard to the (now) impugned verdict of the trial judge.

41 Where, however, a factual error (such as at CCA [82] and [84] in the present case) constitutes a ground of appeal or an aspect of a ground of appeal, the remainder of the judge's reasons may be considered to determine whether that error was inconsequential, such that it cannot be said the fact finding process miscarried (the issue of how errors of fact, and unreasonable verdicts, should be identified in judge alone reasons is addressed further below). If it was not inconsequential, a miscarriage of justice is established and the Court of Criminal Appeal must consider the proviso. If it was inconsequential, there is not, on the grounds of the factual error alone, necessarily a miscarriage. However, that error must be considered together with any other alleged errors or circumstances said to give rise to a miscarriage. Multiple, individually insignificant errors of fact may together result in a miscarriage of the fact finding process and so a miscarriage of justice, requiring the Court of Criminal Appeal to consider the whole of the evidence for the purposes of considering whether that miscarriage was substantial. Similarly, although a single factual error may, in some circumstances, not amount to a miscarriage, where other procedural irregularities or errors of law that did not of themselves amount to a significant miscarriage of justice are

present, the combination of erroneous factual reasoning with the procedural irregularities or errors of law may constitute a substantial miscarriage of justice.

42 As to the first limb of s 6(1), being an unreasonable or unsupportable verdict, the Court in *Fleming* held (at 262 [26]):

> [T]he first limb of s 6(1), which deals with the unsatisfactory quality of 'the verdict of the jury', must now been seen through the prism of s 33(1) [now s 133 of the CPA]. The first limb will address attention to the evidence upon which the trial judge acted, or upon which it was open to the trial judge to act, in reaching the finding as to ultimate guilt. Approached on that footing, is that finding 'unreasonable' or one which 'cannot be supported'? It is unnecessary on this appeal to determine whether, in such cases under the first limb or in cases under the more broadly stated third limb, the appellate court will intervene, as it was put in passages from decisions of the Court of Criminal Appeal set out earlier in these reasons, only where there was no evidence to support a particular finding, the evidence was all the one way or there had been a misdirection, leading to a miscarriage of justice.

43 The cases earlier referred to were *R v Kurtic* (1996) 85 A Crim R 57 (***Kurtic***) at 60 and *R v Ion* (1996) 89 A Crim R 81 at 85-86 (the effect of both of which was summarized in *Fleming* at 256 [14]), and *O'Donoghue* (1988) 34 A Crim R 397 (***O'Donoghue***) at 401.

44 In *O'Donoghue*, Hunt J (with whom Carruthers and Wood JJ agreed) held (at 401, emphasis added):

> It is important to emphasise that, unlike appeals to the Court of Appeal in civil cases, an appeal to this Court is not by way of rehearing. An appeal which is not by way of rehearing is no more than the right to have a superior court interpose to redress the error of the court below: *A-G v Sillem* (1864) 10 HLC 704 at 724; 11 ER 1200 at 1209; *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 109. Error may be demonstrated if there is no evidence to support a particular finding, or if the evidence is all one way, or of the judge has misdirected himself. But this Court has no power to substitute its own findings for those of the trial judge. The members of this Court may individually disagree with the findings which were made, but the court cannot for that reason interfere with those findings. It is only where the very narrow basis upon which this Court can intervene in relation to a trial judge's findings of fact has been established that the conviction can be set aside, and then only if the error has led to a miscarriage of justice: see *Merritt and Roso* (1985) 19 A Crim R 360 at 372-373; *Kyriakou* (1987) 29 A crim R 50 at 60-61.

45 In *Kurtic*, Hunt CJ at CL held that it was the statutory context of s 6(1) of the *Criminal Appeal Act* and s 33 (now s 133) of the CPA that necessitated the above constraints, as 'the finding of a judge [in a judge alone trial] is to be given the same effect as a verdict of a jury for all purposes': *Kurtic* 60.

46 The above passages in *O'Donoghue and Kurtic* cannot survive this Court's decision in *Weiss v R* (2005) 224 CLR 300 (***Weiss***) at [18]-[23] and [41].

47 The history of s 6(1) was set out in *Weiss*, showing that a miscarriage of justice was originally any departure from trial according to law, and that the intention of the proviso, in particular the expressions 'substantial' and 'actually occurred', was to do away with the Exchequer rule (whereby an appeal was allowed where any departure from the applicable rules of evidence or procedure could be shown): *Weiss* 308 [18]-[19] and 315 [38]. The supplemental powers provided to appellate courts (such as in s 12 of the *Criminal Appeal Act*) are necessary only if the appeal court is 'to make its own inquiry about whether the accused was in fact guilty as the jury had found and had moved beyond functions apt solely to a court of error': *Weiss* 310 [23]. The Court in *Weiss* thus concluded that the proviso task (at 316 [41]):

> is to be undertaken in the same way an appellate court decides whether the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence. The appellate court must make its own independent assessment of the evidence [citing, *inter alia*, *M v The Queen* (1994) 181 CLR 487] and determine whether, making due allowance for the 'natural limitations' that exist in the case of an appellate court proceeding wholly or substantially on the record [citing *Fox v Percy* at 125-126 [23] per Gleeson CJ, Gummow and Kirby JJ], the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty. There will be cases, perhaps many cases, where those natural limitations require the appellate court to conclude that it cannot reach the necessary degree of satisfaction. In such a case the proviso would not apply, and apart from some exceptional cases, where a verdict of acquittal might be entered, it would be necessary to order a new trial. But recognising that there will be cases where the proviso does not apply does not exonerate the appellate court from examining the record for itself.

48 Thus, although an appeal under ss 5 and 6 is not a 'rehearing' in the sense of civil appeals under s 75A of the *Supreme Court Act* 1970 (NSW), is it also not correct that the provision of reasons by the trial judge converts the Court of Criminal Appeal determining a ss 5 and 6 appeal into merely or 'strictly' a 'court of error' (particularly in the way that phrase is understood in *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 108-110 and confirmed in *Eastman v The Queen* (2000) 203 CLR 1 at 11 [13] per Gleeson CJ, 24 [69] per Gaudron J, 34 [108] per McHugh J, 60 [184] per Gummow J and 97 [290] per Hayne J, which was concerned with s 73 of the Constitution, not ss 5 and 6 of the *Criminal Appeal Act*, as is *O'Donoghue*).

49 This conclusion is further supported by the following considerations. Subject to leave, s 5 of the Criminal Appeal Act gives an appellant a right of appeal on a question of fact alone. To give that right and then take it away with a 'no evidence' rule or equivalent would be anomalous. That the Court of Criminal Appeal may uphold an appeal for a miscarriage of justice also suggests 'the possibility of considerations ranging more widely than those acknowledged in *O'Donoghue*': *DPP v JG* [2010] NSWCCA 222; (2010) 220 A Crim R 19 per Basten JA at [21]. The breadth of the circumstances which may constitute or give

rise to a 'miscarriage of justice' are set out in *Cesan v R* (2008) 236 CLR 358. Also apt is the requirement for the appellate court to assess the relevant question for itself in appeals concerning jury discharge based upon 'impermissible prejudice' (*Crofts v R* (1996) 186 CLR 427 at 441) and bias and apprehended bias: *Webb v R* (1994) 181 CLR 41 at 53-54. Finally, it has also has never been suggested that the reasoning in the *O'Donoghue* line of cases applies to the Court's assessment of the proviso, which is the converse of but otherwise akin to the exercise under the first limb of s 6(1).

50 Guidance as to the Court of Criminal Appeal's task on an appeal from a trial by judge alone, when considering whether an error of fact has been established or whether, more generally, a verdict is unreasonable or cannot be supported having regard to the evidence, can, however, be found in *Warren v Coombes* (1978-1979) 142 CLR 531 and the long line of cases applying it, with clear recognition of the differing statutory context and burden of proof. (It should be noted that in *Sio v R* [2015] NSWCCA 42, Leeming JA, with whom Johnson and Schmitt JJ agreed, considered that the Court of Criminal Appeal approaches a review of a trial judge's conclusion when giving a ruling on the admissibility of hearsay evidence that the circumstances make it 'likely' that the representation is reliable, in accordance with *Warren v Coombes*.)

51 *Warren v Coombes* concerned an appeal by way of rehearing (pursuant to s 75A of the *Supreme Court Act* 1970 (NSW)), however, more generally it provides logical reasoning, without presumptions, as to the manner in which appellate courts review findings of fact. In relation to the position of the Court of Appeal faced with a ground of appeal as to errors in the inferences drawn by a trial judge, Gibbs CJ, Jacobs and Murphy JJ held (at 551-553, citation omitted):

> [I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it. These principles, we venture to think, are not only sound in law, but beneficial in their operation.
>
> ... the traditional and practical reasons for the reluctance of an appellate court to interfere with the verdict of a jury do not exist where the judgment is that of a judge sitting alone; for one thing, the judge gives reasons, whereas the verdict of the jury is, as Lord Denning M.R. has said, 'as inscrutable as the sphinx'. Again with the greatest respect we can see no justification for holding that an appellate court, which after having carefully considered the judgment of the trial judge, has decided that he was wrong in drawing inferences from established facts, should nevertheless uphold his erroneous decision. To perpetuate error which has been demonstrated would seem to us a complete denial of the purpose of the appellate process.' ... if the judges of appeal consider that in the circumstances the trial judge was in no better position to decide the particular question than they are themselves, or if, after giving full weight to his decision, they consider that it was wrong, they must discharge their duty and give effect to

> their own judgment. ... if the law confers a right of appeal, the appeal should be a reality, not an illusion; if the judges of an appellate court hold the decision of the trial judge to be wrong, they should correct it.

52 Put another way, it might be said that the Court of Criminal Appeal asks whether the challenged finding of fact or inferential reasoning was reasonably open to the trial judge. The question is not so different from the identification of error by reason of mistake of fact (in the different context of discretionary judgments) in *House v The King* (1936) 55 CLR 499, where, mistake the facts must mean that the finding was not reasonably open to the decision maker. Thus, the Court of Criminal Appeal is not rehearing the matter and simply substituting its opinion for that of the trial judge's, however, where it can determine that the finding beyond reasonable doubt was not reasonably open, applying its own logical considerations, factual error or unreasonable verdict (depending on the nature and consequences of the error) is established. The next question will be whether the error was of any significance to the reasoning to guilt, such that it can be determined whether the error was so insignificant as to not constitute a miscarriage of the fact finding process resulting in a miscarriage of justice, in the case of factual error; or whether the error was in an aspect of the reasoning process that made the verdict unsupportable. In the latter case, if the judge's reasons show that the impugned reasoning process could not support a verdict of guilty, the Court of Criminal Appeal must then consider whether, on the whole of the evidence, it was open to the trial judge to convict the appellant. If it was not, the Court of Criminal Appeal must acquit the appellant. If it was, the Court of Criminal Appeal must then consider the proviso; whether it was, on the whole of the evidence, open to acquit the appellant (the sine qua non referred to in *Weiss*), and, if not, whether there was, in any event, a substantial miscarriage of justice warranting a retrial.

**(c) Outcome in these proceedings**

53 The second of Mathews AJ's errors found by McClellan JA – that her Honour impermissibly reasoned that the statements made by the appellant as to his state of mind *after* the shooting showed that he had not lost self-control *at the time* of firing the shots, and then impermissibly gave determinative weight to that reasoning – effectively precluded Mathews AJ from determining the first limb of the test of provocation as it applied to the appellant's case. What her Honour was in fact required to determine was whether the appellant, who was quick to temper, shot the (two) deceased as a result of a loss of self-control induced by the conduct of the deceased in bringing a firearm to his home, showing it to him within about a metre from his person and telling him, 'we've got this', in the context of an escalating dispute with the deceased that had involved property damage, verbal abuse and threats of serious violence using a firearm, the most recent

incident of which was an abusive sexual message scratched by one of the deceased into his vehicle, or possibly a false allegation of having thrown books through the deceased's window.

54 The errors made by her Honour in respect of the second limb of the provocation test also caused her Honour to apply an incorrect and higher test than is provided in the Act, thereby precluding her determination of the second limb. The question her Honour was required to, but did not, ask, is set out above at [31]. Thus, neither limb of the test necessary to determine the appellant's guilt was determined according to law in the appellant's trial. This is an error in respect of the central issue to be tried and is similar, although not as egregious, as the procedural error in *AK v R* [2008] HCA 8; 232 CLR 438. In these circumstances, her Honour's errors constituted a substantial miscarriage of justice and this Court cannot be satisfied that it was not open to acquit the appellant. This Court can be satisfied that the only appropriate order the Court of Criminal Appeal could make is to order a retrial. Accordingly this Court should make the orders sought by the appellant.

55 Alternatively, and having regard to the restricted basis upon which leave to appeal to this Court was granted, it is accepted that if this appeal ground is made out, the appropriate course may be for this Court to remit the matter to the CCA be determined according to law.

**Sentence appeal**

56 Justice Mathews held that she was obliged to sentence on the basis that 'the origin of the revolver (was) an unknown quantity': ROS [22] cf. CCA [113]-[123]. '[F]or the purposes of the trial' her Honour accepted that Luke Willis had 'brought the revolver to the confrontation': ROS [14]. Although her Honour ultimately decided the question of provocation at trial adversely to the appellant, she considered the finding as to who brought the gun to the confrontation 'significant finding in the circumstances of this case': JOC [36].

57 Her Honour held that the Crown could not establish beyond reasonable doubt that the appellant brought the loaded gun to the confrontation, so it failed on the issue. However, she also held that, as the appellant could not establish the converse on the balance of probabilities, he too failed on that issue. Her Honour accepted the Crown submission that she was therefore 'in a form of limbo': ROS [22].

58 In point of fact there were only two possibilities available to her Honour: either Luke Willis brought the loaded gun to the confrontation or it was brought by the appellant. It was a binary choice, and for sentencing purposes the difference was stark. The finding as to who brought to gun was essential to the very circumstances of the offence, including questions as to state of mind. The approach taken by Mathews AJ, if applied literally, meant that the Court was to assess culpability absent any finding as to the critical events occurring in the period immediately before the actual acts of pulling the trigger. It can be asked, rhetorically, how could one begin to assess any such question without any content on the most critical factual question at issue? Without a finding, there was very little that actually could be found about the circumstances and gravity of the offending, and little or no meaningful content given to sentencing principles found in the *Crimes (Sentencing Procedure) Act* 1999 (NSW) (for example, in ss 3A and 21A) and at common law. The consequent findings on sentence one might anticipate would have been rather different if the appellant was sentenced on the basis that Luke Willis brought the loaded gun to the confrontation, the appellant disarmed him and then in quick time shot both him and his brother Sam Willis.

59 This 'limbo' position appears to be a consequence of an application by Mathews AJ of *Olbrich v R* (1999) 199 CLR 270 at 281 [27] (a case following a plea of guilty in which no question arose as to any findings of fact by the jury, adopting *R v Storey* [1998] 1 VR 359 (***Storey***) at 369).

60 However, this situation in the present case is more akin to that considered in *Cheung v The Queen* (2001) 209 CLR 1 (***Cheung***). The example posited in *Cheung* involved a choice between greed or mercy as a motive for killing an ill and elderly person. There the plurality said (at 11 [9]): 'If the judge were unable to be satisfied beyond reasonable doubt as to the motive of personal gain, then the accused would be sentenced up on the more favourable basis... because the sentencing judge could not be satisfied of the prosecution's allegations'.

61 In this case the judge at trial was unable to find to the criminal standard that the appellant brought the gun to the confrontation and accordingly approached the matter on the basis that Luke Willis brought it, but not because of satisfaction that such was the case. Her Honour should have approached the matter on the same basis on sentence.

62 The incongruity of an inflexible application of *Olbrich* to this situation can be seen from an extrapolation from the circumstances of this case. Assume that on the basis posited (and in light of the criminal onus and standard) the judge found (still applying the criminal

standard) that the appellant did lose self control and she did find that an ordinary person could have been provoked but not so far as to form an intent to kill or do serious injury. That is, in the situation posited the appellant just failed in successfully raising provocation, but was convicted of murder. Coming to sentence should the judge now ignore entirely those findings (on the critical issue at trial) because they were made according to the criminal standard, for the reason that the appellant had failed in establishing the same thing on the balance of probabilities.

63 In that situation if the appellant had raised a doubt on the 'ordinary person' leg of provocation he would have stood to be sentenced for manslaughter yet if he failed on that last issue alone the question of provocation would be ignored entirely in the sentence proceedings for the murder. This outcome, like the one considered in *Olbrich* at 280 [24], is incongruous (the argument rejected in *Storey* at 370 was somewhat different).

64 In *R v Isaacs* (1997) 4 NSWLR 374 at 378 the NSW Court of Criminal Appeal stated five propositions concerning fact finding in sentence. In *Cheung* those five principles were recited and apparently accepted: at 13 [14]. The fourth and fifth of those principles were stated as follows:

> 4. A second constraint is that findings of fact made against an offender by a sentencing judge must be arrived at beyond reasonable doubt.
> 5. There is no general requirement that a sentencing judge must sentence an offender upon the basis of the view of the facts, consistent with the verdict, which is most favourable to the offender: *R v Harris*. However, the practical effect of 4 above, in a given case, may be that, because the judge is required to resolve any reasonable doubt in favour of the accused, then the judge will be obliged, for that reason, to sentence upon a view of the facts which is most favourable to the offender. When that occurs, it will be because of the application of the principle referred to in 4 to the facts of the particular case, and not because of some principle requiring sentencing on the basis of leniency: *R v Lupoi* (1984) 15 A Crim R 183 at 184.

65 Acceptance of these propositions may mean, in some instances, a judge will be obliged to sentence on a version of the facts which the judge did not think established on the balance of probabilities by an offender, however that will be a necessary consequence of the Crown failing to prove a fact beyond reasonable doubt where the issue is essential to the sentencing exercise and presents a binary choice.

66 Further, when a judge sentences (say) in manslaughter on the basis of provocation (according to a jury verdict), the judge does not sentence on the basis that provocation was a reasonable possibility only, rather than something that was accepted as a sentencing fact. Were it otherwise then the history and practice of sentencing would have been quite different. An acquittal for murder but conviction for manslaughter based on the partial defence of provocation would only be a starting point. It would then be a matter of some

considerable importance for an offender to establish provocation on the balance of probabilities. Sentencing practice has not developed this way and these is no case law that suggests it has ever been a serious issue. Section 21A(3)(c) *Crimes (Sentencing Procedure) Act* 1999 providing as a mitigating factor that the offender was provoked by the victim, has not produced this result and would not deny the appellant a finding that he was provoked, nor, in the present case, the finding that the gun was brought by the brothers, in accordance with *Cheung*.

67 *Olbrich* should be read consistently with *Cheung* and applied in a practical way. That means, consistently with *Cheung*, that in a case such as this, findings of fact on issues critical to the question of guilt should have been adopted by her Honour on the question of sentence. There was no occasion for her Honour to be, as it were, 'in a state of limbo'. There was a binary choice on the facts. Not satisfied of the more serious one her Honour should have sentenced on the basis of the other less serious one.

68 It might be noted that the potential 'limbo' position problem does not arise in the United Kingdom, where, upon a contested facts hearing (called a *Newton* hearing; *R v Newton* (1982) 4 Cr App R (s) 13 (CA)) a judge must approach the questions of fact to be decided in accordance with the criminal onus and standard of proof, and the prosecution must generally rebut any mitigating fact the offender asserts: *R v Kerrigan* (1993) 14 C App R (S) 179 at 181 (CA), a case in which the Crown was unable to exclude beyond a reasonable doubt the offender's account of acting in defence of a friend, and therefore the sentence should have been determined 'on the basis that the account which was given to the learned judge by the appellant might have been true'.

69 If the error is established on the single ground upon which leave has been granted in the sentence appeal, then it should be noted that the appellant contends that the CCA conducted the s 6(3) *Criminal Appeal Act* 1912 (NSW) test incorrectly, accepting that her Honour sentenced the appellant erroneously in accordance with the principles in *Way v R* [2004] NSWCCA 131; (2004) 60 NSWLR 168 but refusing the appeal on the basis that the sentences '*were* entirely appropriate and no lesser sentence *was* warranted in law': CCA [123]; cf *Kentwell v R* (2014) 313 ALR 451; (2014) 88 ALJR 947 (*Kentwell*) at [42]-[43] per French CJ, Hayne, Bell and Keane JJ.

70 However, the appellant accepts that if the appeal is successful on the sentence ground alone, then the appropriate order would be one of remittal. If that course were followed,

then the appellant could take up the issue of compliance with *Muldrock v R* (2011) 244 CLR 120 and *Kentwell* in the remitted hearing before the CCA.

**Part VII:** The applicable statutes and regulations as they existed at the relevant time are attached as annexure A. Section 23 of the *Crimes Act* 1900 is no longer in force in the form it was at the relevant time, and was amended by the *Crimes Amendment Provocation Act* 2014

**Part VIII:** The appellant seeks the following orders:

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1. The appeal is allowed.
2. The orders of the Court of Criminal Appeal are set aside.
3. The appellant's convictions are quashed.
4. A new trial is ordered.
5. Alternatively to orders 3 and 4, the conviction appeal is remitted to the Court of Criminal Appeal to be determined in accordance with this Court's reasons.
6. If appropriate, the orders of the Court of Criminal Appeal in relation to sentence are set aside, and the matter be remitted to the Court of Criminal Appeal to be determined in accordance with this Court's reasons.

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**Part IX:** It is estimated the presentation of the appellant's oral argument will require 2-3 hours.

Dated: 8 April 2015

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**IN THE HIGH COURT OF AUSTRALIA**
**SYDNEY REGISTRY** **No. S59 of 2015**

BETWEEN: **CHRISTOPHER ANGELO FILIPPOU**
Appellant

and

**THE QUEEN**
Respondent

**ANNEXURE A**

| No. | Description of Document | Date | Page |
|---|---|---|---|
| | Legislation | | |
| 1. | *Criminal Appeal Act* 1912 No 16 (NSW), ss 5 and 6 | Current | |
| 2. | *Criminal Procedure Act* 1986 No 209 (NSW), s 133 | Current | |
| 3. | *Crimes Act* 1900 No 40 (NSW), s 23 | As at 27.6.10 – 12.06.14 | |
| 4. | *Crimes Act* 1900 No 40 (NSW), s 23 (As amended by Crimes Amendment (Provocation) Act 2014 No 13 (NSW)) | 13.06.14 – Current | |

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## Part 3 Right of appeal and determination of appeals

### 5 Right of appeal in criminal cases

(1) A person convicted on indictment may appeal under this Act to the court:

(a) against the person's conviction on any ground which involves a question of law alone, and

(b) with the leave of the court, or upon the certificate of the judge of the court of trial that it is a fit case for appeal against the person's conviction on any ground of appeal which involves a question of fact alone, or question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal, and

(c) with the leave of the court against the sentence passed on the person's conviction.

(2) For the purposes of this Act a person acquitted on the ground of mental illness, where mental illness was not set up as a defence by the person, shall be deemed to be a person convicted, and any order to keep the person in custody shall be deemed to be a sentence.

### 5AA Appeal in criminal cases dealt with by Supreme Court or District Court in their summary jurisdiction

(1) A person:

(a) convicted of an offence, or

(b) against whom an order to pay any costs is made, or whose application for an order for costs is dismissed, or

(c) in whose favour an order for costs is made,

by the Supreme Court in its summary jurisdiction may appeal under this Act to the Court of Criminal Appeal against the conviction (including any sentence imposed) or order.

(1A) An appeal against an order referred to in subsection (1) (c) may only be made with the leave of the Court of Criminal Appeal.

(2) For the purpose of this Act, a person acquitted on the ground of mental illness, where mental illness was not set up as a defence by the person, shall be deemed to be a person convicted, and any order to keep the person in custody shall be deemed to be a sentence.

(3), (3A) (Repealed)

(4) The Court of Criminal Appeal, in proceedings before it on an appeal under this section, may confirm the determination made by the Supreme Court in its summary jurisdiction or may order that the determination made by the Supreme Court in its summary jurisdiction be vacated and

(a) may affirm or vacate the judgment, order, decision or ruling appealed against, and

(b) if it vacates the judgment, order, decision or ruling, may give or make some other judgment, order, decision or ruling instead of the judgment, order, decision or ruling appealed against.

(6) If leave to appeal under this section is refused by the Court of Criminal Appeal, the refusal does not preclude any other appeal following a conviction on the matter to which the refused application for leave to appeal related.

(7) A person may not appeal to the Court of Criminal Appeal under this section against an interlocutory judgment or order if the person has instituted an appeal against the interlocutory judgment or order to the Supreme Court under Part 5 of the *Crimes (Local Courts Appeal and Review) Act 2001*.

### 5G Appeal against discharge of whole jury

(1) The Attorney General, Director of Public Prosecutions or any other party to a trial of criminal proceedings before a jury may appeal to the Court of Criminal Appeal for review of any decision by the court to discharge the jury, but only with the leave of the Court of Criminal Appeal.

(2) The Court of Criminal Appeal is to deal with an appeal as soon as possible after the application for leave to appeal is lodged.

(3) The Court of Criminal Appeal:

(a) may affirm or vacate the decision appealed against, and

(b) if it vacates the decision, may make some other decision instead of the decision appealed against.

(4) If leave to appeal under this section is refused by the Court of Criminal Appeal, the refusal does not preclude any other appeal following a conviction on the matter to which the refused application for leave to appeal related.

(5) This section does not apply to the discharge of a jury under section 51, 55E, 56 or 58 of the *Jury Act 1977*.

### 6 Determination of appeals in ordinary cases

(1) The court on any appeal under section 5 (1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage

of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this Act, the court shall, if it allows an appeal under section 5 (1) against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3) On an appeal under section 5 (1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

### 6AA Appeal against sentence may be heard by 2 judges

(1) The Chief Justice may direct that proceedings under this Act on an appeal (including proceedings on an application for leave to appeal) against a sentence be heard and determined by such 2 judges of the Supreme Court as the Chief Justice directs.

(2) Such a direction may only be given if the Chief Justice is of the opinion that the appeal is not likely to require the resolution of a disputed issue of general principle.

(3) For the purposes of proceedings the subject of a direction under this section, the Court of Criminal Appeal is constituted by the 2 judges directed by the Chief Justice.

(4) The decision of the court when constituted by 2 judges is to be in accordance with the opinion of those judges.

(5) If the judges are divided in opinion:

(a) as to the decision determining the proceedings, the proceedings are to be reheard and determined by the court constituted by such 3 judges as the Chief Justice directs (including, if practicable, the 2 judges who first heard the proceedings on appeal), or

(b) as to any other decision, the decision of the court is to be in accordance with the opinion of the senior judge present.

(6) Proceedings heard by the court constituted by 2 judges under this section are rendered abortive for the purposes of section 6A (1) (a1) of the *Suitors' Fund Act 1951* if they are required to be reheard because the judges were divided in opinion as to the decision determining the proceedings. The rehearing of the proceedings is considered to be a new trial for the purposes of that Act.

(6) The court must not make a trial by judge order unless it is satisfied that the accused person has sought and received advice in relation to the effect of such an order from an Australian legal practitioner.

(7) The court may make a trial by judge order despite any other provision of this section or section 132A if the court is of the opinion that:

(a) there is a substantial risk that acts that may constitute an offence under Division 3 of Part 7 of the *Crimes Act 1900* are likely to be committed in respect of any jury or juror, and

(b) the risk of those acts occurring may not reasonably be mitigated by other means.

**132A Applications for trial by judge alone in criminal proceedings**

(1) An application for an order under section 132 that an accused person be tried by a Judge alone must be made not less than 28 days before the date fixed for the trial in the Supreme Court or District Court, except with the leave of the court.

(2) An application must not be made in a joint trial unless:

(a) all other accused person apply to be tried by a Judge alone, and

(b) each application is made in respect of all offences with which the accused persons in the trial are charged that are being proceeded with in the trial.

(3) An accused person or a prosecutor who applies for an order under section 132 may, at any time before the date fixed for the accused person's trial, subsequently apply for a trial by a jury.

(4) Rules of court may be made with respect to applications under section 132 or this section.

**133 Verdict of single Judge**

(1) A Judge who tries criminal proceedings without a jury may make any finding that could have been made by a jury on the question of the guilt of the accused person. Any such finding has, for all purposes, the same effect as a verdict of a jury.

(2) A judgment by a Judge in any such case must include the principles of law applied by the Judge and the findings of fact on which the Judge relied.

(3) If any Act or law requires a warning to be given to a jury in any such case, the Judge is to take the warning into account in dealing with the matter.

guilty of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of such child.

(2) Where upon the trial of a woman for the murder of her child, being a child under the age of twelve months, the jury are of opinion that she by any wilful act or omission caused its death, but that at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to such child or by reason of the effect of lactation consequent upon the birth of the child, then the jury may, notwithstanding that the circumstances were such that but for the provisions of this section they might have returned a verdict of murder, return in lieu thereof a verdict of infanticide, and the woman may be dealt with and punished as if she had been guilty of the offence of manslaughter of the said child.

(3) Nothing in this section shall affect the power of the jury upon an indictment for the murder of a child to return a verdict of manslaughter or a verdict of not guilty on the ground of insanity, or a verdict of concealment of birth.

**23 Trial for murder—partial defence of extreme provocation**

(1) If, on the trial of a person for murder, it appears that the act causing death was in response to extreme provocation and, but for this section and the provocation, the jury would have found the accused guilty of murder, the jury is to acquit the accused of murder and find the accused guilty of manslaughter.

(2) An act is done in response to extreme provocation if and only if:

(a) the act of the accused that causes death was in response to conduct of the deceased towards or affecting the accused, and

(b) the conduct of the deceased was a serious indictable offence, and

(c) the conduct of the deceased caused the accused to lose self-control, and

(d) the conduct of the deceased could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased.

(3) Conduct of the deceased does not constitute extreme provocation if:

(a) the conduct was only a non-violent sexual advance to the accused, or

(b) the accused incited the conduct in order to provide an excuse to use violence against the deceased.

(4) Conduct of the deceased may constitute extreme provocation even if the conduct did not occur immediately before the act causing death.

(5) For the purpose of determining whether an act causing death was in response to extreme provocation, evidence of self-induced intoxication of the accused (within the meaning of Part 11A) cannot be taken into account.

(6) For the purpose of determining whether an act causing death was in response to extreme provocation, provocation is not negatived merely because the act causing death was done with intent to kill or inflict grievous bodily harm.

(7) If, on the trial of a person for murder, there is any evidence that the act causing death was in response to extreme provocation, the onus is on the prosecution to prove beyond reasonable doubt that the act causing death was not in response to extreme provocation.

(8) This section does not exclude or limit any defence to a charge of murder.

(9) The substitution of this section by the *Crimes Amendment (Provocation) Act 2014* does not apply to the trial of a person for murder that was allegedly committed before the commencement of that Act.

(10) In this section:

*act* includes an omission to act.

### 23A Substantial impairment by abnormality of mind

(1) A person who would otherwise be guilty of murder is not to be convicted of murder if:

(a) at the time of the acts or omissions causing the death concerned, the person's capacity to understand events, or to judge whether the person's actions were right or wrong, or to control himself or herself, was substantially impaired by an abnormality of mind arising from an underlying condition, and

(b) the impairment was so substantial as to warrant liability for murder being reduced to manslaughter.

(2) For the purposes of subsection (1) (b), evidence of an opinion that an impairment was so substantial as to warrant liability for murder being reduced to manslaughter is not admissible.

(3) If a person was intoxicated at the time of the acts or omissions causing the death concerned, and the intoxication was self-induced intoxication (within the meaning of section 428A), the effects of that self-induced intoxication are to be disregarded for the purpose of determining whether the person is not liable to be convicted of murder by virtue of this section.

(4) The onus is on the person accused to prove that he or she is not liable to be convicted of murder by virtue of this section.

(5) A person who but for this section would be liable, whether as principal or accessory, to be convicted of murder is to be convicted of manslaughter instead.

(6) The fact that a person is not liable to be convicted of murder in respect of a death by virtue of this section does not affect the question of whether any other person is liable to be convicted of murder in respect of that death.

(7) If, on the trial of a person for murder, the person contends:

(a) that the person is entitled to be acquitted on the ground that the person was mentally ill at the time of the acts or omissions causing the death concerned, or

(b) that the person is not liable to be convicted of murder by virtue of this section,

evidence may be offered by the prosecution tending to prove the other of those contentions, and the Court may give directions as to the stage of the proceedings at which that evidence may be offered.

(8) In this section:

***underlying condition*** means a pre-existing mental or physiological condition, other than a condition of a transitory kind.

### 24 Manslaughter—punishment

Whosoever commits the crime of manslaughter shall be liable to imprisonment for 25 years:

Provided that, in any case, if the Judge is of the opinion that, having regard to all the circumstances, a nominal punishment would be sufficient, the Judge may discharge the jury from giving any verdict, and such discharge shall operate as an acquittal.

### 25 (Repealed)

### 25A Assault causing death

(1) A person is guilty of an offence under this subsection if: