IN THE HIGH COURT OF AUSTRALIA

SYDNEY OFFICE OF THE REGISTRY **No. S 59 of 2015**

B E T W E E N: **CHRISTOPHER ANGELO FILIPPOU**

Appellant

and

THE QUEEN

Respondent

10 **RESPONDENT'S ANNOTATED SUBMISSIONS**

Part I: Publication

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

Part II: Concise statement of issues

1. Whether the approach required in determining whether a verdict is unreasonable in a trial by judge alone is to assess the judgment on conviction, determine whether individual findings of fact or particular inferences were open and then determine the effect of any such errors on the reasonableness of the conviction
20 or whether the CCA is to assess the evidence and determine whether the verdict was open on the evidence.

2. Whether, in the accepted circumstances of the present case, the sentencing judge was required to find that the deceased had brought the gun.

Part III: Section 78B of the Judiciary Act

It is certified that this appeal does not raise any constitutional question. The respondent has considered whether any notice should be given in compliance with s78B of the *Judiciary Act 1903 (Cth).* No such notice is required.

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Part IV: Statement of contested material facts

4. 1 The respondent does not contest the applicant's outline of the facts except the assertion that the appellant shot Sam Willis because he was "still abusing" him (AWS [18]). The appellant did not say that Sam Willis was abusing him. He said he did not know what the brothers were yelling when he went out the front of his house (ERISP Q & A 43, 76, 79 (AB 235.10, 239.10). Mrs Filippou said they were calling out his name "Chris, Chris" (ERISP Q & A 50 AB196.10). He said he shot Sam Willis "*because he was still mouthing off*" (Q & A 119 AB 243.25) and appeared unaware of what they were saying: "*Oh F'ing this or whatever, whatever, at that stage it had gone past the point of, you know what I mean?*" (Q & A 120 AB 243.30). There was no evidence that Sam Willis was abusing, or had abused, the appellant.

PART V: Applicable Legislative provisions

The appellant's list of legislative provisions is accepted.

PART VI: Statement of Argument

6. 1 The appellant went to the police station the day after the shooting and told police he had shot the brothers: "*I'm admitting it, I shot the fuckin' queer cunts, I'm admitting it*" (ERISP Q & A 200 AB 253.30). They were "*shit*" (AB 233.43) and they "*probably deserved what they got*" (AB 249.25). He said they pulled a gun on him "*.....But I've always said, you know, come fight, you know, by fist. Pull a gun on some cunt, sorry sweetness, pull a gun on someone, it's a different story altogether, right*" (AB 235.30). Later that day he said "*I'm fucking proud of what I done. Fucking proud of it.*" (AB 390.47)

6. 2 The ERISP statements were made about 20 hours after the shooting.

6. 3 The appellant submits that her Honour made three errors, the principal of which was that her Honour treated these later statements as if they alone, or predominantly, determined that the appellant had not lost self-control (CCA at [102] – [103] AB 479.20).

6. 4 The hostility expressed so soon after the shooting was, on any view, highly relevant to his state of mind at the time of the shooting. It did not foreclose the

issue of whether he had lost self-control, nor was it to be considered alone or in isolation, but it would be difficult to overstate the significance of the appellant's own description of what happened to the assessment of his state of mind at the time.

6. 5 The appellant contends the CCA found that the trial judge gave sole or determinative weight to these admissions (at CCA [103] AB 479.33), and having found that error established, should then have undertaken the proviso task. The CCA did not find that error established.

6. 6 The judgment on conviction presented a coherent narrative of the shooting starting with the initial noise dispute a year before, the appellant's threats to shoot Sam Willis, his intense antipathy to Sam Willis, his eventual shooting of Luke and Sam Willis and his pride in having shot them. Each element of that narrative supported the others. No single element was determinative although the two principal features which her Honour considered demonstrated that there was no loss of self-control were the appellant's intense hostility to Sam Willis and his conduct at the shooting. Even those two could not be separated for, as her Honour found, it was his inherent anger which caused him to act as he did (AB 392.35).

6. 7 It is true that in the section dealing with the later admissions her Honour said the admissions were "ultimately determinative" of the issue of provocation (AB 392.10) but that comment cannot be taken out of context. Her Honour had already made the decisive finding that the appellant was an inherently angry person (JOC [102] AB 391.45) whose conduct at the shooting demonstrated that he had not lost self-control (JOC [90] AB 388.10).

6. 8 It was not merely her Honour who connected the ongoing hostility between the appellant and Sam Willis to his shooting of Sam Willis, the appellant himself said in his ERISP that the confrontation with the brothers on the day of the shooting was a "snowballing" of the dispute that started a year earlier and "*it just sort of kept going and going*" (Q & A 44 AB 235.23). Luke and Sam Willis were "shit" (Q & A 36 AB 233.44). Sam Willis was "*one of these noisy loud mouth dickheads, right. Not only with me but with the rest of the, few of them around there. And it just went on, you know, and on and on.*" (Q & Q 50 AB 235.50) .... "*they're the dickheads who are causing it all so to speak*" (Q & A 56 AB 237.20).

6. 9 The trial judge rejected this attempt to shift the blame to Sam Willis by portraying him as a "*loud mouth dickhead*" who created disturbances in the neighbourhood. Her Honour described Sam Willis as a young University student studying Environmental Science, with an interest in Central American art who also worked with Youth Services helping a child with problems in foster care (Judgment at [33] AB 369.15). The neighbours described him as "polite and composed", "apologetic and respectful" (JOC [15] AB 363.50). Luke Willis was described as a primary school teacher who had recently moved into the Willis home as he was in the process of buying his own house (JOC[23] AB 366.23).

6. 10 Her Honour also rejected the suggestion that they caused a string of disturbances. Her Honour found there had been one noisy party a year before over which the appellant sent a threatening letter to Sam Willis (JOC [12] – [13] AB 363.10). Her Honour accepted that the neighbours were not concerned about the noise. The appellant was the "one exception" (JOC [15] AB 364.20).

6. 11 These findings were not merely background. They described the nature of the appellant's attitude, how extraordinary and extreme it was, to the point that he twice threatened to shoot Sam Willis (AB 364.25, 365.15) and they were highly significant to provocation because this long standing and intense antipathy somewhat undermined the claim that shooting Sam Willis was the result of a sudden and temporary loss of self-control.

6. 12 The account of the shooting itself which Her Honour accepted took into account this pre-existing anger. The appellant said one of the brothers, Luke Willis, produced a gun. The appellant had no difficulty taking the gun from him: "*No, it wasn't, no, it wasn't. But I think they were more stunned than anything.*" (ERISP Q & A 114 AB 242.45).

6. 13 At that point, the two young men were unarmed. They presented no threat, and the appellant was not in fear for his safety. That was why there was no claim of self-defence: "*And we're not running self-defence. If he'd, having taken the gun, it was open to him to step back and say, look, in the terms that he no doubt have used, "Go away". That was open to him.*" (T 243.47 AB 343.50).

6. 14 The appellant shot Sam Willis in the neck and Luke Willis in the chest. They both fell to the ground. The applicant then moved over to Sam Willis's body,

repositioned himself, aimed, and fired directly into his chest (JOC [94] AB 388.50).

6. 15 The applicant walked "calmly" away. He went into the house and told his wife to ring their son. He then had "the presence of mind" to return outside and place the gun in Sam's hand (AB 389.20). He drove away immediately.

6. 16 As her Honour made clear, it was these findings about his conduct in the shooting which were determinative: "*Accordingly, in my view, the accused's acts were not of themselves such as to indicate a loss of self-control on his part. If anything his conduct both during the shooting and immediately after it,* ***pointed in the opposite direction.***" (Judgment [90] AB 388.10)*(emphasis added)*.

6. 17 Although provocation was raised in respect of both murders, in reality, there was no viable case of provocation for Sam Willis's murder. Provocation arose, if at all, only for the murder of Luke Willis. This was because the act causing death to Sam Willis was the firing of the third shot. At that time both young men were on the ground. There was a pause of some seconds after the second shot during which time her Honour found the appellant re-positioned himself over Sam's body, raised his arm and fired directly into Sam's chest. The deliberation of that conduct, the walking "calmly" away and "the presence of mind" to place the gun in Sam Willis's hand were the antithesis of loss of self-control, particularly in the context of his long standing hostility to Sam Willis and his previous threats to shoot him.

6. 18 The error her Honour made is said to be that she assumed that the appellant's pride in having shot the deceased was a continuation of his state of mind at the time of the shooting when in fact none of his statements "unequivocally" asserted a particular state of mind at the time of the shooting (CCA [99] AB 478.21). It was said they described only his state of mind at the time of the ERISP and it was possible for a person to have a temporary loss of self-control yet later seek to justify their actions, such that the later justifications may not necessarily indicate no loss of self-control at the relevant time.

6. 19 It is accepted that there may be cases where a person may have lost self-control yet later seek to justify their actions such that the later justification does not necessarily indicate no loss of control. Whether that is so would depend on the particular circumstances of the case. On the other hand, an offender's

description of an event is often very probative of their mental state at the time of the event.

6. 20 In the present case, the antipathy expressed in the ERISP was an obvious continuation of the pre-existing animosity to Sam Willis, as the appellant himself acknowledged in the ERISP. In essence, he hated him before the shooting and he hated him after the shooting.

6. 21 This was not a matter of assuming that the attitude expressed in the ERISP was his mental state at the time of the shooting. It was a matter of drawing obvious conclusions from the evidence of the existing hostility, the previous threats to kill, and the conduct at the shooting. That such extreme hostility continued after the shooting was not surprising. It was plainly not a later justification of a sudden and temporary mental state, it was the continuation of what her Honour found was the appellant's long standing attitude.

6. 22 Her Honour was well aware that later conduct may not necessarily refute a loss of self-control. Her Honour noted that the appellant's conduct of going to his workplace immediately after the shooting to telephone a friend, presumably to disguise his movements, appeared to be the actions of a man in command of his reason (JOC [67] AB 380.10). However, her Honour considered that of limited relevance as, being an hour or so later, it "was well after the event" and loss of self-control can be fleeting: "*and it is inherent in the nature of a loss of control under s 23 that it be a temporary condition, and sometimes only a fleeting one.*" (JOC [96] AB 389.30). Having afforded limited significance to conduct that occurred an hour after the event because of the fleeting nature of loss of self-control, it is fairly evident her Honour did not give determinative significance to conduct that occurred even later.

6. 23 The other difficulty with the appellant's submission is that it was not correct that the admissions merely described his state of mind at the time of the ERISP and not at the time of the shooting for some of the responses provided powerful evidence of his attitude at the relevant time.

6. 24 It was said that only one question addressed the appellant's state of mind at the shooting:

Q 168 How were you feeling at the time, Chris?

A Well I was feeling nothing to tell you the truth when they, I mean I just wanted to know what they were going on about when I went out the front, sort of thing. Do you get me? But after I shot them like to tell you the truth, you know, they probably deserved what they got. Right. Either get shot or, or shoot them, so to speak. … …. …" .

6. 25 The CCA considered that, properly analysed, that response only described his state of mind as he went out the front of his house and immediately after the shooting but not at the actual moment of the shooting (CCA [101] AB 479.10). However, in the context of the preceding questions, it appeared to address his state of mind when he fired the third shot into Sam Willis's body (AB 248.45):

Q 166 Why would you have shot him when he was on the ground?

A It was, just, it was just happening, right. He, that's what happened, I shot them, you've got your thing, you know, lock me up so to speak - - -

Q 167 All right.

A - - - but you know, don't come around to my place and be heroes, you know, like I've always been taught if you pull a gun use it on someone. You know, don't be a hero and……

Q 168 How were you feeling at the time, Chris?

A Well I was feeling nothing to tell you the truth when they, I mean I just wanted to know what they were going on about when I went out the front, sort of thing. Do you get me? But after I shot them like to tell you the truth, you know, they probably deserved what they got. Right. Either get shot or, or shoot them, so to speak. … …. …"

6. 26 In this context, following from Q 166, Q168 appeared to be addressing how he felt when he fired the third shot.

6. 27 The question which addressed what happened when the first shot was fired was Q 119 (AB 243.25):

Q 119 You shot him first?

A - - - shot him first because he was still mouthing off."

6. 28 In describing that first shot, the appellant did not refer to any loss of self-control or sudden reaction because of something Sam Willis said or did. The appellant said he could not hear what they were yelling when he first went out to confront

them so it would appear that he was more affronted by their presence at his house than what they were saying. His explanation contained no suggestion that he had become overly anxious or upset, rather he seemed annoyed that Sam Willis, who had not produced the gun, was "mouthing off".

6. 29 That was not the only response which addressed his state of mind at the time of the shooting:

> *My wife said, they were out the front yelling. I don't know what they were yelling. I went out there, unlocked the door, went out and said, what's your fucking problem, so on and so on. Then I seen one of the, the right handed one pulled a gun and he goes, I've got this. I said you've got that have you? And then I ripped it off him and shot them. That's it. No more and no less. You know, they want to be heroes, that's what happens.*" (Q & A 43 AB 235.10)

6. 30 This description of the shooting again made was no reference to feeling fear or anger or distress. His response to seeing the gun was to say "*you've got this have you?*" and "ripping" it off him. Then he shot them both: "*No more and no less*". "*No more and no less*" could be read as an express disavowal that anything more was involved. As such it contradicted any suggestion that there was something more, such as a sudden but temporary rupture of his ordinary composure resulting in an unexpected and uncontrolled response.

6. 31 It is well established that an offender is not required to state that there was a loss of loss of self-control in order to raise a defence of provocation (***Van Den Hoek v R*** (1986) 161 CLR 158 at [7], [20]), but it is another thing to disregard or diminish his description of the event which eschews that any such extraordinary reaction occurred.

6. 32 Her Honour did not give sole or determinative significance to the later admissions. Her Honour's conclusion was based, as her Honour stated, on all the evidence: "*It is abundantly clear from the totality of the evidence that the accused was, at the relevant time, an inherently angry man.*" (JOC [102] AB 391.45).

6. 33 Her Honour concluded that he killed the brothers because of his inherently angry nature and not because he suddenly lost self-control: "*I am firmly of the view that it was the accused's inherently angry nature which led to his behaving as he did when he fired the fatal shots. I am abundantly satisfied that there is*

no reasonable possibility that it was a loss of self-control which caused him to fire those shots." (JOC [104] AB 392.35).

6. 34 This finding about the appellant's inherently angry nature was based partly on the appellant's "exceptional" response to the noise incident leading to his threat to shoot Sam Willis. It was not a conclusion determined by the later admissions, although all the evidence had to be considered together, and it was hard to overlook the fact that 20 hours after the shooting the appellant was as hostile to Sam Willis as he had been before the shooting.

6. 35 The CCA considered that some of Her Honour's comments about the admissions gave rise to an "ambiguity" in the reasons (CCA [103] AB 479.30) and commented that "if" her Honour meant that the later statements "alone" determined the issue, or "if" her Honour meant they provided determinative weight, then that might have been an error.

6. 36 The CCA was correct to note these "reservations" (CCA [105] AB 480.15) for, as the CCA observed, it is "conceivable" that a person may temporarily lose self-control and later not regret their actions (CCA [103] – [104]) so that it cannot be assumed that later admissions are necessarily determinative in all cases.

6. 37 However, her Honour had clearly not made any such assumption and the CCA found no error in her Honour's approach, in fact, the court adopted it. In reviewing the evidence, McClellan CJ at CL also noted that the appellant's conduct at the shooting was "deliberate and calculated" conduct, particularly the firing of the third shot killing Sam Willis (CCA [105] AB 480.29). His Honour also took into account, as the trial judge had done, that the appellant had previously threatened to shoot Sam Willis and that the circumstances had enabled him to carry out that threat (AB 480.38). As her Honour had found, it was considered that his conduct of walking calmly away also indicated that he had not lost self-control (CCA [106]).

6. 38 The two further errors cited by the appellant relate to the ordinary person test and her Honour's account of the number of times the appellant went out of the house to confront the deceased.

6. 39 The appellant contends her Honour reversed the onus of proof in relation to the ordinary person test but acknowledges that no such error was found by the

CCA (AWS [26]). The appellant seeks to raise other issues in relation to the ordinary person test (AWS [26] – [31]) none of which arise in the present case as the verdict was not based on that aspect of provocation. The verdict was based on her Honour's "firm view" that the appellant had not lost self-control (AB 392.35).

6. 40 The error in her Honour's account about the number of times the appellant went out to the street to confront the brothers stems from some confusion in the CCA about the evidence and was, in any event, inconsequential.

6. 41 Her Honour accepted that the appellant went out to the street twice. The first time he confronted the brothers and shot them. He returned inside and told his wife to ring their son. The second time, he went back outside and placed the gun in Sam Willis's hand. He returned inside, grabbed his keys, and drove away (JOC [94] AB 388.50). This was consistent and with the eye witness testimony and with the appellant's acceptance that he left the gun on him and left (Q & A 127 AB 244.10).

6. 42 Mrs Filippou also said the appellant went out twice. However, there was some inconsistency between this account and the known facts. It was known that the appellant shot the brothers, that he had possession of the gun after the shooting, and that he returned to place it in Sam Willis's hand.

6. 43 The difficulty with Mrs Filippou's account was that it implied that the first time the appellant went out and confronted the brothers he did not shoot them. On her version, he returned inside and told her ring their son. Then he went out a second time and confronted them again (ERISP Q & A 67 – 70 AB 197.15). As it was known that the appellant went back to place the gun in Sam Willis's hand that meant he must have gone out a third time, which was incongruous because Mrs Filippou agreed he only went out twice.

6. 44 In evidence, Mrs Filippou gave a different version saying that the appellant only went out to the street once. The first time, he did not get to the street, he only got as far as the front porch, leaned back in and told her to ring their son, then went out to confront the brothers:

> *....."But he just put his head in and turned around and said, "Ring Christopher". So I've obviously turned around and gone back to the dining room to get the phone.*

Q. Now, on the time he's out there that first time, did he have time to get off the front porch before he turned back and said, "Ring Christopher"?
A. I don't think so. But the time, to me, wasn't – I didn't – I couldn't tell you the time period. To me, it all happened so quickly." (AB 118.18).

6. 45 The difficulty with this version was that it meant the appellant only went out to the street once, which did not reconcile with the known fact that he returned to place the gun in Sam Willis's hand. It was also inconsistent with the version she gave in her ERISP on the night of the shooting where she indicated that the appellant went out the first time to confront the brothers and there were raised voices of all three yelling (Q & A 106 – 122 AB 200.15). Mrs Filippou said he went out again, then returned, grabbed his keys and left (Q & A 181).

6. 46 McLellan CJ at CL did not consider there was any necessary inconsistency between Mrs Filippou's account and the other evidence because it was possible that the appellant did not go all the way inside after shooting the brothers on his second foray but loitered in the front yard, then returned to place the gun in Sam Willis's hand. His Honour thought this explanation was open on the evidence of the eye witness, Mr Allen, who saw the appellant walk inside after the shooting and return to place the gun in Sam Willis's hand because he said he did not actually see the appellant enter the house. Mr Allen saw him walk towards it and disappear behind some trees. In his Honour's view, it was possible the appellant never went all the way to the front door before he turned around and went back to place the gun in Sam Willis's hand (CCA [82]).

6. 47 This seemed an unlikely explanation because Mr Allen said that when the appellant went towards the house he was gone for about a minute. In that time Mr Allen had called the emergency 000 number (Ex C Statement of Mr Allen 27.6.10 at [10]). On all versions, the incident occurred very quickly so it was unlikely that the appellant waited in his front yard with the gun in his hand all that time.

6. 48 The real difficulty with Mrs Filippou's account was not so much the number of times the appellant went out but the fact that Mrs Filippou never heard the 3 gunshots nor saw the appellant with the gun. This made it difficult to reconcile her account with the known facts.

6. 49 In fact, Mrs Filippou was in no position to say how many times the appellant went outside because she acknowledged that, other than the first time, she did not actually see him walk in the front door. She was in the back part of the

house and saw him walk back from the front of the house but not actually exit or enter through the door (Q & A 140 – 151 AB 203.31).

6. 50 Nevertheless, McLellan CJ at CL considered that Mrs Filippou's version was correct and paraphrased it as being that "*the appellant went out to the street then returned inside*" and then went out again (CCA [78] AB 469.22, [82] AB 470.20). However, that was not her account as she explained it at the trial where she said he did not get past the front porch the first time.

6. 51 In any event, the slight difference between her Honour's findings about the sequence and the account accepted by McLellan CJ at CL was inconsequential. On both accounts, the appellant went out twice. The significant matter was what happened when he was out the front and Mrs Filippou gave no evidence about that. She heard raised voices but did not hear the gunshots.

6. 52 The appellant seeks to characterise this factual error as falling within all three grounds (AWS [23]) but it was not an error that rendered the verdict unreasonable (ground 1), gave rise to a wrong decision on a question of law (ground 2), or to a miscarriage of justice (ground 3).

6. 53 On the general issue of the task of an appeal court in relation to trials by Judge alone the appellant contends that the Court of Criminal Appeal has essentially the same task as in a sentence appeal of applying ***House v The King*** principles to identify errors of fact "or inferential reasoning" in the reasons for judgment. Where such errors of fact or inferential reasoning are identified, "the next question" becomes whether the verdict was rendered unreasonable under the first limb, or a miscarriage of justice has arisen under the third limb, the determination of which will depend on the significance of the mistake of fact to the ultimate verdict (AWS [52]).

6. 54 This suggested two step approach involves a departure from the statutory text. The first limb is directed to whether the ***verdict*** is unreasonable. The task for the appeal court in trials by judge alone is the same as in trials by jury, namely, to assess the evidence independently and determine whether the ***verdict*** was open. The fact that the judgment on conviction discloses individual findings that may not be known in jury trial does not change the nature of the appellate task. Nor is there any utility in adding a first step of determining whether individual findings were open for even where a court may disagree with individual findings

the question remains whether the verdict was open. Even disagreeing with individual findings the Court may consider the verdict was open.

6. 55 Such analysis of the individual findings or reasoning may be more appropriate to the third limb of miscarriage of justice. A mistake of fact or error of reasoning may constitute a departure from a properly conducted trial such as to constitute a miscarriage of justice. This is a separate analysis from that under the first limb for the question whether there was a departure from a properly conducted trial does not involve a determination of whether the verdict was unreasonable.

6. 56 Contrary to the appellant's submission, the test under the proviso is not whether it was "open to acquit", and if not, "whether there was, in any event, a substantial miscarriage of justice warranting a retrial" (AWS [52]). As this Court has stated, the conception of the proviso task should adhere to statutory text, that is, to determine whether no substantial miscarriage of justice has actually occurred. This raises no issue of acquittal. Error having been established, the issue is whether to confirm the conviction or order a re-trial.

6. 57 The appellant seeks to apply the approach adopted in relation to civil appeals as explained in decisions such as ***Warren v Coombes*** (1978 – 1979) 142 CLR 531 to appellate review of trials by judge alone even though the statutory mandate for that approach under s 75A of the *Supreme Court Act* which expressly provides for a rehearing and redetermination of the facts, including power to receive further evidence (s 75A (6)) has no equivalent in the appeal provisions under s 6.

6. 58 It is well established, and accepted by the appellant, that an appeal under s 6 is not a rehearing. Even the determination of whether the verdict is unreasonable is not a rehearing. It is, as the terms of s 6(1) make clear, a determination of unreasonableness in the jury's verdict. It is a quintessentially appellate task dependant on finding error.

6. 59 The one difference arising from trials by judge alone is that in some cases, particularly murder and manslaughter cases, the basis of the verdict will be known and the assessment of the reasonableness of the verdict may be more focussed. The basis of the verdict may often be known in jury trials from the way the trial was conducted but there is usually not an explicit finding as in a trial by judge alone. In the present case, it was known that the basis of the verdict was that the appellant had not lost self-control and that finding helped

focus the issues on appeal but it did not change the nature of the appellate task in determining whether the verdict was unreasonable.

6. 60 Similarly, in undertaking the proviso assessment of whether no substantial miscarriage actually occurred, the effect of the error may be more apparent from the judgment on conviction than from a jury verdict, although that may not always be the case. Trials by jury include a summing up which often sets out detailed instructions as to how the relevant law is to be applied, and like the judgment on conviction, is an important part of the record in making the proviso determination. The appellate task remains the same in trial by judge alone and trial by jury, namely, to determine from the record whether no substantial miscarriage of justice actually occurred.

6. 61 The appellant submits that the conception of the Court of Criminal Appeal as a court of error as set out in ***R v O'Donoghue*** (1988) 34 A Crim R 397 confines the appellate power to cases where there is no evidence to support a finding, the evidence is all one way or the judge misdirected himself. That approach is said to be too constrained and cannot survive the decision of this Court in ***Weiss*** (AWS [44] – [47]).

6. 62 The appellant is correct that in determining whether a verdict is unreasonable, whether there has been a wrong decision on a question of law or on any other ground there has been a miscarriage of justice, the CCA is not constrained to consider only whether there is no evidence to support a finding or the judge misdirected himself or herself. The comments in ***O'Donoghue*** did not address the statutory power under s 6(1). They were made in respect of a challenge to findings of fact in a ruling on admissibility in a trial by jury. The alleged error in the exercise of the discretion to exclude an oral admission included a claim that there had been an erroneous factual finding. The CCA observed that challenges to factual findings in such rulings had to identify error, essentially that the findings were not reasonably open. Those observations were not intended to define the full range of appellate power under s 6.

6. 63 Each of the three limbs of s 6 presents a different issue and involves different tasks. However, none of those tasks involves a rehearing of the kind provided for under s 75A of the *Supreme Court Act*.

6. 64 This distinction between the three limbs is illustrated in the present case. If it were established that her Honour determined the question of provocation

relying only, or predominantly, on the later admissions, that would not have rendered the verdict unreasonable. This was an overwhelming case of murder, particularly in relation to the killing of Sam Willis. However, such an error, if it existed, may have constituted a wrong decision on a question of law, or a miscarriage of justice within the second or third limbs. The proviso question would then have been, such error having been established, whether no substantial injustice had actually occurred. At that stage, the only question would have been whether to confirm the conviction or order a retrial[1].

10 **Sentence**

6. 65 The appellant contends that, as the trial judge found that Luke Willis brought the gun for the purposes of conviction, the same finding should have applied on sentence.

6. 66 The factual difficulty with that contention is that the trial judge did not find that Luke Willis brought the gun, on the contrary, her Honour found it was "*most unlikely*" that he brought it: "*My own view, after considering all the evidence, is that it was probably the accused who brought the revolver into the confrontation… … and it is most unlikely that either of [Mr Willis's] sons would have been harbouring it.*" (JOC [85] AB 386.29).

20 6. 67 Her Honour said she was satisfied on the civil standard that the appellant brought the gun: "*If this matter were to be determined according to the civil standard of proof, I would almost certainly have made a finding to that effect.*" (JOC [85] AB 386.30).

6. 68 The appellant's contention also involves a logical difficulty in that the appellant seeks to translate the finding that there was a doubt as to whether the appellant brought the gun into a positive finding that the brothers brought it.

6. 69 That may be possible in some cases where the failure to prove a fact allows for the corresponding conclusion that an alternative fact is established but that was not possible in the present case where there was an express finding that the
30 alternative was most unlikely (JOC [85] AB 386.29).

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[1] These are the usual alternatives in the application of the proviso, although there may be "special cases" where the CCA may substitute a verdict for another offence under s 7 of the *Criminal Appeal Act*.

6. 70 The appellant's submission that the provenance of the gun was "essential" to the circumstances of the offence, in particular, the appellant's state of mind (AWS [58]) is correct for the purposes of conviction but not for sentence. As the appellant points out, the provenance of the gun went to the issue of the appellant's state of mind, in particular, whether he lost self-control which was an issue that had been determined by the time of sentence. The sentence was for murder on the basis that the appellant had not lost self-control. As to his mental state, the trial judge found that he shot the brothers, not because they had produced a gun but because he was an inherently angry man who harboured an intense hostility to Sam Willis. Those findings on conviction were made in acceptance of the possibility that they had brought the gun. Those findings as to his mental state applied at sentence as did the finding that he did not bring the gun.

6. 71 Contrary to the appellant's submission, what was presented was not a binary choice between two equally available alternatives. In fact and in law, it was not a matter of choosing whether the appellant or the brothers brought the gun. The Crown bore the onus at all times. The Crown had to prove that the appellant intended to kill the brothers and that provocation was excluded. In the circumstances of this case, that meant that the Crown had to prove that the appellant brought the gun. Failing that, that he had not lost self-control.

6. 72 The Crown case was that when the appellant first met Sam Willis at his house he told him "if you come back I'll shoot you" and that is what he did (Crown closing address (AB 311.37). The Crown's primary position was that he brought the gun and shot them in a "calm, calculated" way (AB 306.20), and in firing the third shot into Sam Willis's chest he had executed him (AB 304.32).

6. 73 The provenance of the gun was crucial only in the sense that had the Crown proved that the appellant brought the gun then provocation failed as the other circumstances were not sufficient to raise provocation (JOC [86] AB 386.47). But it was not essential to the charge of murder because, even if the Crown could not establish that the appellant brought the gun, it was still possible to exclude provocation if it could be proved there was no loss of self-control.

6. 74 There was no logical inconsistency in determining whether he had lost self-control on the possibility that the appellant might not have brought the gun and sentencing on the basis that the provenance of the gun was unknown. That

was an unexceptional consequence of the standard of proof. The appellant was given the benefit of the doubt about whether he brought the gun on the issue of whether he had lost self-control. That same doubt applied to sentence. Precisely the same findings were made on sentence (ROS 22 AB 427.23). Her Honour noted that she was not satisfied to the requisite standard that the appellant brought the gun. That meant the appellant was to be sentenced on the basis that he did not bring the gun.

6. 75 The appellant submits that sentences for manslaughter by provocation do not proceed on the basis that provocation was merely a reasonable possibility, at sentence, provocation is accepted as "a sentencing fact" (AWS [66]). That is correct and it is because the sentencing judge must sentence in accordance with the elements of the offence and the facts essential to establish those elements. Where manslaughter by provocation is established the sentencing judge must sentence in accordance with the elements of that offence.

6. 76 In the present case, the offence was murder. The provenance of the gun was not an essential fact to the elements of that offence.

6. 77 The appellant submits that even if the provenance of the gun was not essential it was at least relevant as a mitigating factor under s 21A(3) of the *Crimes (Sentencing Procedure) Act* 1999. Her Honour accepted, even without determining the provenance of the gun, that there was no planning or deliberation within the meaning of s 21A(3)(b) (AB 426.30). The brothers came to the appellant's house unexpectedly and his response in going out to confront them was obviously immediate and unplanned.

6. 78 The appellant submits that if there had been a positive finding that the brothers brought the gun there might have been a more favourable view of the appellant's reason for shooting them. It is doubtful that such a favourable view was available as her Honour had already made findings as to why he killed them even accepting the possibility that they brought the gun.

6. 79 Her Honour found that, even accepting the possibility that they had brought the gun, the appellant shot the brothers because he was an inherently angry man who had an unwarranted yet intense hostility to Sam Willis. Her Honour found the appellant deliberately positioned himself over Sam Willis's body realising that his first shot had not been fatal and purposefully aimed a second shot into his chest (ROS [23] AB 427.37). The provenance of the gun had little

significance to the sentence given those findings which had been based on the possibility that Luke Willis brought the gun.

6. 80 The appellant relies on a passage from the joint reasons in ***Cheung v R*** where two possible motives for murder are posited, one greed, the other a humanitarian desire to end the victim's suffering and it was said that "*If the judge were unable to be satisfied beyond reasonable doubt as to the motive of personal gain, then the accused would be sentenced upon the more favourable basis*"[2] and contends the same applies in the present case. Either the appellant or the brothers brought the gun. If the judge was unable to determine beyond reasonable doubt that the appellant brought the gun then he ought to have been sentenced on the more favourable basis that the brothers brought it.

6. 81 This confuses the principle with the example which illustrated it. The principle was that there is no obligation on a sentencing judge to sentence upon a view of the facts most favourable to the offender consistent with the jury's verdict. The example illustrated this by showing that in some cases, if the judge proceeded on the most favourable basis it was because of the operation of the onus of proof on the particular facts of the case not because it was required by principle.

6. 82 The example did not purport to prescribe a general approach for drawing conclusions between alternatives, it merely illustrated why, as a practical matter, favourable findings may be made, while emphasizing that there was no requirement to do so. The making of findings must depend on the particular circumstances of each case.

6. 83 The example in ***Cheung*** posited two equally available alternatives where the logical consequence of a failure to prove one was that the other became available. That did not apply in the present case. The two alternatives were not equally available. Her Honour found it was most unlikely that the brothers brought the gun and the probabilities were that the appellant brought it. In that context, a failure to be satisfied beyond reasonable doubt did not lead to the finding that the brothers brought it.

6. 84 The applicable principle is that stated in ***Cheung***, quoting from ***R v Isaacs*** (1997) 41 NSWLR 374, that findings made against an offender must be arrived

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[2] ***Cheung v The Queen*** (2001) 209 CLR 1 at [9].

at beyond reasonable doubt. The practical effect of that "*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.....*"[3]. Whether that "practical effect" will operate in a particular case will depend on the circumstances of the given case.

6. 85 In the present case, the practical effect was that the appellant was sentenced on the basis that he did not bring the gun.

6. 86 There may be circumstances where an alternate finding favourable to the offender is possible on sentence but that must depend on the circumstances of the given case. That was not possible in the present case because of the express finding that it was most unlikely the brothers brought the gun.

6. 87 There are many matters relevant to sentence which may not be able to be determined in a particular case. As this Court held in ***Weininger v The Queen***: "*The sentencing judge may not be able to make findings about all matters that may go to describe those circumstances. In particular, an offender may urge a particular view of the nature and circumstances of the offence, favourable to the offender. The sentencing judge may be unpersuaded that the view urged is, more probably than not, an accurate view of the circumstances. In such a case, it is not correct that the judge is bound to sentence the offender on that favourable basis, unless the prosecution proves the contrary beyond reasonable doubt. Accordingly, in the particular facts of* ***Olbrich****, where the offender asserted that he was no more than a courier of the drugs, but the sentencing judge disbelieved him, it was neither necessary nor appropriate to sentence him on the basis that he was a courier.*"[4]

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[3] ***Cheung v The Queen*** (2001) 209 CLR 1 at [14].
[4] ***Weininger v The Queen*** (2003) 212 CLR 629 at 636 – 7 [20].

6. 88 In such circumstances, the sentence must proceed on those matters which are known: "*Further, a sentencing hearing is not an inquisition into all that may bear upon the circumstances of the offence or matters personal to the offender. Some matters may be fixed by the plea or verdict of guilty although, even there, there may be ambiguities (as for example, in some homicide cases where a verdict of manslaughter is returned). Many of the matters relevant to fixing a sentence are matters which either the prosecution or the offender will draw to the attention of the sentencing judge. Some matters will remain unknown to the sentencing judge.*"[5]

10 6. 89 This is not to say that a finding that the brothers brought the gun would have been irrelevant, however, it was not essential. The finding that the provenance of the gun was unknown was not made because the appellant bore an onus which he had failed to satisfy. The finding was made in the trial where the Crown bore the onus. The issue of who brought the gun was not entirely in limbo. It was accepted for the purposes of sentence that the appellant had not brought it. Having stated expressly that it was most unlikely that the brothers brought it no principle of law or practice required her Honour to overturn that finding and proceed to sentence on a basis that had been expressly rejected.

20 **PART VIII: Time Estimate**

It is estimated that oral argument will take 1 hour.

Dated: 22 April 2015

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[5] ***Weininger v The Queen*** (2003) 212 CLR 629 at 637 [23].