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Federal Court of Australia No. NSD. 689, 690, 691 of 2023

District Registry: New South Wales

Division: General

Ben Roberts-Smith VC MG

Appellant

Fairfax Media Publications Pty Ltd and others

Respondents

APPELLANT'S OUTLINE OF SUBMISSIONS IN REPLY

A. RESPONDENTS' SUBMISSIONS RE APPROACH TO FACT FINDING

1. Approach to fact finding

1. 1. Despite invoking orthodox principles regarding the onus of proof [RS 89 and 97], the respondents contend that in some circumstances, positive disbelief in a particular state of affairs may support the existence of a belief in an alternative state of affairs [RS 90] citing as authority, the observations of Gibbs J in *Steinberg v Federal Commissioner of Taxation* (1970) 134 CLR 640 at 694 that if the truth must lie between two alternative states of fact, disbelief in evidence that one of the state of facts exists may support the existence of the alternative state of facts. Gibb J's use of the word "may" expressed a well-informed caution that the common law's approach to discovering facts is not simply a matter of preferring one witness's version to another, but rather involves establishing a case to the requisite burden of proof, including by consideration of a kind carried out daily by trial courts concerning the reliability of a witness's recollection of historical events. In principle, a civil onus (with or without section 140 rigour) is not to be treated as discharged by disbelief in opposing evidence: cf in the case of criminal onus, *Liberato v R* (1985) 159 CLR 507 at 515 per Brennan J.

1. 2. The Respondents contend that the rejection of one of the two competing accounts has consequences for the fact finding process [RS 11] and that in respect of each of the missions to W108, Darwan and Chinartu, the elimination of the Appellants' account made the Respondents' case more credible because, presumably, such rejection rendered the Respondents' case more probable [RS 96].

1. 3. For example, in relation to the mission to Darwan, if neither of the Appellant's case (that the man was a spotter who had been hiding in the cornfield, and that the appellant shot him as he returned the HLZ) nor the Respondents' case (that the Appellant and Person 11 were responsible for kicking the man off a cliff, and then dragging him to the edge of a cornfield and shooting him) is true, then how can (the Respondents ask) the death of an Afghan male in a cornfield be explained? [RS 96]

1. 4. A reasoning process that involves relying upon the rejection of one party's case as a matter that confirms or supports the other party's case, even where neither party propounds the possibility of a "third option" is flawed:

(a) It inverts the burden of proof because it depends upon an assessment only of the evidence of the party whose case is rejected.

(b) In the absence of a permissible finding of consciousness of guilt, the reasoning may become circular in the sense that reliance upon the falsity or rejection of the Appellants' witnesses for corroboration of the Respondents' case would amount to the Respondents' witnesses corroborating themselves.

1. 5. The question for the tribunal of fact is always whether the party bearing the onus has discharged it. It may be correct that if the opposing party's case is accepted, then the party with the onus would not have discharged it. However, even where the truth must lie between two alternative states of affairs, meaning it must be one or the other as opposed to some intermediate or different state of affairs, disbelief in a party's case must not be used by the tribunal of fact to corroborate the strength of the opposing party's case or to render it more probable than not. It is in this sense that the judicial approach, having rejected an opposing version, properly focuses on the abiding question whether the supportive evidence shows the requisite preponderance of likelihood.

B. ADEQUACY OF REASONS

2. Adequacy

2. 1. The provision of adequate reasons requires an unsuccessful party to be able to understand why the trial judge has accepted the case of his or her opponent. Where issues of credibility involve sub-issues, it is incumbent upon a trial judge to resolve the sub-issues and to explain how the decisions on the sub-issues have assisted the trial judge in forming a conclusion on the ultimate issue: *Goodrich v Aerospace* [2006] NSWCA 187; (2006) 66 NSWLR 186 (Ipp JA, Mason P and Tobias JA agreeing).

2. 2. A glaring improbability about the story accepted may constitute "a governing fact" that has created a "wrong impression" and may reveal error in the process of fact finding. Likewise misunderstanding or disregard of a material fact may have a similar effect: *SS Hontestroom v SS Sagaporack* (1927) AC 37 at 50 (Lord Sumner). In *Waterways Authority v Fitzgibbon* (2005) 79 ALJR 1816 at 1835, Hayne J observed at [130]:

> Rather, because the primary judge was bound to state the reasons for arriving at the decision reached, the reasons actually stated are to be understood as recording the steps that were in fact taken in arriving at that result. Understanding the reasons given at first instance in that way, the error identified in this case is revealed as an error in the process of fact-finding. In particular, it is revealed as a failure to examine all of the material relevant to a particular issue.

2. 3. A failure by a trial judge to deal with an improbability constituting a "governing fact" in the *SS Hontestroom* sense may constitute "an error in the process of fact-finding" as explained by Hayne J: *Goodrich* at [31].

C. W108 (GROUNDS 1 TO 4)

3. 12 April 2009

3. 1. Although the trial judge referred correctly, on a number of occasions, to the proposition that the onus of proof remained from start to finish on the Respondents (see for instance J[538], [580], [779], [789] and [871] in relation to W108), his Honour did reason inconsistently with this proposition.

3. 2. No more was this evident than in relation to his findings concerning the execution of EKIA 56 and EKIA 57 at W108. At J[535], the trial judge noted the Respondents' submission that:

(a) the location of the body of EKIA 56 provides the surest guide to the resolution of the conflict between the respective cases of the parties;

(b) the body of EKIA 56 was located inside the tunnel courtyard (the Appellant's case was that it was located outside the compound – a finding that is not challenged on appeal);

(c) it followed almost inevitably from a finding about the location of the body, that the corresponding party's case in relation to the circumstances of the death of EKIA 56 should be accepted.

(d) once a party's case concerning the circumstances of EKIA56's death is accepted, it followed that that party's case concerning the circumstances of EKIA57 should also be accepted.

3. 3. The Respondents' submissions (RS [18], [201], [210], [247]-[259] and [373]) place significant weight on the documentary evidence concerning the location of the body of EKIA 56 as corroborating the evidence of Person 41 who said he saw the execution of EKIA 56. The Appellant does not challenge for the purposes of this appeal the trial judge's finding about the location of the body of EKIA 56 in the tunnel courtyard at W108 (cf RS [259]). However, there could not be any rule or principle to the effect that evidence that corroborates one part of a witness's

testimony (here Person 41) automatically corroborates the entirety of that witness's testimony: *R v Major and Lawrence* [1998] 1 Qd R 317 at 319 [20] per Fitzgerald P. That Person 41 was correct about the location of the body of EKIA56 does not mean that the probability of the remainder of his evidence about Person 4's involvement in the death of EKIA56 was enhanced. This is inconsistent with the truism, elsewhere referred to by the trial judge, that a witness can be correct about one matter, but not about others (J[948]). Nor does the supposed fact that EKIA56 was killed in the tunnel courtyard necessarily increase the probability that he was found in the tunnel rather than elsewhere, either inside or outside the compound.

3. 4. Further, the fact that the body of EKIA 56 was located in the tunnel courtyard or that he was killed by a shot to the head does not increase the probability that EKIA 56 was executed (as opposed to lawfully engaged), nor does it increase the probability that EKIA 56 was one of two men who were found in the tunnel a short distance away in the courtyard of W108.

3. 5. That the body of EKIA 56 was located in the tunnel courtyard and that the execution was found to have occurred after the compound was declared secure (J[433]) serve only to reinforce the peculiarity (and improbability) of Person 41's evidence concerning the request by the Appellant and Person 4 to borrow a suppressor. The Appellant does rely on the inconsistency between the request for a suppressor (and the apparent intention to mask an execution with discretion) and the proximity of the bodies of EKIA 56 and EKIA 57 to one another. Accepting that EKIA 56 was found within the courtyard, the evidence of Person 41 was that Person 4 was very close at the time of execution. Person 41 placed the Appellant, at the time he fired shots at EKIA 57, outside of the courtyard but very close by – perhaps 10-15 metres.

3. 6. Furthermore, the Appellant does not accept that either the trial judge or the appellate court is confronted with just two competing versions of events concerning W108. The evidence of the Respondents' witnesses concerning the mission includes inconsistencies among themselves (about the number of men emerging from the tunnel and the sequence of events thereafter) which affect the coherence of their accounts and their reliability. As described below, an inconsistency between the evidence of Person 40 and Person 43, on the one hand, and Person 81, on the other

hand, about whether there were men in the tunnel who were then detained by Gothic Troop remains unaddressed (and unresolved). The Appellant does not advance on appeal a submission that the trial judge erred by rejecting the Appellant's versions of events at W108. Rather, the Appellant submits that the Respondents' evidence was not capable of persuading the trial judge to the requisite standard to make findings that the Respondents' account of events actually occurred. The reasons do not explain how the requisite preponderance of likelihood appears.

4. Particulars 14, 16 and 17: "Blooding the rookie"

4. 1. At RS [147], the Respondents refer to the trial judge's finding at J[275] that in relation to the killing of Objective Depth Charger, which occurred prior to the W108 mission, the perceptions at the time were that the soldiers who fired the fatal shots were Person 6, Persons 18 and 14. While this may have been true for these three persons (that is, each of them may have understood that they were individually or jointly responsible for engaging the target), Person 4's evidence was that he along with Person 6 and Person 5 engaged the target.[1] Person 4 did not suggest that either Person 18 or Person 14 engaged the target. The trial judge did not explain why Person 4's evidence in this respect was not accepted.

4. 2. The trial judge accepted the evidence of Persons 4 and 18 (but not Person 5) in relation to what occurred on the mission (J[274]-[275]). In doing so, the trial judge did not explain why their evidence was accepted in circumstances where Person 4's account was inconsistent with the Person 18's account, but also in part corroborated Person 5's account (who said that he and Person 4 engaged the target).

4. 3. Even if Person 5's evidence is not accepted, on the basis of Person 4's evidence, which the trial judge accepted (J[274]-[275]), his perception and Person 5's perception would have been that they together engaged the target. As the Respondents' case in relation to the execution of EKIA 56 at W108 was premised on Person 5's desire to "blood the rookie", insofar as Person 4 was involved in the engagement of Objective Depth Charger, it was the perceptions of Person 5 and

[1] T2768:1-4 (P4).

Person 4, rather than Persons 6, 18 and 14, that mattered. The trial judge's reference to "perceptions at the time" at J[275] with respect, overlooks the significance of whose perceptions mattered and what Person 4 said in respect of his involvement in the engagement of Objective Depth Charger.

4. 4. Finally, on this issue, the suggestion that Person 4 drew a distinction between "engaging" and "killing" goes nowhere in circumstances where there is no controversy that the target was killed.

5. Particulars 9(a) 10 and 13; Afghan men in the tunnel

5. 1. At RS [189], the Respondents refer to the trial judge's reliance upon three alleged contemporaneous conversations between Person 40, on the one hand, and Persons 41, 42 and 43, on the other, concerning the fate of the two Afghan men in the tunnel. The trial judge treated this evidence as corroborating Person 40's evidence that two men came out of the tunnel. Each of Persons 40, 42 and 43 gave evidence that they saw men come out of the tunnel at W108.[2]

5. 2. The trial judge's approach at J[446]-[451] involved circularity. Each of Person 40, Person 41, Person 42 and Person 43 were the only witnesses (other than Person 18) who claim they saw men emerge from, or be detained near, the tunnel, to support Person 40's evidence that he saw men come out of the tunnel. Whether any men were present in the tunnel was a disputed matter. Persons 40, 41, 42 and 43 were called by the Respondents to give evidence in support of the contention that two men were found in a tunnel at W108. The existence of the alleged conversations between Person 40 and Persons 41, 42 and 43 about the disputed matter should not have been attributed any weight by the trial judge as matters that supported a finding that two men were located in the tunnel for two reasons. *First*, the evidence of these conversations amounted to witnesses corroborating themselves. Person 40's evidence of his conversation with Person 42 provides the example; it involved the witness corroborating himself. The evidence of the other two conversations between Person 40 and Persons 41 and 43 are not logically probative of the question

[2] J[435].

whether two men were found in the tunnel as their evidence was not independent testimony in relation to the disputed issue. *Second*, none of Person 40, 41, 42 and 43 backed up the evidence of the conversations. In each case, only one party to the alleged conversation gave evidence that it had occurred. The trial judge did not explain how he was satisfied, on the slender evidence adduced, that those conversations from 13 years ago actually occurred, more likely than not.

5. 3. In reply to RS [206] and [208], the trial judge's finding that two men were found in a tunnel at W108 was inconsistent with the evidence of Person 81 when his evidence is examined in the context of the Respondents' case, particularly Persons 40 and 43. There was an inconsistency between the evidence of Persons 40 and 43 and the evidence of Person 81 concerning whether men came out of the tunnel at W108. Person 40 said that Person 81 and Person 82 and all of the patrol commanders were present when two insurgents emerged from the tunnel.[3] Person 43 said that Person 81, Person 82 and the patrol commanders were present and getting ready to conduct the Commanders' RV when the tunnel was discovered and a man emerged from it.[4] Person 81 could not recall whether he was standing nearby when the tunnel was discovered and refused to speculate about this matter.[5] While Person 81 accepted that he was unable to say one way or the other whether there were people in the tunnel,[6] he did not see anyone come out of the tunnel,[7] nor did he see any fighting aged males being PUC'd near the tunnel,[8] nor was he told that any fighting aged males were found in the tunnel.[9] Person 81's evidence was directly inconsistent with two of the Respondents' main witnesses concerning whether there were men in the tunnel (Persons 40 and 43). As Person 81 was a witness who the trial judge appeared to accept (that is, the trial judge did not, apart from observing that he did not have a good recollection of the mission (J[429]), indicate that Person 81 was a witness whose evidence he would not accept unless it was corroborated by evidence that he did accept), the trial judge's failure to refer to this inconsistency or resolve it has left the Appellant uninformed as to why the

[3] T3263:16-46, T3276:13-44, T3316:17-45 (P40).
[4] T3349:13-34 T3352:38-45 (P43).
[5] T6177:37-43 and T6178:23-25 (P81).
[6] T6179:17-18 (P81).
[7] T6160:43, T6179:17-18 (P81).
[8] T6160:45-46 (P81).
[9] T6160:31-32 (P81).

evidence of one of his chief reply witnesses was not accepted, at least so as to prevent a finding in the balance of probabilities to the contrary of it.

5. 4. Further, in light of Person 81's evidence above, the trial judge's observation that Person 81's evidence did not rule out a finding that two Afghan males were taken from the tunnel (J[492]), based as it was upon one question and answer during cross-examination,[10] underestimates the entirety of Person 81's evidence and the evidence of Persons 40 and 43, whose evidence the trial judge accepted. The Respondents' case, was that Person 81 was present when two men came out of the tunnel, but he denied seeing anyone come out of the tunnel or being PUC'd near the tunnel. The trial judge's observation noted at J[492] was inconsistent with the evidence.

5. 5. The Respondents submit [RS 210] that photographs of EKIA 56 which show a sign reading "NW Corn tunnel" supported a finding that EKIA 56 was found in and then killed next to the tunnel. The trial judge accepted that this notation supported a finding that EKIA 56 was located, when photographed, near the tunnel (J[868]). Evidence of that location of the body does not favour the probability that the person, prior to being killed, was present in a different place, in the tunnel.

5. 6. The Respondents' attempts at RS [209], [214], [230] and [236] to reconcile the evidence of Persons 40, 41, 42 and 43 rely on speculation and should be rejected, as any contribution towards finding the requisite preponderance of likelihood.

5. 7. The summary depends upon the theory advanced at RS [214] that the two Afghans who emerged from the tunnel were marched away and then the older man (EKIA 56) was returned to the courtyard whereas EKIA 57 was "*instead taken outside by Mr Roberts-Smith*". That is inconsistent with Person 41's account of events where the two executions occurred, in quick succession, one after the other.

5. 8. There is simply no foundation in the evidence to support a proposition (at RS [209]) that Person 43 was so focused on securing the first Afghan male to emerge from the tunnel that he somehow missed the emergence of the second man moments later

[10] T6179:17-18.

and only metres away. Although Person 43 said that he only saw one person emerge from the tunnel, who was then placed under control,[11] he said that his recollection was that there were two PUCs on that mission. He was unable to explain how he had come to have that recollection.[12] He did not say that he saw a second PUC. In those circumstances, Person 43's evidence that he recalled that there were two PUCs should be accorded little weight, as it was likely based on something that he was told (given that he did not see a second PUC). The possibility that his recollection of two PUCs was prompted by the leading question at T3354:6 cannot be excluded.[13]

5. 9. The effect of RS [230]-[232] is that Person 41's "minute or two" (when he stepped out of the courtyard to search the rooms) is now strained to include the emergence of the men from the tunnel, the process by which they were secured, them being marched away, the Commanders' RV, the return of EKIA 56 to the courtyard, the return of Person 18 to the courtyard, a period during which Person 18 assisted Person 35 clear the tunnel, the departure of Person 18 from the courtyard, and then Person 5's summoning of Person 4 to the courtyard. That is not probable even if a "minute or two" was used loosely or figuratively. The attempts at RS [233] to suggest the one to two minute period (or even the period of less than 10 to 15 minutes) meant "*a short period of time or not a very long time*" cannot reasonably accommodate the sequence of events alleged to have occurred in during this period.

5. 10. In reply to RS [236], there is a material inconsistency between the sequence and timing of events propounded by Persons 40 and 41. Person 40's evidence of a 20-25 minute period (between the emergence of the men from the tunnel and the shooting of EKIA 57) apparently covers the time spent by Person 41 searching the rooms (the period discussed in the paragraph above). Otherwise, it would also cover the exchange of the suppressor, the execution of EKIA 56, the return of the suppressor, a period where Person 41 looked at the body and then the walk outside where Person 41 saw the execution of EKIA 57. Person 41's account of the events once he returns to the courtyard (much like the time he spent in searching rooms

[11] T3353:31-35 (P43).
[12] T3402:28-29 (P43).
[13] That question followed P43's earlier evidence-in-chief that he was not aware of any one else coming out of the tunnel other than the man he said he observed: T3353:31-32.

immediately prior to this) is consistent with those events unfolding rapidly. It is not probable that on the account of Person 41 they could have taken anything like 20-25 minutes.

5. 11. The trial repeatedly observed that findings regarding the events of W108 were made having regard to the whole sequence of events of which they form a part J[224], [866]-[867]. Whilst a tribunal of fact must consider the evidence as a whole, the supposed fact that two men were killed in the general vicinity of the courtyard tunnel does not increase the probability that the two men were found in the tunnel as opposed to somewhere else. There was no logical or causal connection between the trial judge's finding that two men were executed during the W108 mission that made it more or less likely that those two men came out of a tunnel. The trial judge was alert to the danger of such reasoning in relation to the identity documents of EKIA 57 which were found in the tunnel (J[493]). The discovery of those identity documents inside the tunnel of itself did not increase the probability that EKIA 57 was found in the tunnel when it was discovered, rather it established a connection between that man and the tunnel and suggested only that he had used the tunnel and had been present in it at some point in time (J[493]).

6. <u>Particulars 4 and 5; Person 41's reliability and the request for a suppressor</u>

6. 1. We refer to the Respondents' submissions at RS [260]-[261]. The only plausible meaning of the language employed by the trial judge (cf."*considerable force*") is that the trial judge relied upon the peculiarity of the request for a suppressor as something that added to the credibility of this piece of evidence from Person 41, as opposed to treating that vignette as having a neutral impact upon his reliability or indeed as something that undermined his reliability. The fact that Person 41 himself described the request for a suppressor as strange makes no difference.

6. 2. In response to RS [263]-[264], the matters surmised about the "logic of muffling Person 4's single shot" inside the courtyard and the explanation proffered as to why EKIA 57 was taken outside the compound are based purely on conjecture. The distance between the location of the body of EKIA 56 and where he saw the Appellant shoot EKIA 57 could have been no more than approximately 10-15

metres.[14] Given the proximity of these locations to one another, the fundamental issue which the Respondents do not grapple with, is the incoherence between the Appellant assisting Person 4 to procure a suppressor to discharge a weapon in the then secured tunnel courtyard and the Appellant's use of an unsuppressed minimi machine gun just outside the courtyard shortly thereafter.

6. 3. The Respondents emphasise the fact that no witness reported hearing a single unsuppressed shot from an M4 rifle from the area of the tunnel courtyard. They rely on this as a matter corroborating Person 41's account that a suppressor was used in the killing of EKIA 56 in the tunnel courtyard (RS [265]). Rather than providing powerful corroboration of Person 41's evidence, little weight should be attributed to this matter. That none of the other witnesses recalled hearing a single unsuppressed shot, let alone any single shot, is not probative of whether Person 4 used a suppressor or not. Indeed, it tends to be probative that no shot was fired.

7. Particular 12: Insurgent behaviour

7. 1. In reply to RS [269], the Appellant does not accept that the rejection of the account of a legitimate engagement outside the compound means the only plausible explanation for the deaths of EKIA 56 and 57 is that described by the Respondents' witnesses and that consequently the Respondents have proved their case. The accounts of the Respondents' witnesses are too contradictory and at points too improbable to stand. The mere fact that on appeal the Appellant does not challenge the finding of the location of the body of EKIA 56 does not somehow resolve these issues, let alone lead to a finding of two murders committed by the Appellant.

7. 2. In reply to RS [273]-[274], the trial judge's finding was that if two insurgents had appeared from the threat area, being monitored by Gothic 4, that would have involved a serious failure of the cordon, and it is reasonable to expect that such a failure would have been the subject of comment on the ground or in post mission reporting or both J[823]. The trial judge's observation was directly inconsistent with the evidence of the Troop Commander, Person 81, who was asked about the

[14] Exhibit R92. Person 18 estimated that the sound of the Minimi being discharged was approximately 10-15 metres away from the tunnel: T3013:19 (P18).

purpose of the cordon to guard against threats. Person 81 said that as the troop had not cleared up to W109 at that stage of the mission, it was impossible to put a complete cordon around W108.[15] Person 81 also said the following in cross-examination:[16]

> Now, if insurgents had managed to approach Whisky 108 from the north to a distance of, say, 10 metres, that would have been a serious matter that you would have expected to be brought to your attention; is that right?---Not necessarily.
>
> Obviously, a range of contacts occur, a range of time and other complicating factors. In the end, my job is coordinating a range of different support mechanisms to enable that action to occur rather than specifically about that tactical manoeuvre inside a compound.

8. Particular 9(b): The consistency of Persons 41, 14 and 24

8. 1. In reply to RS [323], the submission that Person 24 did not give evidence, one way or another, about whether he saw any other operators in the vicinity of the Appellant during the execution of EKIA 57, misconstrues Person 24's evidence. Person 24 did not suggest that much time elapsed between the Appellant marching EKIA 57 15 metres outside the compound, shooting him, and then walking back inside the compound.[17] These events occurred sequentially and without pause. The entire period could not have been more than a minute or two. The Respondents contend that the question at T3451:3 directed Person 24's attention to the point in time when the Appellant had gone back inside the compound rather than during the execution itself. That construction is not a fair interpretation of the evidence. It places too narrow a meaning on the words "*at this time*" in the question "*Were you able to see any other SAS operators at this time?*" in view of the evidence that Person 24 had just given in answers to previous questions about seeing the execution.

[15] T6174:27-32 (P81).
[16] T6175:22-28 (P81).
[17] T3450:15-44 (P24).

9. Particular 11; Reliability of Person 14

9. 1. In reply to RS [331]-[332], the natural meaning of Mr Masters' note of his discussion with Person 14 is simply that Person 14 understood, when he spoke to Mr Masters in 2018, that Person 4 had shot the man with the prosthetic leg. If, as the Respondents suggest, the true meaning was that Person 14 was referring to an understanding that Person 4 carried the Minimi, then Mr Masters would have been able to give evidence to that effect. He did not. In any case, having an understanding in 2018 that Person 4 shot "*an old guy with a prosthetic leg*" is inconsistent with Person 14 learning at the end of the mission that the Appellant carried the Minimi, rather than Person 4.[18]

9. 2. The trial judge's reference to Person 14 later learning the identity of the soldier who carried the Minimi did not make it clear when Person 14 became aware of this fact (J[746]). Nor is it referred to in the extract of evidence referred to at J[747]. That may explain why the trial judge did not find that a prior inconsistent statement, between what is recorded in Mr Masters' notes and Person 14's evidence, was established. Contrary to RS [332], Mr Masters' notes, insofar as they suggest that Person 14 had an understanding that Person 4 shot "*an old guy with a prosthetic leg*" are inconsistent with Person 14's evidence that by the end of the mission on 12 April 2009, he knew that the Appellant had killed EKIA 57. Person 14 gave the following evidence:[19]

> Did you see anyone in person 5's patrol carrying a Para Minimi on that day?---No.
>
> Not – not on that day, no.
>
> All right. On another day you have?---No. No. It was later established at the LUP[20] after the assault, after the mission.

[18] T1416:14-27 (P14).
[19] T1416:11-27 (P14).
[20] Lay up position.

I'm – can you just explain what you mean by, what do you mean by "it was later established at the LUP"? What did you see - - -?---So - - -

- - - in relation to someone carrying a Para Minimi?---I never saw anyone carrying the Para Minimi. I never identified anyone carrying the - - -

Right?--- - - - Para Minimi.

Okay. So what happened at the LUP?---I saw who had the Minimi, the Para Minimi.

Who did you see have the Para Minimi at the LPU?---Ben Roberts-Smith.

9. 3. While Mr Masters' notes may be incomplete, abbreviated and impressionistic, it is unlikely that Mr Masters would have omitted to record Person 14's understanding in 2018, based on what he learned at the end of the mission, that the Appellant carried the Minimi, rather than Person 4, and that it was the Appellant who shot "*an old guy with a prosthetic leg*".

9. 4. At RS [337], the Respondents submit that Person 14 never pretended to have identified the person who shot EKIA 57 and that all he could say was that it was an Australian soldier carrying a Minimi. But Mr Masters' notes record that Person 14 understood it was Person 4, which is relevant to another matter that undermines the reliability of Person 14's account of what he said he saw at W108. Assuming that he witnessed a soldier shoot EKIA 57, Person 14's implied inability to distinguish between the Appellant, who is over 2 meters tall, and Person 4, who is of average height, is improbable.

9. 5. In reply to RS [333]-[334], whilst the trial judge certainly referenced the alternative credit findings concerning Person 14 in each of the discrete parts of the judgment dealing with the missions to W108 and Chinartu, the trial judge's assessment of Person 14's overall credibility and reliability was influenced by the ultimate factual findings made in relation to the Chinartu mission. The Appellant challenges those factual findings on this appeal. If that challenge is successful, it will have a

significant adverse impact upon Person 14's reliability in connection with the events of the mission to W108.

10. Particulars 7 and 8; Post mission reporting

10. 1. In reply to the Respondents' submissions at RS [136]-[138] and [228], it was important to the trial judge's finding that Person 5 caused the post mission operational reporting to be falsified that Person 5 *knew* before the execution of EKIA 56 that it was to take place and later that it had taken place J[712]. The Respondents, in contending that Person 5 knew before the execution of EKIA 56 that it was to take place, relied on (J[705]):[21]

(a) the evidence given by Person 24 about hearing Person 5 call Person 4 into the compound; and

(b) Person 5's statement before the mission of his intention to "blood the rookie" (i.e. Person 4).

10. 2. This evidence, as described further below, provided nothing more than a speculative basis, rather than evidence that could persuade to the requisite degree of satisfaction, for the trial judge's inference regarding Person 5's state of mind prior to the execution of EKIA 56.

10. 3. *First*, Person 24's evidence that prior to the killing of EKIA 57, he heard Person 5 referring by name to Person 4 a couple of times saying "get in here, get here now" J[546] was uncorroborated and Person 24 was a witness whose evidence had to be treated with "considerable caution" J[225], [236], [523] and [869]. *Second,* the statement "get in here, get here now" is too equivocal to support an inference that Person 5 was calling upon Person 4 to come into the courtyard and execute a PUC especially since no other witness gave evidence of seeing or hearing Person 5 directing Person 4 to execute a PUC. *Third*, the evidence that Person 5 had expressed an intention to "blood" Person 4 *before* the mission was based on the

[21] The other matters identified in J[705] are said to support the finding that Person 5 became aware of the execution of EKIA56 (and EKIA57) after they had taken place.

evidence of Person 14 and Person 24 (J[251]-[257] and [258]-[265]). In each case, that evidence was uncorroborated by other persons said to be present when the conversations occurred. Like Person 24, Person 14 was a witness whose evidence the trial judge said must be scrutinised with care (J[225], [523] and [764]). The uncorroborated testimony of Person 14 and Person 24 was too unreliable and did not reasonably support a finding Person 5 had a pre-meditated intent to facilitate an unlawful kill by Person 4 prior to the W108 mission. *Fourth*, having accepted the evidence of Person 14 and Person 24 about what Person 5 said prior to the W108 mission about "blooding the rookie", the trial judge did not give adequate weight to their respective evidence that they understood that reference to mean a lawful kill in action.[22] Despite finding, correctly, that "blooding" could mean a lawful killing in action (J[284]), given their understanding about what "blooding the rookie" meant (i.e. a lawful kill in action), the trial judge erred in relying upon the evidence of Person 14 and Person 24 to infer that Person 5 *knew* before the execution of EKIA 56 that it was to take place.

10. 4. The Respondents contend (see for instance RS[347]-[348], [355] and [363]) that the relevant section of the Patrol Debrief for Gothic Troop describing the engagement of two squirters is false, inconsistent with the evidence of all parties and sourced from Person 5, a witness whom the trial judge disbelieved. Accordingly, on this theory the relevant entry in that document can have no weight. In response:

(a) the fact that no witness at trial supported the account in the (then 12-13 year old) contemporaneous record does not mean the record is without any evidentiary value.

(b) the contention at RS [345] that squirters attempting to flee the compound to the north or northwest would likely have been engaged by Gothic 4 (the cordon patrol) rather than Gothic 5 (one of the two patrols tasked with assaulting and clearing the compound) is speculative. The trial judge did

[22] T1580:14-20 (P 14) and T3573:22-25 (P 24).

not make a finding to this effect. Nor is it relevant to why the Respondents contend the relevant entry in the Patrol Debrief documents is false.

10. 5. In reply to the Respondents' submissions at RS [349]-[353], the Appellant does not challenge for the purposes of the appeal the trial judge's finding that Person 5 was the likely source of information in the Patrol Debrief concerning the engagement of two squirters (J[588]). But the Appellant does not accept and nor was there any basis for finding that Person 5 was the *only* source of that information (cf RS [350]-[353]).

10. 6. The trial judge summarised Person 81's evidence at J[669] as to how information about engagements on missions was customarily passed on to the troop commander. A number of witnesses gave evidence that following the W108 mission, there was (or it was standard operating procedure for there to have been) a troop debrief, at which the entire troop was present and during which the mission was discussed. The trial judge referred to some of this evidence at J[668]). Person 42 said:[23]

> No. And did you subsequently see a copy of the SSE in relation to Whisky 108?---I believe we would have done a troop debrief on return - - -
>
> Yes?--- - - - and that would have been where I seen an SSE report. That's normally where everything is accumulated back together as a consolidated report. But other than that, I don't necessarily have a recollection of any other SSE reports.
>
> And again, I'm not being critical of you, but what you've just said to his Honour is based on an assumption of what would have occurred on that day concerning the SSE, because that is standard procedure, correct?---Correct.
>
> And you don't have an independent recollection of doing that on the day?---No.

[23] T2144:9-43 (P42).

> Okay. Now, in relation to the troop debrief that you've just referred to, is that something, as a person who is not a patrol commander, that you would be involved in as part of the troop debrief?---Yes, normally it's a complete troop.
>
> And the troop debrief: as you correctly point out, that's the complete troop being present?---Correct.
>
> And the troop commander is usually there?---Correct.
>
> Yes. So the captain that we referred to earlier in the evidence – I think it was Person 81 – without referring to that person's name, that would be the troop commander, correct?---It would be normal for that person to be there.
>
> And there is then a discussion in the troop debrief about how Whisky 108 – this is again based on your understanding of what occurs – as to what occurred, correct?---Correct.
>
> Okay. And people give their different views about what they recall occurred on that day, correct?---Correct.
>
> Okay. Thank you. In effect – if I can describe it this way for the lay person: in effect, a group discussion, correct?---Correct.

10. 7. Similar evidence was given by Person 27. He could not recall the troop debrief but said it was standard operating procedure for it to occur.[24] Person 5 said that there was a troop debrief following the W108 mission.[25] The troop debrief, which involved the entire troop, was different from a patrol debrief, described at (J[668], at which only the patrol commander and members of his patrol attended. Person 29 said that there would likely have been a patrol debrief following W108.[26] Person 24 said that he could recall a patrol debrief in relation to W108.[27] Neither Person 29's evidence nor Person 24's evidence contradicted the unchallenged evidence

[24] T53920:9-20 (P27).
[25] T5097:36-40 (P5).
[26] T5486:10-12 (P29).
[27] T3472:24-37 (P24).

from Person 42, Person 27 and Person 5 that following the W108 mission, there was a wider forum involving more than just the patrol commanders in which information about the mission was shared with troop command. The trial judge's summary of the reporting procedure at J[668] did not fully capture the evidence that following the mission to W108, there was an entire troop debrief at Tarin Kowt.

10. 8. Contrary to the submission at RS [352], Person 81 did not say that he received the information (about the engagement of the two squirters) from Person 5 – he could not recall who provided this information, but Person 81 agreed with the proposition that he relied on the patrol commanders to provide information to him concerning EKIAs attributable to their patrols.[28] Contrary to RS [352], Person 81's evidence did not exclude the possibility that he was given the information about the engagement of two squirters at a troop debrief. In view of the unchallenged evidence of Person 42, Person 27 and Person 5 that there was or would have been a troop debrief following the W108 mission at which the entire troop was present, it is improbable that any inaccuracy of the information provided to Person 81 about the engagement of the two squirters would not have been clarified by others present, *even if the likely source of that information was Person 5*.

10. 9. One part of the Patrol Debrief document described the engagement of two squirters during clearance. The trial judge found that only a small number of junior soldiers (apart from the Appellant and Person 5) actually knew about the executions and did not report them, thus concealing the truth from the senior members of the troop (J[679]). In reply to the Respondents' submissions at RS [354]-[362], the trial judge's finding that a small number of SASR soldiers knew about the executions and did not report them or do anything about them (J[674], [679]) overlooks the supposed fact that, on the Respondents' case, a larger number of soldiers, including all of the senior members of the troop (the troop commander, troop sergeant and all of the patrol commanders), knew or must have known that two men were PUC'd at W108. Yet the Patrol Debrief document recorded that that there were no PUCs and only one fighting aged male found at W108 (J[584]).

[28] CCT 1.6.2022 T5:35-37, T6169:21-31 and T6170:35-43 (P81).

10. 10. The more fundamental problem with the Respondents' overall case theory in terms of the reporting at W108 is that the story of two men emerging from a tunnel after the compound was declared secure and being PUC'd in the presence of the Commanders' RV is directly inconsistent with the notation in the Patrol Debrief document recording that no PUCs were found on target. It is glaringly improbable that the entire leadership team of Gothic Troop, who were present and must have known about the PUCs, collectively contrived to conceal the truth about the number of PUCs found on target in the Patrol Debrief document. Unlike the description about the engagement of two squirters, the description that there were "nil" PUCs found on target and only one fighting aged male could only have been included in that document falsely to the knowledge of the troop commander, troop sergeant and all of the patrol commanders. A conspiracy of that kind is glaringly improbable.

10. 11. Furthermore the submission at RS [356]-[357] should be rejected as it ignores the small size of the troop (31 persons) and the supposed fact on the Respondents' case that at least 15 of those persons either saw men emerge from the tunnel, under guard near the tunnel or saw or heard executions (see AS [16.8]). If these events actually happened, it is both highly probable that knowledge would have been disseminated throughout the troop at the troop debrief and improbable that the account in the Patrol Debrief document was propounded and recorded without comment.

10. 12. We refer to the Respondents' submissions at RS [361]. The submission at RS [361(c)] does not grapple with the probabilities. On his account Person 43 actually saw a man emerge from the tunnel, who was then searched and cuffed and led away by Person 5's team. The notion – in all the circumstances outlined by the Respondents' witnesses – that he would have failed to link that event (if it had occurred) with a report of engagements and EKIA reports very close by to the tunnel and proximate in time (whether one or two or 20-25 minutes) is not probable. Similarly, it is not probable that Person 43 would have failed to remark upon a report of there being no PUC's given his account of what occurred in the courtyard.

10. 13. The evidence from the Respondents' witnesses (Person 24 and Person 14) was that Person 6 had actually received a report of the alleged execution of EKIA 57 and

alleged blooding of Person 4.[29] There is no evidence of what Person 6 said or did at the meeting. However, for the murders to have occurred in the manner put forward by the Respondents' witnesses and found by the trial judge, Person 6 must be assumed to have raised no objection. The Appellant submits that is not probable.

[29] T3472:13-16 and T3473:16-17 (P24) and T1417:4-5 and T1523:5-46 (P14).

D. DARWAN (GROUNDS 5 TO 9)

11. 11 September 2012

11. 1. The Respondents' submission that the rejection of the Appellant's case regarding the events of the mission to Darwan bear upon and affect the probability of the Respondents' case in the sense of rendering it more probable that it is correct (RS [96], [453], [489], [538]) should not be accepted – not because of the possibility of some third version that neither party propounded, but because, in accordance with the principle that informs a *Liberato* direction in criminal cases, if one party's evidence is not believed, the question remains whether the other party has adduced evidence to prove its case to the requisite degree.

11. 2. The issue is simply whether the trial judge's findings were supported by evidence capable of persuading the trial judge to the requisite standard to make the findings made. Matters that undermine the evidence of Persons 4 and Hanifa, Mangul and Shahzada bear on the reliability of those witnesses irrespective of whatever version was propounded by the Appellant and his witnesses at trial.

12. Particular 20(b): Inconsistencies about presence of Afghans at the last compound

12. 1. In reply to the Respondents' submissions at RS [445]-[453], Person 4 did say that the last compound was initially empty until a person approached who was then placed under control. He said this:[30]

> Thank you. And were there, to the best of your recollection, any fighting age males in that area?---Initially, no.
>
> Okay. When you say initially no, did that change?---That changed.
>
> And how did that change?---An individual approached using that sloping track

[30] T2928:43 – T2929:14 (P4).

Could you mark - - -?---That terminates to that – that terminates into that compound marked D.

Could you mark that in terms of where you observed that person first?---I didn't observe that person.

You didn't?---No.

Okay. Well, don't mark it yet then. This person that you're referring to, when – well, did you observe that person at some stage?---Yes.

When did you observe that person?---When he was at the compound.

12. 2. Person 4 also said this:[31]

There were no PUCs in the last compound; correct?---No, that's correct.

Yes?---Yes. There was – not initially.

Yes?---But that's where the individual approached - - -

Yes?--- - - - and was, therefore, PUC'd in that location.

I think you told his Honour before lunch that you did not observe the individual yourself?---Approaching.

Yes. Is that right?---Yes, that's correct.

12. 3. On the basis of this evidence, and contrary to RS [447], Person 4 did say that a person arrived *after* the patrol was already there.

12. 4. The Respondents' attempt to reconcile Person 4's evidence concerning the number of PUCs at the last compound with Hanifa and Mangul's evidence on the basis that Person 4 had an "outward" focus and may not have seen Mangul should be rejected

[31] T2940:11-22 (P4).

(RS [451]). The Appellant's patrol was at the last compound for over an hour waiting for extraction (J[1035]) and Person 4 said he observed tactical questioning by the Appellant and the interpreter. The suggestion that Person 4 did not see Mangul at the last compound because Person 4 maintained an outward focus during the entire time is improbable, not least because he said that he would have been "scanning the areas, making sure people are placed in a tactically viable position".[32] The real point is the inconsistent recollections of who was there.

12. 5. In reply to RS [434], although it is not specifically identified as a particular in the notice of appeal, the Appellant relies on the inconsistent evidence concerning the movements of the interpreter as summarized at AS [22.15]. The evidence is relevant to the reliability of the evidence of both Persons 4 and 56. Person 56 did not say that the interpreter "accompanied the Appellant's patrol as it reached the southernmost compounds" (AS [22.15]), but that is a reasonable inference to be drawn from the sequence of questions and answers given at T4750:34-T4752:27 in which he identified the interpreter as being present with his patrol during the process of clearing compounds,[33] and identified the location of his patrol's limit of exploitation.[34] He was then asked during his evidence in chief: "*Now, at that point in time at which you were at this last compound that you visited, were all of the individuals that you mentioned before as present with your patrol still present?*" Person 56 replied "*Yes*."[35] It is submitted on the basis of this evidence that Person 56 suggested that the interpreter joined his patrol at an earlier point in time in the mission (but that he could not recall when[36]) and remained with his patrol for the clearance of the last compound. This evidence was inconsistent with Person 4's recollection that at the last compound the Appellant sent Person 56 back to THQ to fetch the interpreter.[37] The inconsistency is relevant to the overall reliability of the evidence of Person 4 and Person 56.

[32] T2623:15-16 (P4).
[33] T4750:39-40 and T4751:1-11 (P56).
[34] T4751:13-18 (P56).
[35] T4752:18-20 (P56).
[36] T4795:16-19 (P56).
[37] T2622:34-35 (P4).

13. Particular 22: ICOM

13. 1. The Respondents contend at RS [477] that it "was never part of their case *where* the throwdown came from" is incorrect. We refer to the paragraph 129 of the Respondents' submissions regarding the Darwan mission (Section IV) at the trial, where the Respondents submitted that Person 4's evidence about the ICOM appearing to be wet was consistent with it having been recovered from the insurgent engaged across the Helmand river. Although it may be accepted that the Respondents did not need to establish the provenance of the ICOM to establish that a throwdown was used, Person 4's evidence about its provenance, his evidence that it was handed over to the troop sergeant and the improbability that the ICOM was not observed by anyone else during the mission or even by Hanifa, Mangul and Shahzada until they say they examined the body of Ali Jan is a matter that is relevant to the overall probabilities that the ICOM in the photograph was a throwdown.

13. 2. In reply to RS [491], a fair reading of the whole of the evidence of Person 4 (and in particular his statement that it dawned on him that he did know where the ICOM had come from[38]) suggests he had a high level of confidence in his view of the origin of the ICOM. This confidence was not diminished by his concession during cross-examination that he had made an assumption about where the ICOM had come from.[39]

13. 3. In reply to RS [494]-[495], the Appellant does not press the submission at AS [22.6].

13. 4. In reply to RS [497a], notwithstanding that Person 56 declined to answer a question about the use of "throwdowns" by his patrol in 2012 on the basis that it might incriminate him, he did not say that he observed an ICOM radio, either after the engagement of the insurgent across the Helmand river or otherwise during the

[38] T2629:41-42 and T2880:1-3 (P4).
[39] T2881:29-32 (P4).

Darwan deployment on 11 September 2012, which the trial judge referred to at J[1334]. Person 56 said this:[40]

> Now, did you see Mr Roberts-Smith swim across the Helmand River carrying the insurgent's AK rifle and other equipment?---An AK rifle, yes.
>
> Did you see him with any other equipment?---Not to my recollection.

13. 5. In reply to RS [497b], the invocation by the Respondents of the pre-deployment evidence as a matter that rendered it more probable that a throwdown was used at the Darwan mission repeats the tendency reasoning error at J[1335], notwithstanding the disavowal at J[931]. It is no answer to the point that no witness, not even Person 4, observed the Appellant or Person 11 carrying an ICOM throughout the mission at Darwan.

13. 6. In reply to RS [497c], the Appellant did not say the ICOM was concealed in the spotter's clothing. His evidence was as follows. In evidence in chief, the Appellant said:[41]

> At that point, we had identified that that individual – or Person 11 had identified that that person was a spotter and, on searching the individual, we found an ICOM radio.

13. 7. In cross-examination, the Appellant said:[42]

> Yes. You remember that the photographs of that body include a picture of an ICOM on the body?---Yes.
>
> Do you know if that ICOM was found on the body of that spotter?---It was on the body of that spotter, yes.

[40] T4794:16-19 (P56).
[41] T244:2-4 (BRS).
[42] T379:12-20 (BRS).

Did you see it found?---Yes.

Where was it?---It was on the ground actually. On – effectively, underneath him

13. 8. Later he said:[43]

Yes. Now, I think you said earlier today – well, remind me again, where was the ICOM? Could you see the ICOM at this point?---No, I didn't.

When did you first see the ICOM?---I believe when we were doing the SSE of the EKIA. And I just remember it being on the ground sort of underneath him.

13. 9. At no point in his evidence (cf RS [497c]) did the Appellant suggest that the spotter had concealed the ICOM *in his clothing*. Given the length of the aerial on the ICOM that can be seen in the photographs of the body of the EKIA, it would have been extremely difficult to do so. In any case, the trial judge did not accept the evidence of the Appellant. The consequence is simply that an ICOM radio was photographed with the body in the cornfield. If one accepts Person 4's evidence that the ICOM radio retrieved from the other EKIA across the river had been returned to the troop sergeant at tactical headquarters in an evidence bag, there is no explanation for how it came to be there or indeed the manner in which it was carried.

13. 10. In reply to RS [512] the Appellant challenges the identification of Ali Jan by Hanifa, Mangul and Shahzada and relies on the paragraph 21.7(e) of the Appellant's closed court submissions dealing with this issue.

13. 11. At RS [539], the Respondents contend that the Appellant had a motive to kill Ali Jan because he was suspicious that he and Hanifa and Mangul had Taliban links. As this was never put to the Appellant as a motive for killing Ali Jan, it cannot now be relied upon to bolster the trial judge's finding of a possible motive (see J(1300]). In any case, Hanifa's and Mangul's evidence that they were asked questions about whether they were members of the Taliban or knew of persons with Taliban links does nothing more than corroborate the standard procedure of special forces to

[43] T414:19-23 (BRS).

conduct tactical questioning of local nationals in order to determine whether someone should be taken back to Tarin Kowt for further questioning about their links to the Taliban.

14. Particulars 26-28: Motive and tendency

14. 1. At RS [496], the Respondents contend that it was orthodox for the trial judge to find that an instruction by a military commander for his patrol to carry throwdowns was relevant to an assessment of whether a throwdown was, in fact, used on a subsequent occasion. This, it is submitted, exemplifies tendency reasoning; the fact of the earlier instruction was relied upon by the trial judge to find it was more likely that a throwdown was used by the Appellant's patrol on a subsequent mission. Further, the finding at J[1300] to the effect that the pre-deployment findings supported a conclusion that the Appellant would execute persons he thought were Taliban or likely Taliban, goes beyond any notion of "preparatory conduct" referred to at J[931] (which in any case was qualified by the trial judge as only a possibility). The trial judge should not have relied on findings made in relation to the pre-deployment training or the murders at W108 to support a conclusion that the Appellant "would execute persons he thought were Taliban or likely to be Taliban" (J[1300]). This approach involved impermissible tendency reasoning and, it is submitted, tainted the trial judge's overall fact finding approach to the mission to Darwan.

15. Particulars 21: Post mission reporting

15. 1. The Respondents contend at RS[561] that the other patrol commanders did not know enough about the true circumstances of the engagement of a spotter in the cornfield to be in a position to challenge that account at the debrief attended by the other patrol commanders at Tarin Kowt. If, as the Respondents submit elsewhere, it was highly improbable that a spotter could have evaded multiple aerial scans of the cornfield over the duration of a number of hours, then the Appellant's account of an engagement of a spotter near an HLZ just prior to extraction would likely have been a cause for alarm and at the very least questioned by Person 7 who recalled a series of "ice" calls just prior to extraction (meaning no threat) and who

expressed confidence in the scanning capabilities of the aerial assets in use that day. Yet there was no evidence from either Person 7 or Person 31 that the Appellant was challenged on his account either by them or by the troop commander (Troop Alpha) who was a member of the overwatch team.[44]

15. 2. RS [562]-[563] ignores the sequence of events. Any cliff kick was in full view of the overwatch team, the soldiers near Shahzada's hut and the other multiple soldiers described by Hanifa, Mangul and Shahzada as being present in the riverbed and immediate vicinity. The shooting in the cornfield happened moments later. While vision into the cornfield may have been obscured from certain angles any soldier in the vicinity who (on the Respondents' case) was in a position to see the body kicked and then dragged could not have failed to link the subsequent discharge of a weapon to those events.

15. 3. The Respondents' submissions at RS [564]-[566] contend that an inference is available that the evidence of Persons 32, 35 and 38 (about whether they could see or were looking in the direction of the area where the alleged cliff kick and killing occurred) would not have assisted the Appellant. This submission should be rejected. It was not for the Appellant, who did not bear the onus of proof, to lead evidence corroborating Shahzada's evidence of being able to see the cliff kick from where he was positioned in the river bed. The same applies in respect of the members of the overwatch team, who were not called by either party. The point is simply, that on the evidence of the Respondents' witnesses, there were many soldier witnesses present and well within sight and earshot at the time of these events. And yet no person challenged the account given by the Appellant at the debrief shortly afterwards.

15. 4. Given the distance and topography between the extraction points of Person 35 (Bottle 5 on Ex R-1) and Person 32 ("E" on Ex A-237), on the one hand, and the last compound, on the other, it is unlikely that either of them would have had a clear line of sight to the last compound in any case.

[44] T4003:40-42 (P7).

16. Particular 25: Absence of photographic records

16. 1. In reply to RS [567], the PUC handling procedures applied by the SASR in Darwan are relevant not because they corroborate the rejected evidence of the Appellant that there were no fighting aged males located in the last compound, but rather because they are relevant to an assessment of the reliability of the evidence of Hanifa, Mangul and Shahzada that they were detained and questioned by soldiers in or around the last compound. The Respondents assert that these three witnesses were detained and questioned in the final compound set. Yet there is no documentary evidence corroborating their account. No photographs of these witnesses were produced by the Department of Defence, notwithstanding the production of numerous other photographs depicting fighting aged males who had been PUC'd and processed in Darwan (PUCs were identified by reference to the call sign of the soldier who detained them and the compound in which they were located). There is no evidence that Hanifa, Mangul and Shahzada were processed in any way by the SASR on that day. A camera was available to the Appellant's patrol. Indeed it was used to photograph EKIA 4. It was never put to the Appellant, Person 11, Person 4 or Person 56 that they did not follow the PUC handling procedure in relation to Hanifa, Mangul and Shahzada (to explain why no photographs of them exist) nor were they asked why they did not comply with it. When the accuracy of evidence depends upon the reliability of human memory, it is relevant to assess that evidence against the probabilities, particularly in light of the evidence of the troop's practices and procedures for handling PUCs that were used on that mission. There is no evidence as to why the Appellant's patrol did not follow the processing procedure for any fighting aged males located at the last compound in Darwan. This is a significant matter that undermines the reliability of the recollections of Person 4 and Person 56, as well as of Hanifa, Mangul and Shahzada, as to whether anyone was present in the last compound on 11 September 2012.

16. 2. In reply to RS [568], the short answer is that there was a particular practice in use for the Darwan mission for the handling of fighting aged males who had been detained by the SASR. None of this evidence was challenged. Person 7's patrol was the PUC handling team. He estimated that there were 50 or so PUCs once the

clearance had finished and they were placed in the central PUC area (compound 43).[45]

16. 3. Both of RS [569]-[570] raise arguments that rely upon the circular proposition that the reason why Hanifa, Mangul and Shahzada were not processed in the usual way and moved to the central PUC area, is because the Appellant elected to assault and/or murder them. Person 14's evidence about the murder at Chinartu and the events in the last compound is contested in this appeal. The trial judge did not consider the implications of the fact that PUCs had earlier been consolidated at compound 43, in terms of the probabilities that three fighting aged males were detained a short distance away at the last compound set, and were neither processed nor moved from their location, notwithstanding that there would have been ample time to do so.

17. Particulars 20(b) and 23: Reliability of Person 4

17. 1. In reply to RS [585] the evidence did not establish that Person 7 was outside of Australia for the entirety of 2016. He was in Australia in early 2016. During cross-examination, Person 7 referred to telephone conversations with Mr Masters that occurred in early 2016 "around about January" before he "then went away overseas".[46] Person 7's recollection was likely wrong; Mr Master's notes bore the date 16 February 2016 (J[1883]. Person 7 also said that he attended a meeting in Melbourne with Mr McKenzie and Mr Roy Masters in about March 2016 (J[1882(4)]. Although Person 7's evidence that he was "not in Australia in 2016" was not challenged,[47] it was inconsistent with his earlier evidence regarding his discussions with Mr Masters and his meeting with Mr McKenzie. The trial judge did not consider these matters when assessing the reliability of Person 7's evidence that he was not in Australia in 2016 (which in turn was relied upon by the trial judge as a reason why Person 4's evidence of his conversation with Person 7 occurred in

[45] T4004:32-35 (P7).
[46] T3626:42-43 (P7).
[47] T3641:12 (P7).

2016 rather than in 2012 and as a reason for rejecting Person 100's evidence that the cliff kick was not raised in a meeting with Person 7 and others in 2013).

17. 2. In reply to RS [589], Person 31 did not attend the meeting with Person 100 in 2013. The fact that Person 7 told Person 31 something about that meeting does not establish that Person 100's own evidence is incorrect. Although the evidence was unchallenged, it was of no probative weight.

17. 3. In reply to RS [593], while a substantial delay by Person 4 in reporting that a PUC was kicked off a cliff and executed by his patrol in 2012 does not, alone, support an inference that the event did not happen, it is a factor that is relevant to the reliability of the evidence of Person 4 in this appeal.

18. Particular 20: Reliability of Hanifa, Mangul and Shahzada generally

18. 1. In reply to the Respondents' submissions at RS [598]-[607], the accumulated matters raised in the appeal concerning the evidence of Hanifa, Mangul and Shahzada renders their evidence unreliable.

18. 2. In reply to RS[609]-[610], the Appellant rejects the suggestion that evidence was required to establish that firing a weapon into the air is both reckless and dangerous. It is self-evident that a falling bullet with an unpredictable trajectory can injure or kill a person. Hanifa's evidence that he saw not just one, but three, soldiers shooting in the air, is improbable and undermines his reliability. Indeed the trial judge at J[1163], in his attempt to explain away the evidence by referring to the situation being "*very frightening and fast moving*", appeared to view the evidence as odd.

18. 3. The Respondents contend at RS [610] that Hanifa felt unable to articulate precisely what he saw. Although the trial judge correctly observed that Hanifa did not always distinguish between what he saw, what he heard and what he assumed (J[1169]), Hanifa's evidence reproduced at RS [610] about not having a tape to record the shots or make a video of them was given in response to questions in cross-examination about what the gunshots "*sounded like*".[48] On that occasion at least,

[48] T973:39-40 (Hanifa).

Hanifa had no difficulty distinguishing between what he saw and what he heard. He said:[49]

> MR McCLINTOCK: What do you say the gunshots sounded like? Tell us what the sound was.
>
> THE INTERPRETER: It happened eight years ago. How can I explain to you shots fired from a gun or a rifle?
>
> MR McCLINTOCK: Was it a sharp, loud crack? What was it?
>
> THE INTERPRETER: One thing that I forgot is that, when they were dragging Ali Jan, the shots were not loud as if you are shooting into the ground. And then the other shots I told you about, those were shots being fired into the – the air. I didn't have a tape to record the shots or make a video of them so I can explain it to you.

18. 4. In reply to RS [611] and RS [621], there is no basis for drawing an inference that the Appellant was "afraid" to ask his witnesses about whether helicopters were firing at the time of extraction. Such a detail is not recorded in any of the contemporaneous military documents. At J[1168]-[1169], the trial judge explained that Hanifa may have been describing the destruction of caves by the Task Force. This explanation does not appear to be propounded by the Respondents. In any case, the trial judge's remarks at J[1169] do not suggest that his Honour was satisfied that such shooting as described by Hanifa actually occurred.

18. 5. At RS [614], the Respondents contend that Hanifa readily acknowledged the legitimacy of the engagement at the Helmand river. He did no such thing. Hanifa said that the individual who was killed across the river was a member of the Taliban. He repeated the word "Talib" in his answer to emphasise that Mulah Gafur was a

[49] T T973:39 – T971:4 (Hanifa).

member of the Taliban. He did not express any endorsement of this killing or otherwise suggest that it was legitimate. That evidence emerged as follows:[50]

> MR McCLINTOCK: All right. In fact, before you left Darwan, in the months leading up to the trip to Kabul from Kandahar and Darwan, you had spoken, in Darwan, to Man Gul about these events many times, hadn't you?
>
> THE INTERPRETER: Conversations about raids, that is a common thing in those areas. People sit together and they tell each other, "Such and such raid took place," and everybody knows – everybody's aware. This is a common knowledge about those raids.
>
> MR McCLINTOCK: And that, for example, is how you found out that it was Mula Gafur who was the Taliban killed across the river, isn't it?
>
> THE INTERPRETER: Mula Gafur was a Talib. He belonged to Ruyan. He was killed on the other side of the river. Everyone is aware of this. Everyone knows that Mula Gafur was a Talib, a Talib, a Talib, a Talib.

18. 6. In reply to RS [616], Hanifa gave extensive evidence about the existence of other raids to Darwan. Hanifa said this:[51]

> MR McCLINTOCK: Infidel soldiers had attacked Darwan or the villages very close to it on at least three occasions in the seven months before the raid we've been talking about; that's true, isn't it?
>
> THE INTERPRETER: Of course there were raids. Of course there were raids. I do not remember on what – in what year or on what day.
>
> MR McCLINTOCK: Well, Darwan had been raided repeatedly over the years leading up to this raid, hadn't it?

[50] T1033:23- 37 (Hanifa).
[51] T1005:32-T1006:10 (Hanifa).

THE INTERPRETER: Of course there were, yes. Yes.

MR McCLINTOCK: And that's because was a Taliban ….

THE INTERPRETER: I'm not – I'm – I'm sorry. I'm not sure. I do not remember the – the situation was not good there. I don't know if there was raids before this one, how many were there. I do not remember that.

MR McCLINTOCK: But you knew Darwan was being raided because it was a Taliban stronghold.

THE INTERPRETER: There were raids. There were raids. I – I don't know about Darwan being the – the centre of the Taliban. Maybe there were Taliban, but there were – there might have been raids.

18. 7. Hanifa also gave the following evidence:[52]

MR McCLINTOCK: There were three raids, I want to suggest to you, Mr – Mohammed Hanifa, in the months before the raid we've been discussing. One seven months before; do you agree – do you – do you remember that?

THE INTERPRETER: I remember about raids, but I don't know if they took place before this raid or after this raid.

MR McCLINTOCK: Weapons were found on the raid I'm asking you about, weren't they? That is, the raid about seven months before.

THE INTERPRETER: I'm not aware. I don't know about weapons. I'm not aware of that.

[52] T1006:28-T1007:8 (Hanifa).

MR McCLINTOCK: There was another raid, either in Darwan or very close by, about four months before, where there were four people killed; that's right, isn't?

THE INTERPRETER: Four persons.

MR McCLINTOCK: Yes.

THE INTERPRETER: It had taken place. I don't remember it, but four people, yes. Four people were killed.

MR McCLINTOCK: And there had been a raid on Darwan about a month before the raid which we've been discussing here.

THE INTERPRETER: It might have taken place. Of course there were raids, but I don't remember exactly. It may have taken place.

18. 8. Having put to Hanifa that his evidence should not be accepted because it was deliberately false, it was unnecessary, as a matter of fairness to Hanifa, for the Appellant to put to him that the reason for why his evidence should not be accepted was because it was confused. In light of Hanifa's extensive evidence about other raids to Darwan, the submission that his evidence was confused or influenced by other raids to Darwan was neither extraordinary nor inappropriate.

18. 9. In response to RS[617] the existence of a photograph of Person 13 (the interpreter) carrying a pistol while he was on the base at Tarin Kowt ("inside the wire")[53] is not probative of whether he carried a weapon on missions ("outside the wire"). The rationale underpinning the evidence of the Appellant, Person 11, Person 4 and Person 56 that Person 56 was directed, at some point during the mission, to accompany the interpreter from the last compound to THQ or the HLZ or from THQ to the last compound (wherever and whenever that happened) is that Person 13 was *unarmed* and required protection. The contention at RS [617] that Person 13 could have accessed the Appellant's pistol during an interrogation assumes the

[53] CCT 2.5.2022 P18:26-P19:27 (P35).

Appellant would have tolerated that course. That contention can be readily dismissed.

19. Particulars 20(d)(iii)-(v) – Shahzada's reliability

19. 1. The Respondents' submission at RS [632]-[633] that Shahzada appeared to be repeatedly confused is premised not only upon his evidence that he saw a big soldier shooting as he was coming down from the mountain towards the hut, which he subsequently clarified and withdrew, but also upon his evidence about where the warning shots were fired from that he alleged caused Hanifa and Ali Jan to turn around and remain in the village. The trial judge twice remarked upon the confusing nature of Shahzada's evidence at J[1190] and again at J[1195]. In particular, in relation to the second issue concerning the origin of the warning shots, the confused nature of his evidence is readily apparent from a comparison of what he said in chief and what he said in cross-examination. Shahzada's first reference to the warning shots occurred during the following exchange:[54]

> THE INTERPRETER: Yes. I saw Ali Jan and Mohammed Hanifa down in the riverbed go – walking or going towards the – the – the – the valley, and then there was shots fired at them, and they return.
>
> MR OWENS: Did you see with your own eyes the shots fired at them?
>
> THE INTERPRETER: Yes. I saw the shots with my own eyes. The shots hit in front of, and meaning that they should not go. And then they return.

19. 2. The topic was further addressed subsequently in evidence-in-chief as follows:[55]

> MR OWENS: Okay. I asked you a question earlier today about did you see the shots that were fired that made Mohammed Hanifa and Ali Jan turn around. Do you remember when I asked you that?

[54] T1140:25-36 (Shahzada).
[55] T1155:26-T1156:2 (Shahzada).

THE INTERPRETER: I – the question – the other question you ask about the shots, the firing. I heard the shots. They were out near where the – our berry trees are. I heard the shots.

MR OWENS: No, I – Shahzada, I'm talking about the shots that made Ali Jan and Mohammed Hanifa turn around. Do you remember that question?

THE INTERPRETER: Well, those shots – they are – those shots were fired and – and – and – at – in front of them. The – the soldiers didn't want anybody to leave. So when they – when those shots were fired, they turned and came towards Mangul's house.

MR OWENS: I just need to check. Did you see who fired those shots?

THE INTERPRETER: The soldiers did that.

MR OWENS: Did you see where the soldiers where when they fired those shots?

THE INTERPRETER: They were sitting – they were sitting at the top of the mountain. They – they – they fired the shots from there.

19. 3. An issue concerning the translation of Shahzada's evidence was then clarified with the result that his answer to the question "did you see who fired the shots" was actually "the shots were fired either from the plane or the soldiers".[56] With this evidence clarified, Shahzada's evidence on this topic became confused in cross-examination, where the following exchange occurred:[57]

MR McCLINTOCK: Nor did you hear – nor did you see the shots that you say were fired at Mohammed Hanifa and Ali Jan as they were leaving in the morning, did you?

[56] T1145:44-T1146:10 (Shahzada).
[57] T1179:45-T1180:

THE INTERPRETER: I saw them like this. And the witness is pointing with his two – right hand, two fingers.

MR McCLINTOCK: All right. And did those - - -

THE INTERPRETER: Sorry, left hand.

MR McCLINTOCK: Sorry. Did those shots come from the plane or from the position on the hill, or both?

THE INTERPRETER: Those shots, they were fired by the soldier from the aeroplane. The aeroplane that dropped the soldiers on the top of the mountain, and they fired at Ali Jan and Mohammed Hanifa.

MR McCLINTOCK: From the plane or from the ground?

THE INTERPRETER: From the – from – your Honour, the witness is using the word "head". I don't know what he means by "head" here. From the plane's head. The shots were fired from the plane's head.

MR McCLINTOCK: Do you mean from the front of the plane, that is, there was a weapon on the plane itself which was being used to fire?

THE INTERPRETER: No. The plane was sitting on the ground, and the shots – the shots took place. The plane was sitting on the ground.

MR McCLINTOCK: And the shots came from the plane, you say.

THE INTERPRETER: Yes. The shots took place from the aeroplane, and it was upon Mohammed Hanifa and Ali Jan.

19. 4. In this evidence, Shahzada explained that the warning shots were fired, first by a soldier from the plane, and then from the plane's head. Shahzada claimed to have

seen this and denied that his poor eyesight prevented him from doing so.[58] The trial judge correctly observed that his evidence was confusing (J[1195]). The ultimate point is that the trial judge erred in placing any weight on Shahzada's evidence given the confusion in his evidence and the likelihood that it had been contaminated by discussions with Hanifa. The trial judge found Shahzada's denial of this proposition difficult to accept (J[1195]).

[58] T1180:34-T1181:4 (Shahzada).

E. CHINARTU (GROUNDS 10 TO 13)

20. 11 October 2012

20. 1. The Respondents' primary contention that the official records contain a "cover-up story" for the execution of an Afghan male at Chinartu is premised on an assumption about the correctness of Person 14's recollection that he discovered a cache *after* helicopters left the mission and shortly before extraction. No other witness corroborated Person 14's evidence. The only documentary record that offers any corroboration is the Sametime chat which records the report of an engagement towards the end of the mission, some 1.5 hours later than when, according to another military record (OPSUM), the engagement occurred. Importantly, the fact that an engagement was reported at 15:39 does not necessarily mean that the engagement did not occur at 14:05, a matter that was acknowledged at J[1439]). While it is more likely that engagements were reported promptly after their occurrence, there may be operational reasons explaining the delay between the fact of an engagement and its report over the radio to Troop command. The Appellant's evidence to this effect, which was unchallenged, was accepted by the trial judge (J[1439]). As such, the entry in the Sametime chat does not unequivocally corroborate Person 14's recollection, as it may be consistent with the engagement having occurred at 14:05 (or indeed at some other time prior to 15:39). Ultimately, the Respondents' allegations of a cover up rest entirely upon the uncorroborated recollection of a witness of events occurring 13 years in the past. There is an insufficient evidentiary basis to support the Respondents' contentions about a cover up, or the trial judge's findings concerning the execution.

20. 2. Two features distinguish this murder allegation from the murder allegations at W108 and Darwan.

20. 3. *First*, the Appellant's answer to the allegation was denial and did not involve some equally specific but contradictory account of the event. In this sense there were not two competing versions of events but of course there was the contradictory alternative of a denial. In respect of Chinartu there is only one account, being that of Person 14, which is available to support the trial judge's finding that the

Appellant ordered Person 12 to shoot an Afghan male who was under detention (J[1537]). Person 14's reliability, a matter which is challenged on appeal, was critical to the trial judge's overall findings concerning this mission.

20. 4. *Second*, the author of what the Respondents call the "false account" contained within the contemporaneous miliary records is unknown (RS [10]). No evidence of any kind was led by the Respondents about the events at any patrol or troop debrief following this mission. There is no evidence as to how the allegedly false account came to be promulgated and who was involved in this conspiracy.

21. <u>The OPSUM</u>

21. 1. The Respondents repeatedly suggest (see for instance RS [670]-[671], [726], [749]), that the Appellant accepts the trial judge's finding that the OPSUM entry at 14:05 for the Chinartu mission is wrong (J[1438] and [1536]). The Appellant does not accept this finding. It was based, in part, on the evidence of Person 14 (J[1443]), whose reliability the Appellant challenges (AS [29.5]). Further, the Appellant contests an aspect of the trial judge's finding at AS [30.6].

21. 2. The fact that the Sametime chat contained an entry to the effect that an EKIA was *reported* at 15:39 is not necessarily inconsistent with the engagement having occurred at 14:05. The trial judge accepted that there might be good reasons why an engagement was not reported promptly (J1439]). Furthermore the SSE report (which will be discussed in more detail in the closed court submissions) contained information materially inconsistent with both the OPSUM and the Sametime chat.

21. 3. Ultimately, the evidence was not sufficiently cogent to sustain a finding that the 14:05 entry in the OPSUM was false.

21. 4. We refer to the Respondents' submissions at RS [679]-[681]:

(a) Whilst it may be more likely for a report of an EKIA that occurred at 14:05 to have been made shortly afterwards or otherwise earlier than 15:39, that

is only one factor to be taken into consideration and it does not prove a dishonest course of conduct.

(b) At RS [680], the Respondents overstate the effect of the evidence of Persons 32 and 35 on the issue of whether there were no engagements by their patrol during the clearance of the compounds. Neither were definite about whether their patrol had engagements that day. Person 32 said that he had no recollection of a contact by any NDS member attached to his patrol that day.[59] He agreed, *to the best of his knowledge*, with the proposition that no NDS member attached to his patrol during that mission had an engagement during the clearance of the compound.[60] Person 35 could not recall whether any member of the partner force who was attached to his patrol had an engagement during that mission.[61]

(c) The mere fact that Person 14 said that he recalled an engagement late in the day (and the evidence concerning his timeline leading up to the engagement is challenged in this appeal), may indeed be consistent with the Sametime chat. Again that does not prove that the 14:05 entry int the OPSUM was deliberately falsified, particularly in the absence of any evidence whatsoever as to the source of the information in the OPSUM, the manner in which that information was imparted and by whom.

21. 5. Finally, any attempt to assess the reliability and the accuracy of the OPSUM must involve analysis of the SSE report, not just the Sametime chat. The SSE report is partly consistent with the OPSUM but there are material differences. Indeed, a critical difficulty for the Respondents' position is that if the cache that was recorded and photographed was not located in the circumstances described in the SSE report (which somewhat, but not entirely, resembles the 14:05 engagement as described in the OPSUM), then from where did it come?

[59] T5922:1-12 (P32).
[60] T5922:10-12 (P32).
[61] Cl Ct T2.5.22 P24:1-41 (P35).

22. The Person 12 lie

22. 1. The trial judge correctly refused to use the evidence of the (so-called) Person 12 lie as evidence of consciousness of guilt because of a concern that the lie may have been created as a response to the Respondents' case on the Darwan mission of 11 September 2012 (where Person 12 was not in fact present). Having recounted the evidence and findings of the trial judge in relation to the Person 12 lie at RS [694]-[717], the Respondents confirm that they do not advance any consciousness of guilt submission on appeal (RS [715]). As a result, the submissions advanced at RS [694]-[717] are irrelevant. They are not relevant to the question of the reliability of Person 14's evidence which the trial judge relied upon to make the relevant findings concerning the execution at Chinartu.

23. Particular 34; Credibility of Persons 11, 32 and 35

23. 1. In reply to RS [719]-[723], according to Person 14, Persons 11 and 32 witnessed this killing. They denied the event happened (J[1516] and [1517]). The Appellant submits that it was an error to accord the evidence of Persons 11 and 32 no weight whatsoever, in circumstances where Person 14 was a witness whose evidence the trial judge said must be scrutinised with care (J[225], [523] and [764]). Person 14's credit is the subject of further challenge in this appeal.

24. Particular 31(a)-(e); The alleged second cache

24. 1. We refer to the Respondents' submissions at RS [732]-[742].

24. 2. The nub of the point is not that the second cache was never photographed (cf RS [738]). Rather, it is that the second cache was never mentioned or alluded to in the contemporaneous military records (J[1536]). This unexplained feature of Person 14's evidence is even more strange given that Person 14 said that he observed engineers exploiting the second cache that he discovered (J1416]) and that they were able to finish what they needed to do (J[1419]). If that evidence is correct, as the trial judge found, it is improbable that the second cache was never referenced or mentioned in any reports, let alone the one report prepared by the engineers

cataloguing the weaponry and equipment that was located during the mission to Chinartu; the SSE report. Indeed, whilst it is not totally clear, it seems to be the Respondents' case that this alleged second cache, also containing weaponry and equipment, was simply left in place and not returned to Tarin Kowt. That is most improbable.

24. 3. The submission that the phrase "limitations in time" in the SSE report actually refers to an undocumented second cache that is not otherwise mentioned in the report or photographed – as opposed to the cache that the report actually deals with – is an unlikely one. This reference cannot corroborate Person 14. The SSE report considered as a whole reflects adversely on the reliability of Person 14 and his insistence on the discovery of a second cache minutes before 15:39 that day.

24. 4. In response to RS [743]-[745], it is improbable that the identity of the source or witness providing instructions to the Respondents to ask these questions of the Appellant could be any person other than Person 14. He was the only witness from either side who said he observed and recollected the discovery of a second cache that day. Person 14 may indeed have been consistent about his discovery of a cache shortly prior to his observing an execution shortly prior to extraction, but it was only when the documents from the Department of Defence were produced that it became clear that a cache extremely similar to the one that Person 14 described, had in fact been assessed and photographed by engineers. Adversely to the Respondents' case, the discovery and photographing of this cache had occurred at a time that was earlier than, and inconsistent with, Person 14's evidence. Hence the second cache.

24. 5. In response to RS [746]-[750], it seems that the Respondents' theory is that "inspiration" was drawn from a photograph of a rifle and binoculars taken at a time before the killings (the first cache) to justify a report that the body was found with an AK-47. This is undisguised speculation. It is also unlikely given the fact that according to Person 14 he found some rifles right outside the compound where the relevant EKIA was executed. If a person had been minded to pretend that the EKIA had a rifle on his body, there would have been no need to take such "inspiration"

from an earlier photograph of an unrelated cache. According to Person 14 the rifle was just outside the compound where the execution occurred.

24. 6. Further, the Respondents now say the first cache was not found in the circumstances described in either the OPSUM or SSE report and that the "*evidence does not fully explain the circumstances in which the first cache was discovered*." The consequence of the Respondents' position on this version is that both the documents have most likely been fabricated. One would infer different persons must have been involved in the fabrications – since they are not consistent. That is not at all probable. Also not probable is the apparently mysterious appearance of the documented cache uncannily similar to the one described by Person 14.

25. Particular 32: Timing

25. 1. We refer to the Respondents' submissions at RS [753]-[756]. The Respondents do not engage with the trial judge's use of the phrase "*not impossible*" (J[1531]) to describe Person 14's improbable timeline of events. Nothing in this part of the submissions renders the five minute period (which on the evidence can be relatively firmly fixed) for the unfolding events described at paragraph 31.1 of the Appellant's primary submissions any more plausible. It remains highly improbable that the alleged sequence of events occurred within such an abbreviated period. The trial judge was required to make a finding of fact on the balance of probabilities concerning Person 14's evidence and his timeline of events surrounding the discovery of the second cache and the engagement of the Afghan detainee. Referring to the evidence of a critical witness as being "*not impossible*" is at odds with being satisfied of the alleged fact to which that evidence is relevant, to the requisite degree of proof.

26. Particular 33; Number of Persons to be returned to Tarin Kowt

26. 1. We refer to the Respondents' submissions at J[759]-[761]. The contention that the reduction in forecast POI numbers from a yet to be confirmed 3-4 to two provided clear and strong support for the account by Person 14 overstates the inferences that can be reasonably drawn from this evidence. There is no evidence, other than

Person 14's, supporting a conclusion that a reduction in forecast POI numbers from a yet to be confirmed 3-4 to two is sinister. To describe the question "*What happened – what happened to the fucking PUC*" as chilling involves an assumption about the fate of the PUC. Minus that assumption, there is nothing untoward in the question or indeed Person 26's alleged annoyance that provides "clear and strong support" for Person 14's account. An inference that Person 26 suspected that a PUC had been executed based on his reaction and question is tenuous.

26. 2. Contrary to RS [761], it is clear that the trial judge relied upon Person 14's evidence of his conversation with Person 26 to corroborate Person 14's account at J[1536].



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8 December 2023