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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

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1. Introduction

1. 1. The Appellant commenced proceedings against the Respondents following the publication of grave allegations that he was, inter alia, a war criminal who had murdered unarmed persons whilst serving as a member of the Australian Defence Force in Afghanistan during the period 2009 to 2012. The publication of these allegations occurred whilst there was an ongoing inquiry by the Inspector-General of the Australian Defence Force. At the time of the publications of the impugned articles by the Respondents, the Appellant had not been charged with any criminal offence let alone convicted of any criminal offence. That remains the case.

1. 2. The Appellant was and remains entitled to the presumption of innocence. It is only within the contours of s 80 of the Constitution, with all the rigours and protections of the criminal justice system, that a finding of guilt in relation to war crimes can be made. Despite this, the Respondents published allegations that the Appellant was in fact a war criminal. In the proceedings before the primary judge, the Respondents sought to prove that the Appellant had committed multiple murders whilst serving as a member of the Australian Defence Force. As part of their attempt to prove the murder allegations, the Respondents mounted an attack on the credibility of the Appellant and the witnesses called by the Appellant. The Respondents' concerted attack on the credibility of the Appellant raised matters relating to his personal life, which were unconnected to the allegations of war crimes, in a seeming attempt to undermine his credibility as a witness. The Respondents erroneously contended that the primary judge had a binary choice in the proceedings: the Court could either accept the Appellant's witnesses as telling the truth, which would result in the murder allegations not being made out, or else believe the Respondents' witnesses, then the murder allegations had been established by the Respondents. The primary judge erroneously accepted the Respondents' invitation and focused on the credibility attacks on the Appellant and the Appellant's witnesses. This, in part, contributed to primary judge failing to approach with caution the totality of the evidence before the Court, which raised doubts as to the allegations of murder propounded by the Respondents.

1. 3. Allegations of murder fall within the category of the most serious allegation that could be advanced in a civil trial before this Court. The gravity of the allegations determines

the manner in which this Court will attain or not attain reasonable satisfaction of the truth of the allegations, which necessarily takes into account the presumption of innocence which the Appellant was and remains entitled to.[1]

1. 4. In considering the manner in which the Court is to attain reasonable satisfaction of the truth of a murder allegation, the Court must necessarily take into account the consequences that may follow from a finding of murder and that adverse consequences, both within and outside of the proceedings, need to be reflected in a more cautious approach to fact finding.[2] The adverse consequences of such findings in this case include undermining the Appellant's presumption of innocence and the risk of prejudice to any criminal investigation or prosecution.

1. 5. Central to a consideration of the matters raised by this appeal, is the basic principle that belief in the versions of witnesses of the Respondents cannot be used as a basis for finding murder where there is otherwise doubt raised and left unchallenged or not rationally explained by other evidence before the Court (putting to one side the evidence of the Appellant or his witnesses) inconsistent with murders having occurred where that evidence is not answered or explained by the evidence of the Respondents. This was not a case in which the primary judge had a binary choice as the Respondents wrongfully urged upon the Court.

1. 6. The primary judge found in relation to the murder allegations:

(a) the allegation that the Appellant had murdered two persons at Whiskey 108 in 2009 was substantially true;[3]

(b) the allegation that the Appellant murdered one person at Darwan in September 2012 was substantially true;[4]

(c) the allegation that the Appellant murdered one person at Chinartu in October 2012 was substantially true;[5]

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[1] *Wright v Wright* (1948) 77 CLR 191 at 210 (Dixon J).
[2] *GP Building Holdings Pty Ltd v Voiton* (2022) VSCA 210 at [86].
[3] Part A, Tab 10, J[881]–[882].
[4] Part A, Tab 10, J[1368]-[1370].
[5] Part A, Tab 10, J[1537]-[1538].

(d) the allegation that the Appellant murdered one person at Fasil in November 2012 was not a matter of substantial truth.[6]

1. 7. Otherwise in relation to the balance of the allegations:

(a) The allegations concerning the threatening of Person 10, and of domestic violence against Person 17 were not found to be matters of substantial truth.[7]

(b) The allegations of the bullying of Person 1, and the two assaults of persons under confinement (**PUCs**) in 2010 and 2012, were found to be matters of substantial truth.[8]

1. 8. The Appellant appeals from the murder findings. He does not appeal from the finding of bullying against Person 1, nor against the two assaults of PUCs which the primary judge described as respectively "*not regarded as particularly serious*" and "*fairly minor*".[9] The consequences in terms of the imputations which are recorded at J[11]-[13] and J[83]-[85] are as follows:

(a) The findings of substantial truth for Imputations 1-6 and 9 are the subject of appeal. If the appeal against the murder findings is successful there will be no findings made by the trial judge that establish the truth of these imputations.

(b) Imputations 11 and 14 were imputations concerning the assault of Afghan PUCs in 2012. These imputations were found to be matters of substantial truth not just because of the two discrete assaults discussed at 1. 7(b) above but also because of the conduct towards each of the alleged murder victims. If the appeal against the murder finding succeeds the only finding that will sustain the truth of these imputations will be the "*fairly minor*" assault in 2012.

[6] Part A, Tab 10, J[1692].
[7] Part A, Tab 10, J[1964]–[1965], J[2226].
[8] Part A, Tab 10, J[1847], J[1905], J[1912]–[1913].
[9] Part A, Tab 10, J[1905], J[1912].

(c) The finding of substantial truth for Imputation 10 involving the 2010 assault "*not regarded as particularly serious*" will stand.

(d) Imputations 7, 8 and 13 were not found to be substantially true.

1. 9. In respect of the Group 1 articles or the first-second matters complained of, the primary judge found that the relevant imputations were supported by (only) the murder findings.[10] Accordingly, if those findings are set aside, the Appellant will be entitled to judgment on the causes of action.

1. 10. In respect of the Group 2 articles or the third-fourth matters complained of, each of the relevant imputations involved an element of murder and were accordingly found to be matters of substantial truth.[11] Accordingly, if those findings are set aside, the Appellant will be entitled to judgment on the causes of action. There was a defence of contextual truth but the primary judge did not need to consider it.[12]

1. 11. In respect of the Group 3 articles or the fifth-sixth matters, the imputations covered a variety of allegations. There was a defence of contextual truth which the primary judge rejected.[13] The Appellant does not challenge the primary judge's finding on the contextual truth defence as it presently stands. However, if each of the murder findings are set aside on appeal the contextual truth defence cannot succeed:

(a) The only conduct the primary judge found that justified the contextual imputations was the murders.

(b) Even if the primary judge had found the two non-serious assaults on Afghan PUCs justified the contextual imputations, the false imputations of domestic violence and acquiescing to an execution would still have done further harm to the reputation of the Appellant in the language of section 26 of the *Defamation Act 2005* (NSW). The murder allegations were plainly the most serious in this case.

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[10] Part A, Tab 10, J[882], [1370], [1538].
[11] Part A, Tab 10, J[882].
[12] Part A, Tab 10, J[2599].
[13] Part A, Tab 10, J[2600]-[2607].

1. 12. The primary judge made no findings on damages.[14] In the event that this appeal is successful, it is appropriate that the assessment of damages be dealt with on a remitter to a judge other than the primary judge[15] or referred to a member to the Full Court to determine.

1. 13. The primary judge rejected the evidence of the Appellant and his witnesses. For example, the primary judge rejected the Appellant's evidence that there was a legitimate engagement of two squirters outside Whiskey 108 and the legitimate engagement of a spotter in a cornfield at Darwan prior to extraction: see for instance J[1231]-[1236]. This appeal does not invite the Full Court to make findings of fact which involves the acceptance of the Appellant's evidence or that of his witnesses. Rather, the appeal should be upheld and the impugned findings set aside based on the errors of the primary judge's acceptance of the Respondents' case. The primary judge's reasoning is deficient in its treatment and explanation of significant inconsistencies and implausibilities in the evidence of the Respondents' witnesses, and to the contemporaneous records of the Commonwealth (which amongst other matters recorded at the critical points enemies killed in action (**EKIA**) rather than the execution of PUCs). A consistent example is the manner in which the primary judge states he is *"taking into account"* matters adverse to the Respondents' case without explanatory analysis or weighing of the significance of the matter under discussion.

2. Approach to fact-finding

2.1 The role of this Court, on an appeal by way of rehearing, is to conduct a *"real review"*[16] of the trial and to "give the judgment which in its opinion ought to have been given in the first instance".[17] Indeed, it is the *"duty"* of the Court *"to decide the case – the facts as well as the law – for itself."*[18]

[14] Part A, Tab 10, J[2614]-[2618].
[15] *Roberts-Smith v Fairfax Media Publications Pty Limited (No 44)* [2023] FCA 1013 at [37]-[38].
[16] *Fox v Percy* (2003) 214 CLR 118, [25] (Gleeson CJ, Gummow and Kirby JJ).
[17] *Dearman v Dearman* (1908) 7 CLR 549, 561.
[18] *Warren v Coombes* (1979) 142 CLR 531, 552.

3. Appellate restraint

3.1 It is well established that an appellate court is to give weight to the advantages enjoyed by the trial judge in determining whether the judgment under appeal was wrong. But the trial judge's advantages are matters to be taken into account in making that determination: there is no separate stage of the inquiry at which considerations of judicial restraint emerge.[19] If, after giving due weight to the trial judge's advantages, the appellate court takes a different view of the facts, then error is shown,[20] and the court *"must discharge [its] duty and give effect to [its] own judgment."*[21]

3.2 The degree of deference to be afforded to factual findings of a trial judge and the circumstances in which deference is required have been variously expressed from time to time,[22] but the relevant principles are longstanding and have not changed substantially since before federation.[23] The various judicial formulations on the subject are not to be applied mechanically, or as if they were the text of a statute, detached from their underlying basis in principle.[24] The terms *"glaringly improbable"* and *"contrary to compelling inferences"* are *"convenient descriptive labels or guidelines"* for the circumstances in which appellate interference may be warranted with demeanour-affected findings.[25] But *"the weight to be given to the findings of a trial judge will vary according to the type of issue in question, and the nature and the extent of the advantage enjoyed by the trial judge."*[26]

[19] *Cashman v Kinnear* [1973] 2 NSWLR 495, 498-499 (Jacobs P).
[20] *Frigger v Trenfield (No 3)* [2023] FCAFC 49, [139] (Allsop CJ, Anderson and Feutrill JJ); *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93, [50] (Perram J).
[21] *Warren v Coombes* (1979) 142 CLR 531, 552.
[22] *Devries v Australian National Railways Commission* (1993) 177 CLR 472, 479 (Brennan, Gaudron and McHugh JJ).
[23] See eg *Coghlan v Cumberland* [1898] 1 Ch 704, 705 (Lindley MR, for the Court); *McLaughlin v Daily Telegraph Newspaper Co Ltd (No 2)* (1904) 1 CLR 243, 277 (Griffith CJ). There is a helpful summary of the authorities in the reasons of Kirby J in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1990) 160 ALR 588, [81]-[86].
[24] *Prouten v Chapman* [2021] NSWCA 207, [14] (Meagher and Leeming JJA).
[25] *Commonwealth Financial Planning Ltd v Cooper* [2013] NSWCA 444, [67] (Beazley P, McColl and Leeming JJA).
[26] *Jadwan Pty Ltd v Rae & Partners (a firm)* (2020) 278 FCR 1, [414] (Bromwich, O'Callaghan and Wheelahan JJ).

4. Demeanour

4.1 It was recently said, in *Lee v Lee*, that *"[a]ppellate restraint with respect to interference with a trial judge's findings unless they are 'glaringly improbable' or 'contrary to compelling inferences' is as to factual findings which are likely to have been affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give their evidence."*[27]

4.2 That formulation focusses on the potential advantage enjoyed by the trial judge in making assessments of credibility or reliability based on witnesses' manner and demeanour in giving evidence.[28] That is of little or no weight where, as in this case, the trial judge placed little or no reliance on those considerations in assessing witnesses' honesty and reliability. As Meagher and Leeming JJA observed in *Prouten v Chapman*, *"there is an important distinction between the credit and the demeanour of a witness. A court can determine that a witness lacks credit but may do so on a basis that wholly excludes the witness' demeanour."*[29] Credibility findings not based to any substantial degree on impressions based on demeanour do not attract appellate restraint.[30]

4.3 Further, it has always been accepted that *"there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen."*[31] Accordingly, even where a trial judge has or may have taken manner and demeanour into account, it is *"sufficient ... for an appellant to demonstrate that a primary judge has treated objective circumstances*

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[27] *Lee v Lee* (2019) 266 CLR 129, [55] (Bell, Gageler, Nettle and Edelman JJ).
[28] See also *Fox v Percy* (2003) 214 CLR 118, [30] (Gleeson CJ, Gummow and Kirby JJ).
[29] *Prouten v Chapman* [2021] NSWCA 207, [10] (Meagher and Leeming JJA). As to the distinction between 'demeanour' and 'credibility', see *Onassis v Vergottis* [1968] 2 Lloyds Rep 403, 431 (Lord Pearce).
[30] See eg *Prouten v Chapman* [2021] NSWCA 207, [10]-[16]; *August v Commissioner of Taxation* [2013] FCAFC 85, [156]-[158]; *Martin v Norton Rose Fulbright Australia* (2021) 289 FCR 369, [147] (Jagot, Katzmann and Banks-Smith JJ).
[31] *Coghlan v Cumberland* [1898] 1 Ch 704, 705 (Lindley MR, for the Court), approved in *McLaughlin v Daily Telegraph Newspaper Co Ltd* (1904) 1 CLR 243, 277 (Griffith CJ, for the Court); *Dearman v Dearman* (1908) 7 CLR 549, 553 (Griffith CJ), 557-558 (Barton J), 559 (Isaacs J).

as providing material support for the credibility or reliability of a witness when those circumstances cannot reasonably be regarded as providing that support".[32] Findings made *"for reasons which in whole or in part do not truly go to the reliability or veracity of the relevant evidence, or without taking account of an important consideration or considerations material to evaluation of the credibility or veracity"*[33] may be said to have involved *"misuse"*[34] of the trial judge's advantage or to be contrary to compelling inferences.

4.4 The primary judge referred early in his reasons to the doubts expressed in *Fox v Percy* about the value of demeanour and the observation that those doubts had *"encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses"*[35] (J[171]). The primary judge noted that, save for in a *"handful of cases"*, the parties' submissions eschewed reliance on demeanour in preference for contemporary materials, objectively established facts, the apparent logic of events, the presence or otherwise of corroboration and the effect of the evidence as a whole (J[172]). In the exceptional cases where submissions were made about demeanour, the primary judge almost invariably declined to accept them: in multiple cases the primary judge found that the demeanour of witnesses called by the Appellant was not a reason to *"accept or reject [their] evidence"* (J[1142], [1283]), and the only finding made about the Appellant's demeanour was that he *"remained composed"* during *"detailed and challenging"* cross-examination (J[173]). In a small number of cases, the primary judge rejected submissions based on the manner in which Afghan witnesses gave evidence, for reasons which included the difficulty involved in making cross-cultural assessments of demeanour (J[1173], J[1197]-[1198]).

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[32] *Xu v Jinhong Design & Constructions Pty Ltd* [2011] NSWCA 277, [66] (Macfarlan JA, Basten JA agreeing).

[33] *Shimokawa v Lewis* [2009] NSWCA 266, [182]-[184] (Giles JA, Beazley and Ipp JJA agreeing); *Davis v Veigel* [2011] NSWCA 170, [42] (Macfarlan JA, Hodgson and Young JJA agreeing).

[34] Cf *Devries v Australian National Railways Commission* (1993) 177 CLR 472, 479 (Brennan, Gaudron and McHugh JJ); *Abalos v Australian Postal Commission* (1990) 171 CLR 167, 179 (McHugh J), citing *S.S. Hontestroom v S.S. Sagaropack* [1927] AC 37, 47 (Lord Sumner).

[35] *Fox v Percy* (2003) 214 CLR 118, [31].

4.5 The approach expressly adopted by the primary judge leaves little room for speculation about the *"subtle influence of demeanour"* on his findings, even if analysis of that kind were otherwise appropriate (which may be doubted).[36] This Court is in as good a position as the primary judge to determine the weight to be afforded to the matters that were and were not taken into account in supporting the findings made.

5. Other advantages

5.1 It is sometimes said that an appellate court is also bound to take into account the advantage enjoyed by the trial judge by reason of their *"obligation ... to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence"*.[37] However, the deference to which a trial judge's findings are entitled for that reason is not the same as the *"protection"* afforded to findings likely to have been affected by assessments of demeanour.[38] As has already been explained, this advantage is simply a matter for the Court to take into account in considering the correctness of the primary judge's findings.

5.2 In an adversarial system, there is a necessary limit to the significance of the trial judge's obligation, and opportunity, to receive the entirety of the evidence. The parties' representatives can reasonably be expected to draw this Court's attention to the evidence relevant to the findings they seek to impugn or defend.[39] This Court's opportunity to direct its attention, with the assistance of counsel, to a more confined set of factual issues – free from the distractions and complexities of a protracted trial – is an appellate court's advantage over a trial judge.[40]

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[36] As to which see *CSR Ltd v Maddalena* (2006) 224 ALR 1, [23] (Kirby J, Gleeson CJ agreeing).
[37] *Fox v Percy* (2003) 214 CLR 118, [23]. In this Court, see *Frigger v Trenfield (No 3)* [2023] FCAFC 49, [144] (Allsop CJ, Anderson and Feutrill JJ).
[38] *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424, [28] (Allsop J, Drummond and Mansfield JJ agreeing).
[39] Compare *Pell v The Queen* (2020) 268 CLR 123, [10] (the Court).
[40] *Yarrabee Coal Co Pty Ltd v Lujans* [2009] NSWCA 85, [3] (Allsop P); *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331, [257] (Spigelman CJ, Beazley and Giles JJA).

6. The standard of proof

6.1 Although the Appellant does not contend that the primary judge misdirected himself as to the standard of proof, the correctness of the primary judge's findings is necessarily to be considered having regard to that standard. The standard of proof in civil proceedings in this Court is fixed by s 140 of the *Evidence Act 1995* (Cth), which, as the primary judge accepted (J[99]), gives statutory force to the principles in *Briginshaw v Briginshaw*.[41] Section 140 requires satisfaction on the balance of probabilities.[42] But the *"degree of satisfaction"* called for varies *"according to the gravity of the fact to be proved"*,[43] because *"reasonable satisfaction is not a state of mind that is established independently of the nature and consequence of the fact or facts to be proved"*.[44]

6.2 The gravity of a finding, its inherent unlikelihood, and the consequences which may follow from it are all matters relevant to whether *"the issue has been proved to the reasonable satisfaction of the tribunal [of fact]"*.[45] The consequences to be taken into account are not subject to any particular limitation and are not confined to consequences in the instant proceedings.[46] Where a court is asked to make findings of criminal conduct in civil proceedings, due weight must also be given to the

[41] (1938) 60 CLR 336 (***Briginshaw***). See *Qantas Airways Ltd v Gama* (2008) 167 FCR 537, [125]-[139] (Branson J, French and Jacobson JJ agreeing); *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205, [735]-[737] (Spigelman CJ, Beazley and Giles JJA).
[42] Nothing turns on the omission from s 140(1) of the word *"reasonably":* see *Murray v Murray* (1960) 33 ALJR 521, 524 (Dixon J).
[43] *Refjek v McElroy* (1965) 112 CLR 517, 521 (Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ).
[44] *Briginshaw* (1938) 60 CLR 336, 362 (Dixon J). See also *Helton v Allen* (1940) 63 CLR 691, 701 (Starke J).
[45] *Briginshaw* (1938) 60 CLR 336, 362.
[46] *GP Building Holdings Pty Ltd v Voitin* [2022] VSCA 210, [86]. See eg *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291; [2011] FCA 717, [100]-[103] (Middleton J) (reputation); *State of New South Wales v Hathaway* [2010] NSWCA 184, [263]-[272] (Tobias, McColl and Macfarlan JJA) (professional discipline); *Truong v Manager, Immigration Detention Centre, Port Hedland* (1993) 31 ALR 729, 731 (Malcolm CJ, Seaman and Ipp JJ) (liberty).

presumption of innocence,[47] understood in the sense of *"an emphatic caution against haste in coming to a conclusion"*[48] that criminal wrongdoing has occurred.

6.3 Accordingly, although the civil standard of proof always remains proof on the balance of probabilities,[49] satisfaction as to proof on the balance of probabilities of criminal misconduct is not to be *"produced by inexact proofs, indefinite testimony, or indirect inferences"*.[50] For that reason, where allegations of grave criminality are concerned, *"the difference in the effect [of the criminal and civil standards] is not so great as is sometimes represented"*.[51]

6.4 The findings of the primary judge are among the most serious findings of misconduct ever made in a civil case by this Court. Their gravity is self-evident. So too is the gravity of the consequences of those findings, both for the Appellant's reputation and in their potential effect on any future criminal investigations. It is difficult to conceive of a case in which the principles in *Briginshaw* could more clearly or more powerfully be engaged. The Full Court will need to guard jealously against the Respondents' attempt to assert allegations of murder not only against the Appellant but other persons (who are the subject of findings of murder by the primary judge) based on implausible and inconsistent evidence.

7. The erroneous excluded middle

7.1 In assessing the correctness of the primary judge's findings, it is necessary to bear in mind that the critical question is whether the primary judge erred in making findings consistent with allegations made by the Respondents' justification defence. It is not

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[47] *Maxcon Constructions Pty Ltd v Vadasz (No 2)* (2017) 341 ALR 628; [2017] SASCFC 2, [264]-[266] (Hinton J, Lovell J agreeing); *New South Wales v Beck* [2013] NSWCA 437, [71] (Ward JA, Beazley P and Barrett JA agreeing); *Communications, Electrical, Electronic, Energy, Information, Postal, Plbming & Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466; [2007] FCAFC 132, [32] (Weinberg, Bennett and Rares JJ); *Gianoutsos v Glykis* (2006) 65 NSWLR 539, 547 (McClellan CJ at CL, Sully and Hislop JJ agreeing); *Cuming Smith & Co Ltd v Westralian Farmers Co-operative Ltd* [1979] VR 129, 147 (Kaye J).

[48] J F Stephen, *A General View of the Criminal Law of England* (2nd ed, London, 1890), 183, cited in *Briginshaw* (1938) 60 CLR 336, 352 (Starke J)

[49] *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 449-450 (Mason CJ, Brennan, Deane and Gaudron JJ).

[50] *Briginshaw* (1938) 60 CLR 336, 362.

[51] *Wright v Wright* (1948) 77 CLR 191, 210 (Dixon J).

whether the primary judge erred in not accepting some or all of the evidence of the Appellant's witnesses.

7.2 The Court is not bound to accept the case of any of the parties. That proposition is familiar in a criminal context, but it is well recognised in civil cases,[52] if less commonly applied. Unless the parties' respective cases identify the *only* possible versions of events, which will rarely be the case, it must logically be open for the tribunal of fact not *"to make a finding one way or the other with regard to the facts averred by the parties"* and simply *"to say that the party on whom the burden of proof lies ... has failed to discharge that burden"*.[53] Indeed, that conclusion may be not merely open, but necessary, given the stringent requirements of proof to the civil standard in the particular circumstances of this case. If the Court cannot reasonably be satisfied that allegations made by the respondents are more likely than not, the defence fails in respect of those allegations. There is no question of choosing between the parties' cases.

7.3 The rejection or non-acceptance of the evidence of the Appellant's witnesses does not establish the converse of that evidence or the truth of the Respondents' case.[54] As a practical rather than strictly legal matter, in some cases – perhaps even in the typical case – the rejection of one party's case will, by eliminating a competing hypothesis, leave the other in command of the field. But not necessarily. In a case such as the present, concerning highly specific allegations (and findings) of criminal misconduct that are over a decade old and extremely grave and involving large numbers of witnesses recalling these events which occurred during moments of real stress, there could be nothing surprising in a conclusion that the burden of proof was simply unsatisfied.

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[52] See eg *Kuligowski v Metrobus* (2004) 220 CLR 363, [60] (the Court); *Rhesa Shipping Co SA v Edmunds* [1985] 1 WLR 948, 955 (Lord Brandon of Oakbrook); *Jackson v Lithgow City Council* [2008] NSWCA 312, [9]-[10] (Allsop P, Basten JA and Grove J agreeing); *McLennan v Nominal Defendant* [2014] NSWCA 332, [87] (Basten and Emmett JJA and Simpson J); *Macks v Viscariello* (2017) 130 SASR 1, [603] (Lovell J, Corboy and Slattery AJJ).

[53] *McLennan v Nominal Defendant* [2014] NSWCA 332, [87] (Basten and Emmett JJA and Simpson J).

[54] *Hobbs v Tinling (CT) and Co Ltd* [1929] 2 KB 1, 21 (Scrutton LJ); *Kuligowski v Metrobus* (2004) 220 CLR 363, [60] (the Court).

7.4 As will be seen, the objective deficiencies of the Respondents' witnesses' evidence are such that it is simply not possible for this Court reasonably to be satisfied of the honesty and reliability of critical parts of that evidence. The fallibility of memory,[55] the effect of emotion and suggestion on the capacity to 'remember',[56] and the natural tendency for suspicion to progress, by way of belief, to reconstruction and recollection,[57] likewise diminish the force of the Respondents' witnesses' evidence regardless of whether and to what extent the evidence of the Appellant's witnesses was or is accepted.

7.5 The other issue which loomed large before the primary judge was that the Respondents did not have a duty of disclosure which would otherwise exist in proceedings of a criminal nature where murder allegations are being advanced. Whilst it is accepted that these are civil proceedings and such a duty does not apply, the primary judge failed to have regard to the fact that there were numerous instances in the proceedings where the Respondents had not disclosed versions of events, from key witnesses to alleged murders, which directly contradicted the evidence which was being led from them in the proceedings before the primary judge. This should have, but did not, cause the judge to review the totality of the evidence before the Court in a cautious manner rather than make findings based on the alleged eyewitness testimony of the witnesses called by the Respondents.

8. Adequacy of reasons

8.1 The primary judgment is replete with statements that matters or submissions favourable to the Appellant were *"take[n] ... into account"* in his Honour's findings. The primary judge used that language not only in relation to matters of general significance, such as considerations relevant to the principles in *Briginshaw* and the unreliability of oral testimony about matters long past (J[113]-[114], [163]), but also in relation to specific submissions on critical issues of fact (see eg

[55] See *Coote v Kelly* [2013] NSWCA 357, [51] (Leeming JA, Basten and Hoeben JJA agreeing); *Moubarak by his tutor Coorey v Holt* [2019] NSWCA 102, [77] (Bell P, Leeming JA and Emmett AJA agreeing) and the cases there cited.

[56] *Longman v The Queen* (1989) 169 CLR 79, 107-108 (McHugh J).

[57] *Herron v McGregor* (1986) 6 NSWLR 246, 254 (McHugh JA), citing Chief Justice Street, *Report of the Royal Commission of Inquiry into Certain Committal Proceedings Against K E Humphreys*, 9-10.

borrowing of a suppressor (J[698]); credit issues relating to Person 14 (J[760]); credit issues relating to Mohammed Hanifa (CCJ[134] and [135]); Person 4's inconsistent evidence about the ICOM radio (J[1119]); the absence of evidence from Person 4 and Person 56 observing Person 11 carrying an ICOM radio during the Darwan mission (J[1335]); the Troop's PUC handling procedure during the Darwan mission (J[1357]); Person 14's evidence about a cache discovery that is not corroborated and Person 14's failure to report a breach of the Rules of Engagement (J[1536]). His Honour's treatment of each of those submissions will be returned to below in addressing the relevant grounds of appeal. However, it is convenient at this point to deal with the adequacy of his Honour's approach at a general level.

8.2 The Appellant's primary position is that the Respondents have failed to discharge their burden of proof and that this Court should accordingly enter judgment in his favour. However, the Appellant also contends that the primary judge's reasons for his findings on certain critical issues were inadequate. Those inadequacies are not merely a further reason for this Court to interfere with his Honour's findings. They in themselves constitute appealable error.

8.3 That inadequate reasons by a judicial officer may constitute appealable error can be in no doubt.[58] The content of the duty to give reasons is informed by the functions that reasons are to serve,[59] which include permitting appellate courts to discharge their own duties and unsuccessful parties to understand why they lost.[60] What will be sufficient for those purposes will vary from case to case: the *"content of the statement of reasons as well as the degree of detail and elaborateness of reasons is not predetermined, but rather is contingent on the issue and its centrality to the case"*.[61]

[58] The error is typically classified as an error of law, but given the nature of the appeal to this Court, the precise classification of the error is besides the point.
[59] *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430, 442 (Meagher JA).
[60] *Carlisle Homes Pty Ltd v Barrett Property Group Pty Ltd* [2009] FCAFC 31 (***Carlisle Homes***), [40] (Tamberlin, Sundberg and Besanko JJ), citing *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 (***Soulemezis***), 279-281 (McHugh JA).
[61] *Jones v Bradley* [2003] NSWCA 81, [131] (Santow JA, Beazley and Meagher JJA agreeing).

8.4 Perfection is not required, and it may be permissible, even proper, to decline to address arguments or submissions on peripheral issues.[62] But at least in relation to the major issues in the proceedings, it is not sufficient simply to state that matters or submissions have been taken into account without explaining *how* and *why* they have been rejected or outweighed.[63] To do so is to leave open *"which of a number of possible routes has been taken to the conclusion expressed"*.[64]

8.5 Accordingly, where there is complex or contradictory evidence and *"acceptance or rejection of that evidence is critical to one aspect of the case",* the duty to give reasons requires a trial judge to *"enter into the issues canvassed and explain why one case is preferred over another"*.[65] The lack of such an explanation will prevent an appellate court from conducting a *"real review"*[66] of the trial and *"is likely to give rise to a feeling of injustice in the mind of the most reasonable litigant"*.[67] For the same reasons, where important submissions or arguments are rejected, it is necessary for the reasons to expose *"a clear and rational process of reasoning"* for their rejection.[68] No different principles apply where issues of credit are involved,[69] save perhaps in cases which turn "*entirely* on credibility".[70] That is not this case.

8.6 The approach adopted by the primary judge (as outlined at [8] above) involved the identification of the materials and arguments relied on by the Appellant. But that was only the first step in the provision of adequate reasons. It was necessary for his

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[62] *Fletcher Construction Australia Ltd v Lines MacFarlane & Marshall Pty Ltd (No 2)* (2002) 6 VR 1, 43 [157]; *Carlisle Homes* [2009] FCAFC 31, [44].
[63] *Macks v Viscariello* (2017) 126 ACSR 68, 167 [516]-[525].
[64] *Hunter v Transport Accident Commission* (2005) 43 MVR 130 (***Hunter***), 136-137 [21] (Nettle JA, Batt and Vincent JJA agreeing); *Carlisle Homes* [2009] FCAFC 31, [45].
[65] *Jones v Bradley* [2003] NSWCA 81, [129]-[131]; *Flannery v Halifax Estate Agencies Ltd t/as Colleys Professional Services* [2000] 1 All ER 373, 377-378 (Henry and Laws LJJ, Hidden J); *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110, [59] (McColl JA, Ipp JA and Bryson AJA agreeing); *TechnologyOne Ltd v Roohizadegan* (2021) 174 ALD 224 (***TechnologyOne***), [110] (Rangiah, White and O'Callagahan JJ).
[66] *Fox v Percy* (2003) 214 CLR 118, [25] (Gleeson CJ, Gummow and Kirby JJ).
[67] *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8, 18 (Gray J, Fullagar and Tadgell JJ agreeing).
[68] *Moylan v Nutrasweet Company* [2000] NSWCA 337, [100] (Sheller JA, Beazley and Giles JJA). See also *Australian Securities Commission v Schreuder* (1994) 14 ACSR 614, 625 (Underwood J).
[69] *Palmer v Clarke* (1989) 19 NSWLR 158, 170 (Kirby P, Samuels JA agreeing); *TechnologyOne* (2021) 174 ALD 224, [113].
[70] *Soulemezis* (1987) 10 NSWLR 247, 280 (emphasis original).

Honour not merely to identify the Appellant's materials and arguments but to *"assign reasons for the rejection of the argument or the resolution of the issue"*.[71] As will be seen, on a number of significant issues, his Honour failed to do so.

[71] *Hunter* (2005) 43 MVR 130, 136-137 [21].

WHISKEY 108

9. Introduction

9.1 The allegations concerned a mission that occurred on 12 April 2009 in Uruzgan province involving an assault on a compound known as Whiskey 108 (**W108**). The primary judge found that two Afghan males (later designated EKIA 56 and EKIA 57) emerged from a tunnel in a courtyard at Whiskey 108 and were placed under confinement (PUC'd) by Australian soldiers. The primary judge found that EKIA 56 was executed by Person 4 in the courtyard at the direction of the Appellant and that the Appellant executed EKIA 57 outside the north-western corner of Whiskey 108.[72]

9.2 Persons 40, 41, 42, 43 and 18 gave evidence for the Respondents. These witnesses either observed one or more Afghan males emerge from a tunnel discovered in a courtyard at Whiskey 108 or observed a fighting aged male under guard in that courtyard.

9.3 Person 41 was the Respondents' key witness. He gave evidence that the Appellant asked him for a suppressor which he duly provided. He then observed the Appellant force an Afghan to kneel in front of Person 4 and then direct Person 4 to shoot him. Person 41 then stepped into a room where he heard a single suppressed (M4 rifle) shot. When he returned outside, he saw a dead body (EKIA 56) in front of Person 4.[73] No other witness gave evidence of witnessing this execution.

9.4 Person 41 stated he then exited the compound. He noticed the Appellant holding another Afghan male by the scruff of his clothing. He threw him on the ground, flipped him over and shot three-five rounds from his machine gun into the back of the Afghan male before immediately speaking with Person 41. Person 41 identified this person as EKIA 57, a man with a prosthetic leg.[74] Person 14 gave evidence to the effect that he saw a black object thrown to the ground by an Australian soldier whom he could not identify. He saw the soldier raise his Minimi machine gun and fire an extended burst. According to Person 14, two other soldiers stood nearby

[72] Part A, Tab 10, J[881].
[73] Part A, Tab 10, J[547]-[552].
[74] Part A, Tab 10, J[714]-[715].

observing.[75] Person 24 gave evidence that he observed the Appellant walk out of the compound holding a man. He then dropped him and fired 8-10 rounds from a machine gun into his back. The Appellant stopped firing and had to rectify a stoppage. He then walked back inside the compound. Person 24 did not suggest he observed any other soldiers standing near the Applicant.[76]

9.5 The official contemporaneous records do not refer to the executions of any PUCs. They do refer to a number of EKIA and in particular to the engagement and killing of two "*squirters*". This is recorded as occurring after the compound was breached.[77]

9.6 The judgment analyses three issues of fact before proceeding to deal with the Respondents' case in relation to the murder of EKIA 56. Those three issues comprise the location of Person 6's patrol during the compound clearance (which has a bearing on the position of Persons 14 and 24 and their capacity to observe particular events), whether the compound was declared secure before the tunnel was discovered and whether Afghan men were found in the tunnel.[78] After discussion of the Respondents' case on EKIA 56, the next topic is the location of the body of EKIA 56.[79] The primary judge then incorporates a section "*Challenges to the Respondents' case*" before moving to the execution of EKIA 57.[80] After a brief discussion of the move by certain of the patrols to the next compound (Whiskey 109) the primary judge discusses aspects of the account of the Appellant and his witnesses before turning to his key findings and conclusions.[81]

9.7 The Appellant's submission in summary is that the primary judge did not pay sufficient heed to serious inconsistencies and implausibilities in the evidence provided by the Respondents' witnesses. The combined weight of that evidence did not justify the displacement of the contemporaneous official records. This is particularly the case in circumstances where there was no plausible evidence of how

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[75] Part A, Tab 10, J[738]-[740].
[76] Part A, Tab 10, J[765].
[77] Part A, Tab 10, J[584].
[78] Part A, Tab 10, J[303]-[355], J[362]-[433] and J[434]-[534].
[79] Part A, Tab 10, J[536][557] and J[558]-[578].
[80] Part A, Tab 10, J[579]-[712] and J[713]-[801].
[81] Part A, Tab 10, J[802]-[814], J[815]-[862] and J[863]-[883].

a narrative which must have been immediately known to be false by at least some, if not all, of those patrol commanders present at any debrief shortly after the mission was apparently accepted without demur.

10. Inconsistencies between Persons 18, 40, 41, 42, 43 and 81 concerning the emergence of men from the tunnel; Notice of Appeal, Particulars 9(a), 10 and 13

10.1 Person 40 said that two women and an interpreter called for insurgents to leave the tunnel. Person 35 was also involved. The insurgents were promised they would not be harmed. Person 40 saw two insurgents exit the tunnel. He observed one of them lift his trousers to show a prosthetic leg. According to Person 40 the two insurgents were searched and then marched off to another area by the Appellant and Person 35.[82]

10.2 Person 41 said that he stood around the tunnel with Persons 29 and 35 (both of whom gave evidence for the Appellant and denied observing men exit the tunnel). They were yelling into the tunnel to see if anybody in there would come out. Person 41 did not himself see anyone emerge. Person 41 left the courtyard to search some rooms. He heard some louder voices and "*a bit of a commotion*" in the courtyard and he returned to the courtyard. He noticed one older Afghan male squatting near the tunnel entrance. Person 4 and the Appellant stood nearby, closer to Person 41.[83]

10.3 Person 42 said that after the tunnel was discovered soldiers had their weapons trained on it. They shouted phrases in Pashto encouraging anyone inside the tunnel to come out. Afghan women were present. According to Person 42, two or potentially three men emerged from the tunnel. They were searched and he searched one of them. They were then passed on to other Australian soldiers, but he could not recall to whom. Person 42 said that only members of Person 29's patrol were

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[82] Part A, Tab 10, J[435]-[439]; Part B, Tab 1856, T3264 L7–T3265 L21, T3279 L24-46, T3305 L39-T3307 L31, T3313 L7-19, T3340 L43-T3342 L5 (P40).

[83] Part A, Tab 10, J[452]-[453]; Part B, Tab 1844, T1223 L17-41, T1236 L3-45, T1313 L30-31, T1320 L29-34, T1321 L23-1322 L22 (P41).

present at this point (besides himself and Person 29, that included Persons 35, 38, 40 and 41).[84]

10.4 Person 43 was the patrol leader of another patrol on the cordon. He was called to the patrol commanders' rendezvous (**RV**) inside the compound. He observed Person 35 discover the tunnel and ran over to render assistance. He pointed his weapon at the entrance to the tunnel. Other soldiers were present. He called for an interpreter. Before the interpreter arrived, he saw an elderly Afghan male with a beard come out of the tunnel. Person 43 and other soldiers helped remove him from the tunnel. The man was placed on the ground, searched and PUC'd. After he was handcuffed he was handed over for tactical questioning to Person 5's patrol.[85]

10.5 Person 18 said that he heard a radio call concerning the tunnel's discovery. He went to that area and observed an Afghan in flexicuffs. Two or three soldiers stood nearby. He did not recall the identity of those soldiers. He could not recall anything about the Afghan save that he was dressed in white. Person 35 went into the tunnel and Person 18 slid after him.[86]

10.6 The key inconsistency involves the number of persons emerging from the tunnel. Person 40 said two – including one with a prosthetic leg. Person 41 did not see anyone emerge from the tunnel but seconds after hearing a commotion observed just one Afghan under detention close to the tunnel entrance (although as discussed below moments later Person 41 observed the Applicant holding EKIA 57 – the man with the prosthetic leg). Person 42 said two or three Afghans emerged from the tunnel. Person 43 said it was just one person.

10.7 The primary judge found "*[t]hat although the witnesses' evidence did not accord in all respects, it is a coherent and plausible account of two Afghan men being in the tunnel.*"[87] To similar effect, in the context of finding that he accepted the evidence

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[84] See Part A, Tab 10, J[287] for the patrol composition and J[459] for the evidence of Person 42. Part B, Tab 1848, T2096 L11-20, T2097 L15, T2097 L42-T2099 L44, T2134 L3-11, T2136 L27-44, T2139 L42-T2140 L20 (P42).
[85] Part A, Tab 10, J[461]-[462]; Part B, Tab 1857, T3352 L18-T3353 L23, T3368 L10-31, T3369 L32-42, T3370 L28-35 T3371 L5-17, T3373 L12-37, T3374 L3-28 (P43).
[86] Part A, Tab 10, J[469] – [475]. Part B, Tab 1855. T3008 L12-16, T3011 L28-T3013 L3, T3113 L21-T3114 L11, T3117 L38-T3118 L5, T3120 L44-T3121 L10, T3122 L1-26 (P18).
[87] Part A, Tab 10, J[480].

of Person 40, the primary judge observed that each of these witnesses saw different things and stated "*I have considered these differences. The fact is there were a number of people in the area, they were in a highly tense situation attending o different tasks and they saw different things*."[88]

10.8 These findings were in error. The primary judge did not refer to the significance of the discrepancy. If only one person, or more than two persons, had come out of that tunnel then the account of Person 41 of the executions of EKIA 56 and 57 cannot be correct. Additional aspects of the evidence underscore this conclusion:

(a) If, as Person 40 said, Person 35 and the Appellant had (reasonably promptly) together led the two PUCs away, then the accounts of Person 18 and 41 which involve them observing a (single) PUC under detention in the courtyard moments, shortly after the discovery of the tunnel, cannot be correct.

(b) Only Person 40 said he saw a man with a prosthetic leg exit the tunnel.[89] Persons 42 and 43 did not suggest that any of the men they saw exit the tunnel had a prosthetic leg. Persons 18 and 41 observed an Afghan male wearing white clothing under detention in the courtyard (EKIA 57, the Afghan with the prosthetic leg, was not dressed in white). That is, the only support for the proposition that EKIA 57 emerged from the tunnel was the evidence of Person 40, and the evidence of the Respondents' other witnesses was either inconsistent with this proposition or otherwise not corroborative. The primary judge did not refer to the significance of this feature of the evidence which was the subject of a submission by the Appellant.[90]

(c) Person 43 said the Afghan he saw emerge from the tunnel was subsequently PUC'd (and handcuffed) yet that is not something to which the contemporaneous records refer. It is also inconsistent with the evidence of Person 41 who did not say that the Afghan male he saw squatting near the

[88] Part A, Tab 10, J[522].
[89] Part A, Tab 10, J[438].
[90] Part B, Tab 1881, T6613 L4-12, T6621 L42-T6622 L7 (Appellant's oral submissions).

tunnel entrance was handcuffed. The primary judge referred to this evidence but did not acknowledge the difference.'[91]

10.9 Person 81, the Troop Commander, did not see anyone come out of the tunnel although like Person 43 he was passing through the area at or about the time of the patrol commanders' RV. He also did not observe any individuals inside the compound being PUC'd, nor hear an engagement. However, he did observe fighting aged males inside the compound in the area near the patrol commanders' RV.[92] The primary judge found that Person 81's evidence did not rule out a finding that two Afghan males were taken from the tunnel.[93] This finding was erroneous as it ignored Person 81's evidence that he was not told that anyone had come out of the tunnel,[94] and the reasonable likelihood that the Troop Commander would have been informed about two Afghan men hiding in a tunnel that contained ordnance, especially when, according to the primary judge's findings, at least three patrol commanders (Persons 5, 29 and 43) were aware of this fact. Indeed, it is inherently improbable that the Troop Commander, who was responsible for consolidating reporting post mission, would not have been informed that two suspected enemy combatants were discovered in a concealed tunnel containing ordnance.

10.10 Finally on this point, the primary judge excused different witnesses recalling different people (in particular some remembering an interpreter and some not) calling into the tunnel on the basis that the scene was *"chaotic."*[95] So much may be accepted. But any such chaos must also affect the reliability of the witnesses' recollection of what occurred. The primary judge's emphasis on the absence of a motive on the part of these witnesses to lie[96] obscured the issue of the reliability of their evidence in the face of the issues identified above. A finding that a witness had no (apparent) motive to lie does not mean that what they say is true. Concluding that there was no motive to lie does not foreclose the issue of reliability. Further, the primary judge erred by taking into account the absence of any proven motive of

[91] Part A, Tab 10, J[490].
[92] Part A, Tab 10, J[491]-[492], J[511]-[515]. Part B, Tab 1878, T6159 L16-20, L41-47, T6160 L31, T6178 L40-45, T6176 L35-40, T6178 L37-45, T6179 L5-6 (P81).
[94] Part B, Tab 1878, T6160 L31-32, T6179 L8-9 (P81).
[95] Part A, Tab 10, J[487].
[96] See for instance Part A, Tab 10, J[460], J[724], J[731], J[864].

Persons 40, 41, 42 or 43 to lie. The primary judge said, in respect of these witnesses, that *"no plausible motive for lying was identified"* and that *"there was no evidence of a plausible motive to lie or collusion"* (J[864]). These matters were relied upon by the primary judge to bolster the legitimacy of their accounts. That involved circular reasoning. The evidence of the Respondents' witnesses could gain no legitimate credibility from the absence of evidence of motive. The primary judge's finding at J[864] reversed the standard of proof and ignored the fact that the absence of proof motive to lie is a neutral matter.[97]

11. Person 41 and the timing of the execution of EKIA 56; Notice of Appeal, Particular 1

11.1 Person 41's evidence was to the effect that he left the courtyard for a "*minute or two*" to search some rooms at a time, at a time when Persons 29 and 35 were yelling into the tunnel to persuade anyone hiding to emerge. This occurred moments after the discovery of the tunnel. He said that he heard louder voices and *"a bit of a commotion*" and returned to the courtyard to observe the Afghan squatting near the tunnel with Person 4 and the Appellant standing nearby. He did not remember seeing anyone else. According to Person 41, at this time the Appellant asked him for a suppressor for Person 4. The Appellant then grabbed the Afghan, moved him so he was kneeling down before Person 4 and then ordered Person 4 to shoot him. Person 41 stepped back into the room he was searching and within a second or two heard a single suppressed shot. Fifteen seconds later he stepped back outside and observed a dead Afghan at the feet of Person 4.[98]

11.2 Each of Persons 40, 42 and 43 said they saw one or more men emerge from the tunnel. Person 18 saw a handcuffed man dressed in white kneeling near the tunnel entrance when he arrived in the vicinity after hearing a radio call. Person 81 was in the compound at or about this time and said that he saw fighting aged males. One or more of Persons 40, 42 and 43 also said that they remembered the presence of Afghan women, an interpreter, Person 29, Person 35, Person 38 and the Appellant. The courtyard was busy and chaotic. There was a hive of activity. The problem is

[97] *Palmer v The Queen* (1998) 193 CLR 1 at 9 (Brennan CJ, Gaudron and Gummow JJ).
[98] Part A, Tab 10, J[452]-[453] and J[548]-[549]. Part B, Tab 1844, T1223 L43-44, T1236 L1-T1237 L35, T1304 L22-34 (P41).

none of these persons witnessed an execution or heard a suppressed shot in circumstances where if Person 41 is correct the time between the emergence of EKIA 56 from the tunnel and his execution was less than a minute or two.

11.3 The primary judge purported to deal with this problem by accepting the Respondents' submission that that the reference by Person 41 to a "*minute or two*" was a figure of speech for a short time or not a very long time.[99] It was erroneous for the primary judge to have accepted it in circumstances where there was no attempt to clarify this evidence. The primary judge said that Person 41's reference was not to be taken literally and that he meant that "*[i]t was a short period, but a sufficient period for the majority of people in the courtyard to disperse*."[100] Person 41's evidence was generally accepted and endorsed.[101] The Respondents did not re-examine Person 41 about what he meant by his reference to a "*minute or two*". The primary judge did not seek to clarify with Person 41 what he meant by his use of this phrase either. The primary judge erred by rectifying an important but inconvenient aspect of Person 41's evidence and finding that he meant something quite different to the words he actually used.

11.4 Other matters which the primary judge did not consider or assess underscore the serial inconsistencies in relation to the death of EKIA 56 amongst the Respondents' witnesses:

(a) Person 40 said that approximately 20-25 minutes elapsed between when he saw the two PUCs being marched off by the Appellant and Person 35 and when he heard the machine gun fire (marking the death of EKIA 57 outside the compound).[102] If Person 41 is to be accepted the death of EKIA 57 occurred moments after the death of EKIA 56[103] – which itself occurred less than a minute or two after the men emerged from the tunnel. The accounts cannot sit together. Nor does Person 40's evidence sit conformably with the primary judge's finding that a minute or two meant a

[99] Part A, Tab 10, J[556].
[100] Part A, Tab 10, J[660].
[101] Part A, Tab 10, J[868]-[869].
[102] Part A, Tab 10, J[735], Part B, Tab 1856, T3267 L15-T3268 L11 (P40).
[103] See in particular Part B, Tab 1844, T1238 L18-19, T1239 L23-24, T1240 L20-30 (P41). See Part B, Tab 803/1530 Ex R92.

short period but a sufficient time for the majority of people in the courtyard area to disperse, given that it was approximately 18 metres by 30 metres in area.[104]

(b) As discussed above, Person 18 stated that he observed an Afghan dressed in white in flexicuffs standing near the tunnel with two or three Australian soldiers. Person 18 then said he slid into the tunnel after Person 35 assisting him with clearance.[105] If Person 41's evidence is to be accepted, by the time Person 18 emerged from the tunnel the body of EKIA 56 would have been lying very close by (particularly if Person 18's evidence of hearing machine gun fire whilst in the tunnel is interpreted as a reference to the death of EKIA 57). Yet Person 18 could not recall seeing the older man.[106] Furthermore, later when Person 18 performed the Sensitive Site Exploitation (**SSE**) on a body in the courtyard he did not give evidence that this was the same Afghan in white clothes he had earlier observed in flexicuffs.[107] Yet it must have been the same individual who he said he had earlier seen wearing flexicuffs. There is also nothing in the SSE report that Person 18 helped to prepare which suggests that the death of EKIA 57 occurred other than in a legitimate engagement.[108] These matters were the subject of submissions by the Appellant which were not referenced in the judgment.[109]

(c) If Person 81 saw FAMs in the compound at or about the time of the patrol commanders' RV as discussed above, then if the evidence of Person 41 as to the "*minute or two*" is accepted, it is highly improbable that he also would not have been aware of the execution. Person 81 was in the vicinity of the tunnel courtyard and would likely have heard, and made contemporaneous enquiries about, a report from a Minimi machine gun.

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[104] Part B, Tab 1838, T170, L40-41 (BRS).
[105] Part A, Tab 10, J[469], Part B, Tab 1855, T3011 L25-40, T3012 L43-T3013 L14 (P18).
[106] Part B, Tab 1855, T3013 L30-44 (P18).
[107] Part B, Tab 1855, T3018 L26-31 (P18).
[108] Part B, Tab 82/971, Ex A10.11.
[109] Part B, Tab 1881, T6607 L1–T6608 L3, T6613 L20–T6614 L6, Closed Ct 26 July 2022 T6 L31-49, T 7 L10-43 (Appellant's oral submissions).

12. Person 41's reliability and the request for a suppressor to execute EKIA 56; Notice of Appeal, Particulars 4 and 5

12.1 Person 41's evidence in respect of the request for a suppressor by the Appellant and Person 41's subsequent provision of the suppressor to Person 4, is set out at paragraph 11.1 above. It forms a critical part of Person 41's account and this is important because it is alleged to have occurred whilst Person 41 was actually in the courtyard (in the moments after he stepped out of the rooms following the loud voices and commotion, and before he stepped back into them after the Appellant gave an order to Person 4 to shoot).

12.2 As the primary judge observed there was no reason provided in the evidence as to why Person 4 or the Appellant would want to borrow a suppressor from Person 41.[110] Indeed as the primary judge noted Person 4's evidence was to the effect that he always carried his mission essential equipment.[111] Person 5 required members of his patrol to carry a suppressor (although it was not required to be fitted to their weapon during the daylight hours). Person 5 observed (and the primary judge does not appear to have rejected the evidence) that it would have been just as quick for someone to pull Person 4's suppressor from his pack than for Person 4 to borrow one from a nearby operator.[112]

12.3 Whilst the primary judge acknowledged that the absence of any reason for the borrowing of a suppressor was "*a matter to be taken into account*", he immediately then stated "*[a]t the same time, it seems to me there is considerable force in the respondents' submission that it is a very strange detail for Person 41 to include in his account if he is making up that account*."[113] It was an error for the primary judge to effectively find that an improbable detail enhanced Person 41's account because of its very improbability. The primary judge's observation revealed a pre-occupation with the witness's honesty rather than an assessment of the reliability of the evidence.

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[110] Part A, Tab 10, J[698].
[111] Part A, Tab 10, J[690], Part B, Tab 1854, T2839 L29-34 (P4).
[112] Part A, Tab 10, J[687], J[693], J[695]. Part B, Tab 1866, T4842 L6-9, T4999 L21-25 (P5).
[113] Part A, Tab 10, J[698].

12.4 In the larger picture, further matters point to the improbability of this evidence about the suppressor. On Person 41's version the Appellant sought out a suppressor. The rational assumption is that he did so in order to *suppress* the noise of the weapon to be used to execute EKIA 56 – an execution which he is about to order inside the courtyard. Yet:

(a) according to Person 41, moments later the Appellant steps outside to personally execute EKIA 57 using the much louder unsuppressed Minimi machine gun. Indeed, Person 24 referred to that killing at Part B, Tab 1858, T3566 L40-45 as an "*exhibition execution*".[114] This matter was the subject of a submission by the Appellant which was not addressed in the primary judge's reasons.[115]

(b) After he has ordered the execution, the Appellant is said to have left the body of EKIA 56 in the courtyard close to the tunnel entrance. This would have made abundantly clear the fate of the person allegedly seen emerging from the tunnel by any of those witnesses who gave that evidence (and also such person or persons searched and PUC'd). In particular Person 18, who performed the SSE on EKIA 56, gave evidence that he had earlier seen a handcuffed Afghan dressed in white near the tunnel in the courtyard. This matter was the subject of a submission by the Appellant which was not addressed in the primary judge's reasons.[116]

13. Inconsistencies between Persons 41, 14 and 24 concerning EKIA 57; Notice of Appeal, Particular 9(b)

13.1 According to Person 41, after he had observed the body of the man dressed in white, he then walked to an exit at the north western side of the compound. Just outside, he noticed the Appellant walking alongside the outside wall of the compound holding an Afghan male (wearing a dark top) by the scruff of his clothing, sort of "*frog marching*" the Afghan. The Appellant threw the Afghan male onto the ground. He landed on his back and the Appellant turned him over and shot three-five rounds into

[114] Part B, Tab 1858, T3566 L40-45 (P24).
[115] Part B, Tab 1881, T6597 L41-T6598 L4 and T6627 L20-34 (Appellant's oral submissions).
[116] Part B, Tab 1881, T6616 L14-16 (Appellant's oral submissions).

the Afghan's back. The Appellant noticed Person 41 standing there and in effect asked whether he had a problem with what occurred and Person 41 said he did not. Person 41 identified the executed Afghan male as having a prosthetic leg.[117]

13.2 Person 40 who had taken up a position in the northwestern side of the compound stated that he heard a burst of machine gun fire about 30 metres away. This occurred approximately 20-25 minutes after he saw the two men marched away from the tunnel by the Appellant and Person 35. He did not observe the shooting but on his way out of the compound he saw the body of the man with the prosthetic leg.[118]

13.3 Person 14 was outside the compound on the northwestern side near a cleared field when he saw three Australian soldiers outside of the compound. He observed an object "*similar to a human*" hit the ground. One of the soldiers raised his Minimi machine gun and fired an extended burst. That soldier then returned inside the compound. Person 14 did not recognise the soldier who fired the weapon but observed that the shooter and one of the other soldiers had camouflage paint the colour of that used by Person 5's patrol. He could not deny that such paint was also used by Person 29's patrol (which included Persons 40 and 41) and also Person 44's patrol. He did not give evidence of any conversation with Person 24 following the event but told the Court that he said "*What the hell was that*?" to Person 73, another member of his patrol.[119]

13.4 According to Person 24, at the relevant time he was two-three metres away from Person 14. He saw the Appellant walk out of a compound holding a man in his hand by the pants or the back of the shirt. He dropped the man and fired a machine gun burst (eight-ten rounds) into his back. The Appellant's weapon had a stoppage which he rectified as he walked back to the compound. According to Person 24, he then asked Person 14 "*Did we just witness an execution*?" but he could not recall

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[117] Part A, Tab 10, J[714]-[715], Part B, Tab 1844, T1240 L20-T1242 L5, T1358 L38-T1359 L22 (P41).
[118] Part A, Tab 10, J[734]-[735], T3267 L15-T3268 L35 (P40).
[119] Part A, Tab 10, J[737]-[740], Part B, Tab 1844, T1414 L20-T1415 L39, T1416 L15-T1417 L2, T1622 L38-42, T1733 L7-14 (P14).

Person 14's response. Person 24 did not give evidence that he observed any other Australian soldiers at this time.[120]

13.5 The primary inconsistency is as to the number of soldiers standing close by to the Appellant at the time of the alleged murder of EKIA 57. According to Person 41, it was just him. According to Person 14, there were three Australian soldiers. He could go no further than to identify the camouflage paint of two of them as that used by the patrol of Person 5 (and possibly also by the patrols led by Persons 29 and 44). Person 24 observed no other soldiers in the vicinity but the Appellant.

13.6 The primary judge erred by speculating that it was possible Person 14 observed Person 41 as well as Person 40 "*who were in the general vicinity*".[121] The difficulty is that Person 40 said he was 30 metres away and could not see the shooting. There was no basis to conclude that he was one of the men who may have been observed by Person 14. Subsequently the primary judge held that this difference "*must be carefully considered*" before repeating the same observation about Persons 40 and 41 and concluding that "*In any event, the similarities far outweigh this difference or, indeed all the differences*".[122] The primary judge erred in failing to accord proper weight to this discrepancy. In particular, if Person 24 was correct, and the Appellant was the only soldier in the vicinity, then both Person 14's and 41's account would be wrong in a material matter of detail. Person 41 could not have been present, let alone so close to the alleged execution that he spoke with the Appellant seconds after it occurred, and Person 14 could not have observed two other soldiers in addition to the shooter.

13.7 Other differences between the accounts of these witnesses discussed in the judgment[123] are less material but when considered with the inconsistency discussed above, there is an accumulated significance to them that undermine the clear and cogent proof required to satisfy a tribunal of fact of the allegation in question. These

[120] Part A, Tab 10, J[765]-[766], Part B, Tab 1858, T3450 L10–T3451 L10, T3477 L18-23, T3489 L1-18 (P24).
[121] Part A, Tab 10, J[763].
[122] Part A, Tab 10, J[798].
[123] Part A, Tab 10, J[792]-[797] and [799].

inconsistencies need to be considered in conjunction with the credibility and reliability problems afflicting Persons 14 and 24 discussed below.

14. Reliability of Person 14; Notice of Appeal, Particular 11

14.1 On 27 February 2018 Mr Masters made the following note of his conversation with Person 14: "*E Troop went in. P5's patrol seen through the doorway of their next compound. R-S had an MI-4 and P4 a Minimi. Understood P4 had shot an old guy with a prosthetic leg*".[124] Person 14 denied telling Mr Masters that he understood Person 4 had shot an Afghan male with a prosthetic leg. Person 14 also said that he had initially assumed (incorrectly) that Person 4 carried the Minimi and said he had told Mr Masters at a subsequent meeting it was the Appellant.[125]

14.2 The Appellant made submissions to the effect that the statement recorded by Mr Masters was inconsistent with the evidence that Person 14 actually observed an execution in the sense that he saw one of three unnamed soldiers throw an object to the ground and shoot at it. Instead, the record suggests he told Mr Masters as at February 2018 that he said he "*understood*" that Person 4 had shot the man with the prosthetic leg. This was the subject of a submission by the Appellant.[126]

14.3 The primary judge, although he recorded the evidence, did not refer to these submissions. The primary judge recorded and accepted the accuracy of submissions by the Appellant[127] concerning Person 14's changing versions of what he told the journalists (including saying in open court that he told Mr Masters the Appellant shot the Afghan male with the prosthetic leg,[128] before saying in closed Court he did not tell Mr Masters he observed something on 12 April 2009 in relation to the Appellant W108[129]). Subsequently, the primary judge (implicitly accepting at least in part a series of points raised by the Appellant) stated that "*all of these matters*

[124] Part B, Tab 477/1123, Ex A63.
[125] Part A, Tab 10, J[745]-[747]. Part B, Tab 1845, T1789 L40-T1790 L25, T1794 L19-31 (P14). Closed Ct 10 February 2022 T20 L26-29 (P14).
[126] See Part B, Tab 1881, T6623 L16-T6624 L37 (Appellant's oral submissions). Part B, Tab 1885; ASR [179] and [32]-[33].
[127] Part A, Tab 10, J[755].
[128] Part B, Tab 1845, T1790 L16-18.
[129] Part B, Tab 1845, Closed Ct 10 February 2022 T20 L26-29 (P14).

must be taken into account in assessing Person 14's honesty and reliability."[130] Finally, the primary judge concluded that "*Person 14's evidence must be scrutinised with care having regard to the matters above*."[131]

14.4 The primary judge's treatment of the credibility and reliability of Person 14 was in error. The fact was he had made a prior inconsistent statement substantially closer to the time of the events at W108. Mr Masters, who was a Respondent, did not give evidence corroborating Person 14's claim that he had not in fact said what the note recorded (and it may be assumed Mr Masters would have recorded with some alacrity any suggestion of even the possibility that the Appellant was involved in this killing). The primary judge also erred in not undertaking a global assessment of the reliability and credibility of this witness in light of the matters raised with respect to the Chinartu killing. The primary judge did no more than refer to the separate findings concerning Person 14 in the context of the two missions.[132] See in particular paragraphs 30.1 to 30.7 of the section of these submissions dealing with Chinartu.

14.5 When all of these matters are taken into account, together with the other matters summarised by the primary judge in relation to the credibility of Person 14,[133] including particularly the fact that it was not contested that Person 14 gave untruthful evidence in these proceedings about whether he spoke with journalists after January 2014,[134] the only appropriate conclusion available was that no weight could be placed on the evidence of this witness. The primary judge erred in relying on Person 14's evidence to corroborate the evidence of Person 24 and Person 41 in relation to the death of EKIA 57.

15. Reliability of Person 24; Notice of Appeal, Particular 6

15.1 This is the subject of a Closed Court submission.

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[130] Part A, Tab 10, J[760].
[131] Part A, Tab 10, J[764].
[132] Part A, Tab 10, J[753] and [1530].
[133] See Part A, Tab 10, J[750] and J[754]-[759].
[134] See Part B, Tab 1845, T1713 L16-22, T1725 L16-29, Part B, Tab 1884, RS[186(d)] p. 76.

16. Documentary record; Notice of Appeal, Particulars 7 and 8

16.1 At J[584] the primary judge records the salient content of the Patrol Debrief document for the mission. Relevantly, in reference to the clearance of W108, the document records "*2x squirters were killed*". It also records nine EKIA, nil PUCs and one fighting aged male. Paragraph 26 of the document states *"Upon breaching the compound and commencement of clearance INS attempted to squirt, but were engaged"*. Documents recording similar information are the subject of a brief closed court submission.

16.2 Person 81 agreed that he cleared the Patrol Debrief for release and that reference to two squirters being killed and the content of paragraph 26 would have been based on something he was told.[135] The primary judge observed that the likely source for the information about the engagement of the squirters in the Patrol Debrief was Person 5 (based on information provided by the Appellant).[136] The primary judge observed that the usual procedure, following meetings of individual patrols, was for the patrol commanders to meet with each other and the troop commander and the troop sergeant at a troop debrief.[137]

16.3 The question arose as to how the contemporaneous reporting could have been at variance with the account of the Respondents' witnesses in circumstances where a feature of their evidence was the high number of troops likely to have seen the PUCs alive, and the probable presence of a high number of troops in the vicinity of the executions. The primary judge recorded the submission[138] and dealt with it by finding "*one of the features of that case is a large number of SASR soldiers knew about the executions and did not report them or do anything about them. There is obvious force in that point, but the respondents' case is too strong otherwise and sadly this is part of the conclusion*."[139]

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[135] Part A, Tab 10, J[585], [669]. Part B, Tab 1878, Closed Ct 1 June 2022 T4 L36-44, T6170 L4-43, T6173 L26-T6174 L3 (P81).
[136] Part A, Tab 10, J[588], [683].
[137] Part A, Tab 10, J[668]. Part B, Tab 1938, T134 L45-T135 L22 (BRS), Part B, Tab 1866, Closed Ct 21 April 2022 T L11-30, T5122 L13-36 (P5).
[138] Part A, Tab 10, J[673].
[139] Part A, Tab 10, J[674].

16.4 The Appellant submits the approach of the primary judge was in error. The Patrol Debrief and other post mission reports, taken as a whole, contradict the primary judge's finding that EKIA 56 and 57 were killed contrary to the Rules of Engagement. A necessary corollary of the primary judge's findings is that the post mission reports contain false representations that EKIA 56 and 57 were lawfully killed in action consistently with the Rules of Engagement. But given that these reports represented the troop's contemporaneous account of a mission, and the fact that they were prepared in consultation, first with patrol members, through a patrol debrief, and second, with the patrol commanders and members of the troop's command, the ability of any one member of the troop to cause the post operation reporting to include a false representation was extremely limited. While it may be accepted if the Respondents' version of events is true, a falsity must have somehow found its way into the documents, presumably at the instigation of Person 5 or the Appellant, there is no evidence about how this came to pass without demur from the large number of SASR operators referred to below. There was no evidence from any witness about what was actually *said* by Person 5 or the Appellant or indeed anyone else at the troop debrief.[140] No witness suggested that any account concerning the engagements of EKIA 56 and 57 at the troop debrief was challenged. Nor was it put to Person 5 that he knowingly caused the Patrol Debrief or the Exploitation Report[141] to include false representations concerning the engagements of EKIA 56 and 57.

16.5 The primary judge erred by finding that two persons were killed unlawfully during the W108 mission, based on alleged eyewitness evidence given 13 years after the mission, in circumstances where those eyewitnesses, as well as multiple other SASR operators, were or must have been aware of the alleged murders and yet their inaction apparently facilitated the corruption of the troop's post operational reporting process, in breach of an obligation to report unlawful conduct of that kind (i.e. notifiable incidents involving other Australian Defence Force members).[142]

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[140] Part A, Tab 10 J[668]. Part B, Tab 1866, T5122 L13-36 (P5), Part B, Tab 1869, T5486 L7-8 (P29), Part B, Tab 1848, T2144 L10-43 (P42).
[141] Part B, Tab 82/971 Ex A10.11.
[142] Part B, Tab 75/1074 Ex A21.

16.6 To the extent that the post operation reports contain false representations about the deaths of EKIA 56 and 57, then it can only have been the product of a joint and widespread effort to conceal the truth. There was no evidence of any such scheme, nor was their evidence that an apparently false account of the deaths of EKIA 56 and 57 was challenged at the troop debrief or subsequently.

16.7 The Respondents did not adduce evidence from Person 43, a patrol commander during the W108 mission, about what was said during the Troop debrief following the mission. Person 43 was not asked about what Person 5 said during the Troop debrief. It was not put to Person 43 that Person 5 gave a false account of the engagement of EKIA 56 and 57 during the debrief. Nor was Person 43 asked whether he challenged in the troop debrief any suspiciously false account of the deaths of EKIA 56 and 57. Yet Person 43 told the Court that he thought, as he was leaving W108, that two PUCs may have been executed.[143] Nor did the Respondents call Person 6 to give evidence about what occurred during the Troop debrief, notwithstanding that two of the Respondents' witnesses (Persons 14 and 24) said that Person 6 witnessed (in the case of Person 14) or later discussed the killing of EKIA 56 (in the case of Person 24).

16.8 Indeed, as discussed above at paragraphs 11.2 to 11.3, the general evidence to the effect that large numbers of operators observed men emerge from the tunnel and heard the machine gunning of EKIA 57, suggests at a practical level that if it had happened, knowledge of this event must have disseminated through the troop. Indeed, as the primary judge observed, the whole G-Troop contingent at W108 comprised just 31 persons.[144] If at least fifteen of those either saw men emerge from the tunnel, or under guard near the tunnel, or heard or saw the executions[145], then it is highly improbable that each of the patrol commanders did not know what had happened. The primary judge was in error when he concluded that only the Appellant and Persons 4, 5 and 41 knew about the execution of EKIA 56 and that

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[143] Part B, Tab 1857, T3401 L26–T3402 L43 (P43).
[144] Part A, Tab 10, J[287]-[288].
[145] The evidence of the Respondents' witnesses suggests this category includes at least Persons 4, 5, 6, 14, 24, 18, 29, 35, 38, 40, 41, 42, 43, 73 and 81 (possibly or possibly not including the two soldiers Person 14 saw standing with the Appellant).

others such as Persons 40, 42 and 43 "*may have suspected but not known*".[146] That finding is against the probabilities and is again speculative. Even if the patrol officers had not actually witnessed the executions, it is unlikely that they would not have realised that the two squirters killed just outside the part of the compound where the tunnel was (on the version of a legitimate engagement presumably given by Person 5) were not the same men that had been widely observed emerging from that tunnel or under guard nearby.

16.9 There are also specific features of the evidence of the Respondents' witnesses which tell against the notion that an account of legitimate engagements by Person 5 at a patrol commanders debrief would have passed unchallenged:

(a) As the primary judge observed there was evidence from Person 14, that his entire patrol including the patrol commander (Person 6) had actually seen the execution of EKIA 57.[147] The primary judge later incorrectly dismissed Person 14's evidence on this point as involving a "*minor detail*".[148] Person 24 went so far as to say Person 6 discussed the execution at the internal patrol debrief after the mission.[149]

(b) In addition, Person 43, another patrol commander, had seen an elderly Afghan come out of the tunnel, who was then PUC'd and handed over to Person 5's patrol for tactical questioning.[150] It is difficult to conceive that hours later at the debrief he did not immediately realise that Person 5's account of the legitimate engagement of two EKIA immediately outside the compound was false and accordingly challenge the account.

(c) Likewise, Person 81 – the Troop Commander - had also been aware of fighting aged males inside the compound at or about the time of the patrol commanders RV.[151] It is unlikely (against the probabilities) he would have

[146] Part A, Tab 10, J[679].
[147] Part A, Tab 10, J[671]-[672]. Part B, Tab 1845, T1417 L4-5, T1524 L5-10 (P14).
[148] Part A, Tab 10, J[762].
[149] Part A, Tab 10, J[671], Part B, Tab 1858, T3472 L13-18, T3473 L16-17 (P24).
[150] Part A, Tab 10, J[461]-[462], Part B, Tab 1857, T3352 L18-T3353 L23, T3368 L10-31, T3369 L32-42, T3370 L28-35 T3371 L5-17, T3373 L12-37, T3374 L3-28 (P43).
[151] Part A, Tab 10, J[[491]-[492], J[511]-[515]. Part B, Tab 1878, T6159 L5-20, L41-47, T6160 L31- T6161 L5, T6178 L40-45, T6176 L35-40, T6179 L5-6 (P81).

remained silent in the face of Person 5's account of a legitimate engagement, if he had any suspicion that those fighting aged males had been executed at or about the time of the legitimate engagement described by Person 5.

16.10 Whether the contemporaneous reporting that two squirters were killed is false and how a false account could have been propounded in official Australian Defence Force records following the preparation of consolidated reporting after the mission, are matters that are relevant to whether section 140 of the *Evidence Act* as informed by *Briginshaw* was satisfied with respect to the allegations of murder during the W108 mission. There was no basis for the primary judge to dismiss the accuracy of the contemporaneous documents in the absence of evidence of either a conspiracy to conceal the truth or an unsuccessful challenge to the official reporting by someone who knew or suspected that EKIA 56 and 57 were unlawfully executed. In the absence of such evidence about how the post operation reports were allegedly corrupted, it was not open to the primary judge to be satisfied on the balance of probabilities that the Appellant had engaged in unlawful killings during the W108 mission, contrary to the official reports of that mission.

17. The "blooding the rookie" findings; Notice of Appeal, Particulars 14, 16 and 17

17.1 The primary judge erred in accepting the uncorroborated evidence of Persons 14 and 24 that prior to the mission Person 5 has said to them he intended to "*blood the rookie*", the "*rookie*" being understood to refer to Person 4.[152] Even assuming for the purposes of this appeal that the primary judge was entitled to give no weight to the denial of Person 5, for the reasons advanced above in relation to both the credibility and reliability of these witnesses, the primary judge erred in accepting uncorroborated evidence in 2022 from Persons 14 and 24 as to conversations in 2009.

17.2 Persons 14 and 18 gave evidence that Person 5 and/or the Appellant also said that they had *"blooded the rookie"* shortly after the mission at the vehicle drop off or

[152] Part A, Tab 10, J[257], [265]. Part B, Tab 1845, T1394 L41-T1395 L30, T1517L9-T1518 L24 (P14), Part B, Tab 1858, T3443 L38 -T3444 L7, T3481 L43-46 (P24).

layup point.[153] The primary judge accepted that evidence and rejected the denials of Person 5 and the Appellant.[154] In so doing the primary judge erred for these reasons:

(a) Person 4 had himself given evidence in relation to an engagement in an earlier mission in the Mirabad Valley in pursuit of Objective Depth Charger. Person 4 gave evidence to the effect that whilst third in the order of march, he had engaged the target on this mission.[155] Person 18, also on that mission, gave evidence that Person 6 engaged first, followed by himself and Person 14 and that if anyone else engaged thereafter the target would have been dead.[156] The primary judge accepted this evidence and found that although Person 4 had engaged, the perception would not have been that he was responsible for killing the target or the target's associates.[157] The primary judge was in error because the plain meaning of Person 4's own evidence was that he had engaged the target. That was his perception. At the very least the state of the evidence did not permit a positive finding that Person 4 was not responsible for a killing on the mission involving Objective Depth Charger.

(b) The Respondents did not ask the apparently rather simple and obvious question of Person 4 as to what Person 5 had called him in 2009. The primary judge declined to draw an adverse inference from the Respondents' failure to do this.[158] The primary judge's predominant reason for so doing seems to have been that the witness would likely have claimed the self-incrimination privilege. That bespeaks error in circumstances where Person 4 was willing to answer whether he, along with Persons 5 and 6, engaged Objective Depth Charger[159] (an issue that went to the question of whether he was in fact a "rookie" who needed to be blooded on the W108 mission);

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[153] Part A, Tab 10, J[277]-[278]. Part B, Tab 1845, T1424 L38-46 (P14), Part B, Tab 1855, T3020 L25-34 (P18).
[154] Part A, Tab 10, J[282]-[283]. Part B, Tab 1866, T5030 L1-11 (P5). Part B, Tab 1838, T172 L46-47 (BRS).
[155] Part B, Tab 1854, T2766 L11-T2768 L2 – T2808 L1-8 (P4).
[156] Part B, Tab 1855, T3029 L15 – T3030 L14 (P18).
[157] Part A, Tab 10, J[274]-[275].
[158] Part A, Tab 10, J[248].
[159] Part B, Tab 1854, T2766 L15–T2768 L4; T2808 L1-8 (P4).

there was no basis to speculate that Person 4 would have claimed the privilege on the issue of whether Person 5 called him a *"rookie"*.

(c) The primary judge should not have placed weight on the evidence of Person 14 for all the reasons discussed at paragraph 14.1 to 14.5 above.

17.3 In the face of the above matters, even accepting Person 18 as an honest witness, his evidence of the conversation following the mission was unreliable and should not have been accepted. If these conversations (both before and after W108) did not happen, then the notion that Person 5 intended to blood Person 4 falls away. With it disappears the rather faint suggestion of a motive for the sudden killing of EKIA 56 (whom the primary judge found was killed by Person 4 at the direction of the Appellant). There is of course no apparent motive for the execution of EKIA 57).

18. Insurgent behaviour; Notice of Appeal, Particular 12

18.1 The primary judge found that it was unlikely that two insurgents would appear so close to the compound at the precise time the Appellant walked out.[160] The primary judge did not have sufficient evidence before him to draw conclusions about the likely behaviour of members of the Taliban particularly in circumstances where the compound in which these men presumably lived or had a connection with, had been bombed earlier in the day and then assaulted by troops in the previous hour or so.

19. Conclusion

19.1 Even if the Appellant's witnesses and their evidence is entirely disregarded the case propounded by the Respondents is not sufficiently coherent to prove the two allegations of murder to the requisite standard. The versions of key witnesses simply cannot sit together and Person 41's version is itself undermined by internal improbabilities. Two of the witnesses, Persons 14 and 24 were so fraught, that it was inappropriate for the Court to place any weight on their evidence at all. In the circumstances there was no warrant for displacing the version contained in the contemporary records, particularly in the absence of any evidence showing how those records came to contain apparent falsehoods.

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[160] Part A, Tab 10, J[823].

19.2 It bears repeating that the second matter complained of, the first to refer to an incident at Whiskey 108, described the Applicant as a part of a "*rogue team*". That is a peculiar description when the effect of the Respondents' evidence at the trial is to suggest that the killings as W108 were as visible and as attention seeking as could be imagined. According to those witnesses, at least 15 of 31 people either saw the executed PUCs minutes before their death or actually heard or witnessed their deaths. And yet the contemporaneous documents – approved by the Troop Commander from information disseminated at a patrol meeting attended by all patrol commanders - quietly and routinely record two EKIA in a legitimate engagement? The evidence cannot sustain findings on the balance of probabilities to the requisite standard that the Appellant murdered these men.

DARWAN

20. Introduction

20.1 The primary judge found that the Appellant's patrol placed three Afghans under control at the southernmost set of compounds during a mission in Darwan, at some point after about 9.30 am on 11 September 2012. After questioning the men (at about 11 am or shortly thereafter) the Appellant kicked one of these PUCs', an Afghan named Ali Jan (who was not Taliban), off a cliff. Persons 4 and 11 (accompanied by and acting under the direction of Appellant) then dragged his badly injured body to a nearby cornfield. Next, Person 11 shot Ali Jan and killed him immediately following a conversation with the Appellant. The Appellant and/or Person 11 planted an ICOM radio on the body to make it appear as though the man had been killed in a legitimate engagement. The Appellant then falsely reported that a spotter had been killed in the cornfield. The findings are summarised at J[1368].

20.2 The key witness for the Respondents was Person 4, an Australian soldier, who said he was an eyewitness to the events (although his back was turned at the moment Ali Jan was shot). The trial judge accepted the evidence of Person 4. Another Australian soldier, Person 56, also gave evidence for the Respondents. He was not an eyewitness, but the trial judge accepted his evidence of certain events prior to and after the assaults and executions, as matters supporting the Respondents' case. Three witnesses from Afghanistan (Mohammad Hanifa, Mangul Rahmi and Shahzada Fatih) also gave evidence for the Respondents. The trial judge accepted their evidence and placed significant weight on the manner in which the Afghan witnesses corroborated Persons 4 and 56 and vice versa J[1176], [1367]. The trial judge rejected the evidence of the Appellant and Person 11 who denied the allegation that a man had been kicked off the cliff and subsequently executed. Instead, they gave evidence of the (legitimate) engagement of a spotter in the cornfield prior to extraction from Darwan on the mission that day.

20.3 The official contemporaneous records contained a report of a legitimate engagement in a cornfield resulting in an EKIA at 11.09am. None of the records contained any information referring to the execution or assault of a PUC. None of the records contained any suggestion that Mohammad Hanifa, Mangul Rahmi, Shahzada Fatih or Ali Jan had become persons under control (in circumstances where PUCs were

normally photographed and indeed where numerous prisoners had been photographed earlier that day, including persons placed under control by the Appellant's patrol).

20.4 The section of the judgment dealing with the Darwan allegations commences at J[933] with an introduction that discusses the pleaded case. From J[950]-1088] the primary judge summarises the evidence in broad chronological order alternating between the perspective of various witnesses. His Honour then turns to analysing the evidence and assessing the credit of the Respondents' witnesses including particularly (Person 4 at J[1090]-[1144]), Person 56 (J[1145]-[1158]), Mohammad Hanifa (J[1159]-[1176]), Mangul Rahmi (J[1177]-[1187]) and Shahzada Fatih (J[1188]-[1200]. The next section of the judgment summarises the documentary material (J[1202]-[1208]) before returning to deal with the Appellant's evidence ([1209]-[1239]) and the evidence of Person 11 (J[1240]-[1283]). At J[1293]-[1363] the primary judge records a series of submissions advanced by the Appellant and then provides his final conclusions at J[1364]-[1370]. The primary judge's key findings are largely contained within the sections dealing with individual witnesses although certain portions of the earlier summary of the evidence and the later discussion of the Appellant's submissions also contain important findings.

20.5 The evidence of the three Afghan witnesses contained anomalies and improbabilities, the significance of which the primary judge failed to properly consider and appreciate. Likewise, the reliability of Person 4 was materially damaged by a critical internal inconsistency. Furthermore, contrary to the findings of the trial judge, the evidence of Person 4, Person 56 and the Afghan witnesses contained between them contradictions sufficiently significant to undermine fundamental aspects of the Respondents' case on this murder. The combined weight of the oral evidence of these witnesses was not sufficient to establish the allegation of murder on the balance of probabilities, nor was it sufficient to displace the contemporaneous documentary evidence.

20.6 The primary judge rejected the evidence of the Appellant and in particular his evidence of a legitimate engagement of a spotter in a cornfield prior to extraction. See for instance J[1231]-[1236]. It is not necessary for this Court to come to a view on that version of events. The choice presented to the Full Court is not binary. The

improbabilities and inconsistencies afflicting the Respondents' oral evidence, and the general effect of the contemporaneous documents of the Commonwealth, lead to the conclusion that the Respondents have not established their case to the requisite standard.

21. The Afghan witnesses; Notice of Appeal, Grounds 20(a) and 20(c)-(g)

21.1 The most important matters affecting the reliability of these witnesses are dealt with in the Closed Court judgment and the Appellant refers to his Closed Court submissions. Those matters set the context for the Court's treatment of the Afghan's evidence in the open court section of the judgment.

21.2 Other matters dealt with in open Court underscore the unreliability of the Afghan witnesses.

Presence of Australian Soldiers

21.3 According to Mohammad Hanifa, at the time the body was being dragged across the riverbed he observed three soldiers "*shooting in the air*".[161] The trial judge found at J[1163] that the matter was not central to the events the Respondents seek to prove but "*Nonetheless it is a matter to be taken into account*." The primary judge further observed the situation must have been "*very frightening and fast-moving*" from the perspective of the witness. With respect to the primary judge, evidence to the effect that three soldiers were standing around shooting into the air (a reckless act contrary to training and not corroborated by anyone else) – at the very time Ali Jan's body was supposedly being dragged across the riverbed, is a matter of sufficient significance to cast real doubt on the reliability of the witness.

21.4 According to Shahzada Fatih "*many soldiers*" were present at the hut at which he was guarded near the side of the riverbed. He also observed soldiers near "*our houses*" and "*at the creek over the riverbed*".[162] The trial judge found at J[1193] the evidence was "*imprecise*" and that *"there may be a degree of embellishment by*

[161] Part B, Tab 1841, T971 L27-44, T973 L3-21 (Hanifa). Part B, Tab 717/1119, Ex. A49 at [54].

[162] Part B, Tab 1843, T1148 L40 - T1149 L14, T1175 L29-38, T1176 L25-T1177 L19 (Shahzada).

the witness but nothing to the point of suggesting Shahzada had invented the whole account". The problem with the finding is that by focusing on the potential for deliberate fabrication, the trial judge does not consider the reliability of the evidence.

21.5 A similar issue in respect of Mangul Rahmi is the subject of a Closed Court submission.

21.6 At J[1194] the judge accepted submissions from the Respondents that another patrol was likely present at the helicopter landing zone (**HLZ**) ready for extraction and the particular HLZ was used by Commandos in Turn 1 about a half hour before the Appellant's patrol extracted on Turn 2. This raises a more fundamental difficulty that underpins this body of evidence. If the primary judge accepted the Afghans, it follows logically, (even with some discounting for any "embellishment") that he also accepted that there was a large number of Australian soldier witnesses – well beyond just Person 4 (who did not give evidence about the presence of any witness) and the Appellant and Person 11. If that is accepted, then it becomes quite improbable that the Appellant was able to get away with providing a false account of an engagement in a cornfield at the post patrol debrief only hours later. The issue is dealt with further in the section concerning official documents below.

<u>Firing from the air</u>

21.7 Mohammad Hanifa gave evidence that he observed and heard helicopters shooting at the ground at or about the time he heard the shots.[163] Mangul Rahmi gave similar evidence that he heard such firing.[164] No Australian soldier or official document confirmed the existence of this (not insignificant) activity. The Respondents posited an explanation that the witnesses had heard the Task Force's destruction of some caves at or about the same time and suggested that this may have sounded like heavy aircraft fire. The primary judge found at J[1169]/[1170] that this was a "*possible explanation*". It is a speculative explanation. Otherwise at J[1170] and [1181] the primary judge simply stated that he took the matter into

[163] Part B, Tab 1841, T960 L34-40, T961 L7-9 (Hanifa).
[164] Part B, Tab 1841, T1091 L20-47, T1092 L21-T1093 L9 (Hanifa).

account. At no point did the primary judge consider the effect of such evidence, combined with all the other evidence in this section, on the reliability of these witnesses.

21.8 According to Shahzada Fatih shots were fired from the top of the mountain and /or a plane earlier in the day.[165] The trial judge found at J[1195] that this evidence was confusing and took it into account. Indeed, according to Shahzada Fatih, planes came at the time when Mohammad Hanifa and Ali Jan were down at the river en-route to bring back Mohammad Hanifa's stepmother.[166] According to Mohammad Hanifa and Mangul Rahmi the raid had already commenced some time before that point and it is not plausible that "*planes*" or helicopters would have been in the air at this time.[167] The trial judge also observed at J[1195] he found it difficult to believe that Shahzada Fatih had never discussed the case with Mohammad Hanifa (his son).

<u>Motive</u>

21.9 The Appellant put forward two motives for the Afghan witnesses to lie. The first was their view of Australian soldiers as infidels, and of their perception that persons killed by Australian soldiers were "*martyrs*".[168] The second was the long-term financial support provided by the Respondents' agent Dr Sharif to each of the Afghan witnesses and their families.[169] His Honour found at J[1174], [1184] that these were not "*strong*" motives" to lie. At no point did his Honour consider more generally the potential effect of such matters on the reliability of the evidence given. Furthermore, his Honour at no point referred to the extent and long term duration of the financial support.[170] The primary judge's observation at J[1184] that support was limited to the costs of "*accommodation, food and transport*" did not acknowledge the duration of the support, the number of persons being

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[165] Part B, Tab 1842, T1155 L37 – T1156 L2, T1180 L1-46 (Mangul).
[166] Part B, Tab 1843, T1140 L18-20 (Shahzada), Part A, Tab 10, J[994].
[167] Part B, Tab 1841, T940 -941 (Hanifa) and Part B, Tab 1842, T1066-1068 (Rahmi).
[168] Part B, Tab 1841, T1004 L25-T1005 L30 (Hanifa), Part B, Tab 1842, T1103 L9-41, T1109 L17-30 (Rahmi).
[169] Part B, Tab 1841, T1019 L39-T1021 L37 (Hanifa), Part B, Tab 1842, T1119 L39 – T1121 L26, T1122 L45-T1123 L23 (Rahmi), Part B, Tab 1843, T1181 L9 – T1183 L5 (Shahzada).
[170] See the evidence at FN above, the submission in Part B, Tab 1885 ASR[79], and Part B, Tab 1881, T6652 L41-T6652 L14.

supported, and the significance such support might have to witnesses living in the prevailing economic conditions in a country like Afghanistan.

Shahzada Fatih's evidence concerning the Appellant

21.10 Shahzada Fatih gave evidence to the effect that after he witnessed the big soldier kick Ali Jan he lost sight of him.[171] He initially gave evidence that at one point the "*big soldier*" was shooting when he came down the mountain.[172] He later retreated from this position.[173] The trial judge found at J[1190] that the witness was "confused" and this was not a change of position. With respect, the issue is the reliability of the evidence as a whole. It seems reasonably clear that the witness was deeply confused – repeatedly.

21.11 Shahzada Fatih also gave evidence that the big soldier came to the hut and spoke to him in Pashto.[174] This evidence was fanciful. Counsel the Respondents tried to give the witness an opportunity to retreat in re-examination and failed.[175] The trial judge found the evidence could not be "*strictly correct*" and stated that he took it into account. With respect this finding does not adequately deal with the evidence. The contradictory evidence as to whether the big soldier was firing when he came down the mountain and the nonsensical evidence about the conversation in Pashto by themselves were sufficient to render the witness unreliable.

21.12 Shahzada Fatih admitted his eyesight was poor.[176] He agreed in his evidence that the hut at which he stood was some 250 metres away from Mangul Rahmi's compound and that a stand of trees stood between them.[177] The primary judge disagreed at J[1192] with the estimated distance and found the distance was in the order of 100 metres. The primary judge also found that it was "*certainly likely there were gaps in the vegetation*". Even if both those matters were correct his Honour did not take into account the reliability of the whole of this body of evidence. Furthermore, as alluded to above, if Shahzada Fatih could see from the

[171] Part B, Tab 1843, T1150 L19-20 (Shahzada).
[172] Part B, Tab 1843, T1156 L7-42 (Shahzada).
[173] Part B, Tab 1843, T1173 L1-18, T1174 L18-26 (Shahzada).
[174] Part B, Tab 1843, T1174 L28-46 (Shahzada).
[175] Part B, Tab 1843, T1183 L36-T1184 L1 (Shahzada).
[176] Part B, Tab 1843, T1166 L23-30 (Shahzada).
[177] Part B, Tab 1843, T1164 L41–T1165 L25, T1168 L9-T1169 L25 (Shahzada).

hut, then it beggars belief that the Australian soldiers standing right with him – guarding him and his sons – would not also have observed the assault (and heard the subsequent gunfire).

Matters consistent with presence during the raid on 11 September 2012

21.13 At J[1175], [1186] the trial judge listed a number of matters referred to by Mohammad Hanifa/Mangul Rahmi that were "*consistent with his presence in Darwan during the raid*". In summary form the primary judge makes the same point about Shahzada Fatih at J[1199]. These were matters relied upon to bolster the reliability of their evidence, but the primary judge did not refer to the existence of other raids on Darwan as an alternative, and reasonable explanation for these aspects of their evidence. The village had been raided by the Coalition forces (including the SASR) before and after 11 September 2012.[178] It is unlikely that matters such as the positioning and formation of helicopters, the pattern of manoeuvre of the troops through the village, the location of the overwatch, tactical questioning of villagers, how fighting aged males were placed under control, the presence of military working dogs, interpreters and *"big"* soldiers, and how some villagers were taken back to Tarin Kowt for further questioning were unique only to the mission on 11 September 2012. The Afghan witnesses had multiple experiences to draw upon to describe such events. The primary judge erred by disregarding the reasonable likelihood that their evidence, in part, confused or was influenced by other raids to Darwan.[179] Once these matters are discounted there is left only the immediate circumstances referable to Ali Jan, including the dragging and placement of his body. These matters are dealt with below in the context of the findings of corroboration between Person 4 and the Afghan witnesses.

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[178] Part B, Tab 1838, T244 L19-21 (BRS); Part B, Tab 1859, Closed Ct 22 March 2022 T13 L5-24 (P7); Part B, Tab 1842, T1104 L14–T1105 L10; T1000 L41-46 T1001 L1-6, T1005 L32-44, T1006 L1-10, 28-46, T1007 L1-7 (Hanifa); Part B, Tab 1842, T1104 L 14–T1105 L10 (Mangul).

[179] Part B, Tab 1885, ASR [81].

The Interpreter's Pistol

21.14 According to Mohammad Hanifa, during the questioning, the interpreter took out a pistol, placed it on his throat, threatened to shoot him and then struck him with it.[180] Mangul Rahmi said that the interpreter was holding the pistol at Mohammad Hanifa while asking "Where are the Taliban"?[181] Persons 4 and 56 did not corroborate this aspect of the Afghan witnesses' evidence. Neither Person 4 nor Person 56 were asked during their evidence in chief whether the interpreter was armed. Person 4 said that the interpreter was a "word machine" who repeated verbatim the Appellant's questions.[182] Evidence that the interpreter was unarmed[183] was not contradicted by any SASR witness called by the Respondents.[184] Indeed, it was put to the Appellant in cross-examination that interpreters attached to the SASR were not armed.[185] The primary judge did not address the inconsistency between Mohammad Hanifa and Mangul Rahmi's evidence about the interpreter being armed with a pistol, on the one hand, and the body of contrary evidence, on the other, and the implications of this inconsistency for the reliability of Mohammad Hanifa and Mangul Rahmi despite it being the subject of a submission below.[186]

Conclusion on the Afghan witnesses

21.15 The primary judge not only ignored or understated the significance of discrepancies in the evidence of these witnesses but also failed to undertake any holistic analysis of the evidence to assess its reliability. At J[1198] the trial judge referred to an authority cautioning about the difficulty of assessing the demeanour of a foreign witness giving evidence through a translator. So much may be accepted. But if at the end of the day, the evidence as it falls out in the translation contains serious

[180] Part B, Tab 1841, T954 L1-2, T954 L42-T955 L24 (Hanifa).
[181] Part B, Tab 1842, T1075 L8-15 (Mangul).
[182] Part B, Tab 1854, T2623, L3-5 (P4).
[183] Part B, Tab 1838, T239 (BRS), Part B, Tab 1867, T5158; T5159 L12, T5332 L16 (P35), Part B, Tab 1873, T5897 L30 (P32).
[184] Persons 7 and 31, who were called by the Respondents, also participated in the Darwan mission. Neither was asked whether they observed the interpreter carry a pistol.
[185] Part B, Tab 1838, T372, L42 (BRS).
[186] Part B, Tab 1885, ASR [81], Part B, Tab 1881, T6654 L9-23 (Appellant's oral submissions).

inconsistencies, improbabilities and anomalies, then in a general sense it will remain unreliable irrespective of any demeanour assessment.

22. Person 4; Notice of Appeal, Grounds 20(b) and 22-23

ICOM Radio

22.1 The most significant item of documentary evidence that undermines the finding that Ali Jan was murdered by the Appellant's patrol is the presence of an ICOM in the SSE photographs of EKIA 4, which indicates that EKIA 4 was a *"spotter"* affiliated with the Taliban. The primary judge found, as an intermediate step in the chain of reasoning, that the ICOM was *"planted"* by the Appellant and/or members of his patrol to conceal the unlawful nature of the killing of EKIA 4. This finding, however, was unsupported by clear evidence about how the ICOM was obtained and came to be placed on the body of EKIA 4. There was a lacuna in the evidence concerning this issue. It appears to be based in part on the impermissible use of the tendency evidence from the pre-deployment training in 2012 (J[1335]) in order to overcome the lack of evidence. It is important to note that the Respondents eschewed the use of the pre-deployment training as tendency evidence (J[887]) and the primary judge said he would not rely upon the pre-deployment training evidence in order to make a finding of murder in relation to the Darwan mission (J[932]).

22.2 According to Person 4, an ICOM radio had been retrieved by the Appellant from the insurgent who had been engaged across the Helmand River early in the mission. Person 4 stated that the ICOM radio, along with a det (detonation) cord was placed in an evidentiary bag by Person 11. It was then handed over to the troop sergeant at tactical headquarters.[187]

22.3 At the same time Person 4 also said that the ICOM radio placed on the body of EKIA 4 was the very same ICOM radio retrieved from the insurgent killed across the river (indeed he even described it as "*slightly wet*").[188] That is, according to Person 4 the same ICOM radio had both been handed over by Person 11 to the

[187] Part B, Tab 1854, T2797 L22–24, T2925 L23-35 (P4).
[188] Part B, Tab 1854, T2629 L38-45 (P4).

troop sergeant in an evidentiary bag and placed on a body hours later. The inconsistency was never explained. The primary judge dealt with the inconsistency at J[1119] by finding that "*Person 4 must be mistaken about at least one of those matters and that is a matter I must take into account*." See also J[1304]. With respect to the primary judge, that is an insufficient treatment of a significant inconsistency – never withdrawn or explained – by the key witness – on a critical issue.

22.4 Although the primary judge did not make an express finding, consistently with the Respondents' case,[189] that the ICOM photographed with the body of EKIA 4 had been recovered from EKIA 3 (killed by the Appellant near the Helmand river earlier in the mission), such a conclusion, however, *appears* to have been a necessary step in the primary judge's reasoning, given his Honour's multiple references to the Operational Summary (**OPSUM**) referring to the recovery of two ICOM radios, but only one being returned to Tarin Kowt.[190] There were four errors in the primary judge's treatment of the issue concerning the origin of the ICOM radio.

22.5 *First*, the primary judge's failure to make an express finding concerning the origin of the ICOM photographed with the body of EKIA 4 has deprived the Appellant of understanding clearly how his Honour resolved the irreconcilable inconsistency in Person 4's evidence that the ICOM placed on the body of EKIA 4 had been recovered from EKIA 3 notwithstanding that the same ICOM was handed over to the Troop sergeant prior to the engagement of EKIA 4.

22.6 *Second*, the primary judge's *apparent* finding (that the ICOM was recovered from EKIA 3), as a necessary step in forming a conclusion on the ultimate issue (that the ICOM was used as a *"throwdown")* was made notwithstanding the Respondents' failure to cross-examine the Appellant about the origin of the ICOM, whether it had been recovered from EKIA 3 and whether it had been retained for use as a *"throwdown"* later in the mission. This was in contrast with the cross-examination

[189] Part B, Tab 1884, RS (Section VI [129]); Part B, Tab 1880, T6388 L46-47, T6389 L1-6, T6415 L43-47 (Respondents' oral submissions).
[190] Part A, Tab 10, J[1119], [1305], [1306], [1330], [1335].

of Person 11 concerning this issue.[191] Nor was the Appellant cross-examined about the inconsistency in the OPSUM concerning the number of ICOMs recovered. When determining whether, given the serious nature of the allegation, the evidence was sufficient to support the primary judge's apparent finding on the balance probabilities that the Appellant had recovered an ICOM radio and retained it for use as a *"throwdown"*, this Court is entitled to take into account the lack of any cross examination of the Appellant with respect to those matters.[192] The primary judge should not have made an apparent finding about the origin of the ICOM photographed with EKIA 4 in circumstances where that allegation was never raised with the Appellant with the result that he was deprived of an opportunity to respond to it.[193]

22.7 *Third*, as noted above, the primary judge relied on the fact that the OPSUM referred to the recovery of two ICOM radio devices but only one device being returned to Tarin Kowt as supporting the Respondents' case that the ICOM photographed with EKIA 4 was a *"throwdown"* that had been recovered from EKIA 3.[194] The primary judge erred in drawing an inference from the OPSUM that an ICOM had been associated with two separate engagements. The inference is speculative.[195] The author of the OPSUM was not called to give evidence about its contents. An alternative, possible explanation for the apparent inconsistency in the OPSUM is that the reference to one ICOM being returned to Tarin Kowt was an error, assuming that two ICOMs were in fact recovered during the mission (neither the Appellant, Person 11 nor Person 56 said that an ICOM was recovered from EKIA 3).[196] The number of ICOMs retrieved from the mission is not the only apparent inconsistency in the OPSUM.[197] The "Summary of Timings and Events" refers to the recovery of two Chicom Type 56 assault rifles during two separate engagements, yet three such weapons are recorded as having returned to Tarin

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[191] Part B, Tab 1871, T5759 L7-14 (P11).[192] *Bale v Mills* (2011) 81 NSWLR 498 at [85] (Allsop P, Giles JA and Tobias AJA).
[192] *Bale v Mills* (2011) 81 NSWLR 498 at [85] (Allsop P, Giles JA and Tobias AJA).
[193] *Bale v Mills* (2011) 81 NSWLR 498 at [73]-[79].
[194] Part A, Tab 10, J[1119], [1305], [1306], [1330], [1335].
[195] *Caswell v Powell Duffryn Associated Collieries, Ltd* [1940] AC 152 at 169 –170; *Seltsam Pty Ltd v McGuiness* [2000] NSWCA 29; 49 NSWLR 262 at [87] (Spigelman CJ).
[196] Part A, Tab 10, J[1303].
[197] Part B, Tab 305/1346, Ex R11.

Kowt. Further, a pistol was returned to Tarin Kowt yet it was not referred to in *"Summary of Timings and Events"*. The primary judge failed to consider human error as an equally likely, if not probable, explanation for the inconsistency in the OPSUM concerning the number of ICOMs that were returned to Tarin Kowt.

22.8 *Fourth*, the discrepancy in Person 4's evidence is compounded by the fact that no witness (none of Persons 4, 7, 16, 35 or 56) gave evidence to the effect that they observed the Appellant or Person 11 carry a Taliban issued ICOM radio for use as a throwdown during the mission in Darwan.[198] An ICOM radio was not a small device. At J[1335] the trial judge took this matter into account but then cited three matters, being the evidence that Ali Jan did not have a radio, the fact that the OPSUM referred to the recovery of two ICOM radio devices but only one device being returned to Tarin Kowt and the findings in relation to pre-deployment training. At no stage did the primary judge consider (1) the significance of the evidence that no person observed the Appellant or Person 11 carrying an ICOM, in the light of (2) Person 4's evidence that the patrol had earlier handed in an ICOM recovered from EKIA 3 to the troop sergeant in an evidentiary bag. Those two pieces of evidence are corroborative. Cumulatively, they support the conclusion the ICOM radio photographed with EKIA 4 was not *"planted"*.

Timing of First Report by Person 4

22.9 According to Person 4:

(a) he had first spoken to Person 7 about the cliff kick incident in late 2016;[199]

(b) he had later spoken to Person 18 about the incident in the second half of 2019.[200]

22.10 However:

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[198] See the evidence of Persons 7, 16 and 35 discussed at Part B, Tab 1885, ASR [109]-[110].
[199] Part B, Tab 1854, T2775 L10-45, T2632 L36-37, T2792 L1 (P4).
[200] Part B, Tab 1854, T2632 L32-40, T2775 L6-L21, T2794 L46 – T2799 L39 (P4).

(a) Person 7's evidence was to the effect that Person 4 discussed the cliff kick incident with him in early 2013.[201] Person 31 corroborated this account; he said that Person 7 reported such a conversation with Person 4 to him in late 2012 or early 2013.[202] Mr Hastie said that Person 7 mentioned the allegation at a meeting in the second half of 2014.[203]

(b) Person 7 also told the Court that he raised the cliff kick allegation at a meeting of sergeants in or about early 2013 that involved Person 100, and Persons 7, 43, 44 and 51.[204] Person 7 also said the matter had been raised in a meeting in late 2013 by Person 4 himself, with Persons 8, 18 and 32 also present.[205]

(c) Person 18's evidence was that Person 4 reported to him in late 2012 an incident where the Appellant has kicked a detainee off a cliff.[206]

22.11 The primary judge at J[1130] and [1142] accepted the evidence of Persons 7 and 18 and rejected the evidence of Person 4. The reference to 2012 in J[1142] is an error; it should have been 2013 (see J[1131] and [1134]). In any event, the consequence was that the primary judge found Person 4 had first told Persons 7 and 18 about the incident just months after it occurred instead of several years later.

22.12 The primary judge's rejection of the evidence of Person 100 is critical to the line of reasoning. Person 100 was the Regimental Sergeant Major (**RSM**) in 2013. There was no evidence he had ever been a friend of the Appellant or had ever discussed the case with the Appellant or Person 11 (or, for that matter any of the Appellant's other friends). He attended both the sergeants' meeting discussed above in early 2013[207] and the other meeting of corporals including Persons 4, 14 and 18 later in 2013.[208] His evidence was that those in attendance made various complaints

[201] Part B, Tab 1859, T3615 L25-T3616 L25 (P7).
[202] Part B, Tab 1864, T4654 L45-T4655 L12 (P31).
[203] Part B, Tab 1861, T4244 L43-T4246 L6 (Hastie).
[204] Part B, Tab 1859, T3618 L45 – T3619 L5, T3672 L38-T3673 L4, T3876 L35-38, T3889 L24-43 (P7).
[205] Part B, Tab 1855, T3025 L4-27 (P18).
[206] Part B, Tab 1855, T3021 L1 – T3023 L30 (P18).
[207] Part B, Tab 1870, T5596 L38-46 (P100).
[208] Part B, Tab 1870, T5601 L13-45 (P100).

against the Appellant including complaints about his Victoria Cross, bullying and claiming responsibility for various EKIA when others were responsible.[209] Person 100 denied there was any mention of war crimes or an incident of where a PUC was kicked off a cliff.[210]

22.13 The trial judge rejected Person 100's evidence at J[1142] observing "*Whether Person 100 has had a genuine memory failure, perhaps aided by the allegation being a somewhat sensational one and one which he shut down quickly, or he was consciously covering up his own failure to act at the time because he did not want to create a scandal within the unit, or engender the animosity of the Appellant's powerful friends and associates, as the respondents allege, is difficult to determine. One thing is clear and that is the allegation was raised…*" Despite making no findings about why Person 100 would give unreliable evidence, the primary judge speculated about Person 100's reasons for doing, presumably to explain the basis for rejecting his evidence and preferring the accounts of Persons 7 and 18. In finding that the allegation was raised by Person 7 at the sergeant's meeting in 2013, the primary judge placed insufficient weight on three reliable contemporaneous documents. The first document comprises Mr Masters' notes of a conversation with Person 7 in 2015-2016, which record incidents involving the Appellant, but nothing about a cliff incident. The second document comprises Mr McKenzie's notes of a conversation with Person 7 in 2018, which records a cliff incident. It is reasonable to infer that Person 7 learned of the cliff incident allegation after 2015-2016 and before 2018. The third document is a letter of complaint relating to the Appellant's Commendation for Distinguished Service in 2014, which was prepared by Person 6 and signed by Person 7.[211] It said nothing about a cliff incident. Again, it is reasonable to infer that the cliff incident allegation would have been used by Person 7, had he been aware of it at that time, to contradict the commendation that the Appellant's conduct in 2012 kept with *"the finest traditions of the Australian Army and the Australian Defence Force."*[212]

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[209] Part B, Tab 1870, T5597 L26-31, T5599 L9-12 (P100).
[210] Part B, Tab 1870, T5619 L27-34, T5597 L26-47, T5598 L1-47 (P100).
[211] Part A, Tab 10, J[1143].
[212] Part B, Tab 2/1120, Ex A51.

22.14 The primary judge's finding that Person 7 raised the cliff incident at the sergeants' meeting in 2013 is against the probabilities.[213] Once again, the primary judge appears to be focused on the honesty of the witnesses, whereas the critical issue (taking into account the passage of time) is the reliability of the evidence. The ultimate significance of the point is twofold: *first*, it is that if the evidence of Person 100 were accepted (as the Appellant contends it should have been) then Persons 7 and 18 who said they had reported a cliff kicking incident allegation to Person 100, were either lying, or giving false evidence due to reconstructed memory, which reflected adversely on their credibility generally. *Secondly*, it is that the chief witness made no report of his allegation for some years, and there is no evidence sufficiently explaining the reason for the delay. The inference is that it was because the alleged incident did not happen.

The Interpreter

22.15 According to Person 4, there was no interpreter with the patrol at the time it arrived at the last group of compounds (which was in fact consistent with the evidence of Person 11 and the Appellant).[214] Person 4 said that the Appellant sent Person 56 back to troop headquarters (**THQ**) to bring back an interpreter and then sent him away a second time to return the interpreter.[215] According to Person 56, the interpreter accompanied the patrol as it reached the southernmost set of compounds and Person 56 was only sent back to the HLZ (once) to return the interpreter.[216] Person 56 could not recall this with certainty.[217] In contrast, Person 7 gave evidence that prior to extraction he returned a number of PUCs to the central compound, and with the aid of an interpreter told them to remain inside that compound until the helicopters had left.[218] This was the subject of a submission by the Appellant[219] but not referred to by the trial judge.

[213] Part A, Tab 10, J[1136], Part B, Tab 432/1159, Ex A142 (notes of Mr Masters). See the evidence of Person 7 at Part B, Tab 1859, T3669 L1-3, T3688 L42-T3689 L5, T3906 L22-39 and T3911 L 20-32 (P7).
[214] Part B, Tab 1854, T2619 L11-12 (P4).
[215] Part B, Tab 1854, T2623 L20-27, T2624 L46 – T2625 L17 (P4).
[216] Part B, Tab 1865, T4752 L23-27, T4752 L33-T4753 L6 (P56).
[217] Part B, Tab 1856, T4753 L24-25 (P56).
[218] Part B, Tab 1859, T3612 L33-46 (P7).
[219] Part B, Tab 1881, T6642 L1-39 (Appellant's oral submissions).

22.16 The inconsistency has a significance because the Afghan witnesses' account (see especially Shahzada Fatih who was located in the first residence the soldiers would have reached) involved the presence of an interpreter from the outset.[220] The trial judge observed the fact of the inconsistency at J[1047] but did not analyse or assess its significance, despite its being the subject of a submission by the Appellant at ASR[85]. This is another reason to doubt the reliability of the recollection of Person 4, or otherwise Person 56 and the Afghans.

<u>Inconsistencies between the evidence of Person 4 and the Afghan witnesses</u>

22.17 The primary judge repeatedly found and emphasised that the evidence of Person 4 and the Afghan witnesses corroborated one another. See for instance J[1176], [1187] and [1367].

22.18 According to Person 4, an individual was found in the second to last compound.[221] He said that the last compound was empty until a man on a donkey arrived. That man was PUC'd.[222] At the time no other local national was present although a second individual was later present but Person 4 could not recall the timing of his appearance.[223] Person 4 recollected that two local nationals were present during the tactical questioning.[224]

22.19 The evidence of Mangul Rahmi and Mohammad Hanifa is to the effect that both of them and Ali Jan were all present in the last compound set along with several children. Ali Jan was already there when the soldiers arrived – and had been for hours (drinking tea) – he had not just arrived on a donkey.[225] The three men were interrogated (and according to them assaulted) whilst in close proximity to each other.[226]

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[220] Part B, Tab 1843, T1141 L42-T1142 L10 (Shahzada).
[221] Part B, Tab 1854, T2621 L5-13 (P4).
[222] Part B, Tab 1854, T2621 L39 (P4).
[223] Part B, Tab 1854, T2622 L14-29 (P4).
[224] Part B, Tab 1854, T2623 L7-10 (P4).
[225] Part B, Tab 1841, T944 L6-T945 L16, T946 L14-T949 L42 (Hanifa), Part B, Tab 1842, T1067 L13-T1068 L30 (Rahmi).
[226] Part B, Tab 1841, T951 L1-27 (Hanifa), Part B, Tab 1842, T1069 L13-37, T1072 L11-T1073 L15, T1074 L18-20 (Rahmi).

22.20 This is a significant inconsistency because if Person 4 is correct the version of the Afghan witnesses is simply impossible. The primary judge observed the effect of Person 4's evidence at J[1033], [1041]-[1042] and [1047] but did not consider the significance of its contradiction with the evidence of the Afghans and the implications for the reliability of all of the witnesses involved, notwithstanding a submission by the Appellant.[227]

23. The official contemporaneous records; Notice of Appeal, Ground 21

23.1 The OPSUM recorded a "*Post de-brief consolidation*" took place at Tarin Kowt 14.37DE, approximately three hours after the end of the mission.[228] At J[668] the primary judge observed the evidence suggested that patrol commanders and the troop commander and troop sergeant attended these debriefs. The record of the de-brief as it appeared in the same-time chat[229] included a reference to the engagement in the cornfield at 11.09 resulting in an EKIA. This information (or parts of it) was taken up elsewhere in the OPSUM and official documentation.[230] It was also accompanied by a reference to a significant amount of ICOM traffic indicating that insurgents were attempting to co-ordinate an attack against the Forward Element (FE).

23.2 At J[1322] the primary judge recorded the Appellant's submission that enough persons outside of his patrol would have seen and/or heard sufficient of the relevant conduct for the patrol commanders at the troop debrief to know enough to immediately reject the Appellant's account (of a legitimate engagement in the cornfield) provided at the debrief. The primary judge did not proceed to consider this submission. Persons 7, 31, 32, 35, 55 and 57 attended the troop debrief.[231] The Appellant's unchallenged evidence was that the after action reports (OPSUMs) were prepared by an operations officer in the presence of the Officer Commanding (**OC**), the Troop Commander and the patrol commanders and that questions would be asked by the operations officer and checked against the real-time feed to

[227] Part B, Tab 1885, ASR[82].
[228] Part B, Tab 305/1346, Ex R11.
[229] Part B, Tab 326/1345, Ex R10.
[230] Part B, Tab 274/993 Ex A10.33, Tab 277/996, Ex A10.36, Tab 278/997, Ex A10.37, Tab 279/998, Ex A10.38 and Tab 280/998, Ex A10.39.
[231] Part B, Tab 1838, T250 L1-3 (BRS).

confirm details of the EKIAs.[232] Person 7's evidence of what occurred at the troop debrief was limited to his recollection that the Appellant said *"we killed one spotter."*[233] Person 31 gave similar evidence.[234] Person 7 said that he told Mr Masters that during the extraction from Darwan, he saw a body at the bottom of a cliff and asked himself if it wasn't a spotter who was killed in action, who was it?[235] There was no evidence that the Appellant was challenged on his account by Person 7 or anyone else who was present at the Troop debrief, including Person 55 who was in the overwatch patrol during that mission and would have been in a position to observe the assault and execution.[236] A necessary implication of the primary judge's findings concerning the murder of Ali Jan is that the operational reporting contains material falsehoods. Yet it is improbable that the Appellant was able to provide an unchallenged false account of the killing of EKIA 4 at the Troop debrief in the presence of the other patrol commanders, the Troop Commander and the OC when, on the Respondents' case it would have been improbable for a spotter to remain undetected in that location for a period of five or more hours and when multiple Australian soldiers would have been in a position to observe the assault and execution.

23.3 The significance of this issue is compounded by the evidence of the Afghan witnesses. The primary judge observed at J[979] that the Task Force that day consisted of 42 Australian soldiers and 18 NDS or Afghan Partner Force soldiers. Turn 1 had left Darwan at 10.52DE (see J[1035] and Turn 2 departed at 11.21DE (see J[1225]). Therefore approximately 20 Australian SASR members remained present in the village at the approximate time EKIA 4 died (the report was at 11.09 DE). Even allowing for some embellishment, if the Afghan witnesses are to be accepted, then a majority of those must have been in a position to easily view the assault and the engagement. There is for instance no doubt that the soldiers on the overwatch were in a position to observe the assault and execution. At J[1319] the primary judge stated that he took into account the Appellant's submission that at

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[232] Part B, Tab 1838, T250 L21-31 (BRS).
[233] Part B, Tab 1859, T3614 L27-30 (P7).
[234] Part B, Tab 1864, T4646 L10-15 (P31).
[235] Part B, Tab 1859, T3855, L36-46, T3856 L1-14 (P7) and Part B, Tab 593/1250 Exhibit A269 [85].
[236] Part B, Tab 1838, T232, L28 (BRS).

least some Australian soldiers would likely have seen the assault and/or execution. However at J[1320] the trial judge immediately observed that "*at the same time*" the Respondents' point about the unlikelihood of a spotter remaining undetected in the cornfield was "*correct and important*". That issue is dealt with in the discussion of Ground 24 below, but in any case, it is a different point.

23.4 If the thrust of the Afghan witnesses' evidence as to the presence of Australian soldiers in view and earshot of the assault and execution is to be accepted, then it becomes highly improbable that at least one if not all of the patrol commanders present at the debrief did not immediately know the Appellant's version of a cornfield engagement was false. It follows that for the Respondents' case to prevail, that some or all of these men remained silent while a false account was given. That is not probable, especially in the absence of any evidence from the patrol commanders about what happened at the debrief.

24. Usual Practice with respect to PUCs; Notice of Appeal, Ground 25

24.1 There was no evidence, photographic or otherwise, suggesting that any of Mangul Rahmi, Mohammed Hanifa or Ali Jan had been PUC'd. Nor was there any evidence that any such photographs or records had been created and then deleted. There was unchallenged evidence in documentary form that earlier in the mission, the Appellant's patrol had taken a number of prisoners and photographed them in the usual course.[237] The Appellant and Persons 32 and 35 gave evidence that persons placed under control would typically be returned to the centralised PUC holding area.[238] Consistently with this practice, Person 7 said:

(a) his patrol collected a lot of fighting aged males and became the PUC handling patrol;[239]

[237] Part B, Tab 318/1407, Ex R22, Tab 319/1408, Ex R23, Tab 320/1409, Ex R24, Tab 321/1410, Ex R24, Tab 322/1411, Ex R26, Tab 323/1412, Ex R27 and Tab 324/1413, Ex R28. See Part B, Tab 1838, Closed Ct 22 June 2021 T32-T37 (BRS) and Part B, Tab 1849, Closed Ct 17 February 2022 T3-T7 (P1).
[238] Part B, Tab 1838, T248 L4-23 (BRS), Part B, Tab 1867, T5205 L1-7 (P35), Part B, Tab T5877 L17-19 (P32).
[239] Part B, Tab 1859, T3611 L3 and T4003 L16, L25-28 (P7).

(b) that there was a central PUC area where approximately 50 PUCs were placed;[240] and

(c) at the time of his patrol's extraction "*pretty much … every fighting-age male in Darwan … was in a compound*".[241]

24.2 Person 14 gave evidence to similar effect in relation to the Chinartu Mission.[242]

24.3 The Appellant submitted that if fighting aged males had been located in the last compound set, there would have been no reason for him not to move them back to the PUC holding area. In other words, it was improbable that contrary to usual practice he and his patrol would have retained PUCs (for upwards of an hour) at the end of the village close to the extraction zone.[243]

24.4 The primary judge dealt with this body of evidence and submissions at J[1351]-[1357]. At J[1357] he stated "*This is a matter to take into account, although it is largely based on evidence of the Appellant and Person 35 who are witnesses I do not accept*." This finding was an error for three reasons. *First*, it ignored the evidence of Person 32[244] and Person 7, who was a witness that the primary judge did accept. *Second*, it ignored the fact that the Respondents put to the Appellant that the process for handling PUCs during that mission was that PUCs were taken by the assault patrols, they were handed off to Person 7's patrol for photographing and processing and were then moved back to the PUC holding area.[245] There was no evidence contradicting the evidence given by the Appellant and Person 35 as to the usual practice of dealing with PUCs. *Third*, the primary judge did not accord sufficient weight to the improbability that the Appellant and his patrol elected to ignore the Troop's practice of processing and photographing PUCs and taking them back to the PUC holding area when, as the primary judge found, they encountered three fighting aged males in the southernmost compound at approximately

[240] Part B, Tab 1859, T4004 L28-35 and T4006 L1-2 (P7).
[241] Part B, Tab 1859, T3613 L6-7, T3892 L29-34 (P7).
[242] Part B, Tab 1845, T1432 L32-T1433 L19 (P14).
[243] Part B, Tab 1885, ASR [119].
[244] Part A, Tab 10, J[1354].
[245] Part B, Tab 1838, Closed Ct 22 June 2021 T31 L1-15, T34 L31-33, T35 L5-24, T36 L9-11, L29-33, T37 L4-6, T38 L9-28 (BRS).

09.30DE. Given that the Appellant's patrol did not extract until 11.21DE,[246] there was ample time for the Appellant and his patrol to comply with the Troop's standard PUC handling practice. Nor did the primary judge accord any weight to the absence of any photographic or other evidence identifying the Afghan witnesses either by name or location, as persons having been placed under control during the mission to Darwan.

25. Scanning Assets; Notice of Appeal, Ground 24

25.1 This is the subject of a closed court submission.

26. Motive, Tendency and the Pre-Deployment Findings; Notice of Appeal, Grounds 26-28

26.1 At J[915] the primary judge found that the Appellant had carried out a mock execution of a PUC during the course of pre-deployment training in about May 2012, and that he had said to Person 10 words to the effect that that was how it was going to be in Afghanistan. At J[925] the trial judge made further findings concerning the conduct of the Appellant in training including to the effect that the Applicant said "*unmanned aerial vehicles would be pushed off station so they weren't observing the target area*" and that persons suspected of being enemy combatants were "*bad cunts*" who would be shot.

26.2 At J[930] the primary judge observed that "*the precise way in which the respondents seek to use this evidence, which is not a tendency use, is not clear to me.*" At J[932] the primary judge decided to take a "*cautious*" approach to this evidence, observing that he found the Darwan and Chinartu murders occurred irrespective of the pre-deployment training findings. Alternatively, the primary judge stated that "*if this be an overcautious approach*" those findings provided additional support in relation to those conclusions.

26.3 Notwithstanding those findings, at J[1300] when the primary judge was dealing with the Appellant's submissions about an absence of motive for the killing of Ali Jan, the primary judge found that the pre-deployment training findings (as well as the Whiskey 108 findings) "*provided support for a conclusion that the [Appellant]*

[246] Part A, Tab 10, J[1035] and Part B, Tab 326/1345, Ex R10, page 4.

would execute persons he thought were Taliban or likely to be Taliban." The primary judge observed that "*This motive, if it be such, was not specifically put to the [Appellant] in relation to the murder of Ali Jan but the pre-deployment statements were put to him and the [Appellant] must have appreciated that that was said to be his method of operation*." That finding was in error:

(a) the Respondents' case was emphatically that Ali Jan was not a member of the Taliban. The Afghan witnesses all gave evidence to this effect.[247] It was not put to the Appellant that Ali Jan was Taliban or even that he suspected Ali Jan was Taliban and there was no reason for him to assume that was the case – quite the contrary.

(b) Contrary to the statements at J[930]-[932], the primary judge in reasoning in this manner, had effectively used the pre-deployment findings as tendency evidence.

(c) It cherry picked the pre-deployment findings which included a finding that the Appellant had also said that prior to committing murders of Taliban that "*unmanned aerial vehicles would be pushed off station*." This of course had not happened and there was no suggestion the Appellant had made such a request.

26.4 There was simply no evidence of motive for this assault and killing save for the suggestion that Ali Jan smiled at the Appellant.[248] The primary judge failed to take into account the improbability that the Appellant would act with such extreme cruelty in response to such a slight provocation.

26.5 Furthermore, at J[1335] the primary judge made another reference to the pre-deployment findings. In that paragraph the primary judge was discussing the Appellant's submission that it was improbable that no person observed him or Person 11 carry a throwdown during the course of the mission at Darwan. The trial judge stated that he took the matter into account but then drew attention to three contrary matters, one of which was the pre-deployment findings. Once again,

[247] Part B, Tab 1841, T924 L40-43 (Hanifa), Part B, Tab 1842, T1052 L13-16 (Rahmi) and Part B, Tab 1843, T1137 L45-47 (Shahzada).
[248] Part B, Tab 1838, T507 L25-27, T508 L1-3 (BRS).

contrary to the statement of intention at J[932], the primary judge effectively used the pre-deployment findings as tendency evidence. It would appear that despite the note of caution sounded at J[924] in relation to Person 19's evidence about the part of the conversation concerning throwdowns (Person 19 said his recollection was not "great" and in any case was unsure if the words had been said by the Appellant or Person 35), the primary judge nonetheless relied on Person 19's evidence as supporting a finding that the Appellant had a tendency to use throwdowns.

26.6 The error with respect to throwdowns is compounded by the primary judge's finding at J[1331]. In that paragraph the primary judge found that the fact that the mission objective (Hekmatullah) was on the JPEL (and therefore a target who could be killed) did not make it more improbable that the Appellant or Person 11 would keep a throwdown for later use. According to the primary judge, this was because four Afghan males were killed on the mission and none of them was Objective Jungle Effect. The apparent logic of this statement is that the mere possibility of the death of an Afghan on the mission who was not on the JPEL, and who could not lawfully be killed under the Rules of Engagement, makes it plausible that a throwdown would be brought and kept ready. The evidence did not support such a finding and it seems as though the primary judge must have once again used the pre-deployment findings to support a conclusion in a manner his Honour had previously disavowed.

27. Credibility of Person 11; Notice of Appeal, Ground 29

27.1 The primary judge dealt with the credit of Person 11 at J[1265]-[1283]. At J[1283] the primary judge rejected the account of Person 11 and stated that he generally did not accept Person 11 as an honest and reliable witness. The primary judge made these findings in spite of the fact that on at least one issue he accepted the evidence of Person 11 and compared it favourably with that of the Appellant.[249]. The Appellant submits that the matters summarised by the primary judge, even if accepted (observing that the findings are sometimes equivocal as to mistake or honesty – see for instance J[1269], [1264] and J[1277]) are insufficient to justify the wholesale rejection of his evidence, particularly when it was uncontradicted or

[249] Part A, Tab 10, J[1265].

corroborated by the evidence of other witnesses (not placing reliance on the Appellant's evidence for the purposes of this submission) or documents.

28. Conclusion and Notice of Appeal, Ground 30

28.1 At J[105]-[107] and [114] the primary judge discussed the relevance of the presumption of innocence in applying the *Briginshaw* standard to allegations of criminality in civil proceedings. Those authorities are a reminder that notwithstanding that the criminal standard of proof does not apply, a civil Court must take real care before making findings of criminality. In the case of the Darwan allegations the murder finding could not be justified:

(a) The evidence of the Afghan witnesses was unreliable.

(b) The evidence of Person 4 contained an inconsistency so significant that it materially damaged the reliability of the whole of this account.

(c) The evidence of the Afghan witnesses contained material inconsistencies with the evidence of person 4; and

(d) The contemporaneous documentary record squarely contradicted the Respondents' case and no satisfactory evidence was adduced to explain why and how it had been so entirely corrupted.

(e) Particularly in the light of all of the above, the sheer improbability of such a violent killing occurring for no apparent reason - in sharp contradiction to the behaviour of the Appellant and his patrol in relation to the taking an processing of PUCs earlier in the day – and in ostentatious view of an veritably packed amphitheatre of Australian soldiers and airborne assets, was not accorded proper weight by the primary judge.

CHINARTU

29. Introduction

29.1 The primary judge found that at about 3.39pm on 12 October 2012, the Appellant ordered Person 12 (a member of the NDS or Afghan Partner Force) to execute an Afghan male under detention and that immediately thereafter Person 12 ordered another NDS Afghan Partner Force member to carry out the execution which duly occurred. The Appellant is alleged to have given the order via a translator, Person 13. The Appellant had been interrogating the PUC. According to Person 14, the only eyewitness that gave evidence in support of the Respondents, the execution occurred moments after Person 14 discovered a cache of weapons just outside the compound in which the interrogation was occurring. The findings are summarised at J[1537].

29.2 As stated above, Person 14 was the sole eyewitness who gave evidence of an execution. The primary judge accepted the evidence of Person 14 at J[1533] and J[1536]. Each of the Appellant and Person 11 (both present inside the compound) and Person 32 (present outside the compound with Person 14) gave evidence that such an event had not occurred. The primary judge rejected the evidence of those witnesses at J[1535]. Person 14 also alleged that two Australian combat engineers were present and dealing with the cache at the time of the execution. They were not called to give evidence.

29.3 The OPSUM recorded two EKIA's on this mission at 14.05 and 14.10.[250] The same time chat recorded one EKIA being reported at 14.14 and another at 15.39.[251] No contemporaneous record referred to the execution of a PUC. An SSE report prepared by engineers supplied in Closed Court referred to and discussed a cache that was photographed at 15.24 and 15.26pm.[252] There was no reference in any contemporaneous record to a second cache or to a cache discovered after that time.

29.4 From J[1382] to J[1447] the primary judge analysed the oral and documentary evidence about what occurred on the day. From J[1448]-[1511] the primary judge

250 Part B, Tab 337/1006, Ex. A10.46, Part B, Tab 365/1655, Ex R192.3
251 Part B, Tab 342/1011, Ex A10.51, Part B, Tab 366/1421, Ex R36.
252 Part B, Tab 341/1010, Ex A10.50.

analysed the evidence as to whether Person 12 was present at Chinartu on 12 October 2012 and concluded at J[1511] that Person 12 was present. That finding is not challenged on appeal. At J[1512]-[1535] the trial judge discusses some of the central submissions made by both parties and then provides his conclusions at J[1536]-[1537].

29.5 The Appellant submits the allegations of Person 14 are unpersuasive when considered in the light of the contemporaneous records. He is the foundation for the entire allegation and if his version is unreliable, then the Respondents' case on this murder must fail.

30. The cache; Notice of Appeal Grounds 31(a)-(e)

30.1 Person 14 stated that he noticed a discolouration on the compound wall and kicked it. A number of weapons then fell out, including bags with bullets, two RPG warheads with separate boosters, binoculars and rifles. Person 14 begun to pull the material out but then two combat engineers took over and worked on the cache.[253] According to Person 14, the Appellant's order for the execution followed immediately after the discovery of the cache[254] and as the primary judge observed at J[1522] the discovery of the cache is the event the respondents allege led to the change in mood and the Appellant's order.

30.2 Following the mission, two engineers prepared an SSE report of approximately seven pages.[255] It is a sensitive document dealing with the exploitation of the cache and it is the subject of a Closed Court submission. Suffice to say it reported on the discovery of a cache of weapons, describing how they were discovered and providing further analysis. The weapons appear in the declassified photographs comprising Part B, Tab 345/1532, Ex R100. They are very similar to but not precisely the same as the items identified by Person 14 as comprising the cache he

[253] Part B, Tab 1845, T1440 L42-T1441 L18, T1667 L18-39, T1668 L42-43, T1754 L1-27 (P14).
[254] Part B, Tab 1845, T1441 L25-T1442 L26 (P14).
[255] Part B, Tab 341/1010, Ex A10.50.

discovered.[256] According to the metadata, those photographs were taken between 3.24 and 3.26pm on 12 October 2012.

30.3 Person 14's evidence in February 2022 was that the photographs taken of weapons from a cache discovered on 12 October 2012 were not photographs of the weapons from the cache he had discovered.[257] As the primary judge observed at J[1522] it follows that the discovery of Person 14's cache is undocumented. Indeed as the primary found at J[1524], on the Respondents' case, two caches were discovered during the mission, one the subject of the SSE report by the engineers and one not documented in any way.

30.4 The primary judge said that he took this matter into account at J[1536] but the Appellant submits the primary judge failed to properly assess the significance of the point. The discovery of two such similar caches on a single mission was unlikely. The fact that one cache was photographed and documented in a report by the engineers and the other one was not referred to in any report is improbable, especially when according to Person 14, engineers actually exploited the cache he said he discovered.

30.5 The Appellant submitted that Person 14 invented a story about a second cache.[258] The Appellant submits he did so some time after it was understood by him that first, the exploitation report disclosed certain features concerning the discovery of the cache by the engineers that were inconsistent with his version of events, and second, that the cache photographs had been taken at 3.24-3.26pm – at least 10 minutes before he said he discovered the cache. The primary judge did not deal with that submission. That Person 14 invented a story about a second cache is consistent with the fact that when the Appellant gave his evidence in June 2021, it was put to him by the Respondents (presumably on instructions from Person 14) that the official photographs of the cache of weapons showed the same cache discovered prior to the execution.[259] By the time Person 14 gave his evidence in February 2022 the position had changed. Of course, even if Person 14 has a

[256] Part B, Tab 1845, T1444 L17-45 (P14).
[257] Part B, Tab 1845, T1444 L16-45 (P14).
[258] Part B, Tab 1885, ASR [28].
[259] Part B, Tab 1838, Closed Ct 23 June 2021 T41 L1-11 (BRS).

genuine recollection, the improbability of his allegation and the shift in position materially damages his reliability in any event. Also relevant to the question of the reliability of Person 14's account is the fact that he did not report this execution of a PUC. In fact, the evidence was that he first made the allegation in about April 2018 after he had met with Mr Masters and Mr McKenzie.[260] Person 14's credit must also be assessed in the light of the matters raised above in the section dealing with Whiskey 108, namely his report to Mr Masters that it was Person 4 that executed a person with a prosthetic leg and his admittedly false evidence concerning media contacts.[261]

30.6 A further issue arises in relation to the contemporaneous documents. The OPSUM[262] included an account of an engagement at 14.05DE where an NDS Afghan Partner Force soldier had engaged an EKIA. That report also included reference to the discovery of a cache. The primary judge found at J[1438] that there was no engagement at 14.05DE as stated in the OPSUM. At J[1446] the primary judge observed that the OPSUM attributed an AK-47 to the insurgent killed at 14.05DE, but that his body had been photographed, contrary to usual practice, without his weapon. The primary judge contrasted this with the SSE report[263] which included photographs of the AK-47 as part of the cache. The primary judge found that the most probable explanation was that "*a cache was found with all the items photographed and then in one way or another, in the OPSUM the AK-47 rifle and the binoculars have been attributed to the EKIA*." That finding is, with respect, speculative. In addition, it ignores a critical problem for the Respondents and that is the undisputed existence of the actual photographed and reported upon cache. From where did it come, if not from the circumstances described in the 1405DE engagement and/or the circumstances described in the SSE report? It is also simply improbable that an AK-47 from a cache discovered much earlier in some different place, would later come to be attributed to the

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[260] Part B, Tab 477/1123, Ex A63, Part B, Tab 1845, T1760 L20-41, Closed Ct 10 February 2022 T20 L42-T21 L9 (P14).
[261] Part B, Tab 477/1123, Ex A63, Part B, Tab 672/1121, Ex A59, Part B, Tab 1845, Closed Ct 9 February 2022 T9 L14-T10 L29, T12 L14-34, T14 L1-31, T1713 L6-22, T1725 L16-29 (P14).
[262] Part B, Tab 337/1006, Ex A10.46, Part B, Tab 365/1652, Ex R192.3.
[263] Part B, Tab 341/1010, Ex A10.50.

relevant EKIA, rather than the AK-47 discovered right outside the compound at the very time he was killed.

30.7 The Appellant submits that if this Court is satisfied that the allegation of the discovery of a second unreported cache is improbable, then the Respondents' case must fail. Person 14 is the sole eyewitness – there is no document recording an execution or even recording any connection between the Appellant and this EKIA. In Person 14's telling, the discovery of the cache and the execution form part of one interconnected chain of events.

30.8 The exploitation report at Part B, Tab 341/1010, Ex A10.50 (**SSE report**) is the subject of a closed court submission.

31. Timing; Notice of Appeal, Ground 32

31.1 According to Person 14 he was sitting in the shade down the hill when he found out the first turn had left Tarin Kowt.[264] The same time chat records this occurred at 15.34DE.[265] Person 14 says he first walked up to the THQ area where he had a short conversation in an attempt to locate his patrol. He then walked further up the hill a distance of 80-100 metres to another compound. On arrival he looked inside and observed the questioning and spoke with Person 32. He then noticed the wall discoloration and moved to the wall and gave it two kicks. It disintegrated and revealed a cache and Person 14 began to take things out before the engineers took over. Person 14 returned to the window and heard the Appellant give the order to Person 13, the interpreter. Person 13 did not relay the statement so the Appellant repeated himself. Person 13 then spoke in Pashtun to Person 12. Person 12 then spoke to his soldiers and one of them fired at the PUC.[266] The primary judge recorded most of these events at J[1409]-[1414].

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[264] Part B, Tab 1845, T1435 L18-25 (P14).
[265] Part B, Tab 342/1011, Ex A10.51, and Part B, Tab 366/1421, Ex R36.
[266] Part B, Tab 1845, T1435 L29-39, T1438 L38-T1443 L13 (P14).

31.2 At 15.39DE the same time chat records that an EKIA was reported.[267] That is, on the Respondents theory, all of those things necessarily happened within five minutes (including the final report).

31.3 At J[1531] the primary judge found that on Person 14's account "*the events happened within a short period of time, but it is not impossible that they would have happened within that time*." This speculative reasoning inverts the burden of proof. Person 14's evidence as to what occurred at Chinartu is improbable and uncorroborated. It provided an insufficient evidentiary foundation for the primary judge's finding of murder in relation to this mission.

32. Number of Persons of Interest to be returned to Tarin Kowt; Notice of Appeal, Ground 33

32.1 The same time chat included an entry at 15.30DE in relation to prisoners to be returned to base "*Numbers still TBC – planning on 3-4ATT*."[268] As the primary judge explained at J[1412] TBC stood for "*to be confirmed*" and ATT meant "*At this time*". As recorded at J[1424], the Sametime chat and OPSUM[269] record that at 15.51DE the Turn 1 helicopters left Chinartu for Tarin Kowt with "*2 x POI*" at 15.51DE. That is, only two persons of interest were returned to Tarin Kowt.

32.2 Person 14 gave evidence to the effect that the last minute change in the number of persons of interest to be returned to Tarin Kowt annoyed Person 26, the troop sergeant.[270] The primary judge found at J[1536] that the change in numbers and the annoyance of Person 26 provided "*clear and strong support for the account by Person 14*". That finding is in error:

(a) At 15.30 the numbers had plainly been rather tentative ("*to be confirmed…at this time*"). Indeed, the evidentiary support for this finding is so flimsy, that it provides a good example of the failure of the primary judge to properly apply section 140 of the *Evidence Act*.

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[267] Part B, Tab 342/1011, Ex A10.51, Part B, Tab 366/1421, Ex R36.
[268] Part B, Tab 342/1011, Ex A10.51, Part B, Tab 366/1421, Ex R36.
[269] Part B, Tab 337/1006, Ex. A10.46, Part B, Tab 365/1655, Ex R192.3.
[270] Part B, Tab 1845, T1443 L29-T1444 L6 (P14).

(b) There is no apparent logical reason why Person 26 would have been troubled by a reduction in the number of prisoners to be returned to base.

(c) The primary judge relied on Person 14's own evidence about Person 26 as corroborating Person 14's own account. This reasoning is circular. The only documentary evidence said to corroborate his account is a shift from a tentative three-four POI (that is to be confirmed) to be returned to base down to two persons.

33. Credibility of Persons 11, 32 and 35; Notice of Appeal, Ground 34

33.1 The primary judge repeats the submissions made in respect of Person 11 above at 27.1. The primary judge rejected his evidence with respect to the Chinartu mission at J[1535].

33.2 As to Person 32 (who like Person 11 was alleged by Person 14 to have been present at the execution), the primary judge rejected his evidence at J[1535]. At J[1292] the primary judge had previously accepted evidence from Person 32 with respect to the Darwan mission which contrasted with Person 35 and generally did not assist the Appellant. At J[1400] and [1442] the primary judge accepted the evidence of both Person 32 and 35 to the effect that their patrol (including NDS/partner force members) had no engagement at Chinartu and relied on this evidence as assisting the Respondents' case. The primary judge reasoned in this way despite the fact that there was another NDS patrol on this mission.[271]

33.3 The Appellant submits that the matters relied upon by the primary judge for his adverse credit findings as to Person 32 (see especially J[1495]) and for Person 11, even if accepted, are insufficient to justify the wholesale rejection of their evidence, particularly when it was uncontradicted or corroborated by the evidence of other witnesses (not placing reliance on the Appellant in this context) or documents. Quite apart from the submissions above concerning the cache and the timing, this finding involved an allegation of an execution carried out in front of an audience of Australian soldiers (Persons 11, 14, 32 and two engineers) as well as many partner

[271] Part B, Tab 1863, T4639 L33-34 (P31), Part B, Tab 1871, T5686 L33 (P11). See the submission made at Part B, Tab 1885, ASR [58(c)].

force soldiers. The finding is inconsistent with the contemporaneous operational reporting in circumstances where no findings were made as to how the operational reporting came to be falsified.

Relevance of evidence concerning the presence of Person 12

33.4 At J[1508]-[1509] the primary judge made findings to the effect that the Appellant and Persons 32, 35 and 38 had put forward a deliberately false narrative concerning Person 12's removal on or about 31 July 2012. At J[1510] the primary judge appeared to decline to find that this narrative was put forward out of a consciousness of guilt. The reason was that until May 2020 the Respondents had also alleged that Person 12 was present and an integral part of the murder at Darwan (it later being agreed Person 12 was not present) and the trial judge could not be sure whether the motivation for the false narrative about Person 12 had its roots in a desire to meet the Darwan allegation as opposed to the Chinartu allegation. In any event there is no basis for this Court to entertain a consciousness of guilt submission as a matter probative of the Chinartu murder given the finding of the primary judge at J[1510].

Conclusion

33.5 Given the serious nature of the allegation, the evidence was insufficient to support the primary judge's finding that the Appellant was complicit in a murder at Chinartu. The finding depends on the evidence of a single, claimed *"eyewitness"* whose account, both insofar as it depends upon the acceptance of the discovery of an undocumented cache and an implausible timeline, is improbable. Even discounting the inconsistency of both the evidence of other witnesses and the content of the official records, with the account of Person 14, his evidence with respect to this mission was too unreliable to support the finding made.

34. CONCLUSION

34.1 In the extraordinary circumstances of this case which involved historic allegations of murder, or complicity in murder in 2009 and 2012, in a foreign country, with no forensic evidence, belief in the evidence of the witnesses called by the Respondents and disbelief in the evidence of the Appellant and his witnesses, cannot be a rational basis upon which the combined effect of the whole of the evidence is not properly considered when forming the view that there is a reasonable satisfaction of the truth of a murder allegation.

34.2 The invitation by the Respondents, which the primary judge appears to have accepted, which conflated the concepts of credibility in witnesses and the Court being reasonably satisfied of the truth of multiple murder allegations, fundamentally departed from the defining safeguards of the *Briginshaw* standard which has regard to the presumption of innocence. That safeguard protects people from the risk of being found by a court, in a civil trial, of findings that they have committed serious crimes, that they did not commit. The ultimate question for this Court, which must be answered in the negative, is whether the Court is of the view upon the evidence being considered, it is reasonably satisfied that the Appellant, and other persons murdered, or were complicit in the murder, of four unarmed Afghans in 2009 and 2012, when the Appellant served as a distinguished member of the Australian Defence Force. There can be no suggestion in this case that the primary judge had any relevant advantage in considering the evidence which the Full Court does not.

34.3 For the reasons advanced in these submissions, on any principled approach to the evidence, the Full Court should make the following orders:

(i) Allow the appeal.

(ii) The judgment for the Respondents be set aside.

(iii) There be judgment for the Appellant in an amount to be assessed on remitter to a Justice of the Federal Court other than Justice Besanko.

(iv) The Respondents pay the Appellant's costs of the proceedings before the primary judge and before this Full Court.

34.4 The Appellant will need to file supplementary submissions and amend the Notice of Appeal once the primary judge delivers his judgment and his orders relating to the costs sought by the Respondents of the proceedings.

Bret Walker **Arthur Moses SC** **Matthew Richardson** **Phillip Sharp**

Counsel for the Appellant

6 October 2023