SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCR 2025 0226

ERIN TRUDI PATTERSON Applicant

v

THE KING Respondent

S EAPCR 2025 0218

DIRECTOR OF PUBLIC PROSECUTIONS Appellant

v

ERIN TRUDI PATTERSON Respondent

JUDGES:	McLEISH, TAYLOR and KIDD JJA
WHERE HELD:	Melbourne
DATES OF HEARING:	19–20 August 2026
DATE OF JUDGMENT:	30 October 2026
MEDIUM NEUTRAL CITATION:	[2026] VSCA 253
JUDGMENT APPEALED FROM:	*DPP v Patterson* (Supreme Court of Victoria, Beale J, 7 July 2025) (Conviction); [2025] VSC 557 (Sentence)

CRIMINAL LAW – Appeal – Conviction – Application for leave to appeal against conviction – Jury sequestration – Separation oath administered to jurors – Jurykeepers' oath administered – Prosecution solicitors and informant staying at same hotel as jury during part of deliberations – Jury accommodated on separate floor – Jury ate meals in separate room to other guests – Assurance from sworn jurykeeper of no communications between jury and solicitors or informant – Prosecution's confirmation – Submissions based on circumstance of risk – 'Double might' test – Merely seeing solicitor or informant not constituting 'communication' – Failure to establish more than conjecture, guesswork or surmise – Substantial miscarriage of justice not established – Leave to appeal granted – Appeal dismissed.

Juries Act 2000, ss 49, 50; *Criminal Procedure Act 2009*, s 276(1)(c).

HCF v The Queen (2023) 280 CLR 596; *R v Chaouk* [1986] VR 707, applied; *CMG v The Queen* (2013) 46 VR 728; *Webb v The Queen* (1994) 181 CLR 41, discussed; *R v Chung; R v Rechichi* (2010) 25 VR 221; *R v Sussex Justices; ex parte McCarthy* [1924] 1 KB 256; *Youssef (a pseudonym) v The Queen* [2019] VSCA 240; *Birchall v The King* [2026] VSCA 63, considered.

CRIMINAL LAW – Appeal – Conviction – Application for leave to appeal against conviction – Admissibility of evidence – Evidence of internet posts of death cap mushroom sightings admitted with expert evidence of call charge records and event-based monitoring data – Expert evidence indicated whether data consistent with applicant visiting locations of death cap mushroom sightings on relevant dates – No direct evidence applicant saw death cap mushroom posts – Expert evidence not merely speculative – Expert evidence relevant and probative in context of circumstantial case – Modest probative value – Limitations of expert evidence clearly explained to jury – Marginal risk of unfair prejudice – Probative value not outweighed by risk of unfair prejudice – Leave to appeal granted – Appeal dismissed.

Evidence Act 2008, s 137.

CRIMINAL LAW – Appeal – Conviction – Application for leave to appeal against conviction – Tendency evidence – SD card with dated photographs of wild mushrooms found in applicant's possession – Defence sought to tender in cross-examination – Whether photographs original evidence of applicant's interest in foraging for wild mushrooms – Whether photographs evidence of tendency to forage for wild mushrooms – Ruling that photographs not admissible as original evidence – Ruling that photographs lacked significant probative value and not admissible as evidence of tendency – Applicant gave evidence of tendency to forage for wild mushrooms – SD card admitted during applicant's evidence – Whether right to silence compromised by need to give evidence following inadmissibility ruling – No identifiable disadvantage – Leave to appeal refused.

IMM v The Queen (2016) 257 CLR 300, applied.

Evidence Act 2008, s 97.

CRIMINAL LAW – Appeal – Conviction – Application for leave to appeal against conviction – 'Anti-motive' evidence of good relationship between applicant and victims central to defence case – Facebook messages adduced by prosecution demonstrating relationship not always harmonious – Whether relationship evidence adduced by prosecution to rebut anti-motive evidence or to establish motive – Clear communications to jury that evidence not used to establish motive – No danger of unfair prejudice to applicant – Leave to appeal refused.

Wilson v The Queen (1970) 123 CLR 334, applied.

CRIMINAL LAW – Appeal – Conviction – Application for leave to appeal against

invitation to jury to reason impermissibly, or reversal of onus of proof – Applicant questioned by prosecutor about other witnesses' evidence and interest in death cap mushrooms – Cross-examination of applicant not unfair – Whether cross-examination about applicant's access to website on death cap mushrooms invoked tendency reasoning – No tendency reasoning – Leave to appeal refused.

Lynn v The King [2025] VSCA 315, applied.

CRIMINAL LAW – Appeal – Conviction – Application for leave to appeal against conviction – Prosecutor's closing address – Applicant alleged substantial miscarriage of justice – 35 complaints in total – Applicant argued prosecutor misstated, distorted and selectively used evidence – Whether prosecutor's closing address fair – Defence counsel made forensic decision not to challenge at trial – Defence counsel criticised prosecutor's approach in closing address – No unfairness or miscarriage of justice – Leave to appeal refused.

Lynn v The King [2025] VSCA 315, considered.

CRIMINAL LAW – Appeal – Sentence – Non-parole period – Crown appeal – Murder – Attempted murder – Life imprisonment – Sentencing judge determined not inappropriate to fix non-parole period under *Sentencing Act 1991* s 11(1) – Non-parole period 33 years – Section 11(1) not creating two-stage sentencing – Whether reasonably open to sentencing judge to impose 33-year non-parole period – Heinous crimes – Intention to kill four family members – Deliberately served poison – Repeated false statements that no foraged mushrooms used in meal – Intention to kill ongoing for nearly three weeks – Anticipation of severe and protracted suffering – Elaborate cover-up – Betrayal of familial trust – Highly restrictive prison conditions – Offender will be 82 years old at conclusion of non-parole period imposed – Non-parole period not reasonably open – Appeal allowed – Inappropriate to fix non-parole period.

CRIMINAL LAW – Appeal – Sentence appeal – Crown appeal – Standard of appellate review – Sentence including decision under *Sentencing Act 1991* s 11(1) whether inappropriate to fix non-parole period – *House v The King* (1936) 55 CLR 499 applies.

CRIMINAL LAW – Appeal – Sentence appeal – Standard sentence scheme – Life sentence – Minimum non-parole period 30 years – Minimum a floor, not a sentencing guidepost – *Sentencing Act 1991* s 11A(4).

Sentencing Act 1991, ss 5, 6A–6F, 11(1), 11A.

R v Coulston [1997] 2 VR 446; *R v HCZ* [2026] HCA 24; *Hunter v The Queen* (2013) 40 VR 660; *Shaptafaj v The King* [2023] VSCA 91; *Cardamone v The Queen* [2019] VSCA 190, discussed; *Yat v The King* [2024] VSCA 93; *R v Lowe* [1997] 2 VR 465; *Crump v New South Wales* (2012) 247 CLR 1; *R v Jamieson* (1992) 60 A Crim R 68; *Mitchell v The Queen* (1986) 184 CLR 333; *R v Shrestha* (1991) 173 CLR 48; *DPP v Tawdros* [2026] VSCA 74; *DPP v Karazisis* (2010) 31 VR 634; *DPP v Lombardo* (2022) 302 A Crim R 329; [2022] VSCA 204; *Ayol v The Queen* [2014] VSCA 151; *Clarkson v The Queen* (2011) 32 VR 361; *R v Pham* (2015) 256 CLR 550; *Watkins (a pseudonym) v The King* [2023] VSCA 203;

Power v The Queen (1974) 131 CLR 623; *Bugmy v The Queen* (1990) 169 CLR 525; *Phillips v The Queen* (2012) 37 VR 594, considered.

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Respondent/Appellant:	Ms A Hogan, Solicitor for Public Prosecutions

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McLEISH JA

TAYLOR JA

KIDD JA:

Introduction

1 On Saturday 29 July 2023, the applicant Erin Patterson hosted a lunch for four guests at her home. The guests were the parents of her estranged husband Simon, namely Donald and Gail Patterson, and Simon's aunt and uncle Heather and Ian Wilkinson. At the lunch, the applicant served individually portioned beef Wellingtons.

2 The meal contained poison from death cap mushrooms and the four guests fell seriously ill. Heather Wilkinson and Gail Patterson died from death cap mushroom poisoning on 4 August 2023 and Donald Patterson died from the same cause on 5 August 2023. Ian Wilkinson nearly died but survived the poisoning.

3 Death cap mushrooms (*amanita phalloides*) are a species of wild mushroom that are highly poisonous. They are found in or very close to the root zone of their tree partners. In Australia, most death cap mushrooms are reported to grow under oak trees. Death cap mushrooms are not farmed or produced in commercial settings. Most observations of death cap mushrooms in Victoria have been made in the month of May. In nature, death cap mushrooms will last approximately one to two weeks in situ. Once collected, very fresh mature spooring bodies can last for up to a few weeks if refrigerated, but may start to become soft and mushy within a couple of days to a week.

4 The main toxins of concern in *amanita phalloides* are amatoxins. Amatoxins are a 'family' composed of a number of toxins called amanitins. Depending on the species, the most common toxins produced by death cap mushrooms are Alpha-amanitin, Beta-amanitin, and (to a lesser extent) Gamma-amanitin. These amanitins exhibit human toxicity and can be lethal due to interruption of metabolic processes, which can cause tissue necrosis leading to irreversible structural tissue damage, particularly in the liver and kidneys.

5 The estimated lethal dose of amatoxins in humans is 0.1 milligrams per kilogram. About three tablespoons, or 50 grams, of death cap mushrooms may contain the potentially fatal quantity of toxin for a 70 kilogram adult.

6 On 7 July 2025, after a trial, the applicant was convicted of three counts of murder and one count of attempted murder. On 8 September 2025, she was sentenced to life imprisonment with a non-parole period of 33 years.

7 The applicant seeks leave to appeal against her convictions on seven grounds as described later in these reasons. The Director of Public Prosecutions appeals against the sentence on two grounds. For the reasons that follow, leave to appeal against

conviction is granted in respect of two of the grounds, but is otherwise refused, and the appeal against conviction is dismissed. The appeal against sentence is allowed.

8 It is necessary to address first the application for leave to appeal against conviction.

Prosecution case at trial

Invitations to lunch

9 The applicant and Simon Patterson married in June 2007 and had two children, a son born in 2009 and a daughter in 2014. During the marriage, the applicant and Simon separated several times for short periods but reconciled. Late in 2015, however, they separated permanently. At this time, the applicant purchased a house in Korumburra while Simon lived at the former family home, also in Korumburra. During the separation, the applicant and Simon remained amicable and shared custody of their children. They remained in regular close contact and went on family holidays together.

10 The applicant moved into a home in Leongatha in the first half of 2022.

11 In late 2022, Simon first noticed a sustained change in his relationship with the applicant. On one occasion, when he was dropping the children at the applicant's home, the applicant expressed concern to him over the fact that his tax return for the previous financial year had stated that they were 'separated'. She said that she would need to seek child support from him. Their communication from that point began to decline. Issues arose regarding child support, including whether Simon should make additional payments for expenses such as school fees. Around this time, Simon Patterson attended Korumburra Baptist Church every Sunday and the applicant attended with the children every second Sunday.

12 On 24 June 2023, the applicant hosted Donald and Gail Patterson at her home for lunch, together with the children. Simon had also been invited but declined the invitation.

13 At some point before 28 June 2023, the applicant told Donald and Gail Patterson that she had a lump in her elbow that required testing and that she had an appointment at St Vincent's Hospital on 28 June 2023 for that purpose. In the evening on 28 June 2023, Gail Patterson sent a text message to the applicant enquiring how she had gone at the appointment. The next day, the applicant replied to the effect that the appointment 'went okay' and thanked Gail for asking. The applicant said that she had a needle biopsy taken for the lump and would be returning for an MRI the following week. She said, 'we'll know more after the results of those two things'.

14 On 6 July 2023, Gail sent the applicant a further text message asking how her medical tests the previous day had gone. The next day, the applicant responded thanking Gail for the message and stating that there was 'a bit to digest with everything that's come out of it all', adding that she 'might talk more about it with you both when I see you in person'. The message concluded 'Love, Erin'.

15 On Sunday 16 July 2023, the applicant attended the Korumburra Baptist Church Sunday service along with the children. Simon also attended, as well as his parents and Heather and Ian Wilkinson. Ian conducted the service. The applicant approached Simon after the service and invited him to come to lunch with her on Saturday 29 July 2023, together with Donald, Gail, Heather and Ian, whom Simon understood she had already invited. Simon's evidence was that she told him that the purpose of the lunch was to discuss some medical issues she had and to get advice about how to 'break that to the kids'. The applicant told Simon that it was important that the children were not present for the lunch.

16 Simon indicated that he was willing to attend the lunch. Later that day, he discussed the lunch with his parents. They told him that they had been invited but they were not sure what the purpose of the lunch was. Simon told them what the applicant had already told him, namely that the purpose of the lunch was to discuss the applicant's medical issues and how to communicate them to the children.

17 The day before the lunch, 28 July 2023, at 6:54 pm, Simon sent the applicant a text message telling her that he would not be attending the lunch. The message said, 'Sorry, I feel too uncomfortable about coming to the lunch with you, mum, dad, Heather & Ian tomorrow, but I am happy to talk about your health and implications of that at another time if you'd like to discuss on the phone. Just let me know.'

18 The applicant responded five minutes later, saying:

> That's really disappointing. I've spent many hours this week preparing lunch for tomorrow which has been exhausting in light of the issues I'm facing and spent a small fortune on beef eye fillet to make beef wellingtons because I want it to be a special meal as I may not be able to host a lunch like this again for some time. It's important to me that you're all there tomorrow and that I can have the conversations that I need to have. I hope you'll change your mind. You're [sic] parents and Heather and Ian are coming at 12:30. I hope to see you there.

19 Simon did not reply, but at some stage informed his parents that he would not be attending.

Lunch

20 On the day of the lunch, or the day before, the applicant told the children that she wanted the lunch to be the 'five adults', so that the children were to go together with a friend to McDonald's in Leongatha for breakfast or lunch and then to the cinema. The applicant drove the three children to McDonald's, and dropped them off some time before midday. Simon called the children around midday and offered to collect them after the movie.

21 The four lunch guests travelled together to the applicant's home and arrived at around 12:30 pm. The children were not present. The applicant showed the guests into the dining/living area. They all went into the back garden before coming inside where the

applicant started serving lunch, which she had been cooking before they arrived. Gail and Heather offered to help the applicant in the kitchen but she told them that it was all in hand. Neither Gail nor Heather helped to prepare or plate the meal.

22 The meal consisted of individual beef Wellingtons, mashed potato and green beans, which the applicant placed on the guests' plates. The beef Wellingtons were prepared as a piece of steak covered with mushrooms and encased in pastry. Ian Wilkinson gave evidence that there were four large grey-coloured dinner plates and one smaller plate which was lighter in colour; he described it as 'orangey-tan'. Simon Patterson gave evidence that Heather later commented on the fact that the applicant had eaten off a different coloured plate. Ian gave evidence of Heather 'reminding' him of that fact. Heather and Gail took the four large plates from the bench to the table and the applicant took the smaller, lighter coloured plate to her place at the table. Ian Wilkinson gave evidence that the four guests ate from the four grey plates, and the applicant ate from the orangey-tan plate.

23 Ian and Heather ate the whole of their meals. Gail ate about half of her beef Wellington and gave the rest to Donald, who ate his own as well as some of Gail's. The applicant also ate a beef Wellington, but not all of it. After the main meal, they ate dessert, consisting of a cake which Gail had brought, and a fruit platter prepared by Heather.

24 Ian Wilkinson gave evidence that, after the lunch, the applicant announced that she had cancer and asked for advice on whether to tell the children or to keep it from them. After a discussion, they prayed as a group for the applicant's health and wisdom in relation to telling the children.

25 During the afternoon, Simon picked up the children and dropped his son and his son's friend at the applicant's house. He did not go inside or speak to any of the lunch guests.

26 The applicant's son gave evidence that he helped the applicant clean up after the lunch. He said he collected the plates and put them next to the sink, together with forks and spoons which were on the plates. He said that the plates were white and about 15 centimetres in diameter. When asked whether they were little serving plates or dinner plates, he said that they were dinner plates, 'big plates' that the applicant would serve a meal on.

27 In the early evening, the applicant drove her son's friend back to his home. She then dropped her son at Subway in Leongatha, where he purchased a meal. At around 9 pm, Simon dropped their daughter back to the applicant's house. Simon did not go inside or talk to the applicant.

Aftermath of the lunch

28 At around midnight on the evening following the lunch, Heather and Ian Wilkinson started to suffer nausea, vomiting and diarrhoea, which continued through the night. At around dawn on Sunday 30 July 2023, Heather spoke with Donald and Gail by

telephone, and learned that they were also unwell. Donald and Gail had already called an ambulance.

29 At about 8:45 am, Donald Patterson rang Simon. He said that he and Gail were vomiting and had diarrhoea which had started around midnight for him and around 1 am for Gail. He told Simon he had called an ambulance.

30 At about 9:15 am, an ambulance attended the home of Donald and Gail Patterson. They were taken to Korumburra Hospital.

31 After speaking with Donald, Simon tried to call Ian and Heather Wilkinson, but neither answered their phones. Simon drove to their house. Ian answered the door. He and Heather were worn out and experiencing ongoing vomiting and diarrhoea. Ian invited Simon inside, where Heather was on the couch. Both were obviously unwell. It was agreed that Simon would call an ambulance. Heather said to Simon that she had noticed that 'Erin served herself her food on a coloured plate, which was different to the rest'.

32 Simon was informed that it would be an hour before an ambulance could be sent. He therefore drove the Wilkinsons to Korumburra Hospital but found that it was at capacity. He then drove them to Leongatha Hospital. On the way there, Heather said, 'Is Erin short of crockery? Is that why she would have this different plate kind of coloured plate that she served herself with?'. They arrived at Leongatha Hospital at 10:57 am. Both continued to vomit and to experience diarrhoea during the afternoon.

33 In the meantime, Donald and Gail Patterson arrived at Korumburra Hospital by ambulance. At 10:10 am, they were assessed by nurse Lisa Shannon. They reported that they had been unwell with vomiting and diarrhoea since the night before and that they had eaten a beef and mushroom dish for lunch, which they thought had caused the sickness. The Pattersons were admitted to the urgent care centre and subsequently admitted to the ward. Tests were conducted within the hospital and they were treated for gastroenteritis.

34 Simon arrived at Korumburra Hospital shortly after midday. Donald Patterson told Simon that the applicant had told him and Gail that she had tests for something on her elbow and that the tests revealed ovarian cancer. The applicant had said she was expected to need chemotherapy and potentially surgery, and that she was not sure how to tell the children.

35 During the afternoon, testing revealed that both Donald and Gail's lactate levels were elevated and a decision was made to transfer them to Dandenong Hospital for further evaluation and care. Donald and Gail were transferred around 5 pm, and arrived at Dandenong Hospital shortly after 6:35 pm. Donald reported having upwards of 30 vomiting and diarrhoea episodes since midnight as well as experiencing mild intermittent abdominal pain associated with the vomiting and diarrhoea. Tests were performed which indicated abnormal liver function, significant kidney damage and a raised lactate level. A CT scan showed his stomach and colon to be distended by fluid.

His vomit and bowel motions contained blood. Gail's initial liver function tests were normal apart from elevated lactate.

36 At 9:30 pm, Dr Beth Morgan commenced her shift at Dandenong Hospital and took over the care of Donald Patterson. She was concerned that gastroenteritis alone was unlikely to explain the severity of his symptoms. At 10:24 pm, she telephoned the toxicology registrar, Dr Mark Douglas, and gave him the presenting history of the Pattersons. Dr Douglas expressed concern that Donald's symptoms might indicate serious toxin syndrome caused by ingestion of *amanita phalloides* mushrooms. Dr Douglas advised Dr Morgan as to the appropriate treatment of the Pattersons, which included infusion of N-acetylcysteine ('NAC'), a medication to protect the liver. A decision was made not to use Silibinin, the specific antidote for *amanita phalloides* poisoning, as there was not sufficient evidence to confirm the ingestion of death cap mushrooms. Dr Douglas asked Dr Morgan to ascertain the source of the mushrooms and to contact Leongatha Hospital to check on the clinical status of the other patients.

37 At 11:20 pm, Donald Patterson was admitted to the intensive care unit and started receiving NAC shortly after midnight. In the early hours of Monday 31 July 2023, Dr Morgan referred Gail to the intensive care unit and, following advice from Dr Douglas, she also started receiving NAC around 4:30 am.

38 At 6:50 am, Dr Morgan telephoned Dr Douglas and provided a clinical update on Gail's worsening condition. Dr Douglas advised treatment for *amanita phalloides* poisoning, including the provision of Silibinin. Dr Morgan arranged for Silibinin to be sourced.

39 At about 7:10 am, Dr Morgan telephoned Dr Christopher Webster at Leongatha Hospital and informed him that there was a high level of concern that Donald and Gail Patterson had been poisoned with *amanita phalloides*, also known as death cap mushrooms. Dr Morgan recommended that Ian and Heather Wilkinson be treated with NAC and benzylpenicillin, and subsequently called around 7:26 am to confirm that they too could be transferred to Dandenong Hospital. They were conveyed by ambulance to Dandenong Hospital and arrived shortly after 9 am.

40 The lunch guests were variously treated with activated charcoal, intravenous rifampicin, intravenous fluid replacement and continuous NAC infusion, based on the working diagnosis of *amanita phalloides* poisoning. Eventually, due to their critical condition, they were transferred to the intensive care unit ('ICU') of the Austin Hospital.

41 Donald and Gail Patterson arrived at the Austin Hospital intensive care unit on Monday 31 July 2023. Heather and Ian Wilkinson arrived the following day. Each of them was sedated and intubated, and each was critically unwell with altered liver function. The cause of their illnesses was accepted by treating physicians to be *amanita* poisoning. They each received intensive medical treatment at the Austin, including enteral multi-dose activated charcoal, intravenous Silibinin and ongoing administration of higher doses of NAC.

42 Donald underwent a liver transplant. It was determined that Gail was no longer capable of surviving an emergency liver transplant. Heather was found to be too unwell to benefit from surgical intervention. Despite treatment, they continued to deteriorate and medical professionals ultimately concluded that treatment would not help them. Heather Wilkinson died on Friday 4 August 2023 at 2:05 am from acute liver failure and multiple organ failure with a clinical diagnosis of *amanita* mushroom poisoning. Gail Patterson died at 5:55 pm the same day due to multiple organ failure resulting from acute liver failure due to clinically-diagnosed *amanita* mushroom poisoning. Donald Patterson died on Saturday 5 August 2023 at 11:30 pm from refractory multiple organ failure secondary to acute liver failure due to clinically-diagnosed *amanita* mushroom poisoning.

43 Ian Wilkinson's condition gradually improved and he was extubated on 14 August 2023. He was discharged to a rehabilitation ward on 11 September 2023.

44 Meanwhile, on the morning of Sunday 30 July 2023, the applicant told her children that she had diarrhoea and that her stomach was sore. In a telephone call, Simon informed the applicant that the four lunch guests were sick and in hospital, and asked how the applicant was. She told him that she had experienced frequent diarrhoea on Saturday afternoon. Simon's evidence was that the applicant told him that she had experienced diarrhoea later that evening, and about every 20 minutes, lasting all night. She said that she had not gone into the Subway store with their son on Saturday evening because she feared she would have an accident if she got off the seat.

45 During the early afternoon, the applicant left her home to drive her son to a flying lesson in Tyabb, over an hour away. The applicant gave no indication that she needed to stop to use the toilet. At a service station along the way, she entered a public toilet but exited nine seconds later. Roughly an hour into the trip, the flight instructor called the applicant and cancelled the lesson due to poor weather. The applicant turned the car around and drove back to Leongatha. The prosecution contended that the applicant did not use a toilet during the trip, nor did she indicate that she needed to do so. At about 5 or 5:30 pm, the applicant and the children ate dinner, consisting of mashed potato, beans and meat which the applicant said later had been left over from the lunch and which she had reheated for dinner after removing the pastry and scraping off the mushrooms.

46 At about 7:30 am on Monday 31 July 2023, the applicant telephoned Simon. She told him that she had been having diarrhoea every 20 minutes and thought she should go to hospital. She asked Simon to take her. Simon declined to take her, and told her to either call an ambulance or try to go to the hospital herself. The applicant presented herself to Leongatha Hospital shortly after 8 am, carrying a handbag and backpack. At this time, staff were urgently arranging the transfer of the Wilkinsons to Dandenong Hospital, having just been informed that they were suffering death cap mushroom poisoning. Dr Webster was ending his shift as the on-call doctor, but told the applicant that she had been kept waiting because there were two critically unwell patients. He asked her why she had come to the hospital. She replied that she had 'gastro'.

Dr Webster asked her name and she gave it to him. He realised that she was the fifth attendee at the lunch. The applicant was brought into the urgent care centre.

Applicant's medical condition and explanation of source of mushrooms

47 The applicant told nurse Kylie Ashton that she had cooked and eaten the lunch. Dr Webster told the applicant that there was a high level of concern regarding possible death cap mushroom poisoning. He asked the applicant where she obtained the mushrooms used in the beef Wellingtons. She told him that she had bought them at Woolworths. Dr Webster told the applicant that they needed to commence emergency intravenous medical treatment. The applicant was told that she would need to be assessed and would likely be transferred to another hospital.

48 Ms Ashton asked the applicant to come to a bay in the urgent care centre for assessment, but the applicant declined and said that she was not prepared to stay in hospital. Ms Ashton took the applicant's observations, which showed a high heart rate. Her blood pressure was also high. The applicant reported that she had experienced diarrhoea and nausea, but no vomiting, her symptoms having started in the evening after the meal. The applicant repeatedly said that she needed to leave. She said that she had not come prepared to be admitted to hospital, just to be checked. Ms Ashton's evidence was that she told the applicant that she was at risk and that the other guests at the lunch were extremely unwell and being transferred. The applicant repeatedly declined to be admitted.

49 Ms Ashton asked the applicant if the children had eaten the same meal. The applicant said that they had eaten some of the leftovers the next day but that she had scraped the mushrooms off. Ms Ashton told the applicant that it was important that the children be brought to the hospital since they had eaten the same food.

50 Shortly afterwards, the applicant got up and started walking out. Ms Ashton and Dr Veronica Foote, who had just started as doctor on duty after Dr Webster, intercepted the applicant as she was leaving and advised her against doing so. The applicant said that she was not prepared to stay at the hospital and needed to go home to sort out things for her children and animals. Ultimately the applicant signed a 'discharge against medical advice' form and left at around 8:10 am, saying that she would return in about 20 to 30 minutes.

51 At 8:22 am, Dr Webster received a phone call from Dr Morgan. Dr Webster informed her that the applicant had presented at hospital. Dr Morgan expressed concern about the number of patients that could be received and treated at Dandenong Hospital and indicated that the applicant would have to be transferred to a different hospital. Ms Ashton subsequently informed Dr Webster that the applicant had discharged herself and left the hospital against medical advice. Dr Webster was concerned and made three phone calls to the applicant's mobile phone which all went through to message bank. He left a voicemail each time, asking the applicant to return to hospital for treatment. In the third message, Dr Webster said that he would have to call the

police to ask for their assistance in getting her to return to hospital, as he was concerned for her health.

52 After consulting with senior officers, Dr Webster rang 000 at approximately 9:30 am. Police officers were dispatched to the applicant's home in order to conduct a welfare check.

53 At 9:48 am, the applicant presented again at the Leongatha Hospital. She told nurse Mairim Cespon that she had been told that she had to be assessed. She told Ms Cespon that she had diarrhoea and nausea, but no vomiting. Dr Webster spoke to the applicant, who informed him that the children had eaten the leftovers but not the mushrooms and pastry surrounding the meat. Shortly before 10 am, Dr Webster told the applicant that the children needed to be medically examined. The applicant responded that they had not eaten the mushrooms. Dr Webster reiterated the critical importance of getting the children to a medical facility to be tested and potentially treated for lethal death cap mushroom poisoning. The applicant became emotional and asked whether it was really necessary, indicating that she did not want her children to be panicked or stressed. Dr Webster replied bluntly that they could be scared and alive, or dead. The applicant stated that she would contact the school and arrange for the children to receive medical attention.

54 Ms Cespon took the applicant's observations shortly after 10 am. Her heart rate and blood pressure were elevated, although her heart rate had come down. The applicant went to the toilet three times in close succession shortly after 10 am, and twice more at 10:15 am and 11:50 am.

55 While the applicant was at the hospital, police officers attended her home and found nobody present. The applicant gave permission for them to recover the leftover food from the lunch, informing them that there were some scrapings from the leftovers in the bin in a Woolworths bag.

56 The applicant provided one of the officers with the gate code for the property and said that the leftovers could be found in a brown Woolworths paper bag either in the red bin located outside the house or at another location inside the house. The officer found leftovers which looked like a meat-filled pastry at the bottom of the outside bin. The officers left the property with the leftovers and took them to Leongatha Hospital. One of the officers handed Ms Cespon the Woolworths bag, which she showed to the applicant. The applicant confirmed it contained food scraps from the beef and mushroom dish.

57 At 10:23 am, the applicant received a telephone call from Donald's son, Matthew, who had been present with Donald when he was speaking to the toxicologist. Matthew explained to the applicant that the toxicologist wanted to know where the mushrooms had come from. The applicant told him that there were two sources, namely fresh mushrooms from Woolworths and dried mushrooms from a Chinese grocer or supermarket within the Oakleigh area.

58 At around 10:30 am, Dr Foote reviewed the applicant. The applicant said that the beef Wellingtons had contained mushrooms she had bought at Woolworths in Leongatha and dried mushrooms purchased at a Chinese grocer in Melbourne in April 2023. Dr Foote assessed the applicant and formed the opinion that she was moderately dehydrated and appeared to have a gastrointestinal illness. Blood tests did not reveal any metabolic acidosis or electrolyte disturbance. Dr Foote advised the applicant against leaving hospital, but the applicant said there was no one else to pick up her children. Dr Foote offered to telephone the school to see if someone could bring the children to the hospital.

59 During the late morning, the applicant telephoned Simon and told him that the children needed to be brought to hospital for testing. She told him that she was going to pick them up from school. Simon offered to pick the children up, but the applicant said that she needed to do it because it was important that they were not scared about why they needed to be tested. Simon said to her that he was pleased to hear that she was well enough to drive to Phillip Island, where the school was located. The applicant paused and eventually agreed to him picking up the children.

60 Shortly before 12 pm, Dr Conor McDermott, toxicology registrar at Austin Health, rang Dr Foote seeking more information about the mushrooms that were in the meal. Dr Foote handed the phone to the applicant so that she could speak directly to Dr McDermott. She told him that she had bought sliced button mushrooms from Leongatha Safeway and that she had bought some dried mushrooms from a Chinese food shop in Oakleigh. He asked her which one, to which she replied that she did not remember. Dr McDermott offered to name Chinese food stores in Oakleigh to identify which one it might be, but the applicant said that she was not able to recall and said that the shop might have been in Glen Waverley.

61 At 12 pm, nurse Cindy Munro attempted to cannulate the applicant in preparation for administering intravenous fluids and additional NAC that was due to arrive at the hospital. Ms Munro gave evidence, which the applicant denied, that the applicant said that she did not want this and refused treatment. Ms Munro explained that the medication was to protect her liver after having ingested poison. Ms Munro said that the children might have ingested some mushroom, to which the applicant responded that she had scraped it off. The applicant said that the children were not unwell and that she did not want to worry them. She said that she did not want the trouble of taking them out of school. Ms Munro said that the poison could still have gotten into the meat. The applicant became teary and said that she did not want to involve the children.

62 Following discussion with Dr Foote and Ms Munro, the applicant commenced treatment with intravenous fluids and NAC. Arrangements were made to transfer her to a tertiary hospital.

63 Some time before 12:03 pm, Dr Laura Muldoon, a toxicology registrar consulting for Monash Health, telephoned Dr Camille Truong, a research scientist specialising in mycology (the study of fungi). Dr Muldoon told Dr Truong that there were several patients in hospital with symptoms of mushroom intoxication and sought her

assistance in identifying the mushrooms. Dr Muldoon sent an email with a single photograph of the leftover beef Wellington. Dr Truong advised that she could not identify a mushroom from such an image. She said that it was highly unlikely to be death cap mushroom poisoning because it was not the season for such mushrooms and because the mushrooms in the meal were reportedly bought from a shop.

64 Shortly after 12:15 pm, paramedics arrived at Leongatha Hospital to convey the applicant by ambulance to Monash Medical Centre. The applicant appeared to the paramedics to be well and alert. She said that she had ongoing complaints of nausea and diarrhoea.

65 The applicant was conveyed to Monash Medical Centre by ambulance, leaving at about 1 pm. On the way, she complained of nausea and a sudden headache, for which she was given medication. She did not complain of abdominal pain, experience diarrhoea or indicate that she needed to use the toilet during the 90-minute trip. During the trip, paramedic Darcy Cummins asked the applicant where she had sourced the mushrooms used in the lunch. The applicant said that half had come from the local Woolworths and the others were in dried form from an Asian grocer in Melbourne.

66 Simon and the children arrived at Monash Medical Centre at around 2:40 pm, about the same time as the applicant. The applicant was seen by toxicology registrar Dr Muldoon around 4 pm. The applicant appeared to be well, with normal vital signs. Dr Muldoon asked the applicant about the ingredients she had used in the meal. The applicant told her she had used dried or dehydrated mushrooms which she had purchased at an unidentified store, possibly a Chinese store in Oakleigh or Glen Waverley. Dr Muldoon asked her if she had used foraged or wild mushrooms and she said she had not.

67 At about 6 pm, Professor Rhonda Stuart, the director of public health and infection prevention at Monash Health, attended the Monash Medical Centre to ensure that there was no public health risk. The applicant told Professor Stuart that she had made lunch for her ex-husband's relatives and described making the beef Wellingtons. She said she had made a mushroom paste using a packet of fresh mushrooms bought from the supermarket plus some dried mushrooms that she said she had bought from an Asian food shop a few weeks beforehand. The applicant said that she had taken the dried mushrooms out of the packet and put them into a plastic container weeks earlier, and that she had used all the mushrooms. The applicant said that she could not remember if the Asian food shop was in Oakleigh or Glen Waverley. The applicant denied having picked or found any other mushrooms or having used any other mushrooms in the meal. The applicant told Professor Stuart that she had developed symptoms of vomiting, diarrhoea and abdominal pain the day after the meal.

68 At about 10 am the following morning, Tuesday 1 August 2023, Dr Muldoon reviewed the applicant and her blood test results. The applicant had no clinical or biochemical evidence of *amanita* poisoning or other toxicological substance ingestion. Upon review by another doctor just after midday, the applicant appeared clinically well and all of her vital signs were within normal limits. She was discharged from hospital at about 1 pm.

69 In the afternoon, child protection workers attended Monash Medical Centre to review the welfare of the children. The applicant told them that she had invited Donald and Gail for lunch four or five weeks earlier as she missed them. She then saw Donald, Gail, Heather and Ian at church and invited them for lunch. The applicant said that she had some health issues she wanted to talk about to them, and that she wanted emotional support and advice on how to approach that issue with her children. The applicant described the meal she had served and said that the mushrooms had been purchased from Woolworths pre-sliced and that she had some dried mushrooms she had purchased from an Asian grocer in Melbourne. She said she had attended a number of different Asian grocers in Oakleigh and Clayton, and could not recall from which store she had purchased them.

70 On Tuesday 1 August 2023 at 8:33 am, SallyAnn Atkinson contacted the applicant. Ms Atkinson was the manager of the enterics team within the communicable disease prevention and control section of the Department of Health. The applicant told her that she had started to experience symptoms slightly before midnight on the evening after the lunch, including explosive diarrhoea continuing through the night every 15–20 minutes but which had slowed down to every 45 minutes throughout Sunday. She said that she had started to feel better by Sunday evening before the symptoms returned and she started to feel worse. The applicant said that the lunch had consisted of beef Wellington, mashed potato and beans. On the evidence of Ms Atkinson, the applicant stated that she had purchased the majority of the ingredients from Woolworths in Leongatha but that she had also purchased some dried mushrooms from an Asian shop in either Clayton, Mount Waverley or Oakleigh. She said that she could not be sure of the location of the shop. The applicant also said that the mushrooms had come in packaging that was not resealable, so she had thrown it out and placed them in a Tupperware container. She described the mushrooms as smelling ‘funny’ and decided she probably wouldn’t use them all. She stored what was left for several months until she used them again.

71 The applicant told Ms Atkinson that the majority of the mushrooms had come from the Leongatha Woolworths and that the recipe required one kilogram of mushrooms. She said that she had decided to also use the mushrooms purchased from the Asian grocer which were stored in the Tupperware container. She rehydrated them before chopping them into pieces and adding them to the rest of the mushrooms.

72 As a result of this information, the Department of Health arranged to investigate all Asian grocery stores in the suburbs mentioned by the applicant. Later that afternoon, Ms Atkinson attempted to call the applicant, but there was no response and the applicant did not return the call. Ms Atkinson subsequently sent the applicant a text message asking the applicant to call her and outlining a number of questions she wanted answered, including a description of the packaging of the mushrooms from the Asian grocer and any landmarks or roads near the store. Ms Atkinson also left a voice message asking the applicant to call her back. The applicant sent Ms Atkinson a message later, saying that she would get the information to her as soon as possible.

73 The next morning, Wednesday 2 August 2023 at 8:56 am, Ms Atkinson again tried to call the applicant but there was no answer. She left a voicemail message to which there was again no response. At 9:29 am, Ms Atkinson sent the applicant a list of questions and offered to communicate through email if that was preferable. The questions again included queries about the location of the Asian grocer and the packaging of the dried mushrooms. The applicant did not respond. On the same day, an environmental health officer employed by Monash City Council started visiting Asian groceries in the areas specified by the applicant to Ms Atkinson in order to investigate dried mushroom products, fresh mushroom products, supply details, packaging and labelling. He prepared a list of premises registered with Monash City Council in Oakleigh, Clayton and Mount Waverley that retailed as Asian grocery stores.

74 At 1:14 pm, Ms Atkinson received a call from one of the child protection officers who was present with the applicant at her home in Leongatha. The officer handed the phone to the applicant, who then answered some questions about aspects of the lunch. The applicant told Ms Atkinson that she did not use mushrooms purchased from the Asian grocer in any other dish but had opened them, noticed their smell and put them into a Tupperware container and not used them until the lunch. She said that she had checked her bank records and could not find any purchases around the day she purchased the mushrooms, and was likely to have paid in cash for smaller items. She said she could not remember where she would have gone to purchase mushrooms but it was likely to have been strip shopping in and around Oakleigh and Clayton.

75 The applicant gave a detailed description of the packaging. She said it was a clear package that looked like it had been re-packaged, with a white handwritten label on it, and that it was unbranded. She said the name of the mushrooms and weight was recorded on the white label. The applicant described the packaging as smaller in size than a sandwich-type Ziploc bag. Ms Atkinson asked the applicant if she had foraged for mushrooms and picked them herself. The applicant denied that she had done so and said that they had been purchased.

76 At 1:44 pm, Ms Atkinson sent the applicant a text message asking what time of day she thought she had purchased ingredients on the Friday before the lunch. The applicant responded that she had purchased the ingredients on multiple shopping trips that week.

Council inquiries

77 In the course of investigating 14 stores across the suburbs of Oakleigh, Clayton and Mount Waverley between 2 and 3 August 2023, a council officer found that none of the premises had displayed for sale any sliced dried mushrooms in packaging equivalent to a Ziploc, smaller in size than a sandwich bag, which had been repackaged and labelled in the manner described by the applicant.

78 The Department's investigation was unable to identify any store in the suburbs identified by the applicant that sold mushrooms as described by her. It was said there

were no other reports of people falling ill in the same way as the lunch guests. The cluster of illnesses was treated as an isolated event and no products were recalled.

Police investigation

79 On Thursday 3 August 2023, police launched an investigation into the circumstances surrounding the lunch. They executed search warrants at the applicant's home address on 5 August 2023 and 2 November 2023. On each occasion they seized items of interest including electronic devices. Those devices were subsequently analysed by senior digital forensic officer Shamen Fox-Henry.

80 Mr Fox-Henry expressed the opinion that on 28 May 2022 at 7:20 pm, a user of a computer seized on 5 August 2023 entered the search term 'iNaturalist' in the search engine Bing. On the same date between 7:20 pm and 7:23 pm, a user of the computer navigated to the iNaturalist website, visiting several pages including a page titled 'Deathcap [sic] from Melbourne, VIC, Australia on May 18, 2022 at 02:36 PM by [user]. Bricker Reserve, Moorabbin'. On the same day at 7:23 pm, a user of the computer entered the Google search term 'Korumburra Middle Pub', and between 7:23 pm and 7:24 pm a user of the computer navigated to the Korumburra Middle Hotel website and visited several pages including 'YourOrder — Checkout'. A tax invoice from the Korumburra Middle Hotel gave the applicant's details.

81 The applicant's phone records were obtained and then analysed by Dr Matthew Sorrell, principal of a company providing digital forensics research and consulting, and expert in mobile network records. The purpose of the analysis was to determine the extent to which the applicant's call charge records might indicate her location at any particular time by reference to the cell tower or base station with which her mobile phone connected at that time. The evidence, taken with evidence of entries posted to the iNaturalist website on 28 April 2023 and 22 May 2023, was said to be consistent with the possibility that the applicant had visited locations in Loch and Outtrim where notifications of death cap mushrooms had recently been posted. The admissibility of this evidence is the subject of the second proposed ground of appeal.

82 Police also made contact with a number of online associates of the applicant who had communicated with her on Facebook. Various items, including the leftover beef Wellington, were subject to scientific analysis. The medical records of the applicant, the attendees at the lunch and the children were reviewed by medical experts.

83 The computer records showed that in about March, April and May 2023, the applicant started posting messages on a Facebook group chat about dehydrating mushrooms. She said that she had purchased a food dehydrator and posted a few messages and photos about it in the chat, including a photograph of the dehydrator sitting on the kitchen bench. She said that she had been dehydrating mushrooms, blitzing them into powder and hiding powdered mushrooms in 'everything'. This included putting powdered mushrooms into chocolate brownies without her children knowing. She told the group that the dehydrator reduced mushroom mass by 90 per cent.

84 The applicant purchased a Sunbeam food lab electronic dehydrator in Leongatha at 12:17 pm on 28 April 2023. The prosecution alleged that, in the morning before this purchase, at around 9 am, the applicant's mobile service data suggested that she had travelled to and remained in the Loch area before returning to Korumburra. This evidence is the subject of ground 2 of the proposed appeal.

85 During the week after the applicant purchased the dehydrator, she took photographs of what appeared to be slices of mushroom on the wire rack of the dehydrator on scales on her kitchen bench. She took a photograph of several fresh mushrooms on a set of digital scales as well as a screenshot of information on the internet about stage 4 ovarian cancer. On or before 10 May 2023, she took a screenshot of information on the internet about ovarian cancer and brain lymphoma symptoms.

86 On 23 July 2023, six days before the lunch, the applicant attended Leongatha Woolworths and purchased, among other items, two 500 gram packets of sliced mushrooms. On 27 July 2023, two days before the lunch, the applicant again attended the Leongatha Woolworths and, among other items, purchased two 375 gram packets of sliced mushrooms. The recipe for the beef Wellingtons required 700 grams of mushrooms.

87 From 15 January 2023, the applicant started using a Samsung Galaxy A23 smartphone ('phone B'). She used a SIM for a number ending in 783 in this phone.

88 From 12 February 2023, the applicant started using a second Samsung Galaxy A23 smartphone ('phone A'). She used the SIM for the number ending in 783 in this phone also.

89 On 11 July 2023, the applicant connected a new phone number, ending in 835, through the Telstra network using a Samsung tablet.

90 On Wednesday 2 August 2023, the day after she was discharged from hospital, the applicant performed a factory reset on phone B. On the same morning, she drove to the Koonwarra transfer station and dropped off a large black box at the e-waste bin.

91 On Thursday 3 August 2023, the applicant removed the SIM for the number ending in 835 from her Samsung tablet and placed it into phone B.

92 On 4 August 2023, an employee of the Koonwarra transfer station checked the e-waste bin and found a black Sunbeam dehydrator. There was no other item resembling a large black box. The dehydrator was examined by a forensic officer who collected various samples of possible vegetative matter inside the dehydrator for examination. The applicant's fingerprints were identified on the dehydrator.

93 On 5 August 2023, police executed a search warrant at the applicant's home and seized a number of devices including an instruction manual for a Sunbeam food lab electronic dehydrator, computers, a telephone and a tablet. Police also found a black Samsung mobile phone being used by the applicant at the dining table. They permitted

the applicant to retain and use the phone to seek legal advice and make child care arrangements, before seizing it.

94 The applicant's phone records revealed that for a period of time during the execution of the search warrant, the applicant was still utilising her SIM for the number ending in 783 in phone A. This was the phone and number she had been using since 12 February 2023 and throughout the period immediately preceding and during the lunch. This phone and SIM were never recovered by investigators.

95 The mobile phone that the applicant eventually provided to police during the execution of the search warrant was phone B, connected to the number ending in 835, which the applicant had set up on 3 August 2023. During the execution of the search warrant on 5 August 2023, and before handing it over to police, the applicant performed another factory reset of phone B.

96 In an interview conducted on 5 August 2023, the applicant told police that: she had never foraged for mushrooms and did not preserve foods; she had never dehydrated food; she left Leongatha Hospital after her first presentation because she was told the hospital wanted to send her to Melbourne and she needed to go home and feed the animals and pack her daughter's ballet bag, which she did before returning; and that she did not own a dehydrator and did not know anything about a dehydrator in her house. She then said that she might have owned one years ago.

97 It was not disputed at trial that the applicant lied to police about not owning and using a dehydrator and about not having foraged for mushrooms. It was in dispute whether the applicant had foraged for non-poisonous mushrooms.

98 On 6 August 2023 at 5:16 am, the applicant performed a third factory reset of phone B, this time remotely as the handset had been seized by police. Her phone records revealed that from that day, the SIM card for the phone number ending in 783, previously utilised in phone A, was utilised in a Nokia handset. The applicant continued to use the SIM for that number in the Nokia in the days that followed.

99 The applicant's medical files were examined by Professor Andrew Bersten, an intensive care specialist. While the results of some of the applicant's tests were consistent with an acute illness, there was no evidence that she suffered an acute liver injury or significant liver damage. There was insufficient evidence on the files provided to support the assertion that she was diagnosed with cancer in mid-2023. A self-administered screening test for cervical cancer was completed in March 2023 and was negative. The Victorian Cancer Registry, which maintains a record of people with cancer in Victoria, had no record of the applicant having received a cancer diagnosis. The applicant's medical records in the months prior to the lunch contained no record of her receiving a needle biopsy.

100 It was not disputed at trial that the applicant had never been diagnosed with cancer or had a needle biopsy.

101 Dr David Lovelock, a virology and bacteriology diagnostician, was asked to analyse a number of items for the purpose of identifying any species of mushroom that may be present. DNA testing revealed that two samples taken from the Sunbeam dehydrator tested positive for *amanita phalloides*. The remaining samples, including the leftover beef Wellington taken from the applicant's bin, tested negative.

102 Dr Dimitri Gerostamoulos, the chief toxicologist at the Victorian Institute of Forensic Medicine ('VIFM'), was asked to analyse a number of items. After the DNA examination by Dr Lovelock, the leftover beef Wellington and debris from the dehydrator were provided to VIFM on 29 August 2023. Toxicological analysis of samples from the leftover beef Wellington revealed that Beta-amanitin was detected in a mushroom paste sample and in a meat sample. Both Alpha and Beta-amanitin were detected in four of seven items of debris taken from the dehydrator. The four items included the two samples that returned positive DNA results for *amanita phalloides* as well as two that did not.

103 It was not in dispute at the trial that the causes of death of Heather Wilkinson and Donald and Gail Patterson, and the serious illness of Ian Wilkinson, were consistent with *amanita phalloides* toxicity.

Applicant's evidence

Accidental poisoning with foraged mushrooms

104 The defence accepted at trial that the beef Wellingtons consumed by the lunch guests contained death cap mushrooms. It was contended that they had been accidentally foraged by the applicant and stored in her pantry in a Tupperware container after having been dehydrated in an appliance purchased by the applicant in April 2023. The applicant said she had not known that she was feeding her guests poisonous mushrooms.

105 The defence case was that, prior to a conversation with Simon on Tuesday 1 August 2023,[1] the applicant honestly believed that the mushrooms she had used in the beef Wellingtons were sourced only from Leongatha Woolworths and an Asian grocer in Melbourne. Accordingly, her responses to questioning from family members and medical staff reflected this belief. However, the conversation with Simon caused her to question whether the mushrooms she had innocently foraged and dehydrated were in the same container as the mushrooms from the Asian grocer, and thus had been used and served in the beef Wellingtons. On the defence case, at this point, the applicant realised she may have been at fault for the lunch guests falling ill, and began panicking and lying. She then disposed of the dehydrator.

106 In her examination-in-chief, the applicant said that she had an interest in wild mushrooms which started in early 2020 during the first COVID-19 lockdown. She said that she liked the taste of mushrooms and tried different varieties, purchased at places like Woolworths, farmers' markets and grocers in Melbourne, and Asian

1The details of which are below at [265].

grocers, including some in Clayton, Oakleigh and Glen Waverley, when she would take the children to Melbourne for school holidays. She would use mushrooms that she had purchased from Asian groceries in curries or pasta dishes and soups. Between 2020 and mid-2023, she foraged for mushrooms at Korumburra Botanical Gardens and elsewhere. She began dehydrating mushrooms that she foraged quite soon after purchasing the dehydrator in April 2023. She was taken to a report on images obtained from the Samsung tablet that had been seized by police, and said that she was 'pretty sure' she picked mushrooms pictured in that report from the Korumburra Botanical Gardens.

107 The applicant said that she experimented by dehydrating mushrooms whole rather than sliced, but they didn't dry properly and turned out 'a bit mushy'. She experimented to find out what temperature to use, and how long to put the mushrooms in the dehydrator.

108 The applicant said that there were two or three oak trees in the Korumburra Botanical Gardens. She did not pick mushrooms underneath the oak trees, but she picked near them. In May 2023, she took home the mushrooms she picked, cleaned and sliced them, and if she did not want to use them that day she would dry them and put them in the pantry in a Tupperware container.

109 She said that she bought mushrooms from an Asian grocery in Melbourne in April 2023, and was going to use them the day she bought them, but they were very pungent and so she put them in a container in the pantry and took them with her when she went back home. The applicant said that this container of mushrooms was in the pantry when she dehydrated mushrooms in May and June 2023. She said that she put the mushrooms she dehydrated in May and June 2023 into a container which already had dried mushrooms in it.

110 The applicant gave evidence that, after she purchased the dehydrator, she took photos of it and shared them with her Facebook friends. She admitted that she had lied in her police interview when she said that she never dehydrated food and that she did not have a dehydrator in the house. She also said that she had lied in the interview about not foraging for mushrooms. She said that she was aware that there were toxic mushrooms (referring to *inocybe*) growing on her property and that they were probably toxic to dogs.

111 The applicant said that she had found out about various kinds of mushrooms, including death cap mushrooms. She had looked up whether they grew in South Gippsland and found that they essentially did not.

112 The applicant denied having ever foraged for mushrooms in Loch or in Outtrim.

113 The applicant said that it was possible that she did the search on the computer for the iNaturalist website on 28 May 2022 in which the searcher navigated to iNaturalist, then to a world map in relation to death cap mushrooms, then to Victoria, and then to a site of death cap mushrooms in Bricker Reserve in Moorabbin. She also gave evidence that she occasionally ordered food from the Korumburra Middle Pub.

114 She said that on the day after the lunch, half an hour into the trip to her son's flying lesson, she felt like she needed to go to the toilet. She pulled over on the side of the road and went to the toilet in the bush. She had diarrhoea. She cleaned herself up with tissues and put the tissues in a dog bag which she put into her handbag or bag, before resuming driving. Then she stopped at the Caldermeade BP station, went into the bathroom with the soiled tissues in the dog bag and put the bag in the bin.

115 The applicant said that her diarrhoea continued when she got home and through the evening. She scraped the mushrooms and pastry off the leftover beef Wellington and heated it for the children's dinner.

116 In cross-examination, the applicant agreed that she had lied to the police when she told them that she had never foraged for mushrooms. She agreed that she told her Facebook friends things about her personal life, about the children and how she felt about Simon and about things she cooked, including mushrooms.

117 The applicant disagreed when it was put to her that she did not go foraging for non-toxic mushrooms.

118 The applicant said that she had not lied when she said that she dehydrated Woolworths mushrooms and kept them in a container mixed with other dried mushrooms.

Evidence about the lunch and the applicant's medical conditions

119 Upon being asked in cross-examination why she invited Heather and Ian Wilkinson to the lunch on 29 July 2023, the applicant said:

> There were a few reasons. Um well, Ian had been my pastor for years and years and I would see and speak with Ian and Heather a lot after church and I really liked them, and I wanted to — I wanted to have a stronger relationship with them. When I had invited Don and Gail for lunch in June, Gail had said that what I had done to the garden was really nice and Heather would love to see it, and I thought, 'Oh, that's a great opportunity to invite Heather and Ian the next time I have Don and Gail for lunch', and I did that. I just wanted — I wanted to say thank you to them for being good to me over the years. Heather helped me a lot when [my daughter] was little and I started taking her to play group at Korumburra Baptist and I was shy and didn't really know many people, and Heather would sit with me through those play group times and was really kind to me and I wanted to — I wanted to say thank you to her.

120 The applicant gave evidence that she had not said at the lunch on 29 July 2023 that she had cancer. She said that, at the end of the meal, she said that she had an issue a year or two earlier where she thought she had ovarian cancer and that she had had various scans related to that. She said that she had 'led them to believe' that she might be needing 'some treatment in regards to that in the next few weeks or months'. In cross-examination she denied saying that she had received a diagnosis. She said that she tried to convey that she was 'undergoing investigations around ovarian cancer and might need treatment in that regard in the future'.

121 The applicant also gave evidence that she was planning gastric bypass surgery and had an upcoming procedure or pre-appointment for that purpose. In examination-in-chief she agreed that when she had earlier sent a message to Gail saying there was 'a bit to digest with everything' that had come out of the testing, that was misleading. She explained that she had decided that she wanted to do something 'for once and for all' about her weight and poor eating habits. She said that she was 'really embarrassed' about the gastric bypass surgery but thought that 'letting [Gail and Donald] believe' that she had 'some serious issue that needed treatment' might mean they would be able to help with the logistics around the children and she would not have to tell them the real reason.

122 In cross-examination, she confirmed that she had a pre-surgery appointment booked for early September at the ENRICH Clinic in Melbourne. The applicant further agreed that she had an appointment on 13 September 2023 which she cancelled on 11 September 2023.

123 It was put to her that the ENRICH Clinic does not offer gastric bypass surgery or gastric sleeve surgery, or conduct assessments relating to gastric bypass surgery or gastric sleeve surgery. The applicant said that she did not know, and was 'a bit puzzled' because she 'had an appointment with them'. She added that the appointment 'would have been related to weight loss surgery' and that 'perhaps it was a different procedure I was doing through them'. She said that she was 'looking into liposuction as well'.

124 The cross-examiner put to the applicant a police statement by the practice manager of the ENRICH Clinic with clinical records. The applicant accepted that the ENRICH Clinic did not offer, and had never offered, gastric bypass surgery or pre-surgery assessments relating to gastric bypass surgery. She also accepted that the ENRICH Clinic only conducted examinations and procedures relating to the skin and its appendages, such as hair and nails.

125 In re-examination, the applicant confirmed her evidence from cross-examination that she had an appointment on 13 September 2023 which she cancelled on 11 September 2023, which 'would have been related to weight loss surgery' and that she was 'looking into liposuction as well'. The defence tendered Exhibit MM showing call charge records that included calls on the applicant's number with the ENRICH Clinic on 19 April 2023 and 31 May 2023. The defence also tendered exhibit NN including an SMS from the ENRICH Clinic to the applicant confirming an appointment. The applicant said that she phoned or sent an SMS cancelling that appointment.[2]

126 The applicant gave evidence that she had a couple of black dinner plates, a couple of white ones, one with red on top and black underneath, and one her daughter made at kindergarten. She said she did not own any grey plates. She said that she did not own four matching plates. In cross-examination she said that Ian Wilkinson was incorrect when he gave evidence that she plated the main meals on the kitchen bench on four

2Nothing was sought to be made of this evidence in the parties' submissions in this Court. It is recorded here for the sake of completeness.

large grey dinner plates and one smaller dinner plate that was an orange-tan sort of colour. Police did not locate any grey plates in the applicant's home or elsewhere.

127 The applicant gave evidence that she told the guests at the lunch to 'grab a plate' while she finished the gravy, and accepted that Ian Wilkinson had given evidence that Gail and Heather picked up two plates each. No direction was given as to which plate was for which person. The applicant picked up the remaining plate and went to the table. She said that she could not recall which plate she had eaten from.

128 The applicant denied having knowingly served beef Wellingtons poisoned with death cap mushrooms to the lunch guests and having eaten a beef Wellington which was not poisoned, from a different plate.

PART A: PROPOSED CONVICTION APPEAL

Proposed grounds of appeal

129 The applicant advances seven proposed grounds of appeal against her convictions:

1. A fundamental irregularity occurred while the jury were sequestered that has fatally undermined the integrity of the verdicts and requires the quashing of the convictions and an order for a re-trial so that justice can not only be done but be seen to be done.

2. The cell tower evidence and evidence of death cap mushroom sightings in Loch and Outtrim posted to iNaturalist should not have been adduced in the applicant's trial as the evidence was not (i) relevant or (ii) the probative value of that evidence was outweighed by its unfair prejudice and the admission of that evidence occasioned a substantial miscarriage of justice.

3. The learned trial judge erred in ruling that photos and videos related to mushrooms and found on an SD card at the applicant's home was inadmissible during the prosecution case such that a substantial miscarriage of justice has occurred.

4. The 'Facebook evidence' — including the evidence from Facebook 'friends' and Facebook messages — should not have been adduced in the applicant's trial as the evidence was not (i) relevant or (ii) the probative value of that evidence was outweighed by its unfair prejudice and the admission of that evidence occasioned a substantial miscarriage of justice.

5. A substantial miscarriage of justice has occurred because of unfair and oppressive cross-examination of the applicant.

6. The prosecutor's closing address caused a substantial miscarriage of justice.

7. A substantial miscarriage of justice occurred because despite opening the case for the prosecution on the basis that there was no evidence of

> motive the prosecution in its closing address changed its case by implying that there was, in fact, a motive for murder.

Ground 1 — Jury sequestration

130 Before the jury was empanelled, the judge informed the potential jurors that the jury would be sequestered. The judge explained that this meant that at the end of each day during their deliberations, the jurors would not be permitted to go home. Instead, they would be bussed to a hotel where they would stay overnight and be bussed back to the court the next morning to continue their deliberations. The judge explained that this was to protect the jury from any interference or outside pressure while they were deliberating and to safeguard the integrity of their verdicts. The judge explained that, while staying at the hotel, the jurors would be supervised by court staff known as jurykeepers. Their contact with the outside world while sequestered would be very limited. The jurors would be required to surrender their mobile phones and their families would be provided with a contact number for the jurykeepers in case of emergency. Otherwise, their families would not be permitted to contact them and vice versa. Access to television, radio and newspapers would be limited.

131 Section 50 of the *Juries Act 2000* permits the court to allow the jury to separate or an individual juror to separate from the jury after the jury has retired to consider its verdict, provided that each separating juror has taken an oath or made an affirmation in the form of sch 5. The form of oath or affirmation provides that the juror 'will not discuss with any person other than another member of this jury any matter relating directly or indirectly to the evidence in this trial or the deliberations'.

132 Before the jury retired, the judge informed the jurors that they would be taking the separation oath or affirmation, explaining that this was so that, in the unlikely event that they became separated, the oath or affirmation would 'drive home the point' that they could not be discussing the case with anybody other than their fellow jurors in the privacy of the jury room.

133 On Monday 30 June 2025, the jurykeepers (who included the judge's tipstaff) took an affirmation in front of the jury. Provision is made in s 49 of the *Juries Act* for the taking of an oath or the making of an affirmation by a jurykeeper in the form set out in sch 4 to the Act, to the effect that:

> [Y]ou … will well and truly keep this jury and each of its members committed to your charge and that, except on the order of the court, while they are in your charge, you will not allow any of them to communicate with any other person, or any other person with any of them, whether directly or indirectly, and that you will not, either during the trial or after it has finished, communicate with any juror about any evidence given or issues raised, directly or indirectly, at the trial.

134 The judge referred to the role of the jurykeepers further, in the following terms:

> Now, ladies and gentlemen, the jurykeepers have an important job to perform and they will be making sure nobody interferes with you.

> If you would please not second-guess any of their instructions, because it would be an awful shame if you did not observe one of their instructions and as a result we had a mistrial.
>
> Some of the instructions may seem over the top to you, but please just bear with it, and if you wish, you could, for instance, ask one of the jurykeepers to raise the matter with me tomorrow and we will see if there is a way around any issue, but it is very important that you follow their instructions and not second-guess them, okay. All right. So, thank you very much.

135 On the same day, the separation oath was administered to each juror. The jury was then sequestered and deliberations commenced. At the conclusion of each sitting day that week, the jurors together with the jurykeepers were taken to a hotel for the night and returned to court to continue deliberating the following day. On Saturday 5 July 2025, the jury moved to different accommodation.

136 On Monday 7 July 2025, the judge's associate sent an email to the parties, in the following terms:

> Dear practitioners,
>
> His Honour has asked me to send you the following:
>
> On Saturday afternoon, I was informed by my Tipstaff that the informant and two prosecution solicitors have been staying at the same hotel as the jury. He also told me that there has been no interaction between them and the jury. The jury have had a separate floor to themselves and have eaten their meals in a conference room separate from other guests of the hotel. But all guests use the same entrance at the hotel.
>
> Coincidentally, on Saturday night the jurors moved to a different hotel in a different town where they will be staying for the rest of this week.
>
> I understand that there is a shortage of accommodation in the district, but it is obviously undesirable for any of the parties or the informant to be staying at the same hotel as the jury.
>
> Kind regards …

137 At 11:13 am on the same day, the prosecution responded to the email as follows:

> … Thank you for your email.
>
> We confirm that the informant was staying at that hotel for the duration of the trial, and we only became aware last Thursday that the jury had commenced staying there. He believed he was staying in a different wing of the hotel and was using a different entrance, and he took steps to avoid common areas from the point that he became aware that they were there.
>
> In relation to the prosecution solicitors, the prosecution team's usual accommodation was no longer available for our use as of Friday last week, so

> we had booked that hotel for the Friday night for prosecution counsel and solicitors. When we became aware that the jury were staying there, we attempted to move everyone but, due to availability issues in the area, we were only able to move counsel. We confirm that the prosecution solicitors did not interact with the jury at any stage and also took steps to avoid any incidental contact in common areas.
>
> The informant and prosecution team are no longer staying at that hotel.
>
> Kind regards …

138 The jury continued deliberating during this time. It returned its verdicts at 2:17 pm on the same day. The parties had not returned to court before that time and it appears that no attempt was made by either party to raise the contents of the emails before the judge in the meantime.

139 The informant had been staying at the hotel for the duration of the trial. He stated that he had made efforts to use an alternate entry when coming and going from the hotel. Two solicitors employed by the Office of Public Prosecutions also stayed at the hotel, on the night of Friday 4 July 2025.[3] Each of them confirmed they did not have any contact with any member of the jury.

140 The jury was accommodated on a different floor of the hotel which they occupied exclusively. They were served and ate their meals in a conference room separate from other guests at the hotel.

141 The applicant referred to media reports from July 2025 which were said to provide further detail. The respondent submitted that these materials were unverified and involved unknown levels of hearsay. The reports were expressed in general terms, referring, for example, to unspecified ‘chaotic scenes’. We accept that such reports are not a sound basis upon which to proceed. They consist of unverified hearsay and it was not suggested that they would be admissible as evidence of the facts they assert. The Court can only proceed on the basis of evidence. The media reports therefore do not assist.

142 The applicant’s solicitors sought the assistance of the Juries Commissioner after the verdicts were delivered. It was not clear what powers of the Commissioner were sought to be invoked in that context. Apart from asserting that the solicitors had twice requested that the Commissioner investigate the matter (which seems to be a loose reference to requests that the Commissioner take steps to secure potential evidence), the significance of these communications was not pressed before us.[4]

3The email from the judge’s associate referred to two solicitors. The respondent’s written submissions state that three solicitors and a social worker stayed at the hotel on the Friday night.

Applicant's submissions

143 The applicant submitted that the above events constituted a 'catastrophic' failure to conform with the principle that justice should not only be done but should 'manifestly and undoubtedly be seen to be done'.[5] The applicant relied on the following observations of Redlich JA in *R v Chung; R v Rechichi*:[6]

> An essential feature of the jury system is that there is to be no contact between the accused and those who sit in judgment upon him. This principle extends to those connected with an accused person and to persons who appear to have an interest in the outcome of the trial. No matter how innocent or unintentional, disregard of this principle may create a perception of impropriety.
>
> The maintenance of the integrity of the jury, and equally significantly, the public perception of that integrity, requires an understanding that even inadvertent contact or involvement with the jury or a jury member by persons who are or might reasonably be perceived to have an interest in the outcome of the case, may compel the intervention by the trial judge. Strict limits have historically been recognised as proscribing contact between jurors and persons with an interest in a trial. As was observed by Deane J (in dissent) in *Webb*:
>
> > The law has long recognised the need to ensure an absence of contact between members of an empanelled jury and those interested in, or concerned about, the outcome of the particular trial. Notwithstanding the abandonment of past methods designed to ensure that the members of a criminal jury were isolated, the position remains that any extraneous contact between a juror and a person with a special interest in, or concern about, the outcome of the trial is a serious irregularity in the administration of justice.[7]

4In a response to the solicitors, the Commissioner drew attention to s 78(4) of the *Juries Act*, which permits the Commissioner or the Director to request the Chief Commissioner of Police to investigate a complaint about the deliberations of a jury. It has not been suggested that such a request was made, or that the applicant's solicitors sought that this be done. It is not necessary to address the question whether this provision applies to complaints other than complaints about breaches of s 78 itself, which concerns the confidentiality of deliberations.

5*R v Sussex Justices; ex parte McCarthy* [1924] 1 KB 256, 259 (Lord Hewart CJ, Lush J agreeing at 259, Sankey J agreeing at 260).

6(2010) 25 VR 221.

7Ibid 229 [30]–[31] (Redlich JA, Harper JA agreeing at 234 [51], King AJA agreeing at 236 [61]), quoting *Webb v The Queen* (1994) 181 CLR 41, 78 (Deane J) ('*Webb*').

144 The applicant submitted that it was not necessary to determine whether there had been actual prejudice flowing to an accused from a departure from the strict requirement that the jury be kept separate from contact with a person with a special interest in the outcome of the trial.[8]

145 The applicant submitted that there was a fundamental irregularity in the trial. First, the mere fact of sequestration in the same hotel with persons directly connected with the investigation and prosecution of the applicant was a material irregularity. Secondly, the appearance of a contaminated jury was inevitable in those circumstances. Thirdly, the irregularity was compounded by the failure of the prosecution to fully disclose it to the applicant's representatives or the Court. Fourthly, the failure to notify the applicant's legal representatives of the irregularity in a timely manner deprived the applicant of the opportunity of investigating the matter and deciding whether to apply to discharge the jury.

146 Counsel for the applicant submitted that the situation gave rise to the risk of inappropriate contact between the jury and the informant and prosecution lawyers. It was contended that even if the jurors saw such people through a window in the hotel that this would be a form of inappropriate contact, capable of giving rise to subconscious influence. Counsel submitted that there was an evidentiary vacuum and the Court had not been informed how it came to the notice of the tipstaff that the informant and solicitors for the prosecution were staying at the same hotel as the jury. It was said that knowledge of the facts lay with the prosecution and an affidavit disclosing the circumstances should have been provided.

147 It was submitted that a reasonable bystander knowing the above facts would readily conclude that justice had not been done and could not reasonably be seen to have been done. The applicant submitted that the only proper remedy for the fundamental irregularity in the trial which had occurred was the quashing of the convictions and an order for a retrial.

Respondent's submissions

148 The respondent submitted that that the applicant had failed to demonstrate that a fundamental irregularity had occurred in the trial. The judge had regularly reminded the jury of the importance of not discussing the trial, other than with their fellow jurors. Each juror took an oath not to discuss any matter relating to the evidence in the trial or the deliberations with any person other than another juror. The judge appointed jurykeepers whose role it was to ensure that no person communicated in any way with any member of the jury and no member of the jury communicated with any other person, and they made affirmations accordingly in front of the jury. It was submitted that these measures fortified the jury's deliberations from actual or perceived interference.

8The applicant relied on *R v Chaouk* [1986] VR 707, 712, 714 (Kaye J), 717 (Hampel J) ('*Chaouk*'); *Carson (a pseudonym) v The Queen* [2019] VSCA 317; *CMG v The Queen* (2013) 46 VR 728, 748 [92]–[93] (Redlich JA) ('*CMG*'); and *R v Gay* [1976] VR 577.

149 More importantly, the evidence in the case was that one of the jurykeepers had advised the judge that there had been 'no interaction' between the jury and the informant and solicitors. There was no evidentiary vacuum and no need for an affidavit. The prosecution had made disclosure in its email and confirmed that the prosecution solicitors 'did not interact with the jury at any stage'.

150 The respondent submitted that the question is not whether there was absolute physical separation to the point of personal isolation of the jury. Instead, the relevant oaths or affirmations are taken to ensure that when a jury breaks from deliberations and moves through the world at large, it does so with the protection from actual or perceived interference that sworn jurykeepers provide. It was submitted that the question is whether the jury was under the control of properly sworn jurykeepers and that the answer to this question was dispositive of the issue of fundamental irregularity. In oral submissions, the Director emphasised the content and significance of the jurykeepers' oath, and submitted that its focus on preventing communications reflected the key issue relevant to this ground.

151 The respondent submitted that there was no suggestion that the jury had become separated from each other or from the jurykeepers. The jurykeepers were therefore able to positively confirm that there had been no interaction between any member of the jury and any other person while the jury were at the hotel. It was submitted that it would be mere speculation to infer from the fact that the situation had come to the attention of the tipstaff that there must have been some kind of contact involving one or more jurors. The evidence was to the contrary.

152 In this way, the respondent submitted, a combination of judicial directions, juror oaths and jurykeepers ensured the integrity of the jury's deliberations.

153 The respondent observed, further, that the judge had directed the jury that they ought only discuss the case and the issues when deliberating in the jury room at the court. The jury was expressly directed not to deliberate at the hotel.

154 The respondent submitted that the occupation by a jury of a building (on a separate floor) also occupied by police or persons acting for the prosecution cannot without more give rise to a fundamental irregularity in the trial. A juror merely seeing such a person out the window could not give rise to any irregularity. There needed to be evidence of actual or reasonable grounds to suspect that a contact or communication with the jury (or a juror) had occurred. There was no such evidence or irregularity in this case. The evidence was to the opposite effect. But in any event, the onus of proof lay on the applicant.

Analysis

155 The purpose of s 50 of the *Juries Act* is to modify the strictness of the common law requirement that juries 'be cloistered after retirement and until verdict'.[9] In that

9*R v Patton* [1998] 1 VR 7, 11 (Phillips CJ, Winneke P and Southwell AJA); *Brownlee v The Queen* (2001) 207 CLR 278, 289 [25] (Gleeson CJ and McHugh J).

regard, the course which was taken in the present matter is an exception to the usual practice by which jurors are commonly permitted to return to their homes after deliberating during the day in the jury room.[10]

156 It is made explicit in the oath or affirmation of jurykeepers in sch 4 that the purpose for their appointment, and the essential content of their task, is to prevent communication between the jurors and any other person, whether directly or indirectly. The responsibility undertaken by the jurykeepers matches the oath or affirmation of jurors before separating during deliberations, to the effect that they will not discuss with any person, other than another member of the jury, any matter relating directly or indirectly to the evidence or the deliberations. Both forms of oath reveal a legislative focus on preventing inappropriate communications with a jury, and their administration is directed to ensuring compliance with the rule in *Chaouk*.[11]

157 The Court in *Youssef* observed that ss 49 and 50 are not only designed to protect jury deliberations from contamination. The provisions 'also serve a secondary function, preventing the perception that there has been any opportunity for unauthorised communications with the jury'.[12] The designation in s 50 of the point after the jury has retired to consider its verdict as the time by which the separation oath must be administered reflects the fact that, from the point where the jury is released to commence its deliberations, 'the stakes are raised, the jurors' responsibilities are heightened, and the dangers associated with improper influence are elevated'.[13]

158 Justice Kaye in *Chaouk* held that 'there must be no communication, or risk of communication, between outsiders and the jury once they have entered upon their deliberations concerning their verdict'.[14] In that case, jurors travelled between the court and their accommodation in taxis. Most travelled with a jurykeeper in their taxi. The remaining three jurors travelled in a taxi unaccompanied by a jurykeeper. The foreman, who was one of those in the last taxi, told the judge in the course of an

10See *Youssef (a pseudonym) v The Queen* [2019] VSCA 240 [64] (Priest, Beach and Weinberg JJA) ('*Youssef*').

11[1986] VR 707, 710 (Kaye J).

12[2019] VSCA 240 [62] (Priest, Beach and Weinberg JJA), quoted with approval by the High Court in *R v Bechaud* [2026] HCA 36 [23] (Gageler CJ, Gordon, Gleeson, Jagot and Beech-Jones JJ). See also *Frendo v The King* [2024] VSCA 319 [139]–[140] (Priest, Taylor and Boyce JJA).

13*Birchall v The King* [2026] VSCA 63 [93(e)] (Boyce, Orr and Kidd JJA).

14[1986] VR 707, 710 (Kaye J).

interrogation of the jurors, that there had been no communication about the case while in the taxi. Nonetheless, the Full Court set the convictions aside. Among other things, the process of interrogation of the jurors by the court was 'less than satisfactory',[15] including because the jurors were not questioned on oath. Hampel J held that it was 'not to the point' that there was 'probably … no improper communication between the taxi drivers and the jurors despite the opportunity for such communications'.[16]

159 The test Kaye J applied in *Chaouk*, in order to identify whether the separation of the jurors gave rise to a substantial miscarriage of justice, was 'whether the incident was of such a character that, if the verdict is allowed to stand, justice would not appear to be done or that the incident was likely to give rise to a reasonable suspicion concerning the fairness of the trial'.[17]

160 The test of 'reasonable suspicion' for determining the impact of juror misconduct has now been replaced by the 'double might' test, articulated by a majority of the High Court in *HCF v The Queen*[18] in the following terms:

> [I]n all cases of jury or juror misconduct, what is required to establish a miscarriage of justice, and what will also establish a substantial miscarriage of justice, is that a fair-minded and informed member of the public might reasonably apprehend that the jury (or juror) might not have discharged or might not discharge its function of rendering a verdict according to law, on the evidence, and in accordance with the directions of the judge.[19]

161 The *HCF* test for identifying a substantial miscarriage of justice is apt to apply under the terms of s 276(1)(c) of the *Criminal Procedure Act 2009*, which requires the Court to allow an appeal against conviction if the Court is satisfied that 'for any other reason there has been a substantial miscarriage of justice'. Although this provision did not apply in *Chaouk* or *HCF*, in particular, there is no single test under the provision for

15Ibid 713 (Kaye J).

16Ibid 717.

17Ibid 712 (Kaye J), applying *R v Ketteridge* [1915] 1 KB 467, 470 (Darling, Lush and Atkin JJ). Hampel J framed the question as whether the incident 'so characterised in all its surrounding circumstances [was] one which constituted a miscarriage of justice': ibid 715.

18(2023) 280 CLR 596 ('*HCF*').

19Ibid 603–4 [13] (Gageler CJ, Gleeson and Jagot JJ). The majority disapproved the alternative language of 'reasonable suspicion' that had been used in *Webb* (1994) 181 CLR 41, 47, 51–3 (Mason CJ and McHugh J).

identifying a substantial miscarriage of justice.[20] In this respect, s 276(1)(c) is indistinguishable from s 668E(1) of the *Criminal Code Act 1899* (Qld), with which *HCF* was concerned.[21] We note that the majority in *HCF* specifically stated that the test applied to determine whether there was a 'substantial miscarriage of justice', even though s 668E(1) refers only to a 'miscarriage of justice'.[22]

162 The references in *Chaouk* to the 'risk of communication' and the 'opportunity' for communication indicate that it is not necessary to be affirmatively satisfied that there has been a departure from the proper processes of the trial — that is, an 'irregularity' — in order for the reasonable apprehension test to be applied. There was such a departure in *Chaouk* itself. The fact that the jury had travelled in separate taxis, albeit with a jurykeeper in all but one instance, constituted an irregularity because the law at that time did not permit the jury to separate.[23] The principal question was not whether there was an irregularity but what was its effect. Similarly, in *HCF*, the irregularity was undisputed and the Court was concerned with the test for identifying a miscarriage of justice in those circumstances.

163 In contrast, in the present case, the applicant is seeking to establish the factual basis for identifying a substantial miscarriage of justice without proof of an irregular incident or communication but on the basis of a circumstance of risk. We do not understand the test in *Chaouk*, as now laid down in *HCF*, to be inapplicable on that account. To establish a reasonable apprehension under that test on the basis of a risk of communication, or an opportunity for communication, without more, will depend in part on the nature and extent of the risk.

164 The High Court explained in *HCF* that the 'double might' test is to be applied after the facts have been found. This followed from the requirement that the apprehension be reasonable:

> To be reasonable, a suspicion or apprehension requires a positive feeling of actual apprehension or mistrust which has an objective basis in fact. To apply the reasonable apprehension test therefore requires first that such relevant facts as can be inferred from the available evidence be found on the balance of probabilities. In undertaking that necessary preliminary fact-finding, it is useful to record the truism that '[o]ne does not pass from the

20*Baini v The Queen* (2012) 246 CLR 469, 479 [26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) ('*Baini*').

21Section 668E(1) relevantly provides that the Court 'shall allow the appeal if it is of opinion … that on any ground whatsoever there was a miscarriage of justice …'

22(2023) 280 CLR 596, 603–4 [13].

23Provision for separation was made by the introduction of s 51A into the *Juries Act 1967* by the *Juries (Amendment) Act 1993*: see *CMG* (2013) 46 VR 728, 746 [87] (Redlich JA).

> realm of conjecture into the realm of inference until some fact is found which positively suggests, that is to say provides a reason, special to the particular case under consideration, for thinking it likely that in that actual case a specific event happened or a specific state of affairs existed'; *inference requires 'something more than mere conjecture, guesswork or surmise'*.[24]

165 In the present case, the factual foundation for the applicant's argument is weak. While the accommodation arrangements increased the risk of an untoward communication involving the jury taking place, the evidence is that the tipstaff, who was one of the jurykeepers, informed the judge that this did not happen. The judge had his associate inform the parties that he had been informed by his tipstaff that there had been no interaction between the informant or the two prosecution solicitors, and the jury. The tipstaff had of course taken an oath, or made an affirmation, in his role as jurykeeper and in so informing the judge, he was discharging his responsibilities as an officer of the Court.

166 The absence of interaction with the jury was confirmed, in the case of the prosecution solicitors, by the email that the prosecution sent in response to the associate's email. It is true, as counsel for the applicant submitted, that the material does not disclose how it was that the situation that had arisen came to the attention of the jurykeepers or the informant (or the prosecution solicitors). The Court does, however, have the email sent on behalf of the prosecution and it can be taken that the matter was investigated and the email was sent in discharge of the prosecutors' duties to the Court. While it would have been preferable for there to have been an affidavit, we do not consider that the absence of one is a basis for not accepting the contents of the email.

167 It was plainly unfortunate that a situation arose in which the jury was accommodated at the same hotel as the informant and two solicitors for the prosecution, during the period when the jury was engaged in deliberations when at the Court. As counsel for the applicant submitted, and the respondent readily accepted, the judge would not have countenanced this arrangement if approval for it had been sought in advance. By increasing the prospect of chance encounters between a juror and a party with an interest in the proceeding, the circumstances increased the risk of an inappropriate communication at the very point when such a communication would be most damaging to the reality and appearance of the administration of justice.

168 On the other hand, as already noted, the evidence shows that the jury was accommodated on a different floor of the hotel apart from other guests and that they ate their meals in isolation from other guests as well. These measures served to moderate the risk to which we have referred. The situation was nonetheless highly undesirable and a risk of improper communication remained.

169 The 'informed' hypothetical member of the public must be taken to know, not only of the accommodation arrangements that had been made (including the fact that the jury slept and ate in their own part of the hotel), but also that one of the jurykeepers had

24*HCF* (2023) 280 CLR 596, 604 [13] (Gageler CJ, Gleeson and Jagot JJ) (citations omitted) (emphasis added).

reported to the judge that there had been no interaction between the jury and the informant and solicitors. It is true that in other cases, statements by jurors that there had been no improper communication were treated with caution and were not decisive.[25] But as already indicated, in those instances, there was an identified irregularity constituting a foundation for the necessary reasonable apprehension, and the juror statements were relevant to the impact of the irregularity rather than its existence. As mentioned earlier, in *Chaouk*, the jury had impermissibly separated. In *Webb*, a juror had given flowers to the mother of the deceased on the day when the judge started to deliver his charge in a murder trial. In *HCF*, the jurors had received the fruits of internet research improperly conducted by one of their number. The present case is also distinguishable on the basis that the assurance that there was no interaction comes from a sworn jurykeeper who is an officer of the Court, rather than a member of the public serving as a juror. The reasonable observer is taken to be apprised of the oath taken by the jurykeepers and the directions that had been given to the jury as to how they were to comply with the directions of the jurykeepers. As mentioned, the supporting confirmation in relation to the prosecution solicitors was also provided in discharge of the obligations owed by officers of the Court.

170 Further, the risk of communications with the jury concerned persons — the informant and two prosecution solicitors — who occupied roles within the justice system. They can be taken to have been intimately aware of the legal obligations and measures in place designed to protect the jury from outside communications. The prosecution's email itself tends to confirm this, and, as we have said, the solicitors are officers of the Court. This all further reduced the risk of improper communication. This case can be contrasted with *Chaouk* where it was observed that the taxi driver — who was a lay outsider — was not privy to the legal protections in place concerning the integrity of jury communications.[26]

171 The evidence that is available does not preclude the possibility to which counsel for the applicant referred, that a juror or jurors may have seen the informant or a prosecution solicitor at the hotel, or through a window approaching or leaving the hotel. We do not accept that merely seeing a person with an interest in the case constitutes a communication or discussion of a kind which it is the concern of the *Juries Act* to prevent. Even if the hypothetical juror inferred from the sighting that the person was staying in the same hotel, nothing untoward would follow from a juror having drawn such an inference. The risk of a juror having done so would not found a reasonable apprehension that the juror might not have discharged their duties according to law. In so far as the applicant invoked the possibility of subconscious influence, the submission was not developed and lacked any factual basis.

172 The fact that the informant in the present case stayed at the same hotel as the jury for an extended period, and that prosecution solicitors did so for one night during the

25*Chaouk* [1986] VR 707, 713 (Kaye J); *Webb* (1994) 181 CLR 41, 52 (Mason CJ and McHugh J).

26*Chaouk* [1986] VR 707, 712 (Kaye J).

period of jury deliberations, involved no impermissible separation of the jurors. The issue concerns only the risk of improper communications involving the jury. In that context, the tipstaff's assurance to the judge that there had been no interaction between the jury and those other persons strongly suggests that the risk did not materialise and lead to such a communication. The reaction of the fair-minded observer must be identified with the significance of that assurance, given by one of the sworn jurykeepers, firmly in mind.

173 As against that assurance, there is only 'conjecture, guesswork or surmise'.[27] The use of a common entry to a building frequented by the jury and the parties creates a risk of communication but the evidence of the tipstaff's assurance supports the conclusion that the presence of the jurykeepers ameliorated that risk. In that respect, this case is like any in which the design of a court building makes it easy for jurors to come into contact with persons involved in the case.[28]

174 The underlying risk in this case is essentially of a familiar kind in criminal trials, and it was addressed by familiar methods. As this Court said in *Youssef*:

> As long and common experience demonstrates, during breaks in proceedings, people connected with trials — whether the accused, complainants, police investigators, witnesses, or friends or family of people connected with the trial — often are to be encountered in and around the court precinct during business hours (especially at lunchtime). The swearing of jurykeepers seeks to maintain the integrity of the trial, by minimising the risk of the jury communicating with others during deliberations.[29]

175 The accommodation arrangements offered fertile grounds for speculation but no objective basis for the fair-minded person to reasonably apprehend that the jury might not have discharged its function of rendering a verdict according to law. The evidence in this case does not satisfy the 'double might' test. It fails to establish that, by reason of the hotel arrangements described in the emails, there was a substantial miscarriage of justice.

176 For these reasons, while leave to appeal should be granted, the appeal in respect of ground 1 must be dismissed.[30]

Ground 2 — Telephone cell tower and iNaturalist evidence

177 The largest platform in Victoria for recording observations and citizen science uploads of fungi is a publicly-accessible website called iNaturalist. Members of the public can

27*HCF* (2023) 280 CLR 596, 604 [13] (Gageler CJ, Gleeson and Jagot JJ).

28As described by the trial judge in *Webb* (1994) 181 CLR 41: see 59, quoting Debelle J.

29[2019] VSCA 240 [58] (Priest, Beach and Weinberg JJA) (citations omitted).

30*Criminal Procedure Act*, s 276(2).

post sightings on this website of a variety of plants and animals. An account is needed in order to post an observation, but any internet user can look at the data and images. Every observation is posted with a photograph and most have precise location information in the form of geospatial data. Internet users can search for images and locality information for a particular species and view these through a map function.

178 Christine McKenzie, a retired pharmacist and senior poisons information specialist at the Victorian Poisons Information Centre, gave evidence that on 18 April 2023, she observed death cap mushrooms under some oak trees in the regional township of Loch in eastern Victoria. She took a number of photographs and collected and disposed of the mushrooms. Ms McKenzie posted four photographs of this sighting to the iNaturalist webpage which geotagged the discovery location. Images posted by Ms McKenzie were subsequently identified by mycologist Dr Tom May as showing death cap mushrooms.

179 Dr May gave evidence that on 21 May 2023 at 2:50 pm, using his iNaturalist profile, he submitted an observation of death cap mushrooms along with a photograph and location of Neilson Street, Outtrim to the iNaturalist website. The location posted was within about 20 metres of the mushroom sighting made by Dr May.

180 The prosecution alleged that the applicant was familiar with the iNaturalist website. As already mentioned,[31] there was evidence that a user of a computer seized from her home had, on 28 May 2022, searched for the term 'iNaturalist' on the Bing search engine and had navigated to a world map indicating precise locations where death cap mushrooms have been sighted, before proceeding to a page that showed a map of death cap mushroom sightings in Victoria. In the midst of this activity, the user placed an online order at the Korumburra Middle Hotel, entering the applicant's details.

181 There was no evidence that the applicant had seen either of the iNaturalist posts by Ms McKenzie or Dr May.

182 The evidence the subject of the second proposed ground of appeal consisted of (a) the evidence that Ms McKenzie and Dr May had posted observations of death cap mushrooms in Loch and Outtrim, respectively, to the iNaturalist website prior to the lunch; and (b) the evidence of Dr Sorrell. Dr Sorrell analysed the call charge records ('CCRs') for the period 2019–23 in relation to the applicant's mobile number ending in 783, and event-based monitoring ('EBM') data for specific dates during that period. CCRs show information such as incoming and outgoing calls and attempts (including the parties to calls and texts), and the base stations associated with phone calls, texts and data connections. EBM data records a phone's communications with the network, which take the form of signals, as distinct from communications in the course of use of the phone for calls, messaging or internet usage. CCRs contain significantly more high-level detail than EBM data. However, EBM data is typically more frequent and provides more precise timing than CCR data, because EBM communications are frequent, as a phone constantly searches for the best connections, whereas CCR data depends on the use of the phone.

31 See above [Error: Reference source not found]–[80].

183 In his ruling on the admissibility of this evidence, the judge described the thrust of Dr Sorrell's evidence as being that, based on the CCRs and the EBM data, it was possible that the applicant had visited Loch on 28 April 2023 and 22 May 2023, and Outtrim on 22 May 2023.[32] Dr Sorrell considered Loch as the area covered by the Loch postcode, and Outtrim as the area covered by the Outtrim postcode according to Google Maps, both of which were areas larger than the townships themselves. Dr Sorrell's opinion was that the records between January 2022 and April/May 2023 suggested that the applicant did not typically travel to Loch or Outtrim and remain in those areas for any length of time.[33]

184 The applicant submitted that Dr Sorrell's evidence was irrelevant, alternatively that its probative value was outweighed by the danger of unfair prejudice, such that it was excluded under s 137 of the *Evidence Act 2008*. The judge admitted the evidence, explaining as follows:

> The impugned evidence does not prove that the [applicant] visited Loch and Outtrim on the dates alleged: it rises no higher than the [applicant] possibly visited those towns on those dates. But it is evidence of opportunity for the [applicant] to have deliberately sourced death cap mushrooms for the fatal lunch at a time proximate to the lunch. As such it increases the probabilities of the [applicant] having deliberately poisoned her lunch guests. A jury could reasonably reject the [applicant's] claim that she unwittingly sourced death cap mushrooms from an Asian grocery, given the extensive investigations by the Health Department and the non-reporting of other death cap mushrooms deaths or illnesses at the relevant time. The limitations of Dr Sorrell's evidence are clearly articulated and easily understood. As such, it is unlikely that the jury will overvalue the evidence. Whilst the evidence is of modest probative value, I am not persuaded that its probative value is outweighed by the danger of unfair prejudice to the [applicant].[34]

185 The judge held that the iNaturalist postings were to be considered in the context of other evidence, including the CCRs. There was evidence from which the jury could infer that the applicant was familiar with the iNaturalist website and knew how to utilise its worldwide map to find the locations of death cap mushrooms locally. The judge also noted that the possible visit to Loch on 28 April 2023 was followed by the applicant purchasing a food dehydrator on the same day. The applicant had subsequently served a meal containing death cap mushrooms alleged to have been preserved using the dehydrator.[35] The judge concluded:

32*R v Patterson (Ruling 2)* [2025] VSC 103 [12] (Beale J) ('*Ruling 2*').

33With the exception of possible visits to the Loch postcode in March through May and August 2022, and February 2023.

34*Ruling 2* [19].

35*R v Patterson (Ruling 7)* [2025] VSC 133 [41] (Beale J) ('*Ruling 7*').

> When these pieces of evidence are considered in combination, they pass the test of relevance because, at the very least, they are evidence of opportunity for the [applicant] to have deliberately sourced death cap mushrooms locally, rather than having inadvertently purchased them from an Asian grocery, as she claimed to investigators. I note that a thorough investigation by the Health Department found no support for that claim.[36]

186 As such, the evidence was admitted. It was not contended at trial that the iNaturalist evidence should be excluded under s 137.

Applicant's submissions

187 The applicant submitted that the cell tower evidence went no further than raising the possibility that the applicant had visited Loch and Outtrim on particular dates. The probative value of the evidence was said to be entirely dependent on other evidence, specifically evidence of the iNaturalist posts. There was no evidence that the applicant accessed or saw those posts. As such, they failed to meet the test of relevance. It was submitted that the evidence of the posts and the cell tower evidence was speculative and its probative value did not increase by taking other speculative evidence into account.

188 The applicant submitted that, even if the impugned evidence was relevant, its probative value was substantially outweighed by unfair prejudice. It was submitted that the EBM records were selectively requested by reference to the CCRs, in respect of dates of possible visits to Loch and Outtrim to the exclusion of other dates. It was submitted that this approach prevented the applicant from challenging the selection of dates of possible visits as outliers or otherwise. It was submitted that a real risk existed that by simplifying highly technical evidence, reducing it to an opinion as to a possible visit, the evidence had the capacity to be grossly misleading.

189 Counsel for the applicant submitted that the prosecution had sought to elevate the CCR evidence, which it had accepted could not 'responsibly' be relied on by itself, into subjective evidence of a mere possibility. It was submitted that the evidence of Dr Sorrell was speculative and did not rationally go to proof of a fact in issue.

Respondent's submissions

190 The respondent submitted that the cell tower evidence and the evidence of the death cap mushroom sightings on iNaturalist formed part of a collection of evidence demonstrating that the applicant had the opportunity of deliberately sourcing death cap mushrooms at a time proximate to the fatal lunch.

191 The respondent submitted that, in determining relevance, the Court must not look at the disputed evidence in isolation.[37] The evidence of Dr Sorrell had to be considered in the context of evidence that suggested that the applicant had visited the iNaturalist website on 28 May 2022 and navigated to a page entitled 'Death-cap [sic] from

36Ibid.

Melbourne, VIC, Australia on May 18, 2022 at 02:36 PM by [user]. Bricker Reserve, Moorabbin', showing the location of death cap mushrooms in Moorabbin,[38] and evidence that the iNaturalist website had received postings of the existence of death cap mushrooms, with geospatial coordinates, in Loch on 18 April 2023 and Outtrim on 21 May 2023. In that context, Dr Sorrell's evidence was as follows:

(a) On 28 April 2023 at 8:59 am, the applicant's phone connected to the Korumburra base station. Following some connections to Holmes Hill, there were several connections to the Loch South base station at 9:14 am. At 10:10 am, the phone was south of the Loch base station and north of the Poowong Central station. The applicant's phone connected back at the Korumburra base station at 10:12 am. This was consistent with a possible visit to the Loch township between 9:14 am and 10:00 am, originating and concluding in Korumburra.[39]

(b) On 22 May 2023, the applicant's mobile phone originated south of Leongatha prior to 8:05 am, before persistently connecting with the Loch South base station, consistent with remaining relatively stationary in or around the Loch township between 9:24 am and 10:00 am, before then moving back to Leongatha by 10:30 am.

(c) Also on 22 May 2023, the evidence was that the phone connected to the Leongatha base station at 10:30 am, before travelling from Leongatha towards Outtrim between 11:18 am and 11:24 am. The evidence indicated that the phone then remained in and around the northern section of the Outtrim locality where Neilson Street is located and was relatively stationary until as late as 11:49 am before travelling back towards Leongatha.

192 The applicant purchased a food dehydrator on 28 April 2023 at 12:17 pm. She used it to dehydrate some mushrooms at some time on or between 28 April and 4 May 2023 which she photographed. Dr May identified the photographed mushrooms as being consistent in appearance with death cap mushrooms at a 'high level of confidence'. The dehydrator was disposed of by the applicant on Wednesday 2 August 2023 and was found to contain debris of death cap mushrooms.

193 The respondent submitted that, considered with the other evidence, the impugned evidence increased the probability that the applicant had the opportunity to, and did,

37*Evans v The Queen* (2007) 235 CLR 521, 568 [177] (Heydon J, Kirby J agreeing at 539 [61], Crennan J agreeing at 600 [206]).

38See the evidence of Mr Fox-Henry summarised at [80] above.

39Dr Sorrell noted, however, that, as discussed below, the absence of data between 9:14 am and 10:00 am meant that although there was the potential for the phone to have been in and remained in the Loch township during that period, this was not definitive.

deliberately source death cap mushrooms at a time proximate to the lunch. The evidence was clearly relevant to a fact in issue, in circumstances where the applicant's defence was that the poisoning was an accident.

194 It was submitted that the danger of unfair prejudice arising from the evidence was negligible. There was no realistic prospect that the jury were unduly influenced by the atmosphere of scientific confidence evoked in the imagination of the average juror by descriptions of scientific findings, sometimes referred to as the 'CSI effect'. The limitations in Dr Sorrell's evidence were clearly explained by the judge in his charge. It was also made clear to the jury that the connections identified in the CCR evidence, and the EBM data, could be consistent with and supportive of a proposition, but they did not demonstrate the proposition. The data did not indicate that there was a visit to a particular address or exclude alternative propositions. The judge read the following passage from Dr Sorrell's evidence when delivering his charge to the jury:

> [T]his evidence has quite significant limitations in terms of both time and place, and as a consequence, generally speaking, the best that can be said is that … a phone is in a general area, or more convincingly, the phone is — convincingly the phone is not in a particular area. There are time precision limitations also. Over the period that we're talking about, before we go to targeted dates, the process is quite high level.

195 Finally, the respondent submitted that evidence of expert opinion based on call charge records is routinely admitted.[40]

Analysis

196 Section 137 of the *Evidence Act* provides:

> **137 Exclusion of prejudicial evidence in criminal proceedings**
>
> In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused.

197 The expression 'probative value' is defined in the Dictionary of the *Evidence Act* as follows:

> ***probative value*** of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue…

40 *Vallance v The King* [2025] VSCA 329 [43] (McLeish, Taylor and Osborn JJA).

198 In *IMM v The Queen*,[41] French CJ, Kiefel, Bell and Keane JJ stated:

> By s 55, evidence is relevant if it 'could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding'. There can be no doubt that the reference to the effect that the evidence 'could' have on proof of a fact is a reference to the capability of the evidence to do so. The reference to its 'rational' effect does not invite consideration of its veracity or the weight which might be accorded to it when findings come to be made by the ultimate finder of fact.
>
> The question as to the capability of the evidence to rationally affect the assessment of the probability of the existence of a fact in issue is to be determined by a trial judge on the assumption that the jury will accept the evidence. This follows from the words 'if it were accepted', which are expressed to qualify the assessment of the relevance of the evidence. This assumption necessarily denies to the trial judge any consideration as to whether the evidence is credible. Nor will it be necessary for a trial judge to determine whether the evidence is reliable, because the only question is whether it has the capability, rationally, to affect findings of fact. There may of course be a limiting case in which the evidence is so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury. In such a case its effect on the probability of the existence of a fact in issue would be nil and it would not meet the criterion of relevance.[42]

199 They continued:

> The enquiry for the purposes of s 55 is whether the evidence is capable of the effect described at all. The enquiry for the purposes of determining the probative value of evidence is as to the extent of that possible effect. But the point is that in both cases the enquiry is essentially the same; it is as to how the evidence might affect findings of fact. An assessment of the extent of the probative value of the evidence takes that enquiry further, but it remains an enquiry as to the probative nature of the evidence.
>
> The assessment of 'the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue' requires that the possible use to which the evidence might be put, which is to say how it might be used, be taken at its highest.[43]

200 The applicant's submissions in respect of this ground are founded on a characterisation of Dr Sorrell's evidence, taken at its highest, as establishing only the 'possibility' that the applicant visited Loch on 28 April 2023 and 22 May 2023, and Outtrim on 22 May 2023. That shorthand was used both by Dr Sorrell in his written timelines, and by the judge in his charge and the pre-trial ruling on this subject. It does

41(2016) 257 CLR 300 ('*IMM*').

42Ibid 312 [38]–[39].

43Ibid 313 [43]–[44].

not follow, however, that the evidence lacked probative value or even that its probative value was weak. It is necessary to look more closely at Dr Sorrell's evidence to see how it could properly be used.

201 In the case of the possible visit to the northern part of Outtrim on 22 May 2023, Dr Sorrell's initial opinion, which he revised after having regard to EBM data, was summarised in a single line: 'Possible visit to northern OUTTRIM 11:24 to no later than 11:49'. That summary was preceded by the words 'Revised opinion (see next page):'. On the following page under the heading 'Revised Opinion', Dr Sorrell referred to EBM records and continued:

> These records generally suggest a location in and around the eastern side of the OUTTRIM locality, originating from a location in or to the south of Leongatha. The frequency of handover between base stations aligns with the proposition that the service is likely moving and making active use of data services (data services do not require intentional user intervention).
>
> **Connections exclusive to OUTTRIM@145 between 11:24:36 and 11:41:59 support the proposition of a handset location in and around the northern section of the OUTTRIM locality, possibly as late as 11:49.**
>
> Connections after 11:49:56, similar to those prior to 11:24, suggest a location in and around the eastern side of the OUTTRIM locality, returning to a location in or to the south of Leongatha.[44]

202 In oral evidence, Dr Sorrell said that between 11:24:36 am and 11:41:59 am 'the phone is more likely to be relevant [sic] stationary'.

203 In the case of the possible visit to Loch on 28 April 2023, Dr Sorrell's original opinion was that there was a '[p]ossible visit from Korumburra'. After evaluating EBM data, he revised this to:

> Visit originating from and returning to Korumburra.
>
> No earlier than 09:06.
>
> No later than 10:07.

204 Dr Sorrell explained that the evidence was 'consistent with the phone effectively having moved from somewhere west of Kardella into the vicinity of Loch post code at least by 9:09, and then the next time we see that phone is at 10 am in the EBM records'. He also described this as a 'possible visit' and added that 'while there is the potential for that visit it doesn't definitively point to the phone being in and remaining in and around the Loch township during that period'.[45]

44Emphasis in original.

45This was owing to the fact that there was an absence of records between 9:14 am and 10:00 am.

205 As to the possible visit to the township of Loch on 22 May 2023, Dr Sorrell said that 'the persistent connections between 9:24 to 10:01 align with the proposition that the phone is in or around Loch township itself'. He also said that the evidence was 'more consistent with the phone remaining relatively stationary between 9:24 and 10 am'.

206 In summary, Dr Sorrell was asked for his opinion as to the possible visits to the Loch reserve:

> All right. The data that you analysed for 28 April 2023, is that consistent or inconsistent with a possible visit to that reserve?---The only indication that that phone on 28 April was in this sector was at one single point in time, and so while it is possible, it is not a strongly supported proposition.
>
> And then on the data that you analysed for 22 May 2023, is that consistent or inconsistent with a visit or a possible visit to that location?---On 22 May there are consistent visits to this sector — sorry, I'll just — I'll stop. There we go. It is consistent with connections to the 330 degree sector persistently between whatever the time was, it was about a 35 minute period. So it's more consistent with being, more consistent and more strongly supported that the phone is in an area that includes Loch township and the reserve.

207 In cross-examination, Dr Sorrell succinctly described the effect of his evidence:

> All right. So the records might be consistent with a particular proposition, but they don't prove the proposition?---They — they can be consistent and they can support that proposition, but they don't demonstrate the proposition.

208 It is clear that Dr Sorrell was at pains that his evidence not be given more weight than it warranted. We have already referred to the judge's direction to the jury to the same effect.

209 But it does the evidence an injustice to characterise it as doing no more than identifying what was 'possible'. Dr Sorrell's evidence about the two possible visits to Loch showed that the second visit was better supported by the evidence than the first: there were different degrees of possibility. His evidence indicated whether or not certain hypotheses as to the whereabouts of the applicant were consistent with what could be gleaned, from the data examined, about the location of her mobile phone. Where the telecommunications data was consistent with the applicant having been in a given area, it could be used to show that she had the opportunity of being in that location at the time in question.

210 The applicant contended that the prosecution had conceded that it could not 'responsibly' rely on the CCR material by itself.[46] It was submitted that, by adducing the evidence of Dr Sorrell, something had been produced out of nothing. In written

46Ie, in the absence of the relevant EBM data.

submissions, counsel made the serious allegation that the prosecution 'sought to adduce irresponsible evidence in a different cloak'.

211 Such a concession, if it had been made, obviously did not go to the relevance, only to the probative value, of the CCR material 'by itself'. But the supposed concession was not made in the way the applicant asserted. It was confined to specific CCR material which had been thought by Dr Sorrell to be consistent with a possible visit on another date altogether. Dr Sorrell reversed that opinion after subsequently reviewing EBM data that excluded that possibility. The concession was plainly specific to the CCR records in that one instance. Obviously, to have advanced a case in relation to that occasion based on the CCR evidence alone would have misled the court. The concession was entirely appropriate and the applicant's argument misconstrued it entirely. The argument is untenable.

212 It is in any event not the case, as the applicant contended, that by relying on Dr Sorrell's evidence the prosecution was turning mere speculation into admissible evidence. The evidence was not merely speculative, it was relevant and probative as part of a circumstantial case which relied on:

(a) the applicant's past use of the iNaturalist website to search for death cap mushrooms;

(b) the postings by Dr May and Ms McKenzie of locational details for recent death cap mushroom sightings in eastern Victoria;

(c) the fact that evidence about the location of the applicant's phone showed that she had the opportunity to go to those locations within 10 days and one day, respectively, after those postings;

(d) the applicant's purchase of a food dehydrator within hours of one of those opportunities; and

(e) the finding of debris of death cap mushrooms in that dehydrator after its recovery from the waste transfer station where the applicant had dumped it a few days after the lunch.

213 This evidence was led to exclude the hypothesis of accidental poisoning which the applicant advanced at the trial.

214 Viewed in the context of the prosecution case, Dr Sorrell's evidence had probative value. We would assess that probative value as being at least 'modest', to use the judge's designation. The same conclusion applies, for much the same reason, to the evidence of the postings by Dr May and Ms McKenzie. The probative value of the latter evidence is reduced by the absence of any evidence that the applicant saw the postings, but that does not mean that it lacked probative value altogether. As part of the overall evidence of opportunity, at a time close to the lunch, for the applicant to source death cap mushrooms which she could dehydrate for later use, that evidence is also, at least, of modest probative value.

215 The phrase ‘unfair prejudice’ is not defined in the *Evidence Act*. It has been held, however, that in the context of s 137 unfair prejudice is the risk of harm to the interests of the accused by reason of the risk that the jury will use the evidence improperly, including where the evidence has some quality which is apt to lead the jury to give it more weight than it warrants.[47]

216 The risk of unfair prejudice to the applicant by reason of admission of Dr Sorrell’s evidence was in our view marginal. We have already set out part of what Dr Sorrell and the judge said about the limits of his evidence. Those limits were clearly explained to the jury.

217 We are unable to discern unfair prejudice from the fact that there was not EBM data for the whole period over which Dr Sorrell examined CCR evidence.[48] Dr Sorrell acknowledged that EBM data could have pointed to other possible visits that may not have been indicated by the CCR evidence. That would not necessarily have assisted the applicant, but the possibility was entirely speculative. To the extent that the prosecution sought to establish that it was unusual for the applicant to visit Loch and Outtrim, the absence of comprehensive EBM records made that argument more difficult.

218 The probative value of Dr Sorrell’s evidence was not outweighed by the danger of unfair prejudice. While we will grant leave to appeal, ground 2 must be rejected.

Ground 3 — SD card mushroom photographs

219 The defence case at trial was that the applicant had had, for a number of years, an interest in foraging for wild mushrooms — that is eating as well as picking wild mushrooms — and that the inclusion of death cap mushrooms in the lunch guests’ meals was a tragic accident consequent upon death cap mushrooms innocently and mistakenly picked and preserved by the applicant being later included in the beef Wellingtons.

220 The third proposed ground of appeal concerns a number of rulings made by the judge in connection with evidence of the applicant’s interest in foraging for mushrooms.

221 On 28 May 2025, shortly after the cross-examination of the informant began, counsel for the applicant questioned the informant about an SD card located in the applicant’s home as part of the police investigation. The SD card contained 23 photographs of mushrooms. Some of the photographs depicted mushrooms apparently in situ in the wild.[49] Others showed mushrooms or parts of mushrooms, apparently uncleaned, either on newspaper on a surface in the applicant’s house[50] or on a draining board. Others showed mushrooms, which might have been washed, on absorbent paper. The

47*R v Dickman* (2017) 261 CLR 601, 616 [48] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

48There was EBM data for 23 days out of approximately 18 months of CCR information.

SD card also contained four videos, apparently of the applicant's children on scooters. The metadata associated with the photographs, if accurate, demonstrated that the photographs and videos were taken on a number of days in late April and early May 2020. The prosecution objected to the tender of the SD card on the ground of relevance.

222 We interpose that the prosecution had originally sought to rely upon the photographs on the SD card as evidence that the applicant had an 'interest in poisons'. On 5 May 2020, the applicant posted a message to a webpage titled 'Poisons Help; Emergency Identification for Mushrooms & Plants' stating that '[m]y cat chewed on this mushroom just now. He is having a vomit. Was in grassland near trees. I'm in Victoria Australia'. The post was made on the same date as some of the photographs on the SD card were taken. Those photographs were included in the post. The prosecution relied on the fact that the applicant had never owned a cat. In a pre-trial ruling, the judge excluded the evidence as temporally remote to the lunch and consequently irrelevant.[51]

223 Returning to the trial, in the course of argument as to the admissibility of the SD card, counsel for the applicant submitted that the evidence refuted the prosecution case that the offending involved isolated incidents in which the applicant had intentionally picked death cap mushrooms. Counsel argued that the photographs on the SD card were evidence of a plainly innocent example of picking mushrooms.

224 The judge excluded the evidence on the basis that it did not meet the threshold of relevance.[52] In his ruling, the judge assumed that the photographs were of mushrooms that the applicant had picked, that she had taken the photographs and that this had happened in late April or early May 2020. The judge stated that, even assuming that the applicant had picked the mushrooms, it was 'a leap rather than a rational inference' that she had also eaten them.

225 A few days later, and while the informant was still under cross-examination, the judge indicated to the parties that he wished to revisit this ruling and to hear submissions on the question of whether the impugned evidence was tendency evidence. Further argument took place accordingly later that day. The judge indicated he had come to a different view after reviewing some authorities over the weekend.[53] He ruled that the

49 Two of the photographs depict a path next to a body of water in which it is difficult to discern mushrooms.

50 In one such photograph, the applicant's daughter is visible in the background.

51 *Ruling 7* [22].

52 *R v Patterson* (Supreme Court of Victoria, Beale J, 29 May 2025).

53 *R v Patterson* (Supreme Court of Victoria, Beale J, 2 June 2025).

jury could rationally infer from the photographs that the applicant had possibly picked and eaten wild mushrooms. The judge held, however, that the evidence was relevant only for tendency reasoning.[54] As such, s 97 of the *Evidence Act* required that it have significant probative value.[55] The judge ruled that the evidence failed to meet that test.[56] The judge was not satisfied that the photographs strongly supported the possibility that the applicant had a tendency to pick and eat wild mushrooms nor was the judge satisfied that the tendency to pick and eat wild mushrooms strongly supported the possibility that the applicant had innocently foraged the mushrooms for the lunch on 29 July 2023.[57]

226 Later that day, the informant's evidence came to an end and the prosecution closed its case. The defence announced that the applicant would be called. She commenced giving evidence at 3:30 pm that day. On the second day of her evidence, the applicant said that she had an interest in wild mushrooms that began during the COVID-19 lockdown. She said that she noticed wild mushrooms in the Korumburra Botanical Gardens and on her three-acre property at Korumburra. The applicant described how she set about discovering which species were edible, including by participating in a Facebook group for mushroom lovers. She said that she eventually became confident enough to eat some. Thereafter, if she saw the same types of mushrooms growing, she would 'usually pick them and eat them'. The applicant also said that she put the mushrooms in the meals eaten by her children. The prosecution objected that the applicant was giving evidence of a tendency absent a tendency notice.

227 The applicant's counsel submitted that the impugned evidence was not led for a tendency purpose but as direct evidence of the context in which the picking of the mushrooms for the lunch should be considered. Nonetheless Senior Counsel accepted, when asked by the judge, that he would argue to the jury that, based on the evidence of the applicant's habit of picking and eating wild mushrooms on many prior occasions, it was a reasonable possibility that on the occasion of the 29 July 2023 lunch, she did exactly as she had done before, namely picked wild mushrooms and included them in a meal believing them to be innocuous.

228 The judge ruled that the evidence was evidence of a tendency led in order to advance tendency reasoning.[58] The judge relied on the decision in *Elomar v The Queen*,[59] to the following effect:

54Ibid.

55Ibid.

56Ibid.

57Ibid.

58*R v Patterson* (Supreme Court of Victoria, Beale J, 3 June 2025).

> As Simpson J has said on previous occasions (for example, *Gardiner* at [124]), proof that a person has or had a tendency (whether to act in a particular way, or to have a particular state of mind) of itself goes nowhere. Tendency evidence is evidence that provides the foundation for an inference. The inference is that, because the person had the relevant tendency, it is more likely that he or she acted in the way asserted by the tendering party, or had the state of mind asserted by the tendering party on an occasion the subject of the proceedings. Tendency evidence is a stepping stone. It is indirect evidence. It allows for a form of syllogistic reasoning.
>
> The process of reasoning is:
>
> - on an occasion or occasions other than an occasion in question in the proceedings, a person acted in a particular way;
> - it can therefore be concluded or inferred that the person had a tendency to act in that way;
> - by reason of that tendency, it can therefore be concluded or inferred that, on an occasion in question in the proceedings, the person acted in conformity with that tendency.[60]

229 The judge permitted late service of a tendency notice by the defence under s 100 of the *Evidence Act*.[61] In doing so, the judge said that the

> tendency evidence which the defence sought to adduce through the prosecution witness lacked significant probative value.
>
> That deprived the [evidence] of any foundation, any proper evidentiary foundation for a final argument that [the applicant] was in the habit of foraging for wild mushrooms, in the sense of both picking them and consuming them. That proper evidentiary foundation, could only be provided by her going in the witness box and giving evidence, as she has done and, clearly, it is central to the defence case, and there has to be fairness to both sides.[62]

230 The following day, after agreement between the parties as to the form of the evidence, the images from the SD card and associated metadata were tendered through the applicant. The applicant gave evidence that she took the images in early 2020.

59(2014) 316 ALR 206; [2014] NSWCCA 303 (‘*Elomar*’).

60Ibid 278 [359]–[360] (Bathurst CJ, Hoeben CJ at CL and Simpson J), citing *Gardiner v The Queen* (2006) 162 A Crim R 233, 260 [124] (Simpson J); [2006] NSWCCA 190.

61*R v Patterson* (Supreme Court of Victoria, Beale J, 3 June 2025, second ruling).

62Ibid.

Applicant's submissions

231 The applicant submitted that her innocent interest in foraging for mushrooms — that is, picking and eating them — was fundamental to the defence case. It was submitted that the judge erred in ruling, first that the evidence was irrelevant, and then that, although relevant, it only supported a possible tendency on the part of the applicant. It was submitted that this left the applicant with no choice but to give evidence on the critical issue in her defence.

232 The applicant submitted that the items on the SD card, which counsel sought to introduce into evidence through the informant, were the evidentiary foundation for a closing argument that the applicant in the past had an interest in foraging for mushrooms for an innocent purpose.

233 The applicant submitted that the evidence was not in the nature of tendency evidence. It stood as original evidence of photographs and videos in the possession of the applicant that provided a basis for a closing argument that the applicant had in the past taken photographs of mushrooms that were not death cap mushrooms or store-purchased mushrooms. It was submitted that the evidence was relevant because it was found in her possession, not because it was tendency evidence. The evidence supported an argument that the applicant had previously foraged for mushrooms other than deadly mushrooms.

234 Two consequences were said to flow from the erroneous ruling that the SD card could not be tendered through the informant, either because it was irrelevant or because it only supported a possible tendency on the part of the applicant.

235 First, the applicant's fundamental right to silence had been compromised.[63] She was compelled to give evidence of her innocent interest in and habit of picking and eating wild mushrooms where she otherwise could have relied upon the contents of the SD card to establish that interest and habit, and remained silent on the issue during her evidence. As a result, there was a departure from the fundamental requirements of a criminal trial and a substantial miscarriage of justice had occurred.

236 Secondly, and alternatively, the wrongful rejection of the tender of the evidence during the prosecution case was capable of having affected the result of the trial and there was a substantial miscarriage of justice on that account.[64] It was submitted that,

63Citing *RPS v The Queen* (2000) 1999 CLR 620, 630–4 [22]–[34] (Gaudron ACJ, Gummow, Kirby and Hayne JJ); *Petty v The Queen* (1991) 173 CLR 95, 99 (Mason CJ, Deane, Toohey and McHugh JJ); *Azzopardi v The Queen* (2001) 205 CLR 50, 64–9 [33]–[48] (Gaudron, Gummow, Kirby and Hayne JJ).

64*Baini* (2012) 246 CLR 469; *Awad v The Queen* (2022) 275 CLR 421; *Karam v The King* (2023) 312 A Crim R 522, 575 [216] (Beach, McLeish and Kennedy JJA); [2023] VSCA 318; *Baker v The King* [2025] VSCA 139 [99] (McLeish, Orr and Kidd JJA).

notwithstanding that the SD card was ultimately in evidence before the jury on her trial, there was an unquantifiable disadvantage that arose from its tender during the defence case to the extent that it must be concluded that if it had been tendered through the informant during the prosecution case, the jury might have reached different verdicts.

Respondent's submissions

237 The respondent submitted that, by the time the informant was called, there was evidence before the jury that the applicant had picked wild mushrooms (including the photographs of wild mushrooms on the trays of the dehydrator) that Dr May had identified as being consistent with death cap mushrooms. There was, however, no evidence of the applicant having previously held an innocent interest in picking and eating wild mushrooms. To the contrary, four witnesses gave evidence that they had not known the applicant to pick wild mushrooms.

238 The respondent submitted that the SD card evidence could never have passed the relevance threshold simply by having been found at the applicant's home. It was necessary to look to the purpose of the evidence in determining its admissibility. Its only purpose was to support tendency reasoning.

239 The respondent submitted that the judge was correct to apply the decision in *Elomar* because the applicant was seeking to have the jury reason that, on occasions other than cooking the lunch, she had acted in a particular way — that is, picking, cooking and eating wild mushrooms — and it could therefore be concluded that she had a tendency to act in that way. By reason of this, it could be further concluded that, in preparing the lunch, she acted in conformity with that tendency.

240 The respondent submitted that, accordingly, at the time the applicant first sought to tender the SD card, the evidence failed both limbs of the test in s 97 of the *Evidence Act*. As to the first limb, the images of wild mushrooms did not strongly support the possibility of a tendency on the part of the applicant to innocently forage for mushrooms for the purpose of including them in meals. It was submitted that nothing in the images suggested that the mushrooms were being prepared for eating, or that they were later eaten. It was also unknown whether the mushrooms were edible or toxic. As such, the images were equally capable of supporting an interest in poisonous wild mushrooms (as the prosecution had originally sought to argue).

241 In respect of the second limb, even if the evidence was capable of demonstrating a tendency on the part of the applicant to pick and eat wild mushrooms in April and May 2020, the respondent submitted that this did not strongly support the possibility that the applicant had innocently foraged for mushrooms included in the lunch in July 2023, some three years later. The evidence therefore failed to meet the threshold of significant probative value and the judge was correct to exclude it.

242 As to the election of the applicant to give evidence, the respondent submitted that the applicant's evidence covered a range of matters that were not otherwise before the jury, including her explanation for the alleged lie about having ovarian cancer and a

description of vomiting after the lunch, as well her claimed long-term innocent habit of picking, eating and preserving mushrooms. It was observed that the applicant did not assert that the judge's ruling on the SD card caused her to give evidence or that, but for the ruling, the trial would have been conducted differently. It could not be said that a substantial miscarriage of justice occurred due to the exclusion of the SD card evidence during the prosecution case.

243 As to the unquantifiable disadvantage that arose from the inability to tender the SD card during the prosecution case, the respondent submitted that the jury would have considered the evidence uninfluenced by the point in the trial at which it was tendered.

Analysis

244 The central plank in the applicant's defence at trial was that the prosecution could not exclude the reasonable possibility that the presence of death cap mushrooms in the lunch served on 29 July 2023 was a tragic accident. So much is plain from the manner in which the applicant's Senior Counsel began his closing address to the jury:

> Members of the jury, your consideration of the evidence in this trial comes down to two simple issues that you have to determine.
>
> First, is there a reasonable possibility that death cap mushrooms were put into this meal accidentally, that's the first issue. Second, is it a reasonable possibility that [the applicant] did not intend to kill or cause serious injury to her guests.

245 For the possibility of accidental poisoning to be reasonable, there had to be a mechanism by which death cap mushrooms could have innocently made their way into the applicant's kitchen for a culinary purpose. More particularly, there had to be an evidentiary foundation to raise the reasonable possibility that the death cap mushrooms in the beef Wellingtons were there as a result of that mechanism.

246 The prosecution evidence established unambiguously that death cap mushrooms are not cultivated commercially. Rather, the prosecution evidence established, death cap mushrooms can only be sourced in the wild. There is little surprise therefore that the mechanism identified by the applicant to reasonably explain the presence of death cap mushrooms in the lunch was her asserted habit, of some years' duration, of foraging for wild mushrooms. Evidence of that habit allowed the applicant to argue that the inclusion of death cap mushrooms as part of the duxelles in the beef Wellingtons could reasonably have been a result of a previous innocent error misidentifying death cap mushrooms as edible mushrooms, leading to them being picked and preserved for later cooking.

247 It is important to note, again, that the asserted foraging interest of the applicant was not limited to simply picking wild mushrooms, but necessarily embraced cooking and eating them. At all times when the term 'foraging' was used by the applicant it meant both picking mushrooms and eating them. So much is obvious. An interest in simply

picking wild mushrooms, even if regularly taken home, cleaned and photographed — but not preserved and/or cooked and eaten — could never found the reasonable possibility of the accidental inclusion of death cap mushrooms in the served lunch.

248 The forensic difficulty for the applicant was not only the absence of any evidentiary foundation in the prosecution case for her asserted interest in foraging wild mushrooms but positive evidence that she did not have such an interest. That evidence was as follows:

(a) The evidence of Jenny Hay, who was a Facebook friend of the applicant. Ms Hay said that in their online discussions, the applicant discussed her love of mushrooms but never discussed foraging for mushrooms.

(b) The evidence of Ms Atkinson, who was told by Simon Patterson that he had never known the applicant to pick wild mushrooms before.

(c) The evidence of the applicant's son, who said that he had never been mushrooming with his mother and had never known her to pick a mushroom.

(d) The evidence of the applicant's daughter, who said that she had never seen mushrooms whilst out with her brother and mother.

249 The applicant also had to contend with answers she had given to police when interviewed. The relevant parts of that interview were as follows:

> Obviously, we've got concerns in relation to these mushrooms and where they've come from.---Mm.
>
> O.K. Is that something you've done in the past, foraging for mushrooms - - -[?] ---Never.
>
> - - - or anything like that? Never?---Never.
>
> All right. Do you preserve foods or anything like that?---No.
>
> Have you dehydrated food or anything - - -[?]---No.

250 In his response to the prosecution opening, Senior Counsel for the applicant said:

> She also lied to the police about foraging for mushrooms. She admits that. She did forage for mushrooms. Just so that we make that clear, she denies that she ever deliberately sought out death cap mushrooms.

251 This statement by Senior Counsel was not evidence that the applicant had lied to police, nor was it evidence that she had ever foraged for mushrooms.

252 It follows that, from the commencement of the trial, the manner in which the applicant chose to conduct her defence — arguing that the prosecution could not exclude the reasonable possibility of accidental poisoning — made it necessary for her to point to

evidence that she had 'lied' to police that she had never been mushroom foraging and also point to some evidence of her interest in and habit of picking and eating wild mushrooms.

253 The applicant's argument under cover of this ground then is essentially that the SD card alone was sufficient evidence of her interest in and habit of foraging for mushrooms and, thereby, of her 'lie' during the record of interview. The argument is that if the judge had permitted its tender as original evidence of that interest and habit during the cross-examination of the informant, the applicant would not have needed to and would not have given further evidence about the 'lie' or her history of mushroom foraging (even though she gave evidence about other matters). She would not have suffered the unquantifiable disadvantage of having to tender the SD card during the defence case.

254 That argument cannot be accepted.

255 The images on the SD card could not, without more, establish that the applicant had an interest in and habit of foraging for wild mushrooms or even that she had so foraged in April/May of 2020. The highest that the applicant's possession of the SD card reached was that she was, in 2020, interested enough in wild growing mushrooms to pick them, take them home, (perhaps) wash them, and photograph them. There is nothing in the images that suggests that the mushrooms were cooked and eaten. It is unknown if the mushrooms depicted were, in fact, edible. The applicant's counsel did not ask Dr May to identify the species depicted. Moreover, there are contraindications in the images that the mushrooms could have been for a culinary purpose, not least their broken, withered and decaying appearance even when in situ in the ground. In any event, at the time the informant was cross-examined, any relevance the images might have had as context or background to the 29 July 2023 lunch could only have been that on a few days in 2020, the applicant picked and photographed some wild mushrooms. While that is not inconsistent with an interest in foraging, as original evidence the images on the SD card necessarily fell short of establishing a prior interest in cooking and eating wild mushrooms. That was insufficient for the applicant's purposes. The SD card was not direct evidence that the applicant 'did forage for mushrooms' and had lied to police when she said she never had, as opened to the jury by the applicant's Senior Counsel.

256 In reality, however, the applicant sought to rely upon the images not as context or background of a prior interest in foraging for mushrooms, but to establish the reasonable possibility of a habit of picking and eating mushrooms and, thereby, a mechanism by which poisonous wild mushrooms could have been, in 2023, misidentified as edible, brought into the applicant's kitchen for eating and later included in the beef Wellingtons. To the extent that the images on the SD card raised that possibility, the applicant relied upon it for a tendency purpose.

257 Section 97 of the *Evidence Act* requires evidence of a tendency to have not merely probative value, but significant probative value. As observed by the plurality in *IMM*:

> The significance of the probative value of the tendency evidence under

> s 97(1)(b) must depend on the nature of the facts in issue to which the evidence is relevant and the significance or importance which that evidence may have in establishing those facts. So understood, the evidence must be influential in the context of fact-finding.[65]

258 That is, evidence will have significant probative value 'if it could rationally affect the assessment of the probability of the existence of a fact in issue to a significant extent'.[66]

259 The judge was correct that, at the time the applicant first sought to tender the SD card as evidence of a tendency to forage for wild mushrooms, the evidence lacked significant probative value. First, the images on the SD card and the applicant's mere possession of it did not strongly support the possibility of the tendency. The observations made above as to the absence of indicia that the picked mushrooms depicted were destined for a culinary purpose are apposite and need not be repeated. Secondly, the evidence of a tendency to forage for mushrooms in April/May 2020 did not strongly support the possibility that the death cap mushrooms served in July 2023 were innocently foraged. The SD card could not support an ongoing and frequently exercised interest in picking and eating wild mushrooms. It could only (very faintly) support the possibility of that interest for a very brief period some years prior to the lunch.

260 The judge did not err in refusing the tender of the SD card during the prosecution case. It was neither original evidence of an interest of the applicant in picking and eating wild mushrooms, nor, alone, was it significantly probative of a tendency by the applicant to do so. The judge was correct that the 'proper evidentiary foundation' for the applicant's argument that her habit of foraging wild mushrooms allowed that the death cap mushrooms could have been picked accidently and thereby innocently included in the lunch 'could only be provided by [the applicant] going in the witness box and giving evidence'. This did not undermine the applicant's right to silence, nor did it occasion an 'unquantifiable disadvantage' to the weight the jury was likely to give to the SD card in its deliberations.

261 It was not suggested by the applicant that she gave evidence in her trial only because of the judge's rulings on this issue. Nor could it be so. If she had stood mute on her trial she would not, for example, have been able to advance her version of why she may have lied to her lunch guests about being seriously ill, if not having cancer.[67]

65(2016) 257 CLR 300, 314 [46] (French CJ, Kiefel, Bell and Keane JJ).

66*Hughes v The Queen* (2017) 263 CLR 338, 356 [40] (Kiefel CJ, Bell, Keane and Edelman JJ).

67The evidence of Ian Wilkinson was that the applicant said she had been diagnosed with cancer (see [24] above), whereas that of the applicant was that she had not said that she had been formally diagnosed (see [120] above).

Having decided to give evidence then, it is fanciful to suggest that the applicant would not have given any evidence about her foraging habit and instead relied upon the prior admission of the images on the SD card to establish that habit and her 'lie' to police on that issue.

262 First, as we have already observed, the SD card alone could not establish that the applicant had ever foraged wild mushrooms — that is, picked and eaten them — let alone that she had a habit of or tendency to do so. Accordingly, Senior Counsel having told the jury that the applicant lied to police about having never foraged mushrooms, it was necessary for the applicant to say that she had lied (and to explain why).

263 Secondly, the applicant's argument that the death cap mushrooms in the lunch were there accidentally as a result of her foraging habit — that is the mechanism of the reasonable possibility of accident — depended upon some temporal proximity between the relevant occasion of foraging and the July 2023 lunch. The images on the SD card alone could not provide that temporal proximity. The lack of temporal proximity greatly weakened any tendency reasoning. Further, it undermined a direct connection with the lunch. Logically, it is unlikely that mushrooms picked in April and May 2020 would be preserved and kept for three years and then used in the 'special lunch' the applicant prepared for her guests, rather than mushrooms picked closer to that time. That is all the more so because the applicant moved houses between 2020 and the lunch. Further, the evidence suggested that she only acquired a dehydrator on 28 April 2023.

264 In this regard, it is instructive to note the evidence the applicant did give on this issue.[68] When shown the images from the SD card, the applicant said that she had taken them. She said that she had done so in early 2020 because her interest had been sparked in wild mushrooms at that time when she went on walks with her children during the COVID-19 lockdowns.[69] The applicant never said that she ate the mushrooms depicted in the images on the SD card. She said that she was trying to figure out what mushrooms grew on her property and discovered that it is hard to discern mushroom species. The applicant had earlier described the process by which she learned to identify field mushrooms and horse mushrooms. She said that 'eventually' she ate wild mushrooms after 'a process of several months' when she arrived at a point where she was confident about what they were. She tested 'a bit off one' to see if she became sick. She did not. Thereafter if she saw the same types of mushrooms growing, she 'would usually pick them and eat them, and sometimes put them in meals [the family] all ate'.

265 Later in her evidence, the applicant expressly made the close temporal connection between the time at which the death cap mushrooms had been inadvertently foraged and the lunch. The applicant said that she and Simon Patterson had had a conversation

68See also [106] above.

69Dr May gave evidence that there had been an increased interest in mushrooming at that time.-

about the dehydrator on 1 August 2023, and that he had asked her 'is that how you poisoned my parents?'.[70] The applicant was asked what crossed her mind when Simon Patterson asked that question. The applicant said:

> So it got me thinking about all the times that I'd used it … and how I had dried foraged mushrooms in it *weeks earlier*, and I was starting to think 'what if they'd gone in the container with the Chinese mushrooms? Maybe — maybe that had happened', yeah.[71]

266 The tenor of this evidence, that the images on the SD card were from the beginning of the applicant's interest in wild mushrooms that later developed into a foraging habit, was reflected in the closing address of the applicant's counsel. Senior Counsel did not argue that the images on the SD card were evidence of the applicant's habit or tendency to pick and eat wild mushrooms, only that the 'photos demonstrate categorically without any question that [the applicant] was interested in wild mushrooms in April and May of 2020' at exactly the time, during COVID-19 lockdowns, that Dr May said lots of people were. Counsel continued: 'She photographed them. She picked them. She took them home.' Counsel did not suggest that the applicant ate the mushrooms. A little later, counsel argued that the applicant's habit of foraging — that is eating as well as picking — developed as she went on walks 'as the years rolled on':

> So she goes on a walk. It's not a walk for the express purpose of foraging mushrooms — it's just a walk. If she sees some, that's her evidence, she'll pick them. A handful of times in the middle of mushroom season of each year, and once you pick it, you check whether it's fine, or throw it out because they don't keep for very long.

267 Counsel emphasised that it was a 'fact' that the applicant loved mushrooms (and not only wild ones). He said that:

> Picking mushrooms *and then later on* picking *and eating* them was not a daily activity. It could only happen in mushroom season, obviously, and it only happened, as I've said, a handful of times in each of those seasons. Her evidence is that field and horse mushrooms were common and the slippery jacks and the honey mushrooms less so, but she tried them too, and that's something that she did occasionally. When she found a mushroom that she didn't know at the beginning, she would pick it up, look at it, try to identify it, try it, and if it was okay, eat more of them. …
>
> She was not suggesting to you that she was out there in the forest every day scrambling around looking for mushrooms. It was an interest that started in 2020 and there were a few occasions each season when it happened.[72]

70 Simon Patterson denied saying this.

71 Emphasis added.

72 Emphasis added.

268 In short, the central plank of the defence case could never have been supported by the tender of the SD card during the prosecution case. Even if the judge permitted its tender during the cross-examination of the informant, alone it was insufficient to provide an evidentiary basis for the applicant to argue that the death cap mushrooms were mistakenly picked during one of her foraging walks a few weeks prior to the lunch, preserved through dehydration and then included in the duxelles made for the beef Wellingtons: the mechanism of accidental poisoning. Alone, the SD card could not establish that the applicant had lied to police regarding foraging nor sufficiently counteract the other combined evidence of persons close to her that the applicant did not forage for mushrooms. Mere possession in 2023 of some photographs of mushrooms taken in 2020 without explanation of their significance — an explanation that could only have been given by the applicant — could not found the critical argument that the prosecution had failed to exclude the reasonable possibility that the poisonings were a tragic accident and, therefore, that the applicant lacked murderous intent. The giving of evidence on the issue was a forensic choice. There was no departure from the fundamental requirements of the applicant's trial. No substantial miscarriage of justice occurred.

269 Finally, turning to the asserted 'unquantifiable disadvantage' productive of a substantial miscarriage of justice arising from the tender of the SD card during the evidence of the applicant as opposed to during the cross-examination of the informant, we observe that, aside from arguing that it was unquantifiable, the applicant was unable to identify the nature of the disadvantage.

270 That is because there was not one.

271 Importantly, the SD card was ultimately in evidence before the jury. The significance of the images on it were explained by the applicant in the manner just described. The informant could not have given that evidence, nor could that significance have been inferred from the applicant's mere possession of the card. Further, the SD card — and the applicant's evidence about it — was the anchor of the applicant's final argument as to the evolution of her interest in foraging for mushrooms central to her defence. There is no reason to assume that the jury would have considered the evidence of those images or the applicant's explanations of them differently if the SD card had been tendered through the informant. Whenever it was tendered, the jury would have been aware that it was a defence exhibit. But, a physical exhibit does not acquire a patina of relatively less or more weight depending upon the manner of its tender or the point in the trial at which the tender is made. It simply becomes part of the evidence. The refusal to permit the tender during the prosecution case could not possibly have affected the result of the trial. There was no substantial miscarriage of justice.

272 Proposed ground 3 is without merit. Leave to appeal on this ground is refused.

Grounds 4 and 7 — Facebook evidence, change of prosecution case

273 From about 2019, the applicant formed connections with a number of online associates who came to know her through their participation in a true crime Facebook

group. The prosecution alleged that the applicant participated in these groups under the Facebook accounts named 'Erin Patterson', 'Erin Erin' and 'Erin Erin Erin', and sought to rely on a number of communications alleged to have been sent by the applicant (together, the 'Facebook evidence', the specifics of which are articulated below).

274 The admissibility of evidence of those communications is the subject of the fourth proposed ground of appeal. The use made by the prosecution of the evidence is central to the seventh proposed ground, which alleges a change in the prosecution case by introducing an alleged motive for murder in the closing address.

275 The impugned evidence, in the form of Facebook messages and evidence from persons with whom the applicant had communicated through Facebook, was that the applicant discussed issues she was having with Simon in a Facebook group chat, in which she painted him in an unfavourable light and expressed her unhappiness about issues such as the payment of child support. In the messages the applicant described herself as an atheist and expressed frustration that Simon's religion was preventing them from getting a divorce.

276 The impugned evidence was, further, that in December 2022, the applicant communicated with her online friends from the Facebook group about her relationship with Simon in critical terms, describing her dislike of him. The applicant wrote that Gail had been 'horrified' when she claimed child support from Simon, whom she described as a 'deadbeat'. She complained that Donald and Gail would not intervene in the issues between her and Simon, and just suggested that they pray. She wrote, 'this family I swear to fucking god' and at one point described Donald and Gail as a 'lost cause'.

277 On 6 December 2022 at 10:44 am, the applicant sent the following message in a Facebook Messenger group chat:

> Don rang me last night to say that he thought there was a solution to all this if Simon and I get together and try to talk and pray together [two upwards looking face emojis] and then he also said Simon had indicated there was a solution to the financial issues if I withdraw the child support claim?! My head nearly exploded and I was like what?? And don goes oh sorry just ignore what I said I don't want to get involved. So anyway I sent a group message to them all last night saying how Simon is behaving is unconscionable and asking me to withdraw the child support claim is wrong and disadvantages me and his children and how dare he etc. Don messaged to say he and Gail don't want to get involved in the financial things but just hope we will pray for the kids [upwards looking face emoji] so I replied this morning saying I understand it's uncomfortable and awkward for them but I want to copy them into this stuff because Simon needs to be accountable for the decisions he is making that are hurting his children and I would hope they care about their grandchildren enough to care about what Simon is doing. That's when don said they tried to talk to him but he refused to talk about it so they're staying out of it but want us to pray together. I'm sick of this shit I want nothing to do with them. I thought his parents would want him to do the right thing but it seems their

> concern about not wanting to feel uncomfortable and not wanting to get involved in their sons personal matters are overriding that so fuck em.

278 The applicant also wrote to the group on 7 December 2022 in the following terms:

> His parents sent me a message yesterday afternoon and Simon sent me one last night but I've read neither and I don't think I will. I don't want to hear it. Simon's will just be horrible and be gaslighting and abusive and it will ruin my day and his parents [sic] message will be more weasal [sic] words about not getting involved so I think I'm going to just move on. I don't need anything from any of those people. Simons [sic] parents say they don't want to take sides but by their very actions they have. If their daughter came to them laying all the same complaints about her husband, that I did about Simon, they would never say to her 'oh well we can't believe you until we hear Josh's side, right now it's your word against his'. No they would just believe her. If their daughters [sic] husband just walked away and refused to support her kids they would have things to say to him. But by refusing to hold Simon to account they've made it clear his word means more than mine so that speaks volumes even if they claim they haven't taken sides. Theyve [sic] had Simon for tea every night for three months and never once picked up the phonw [sic] to me since the separation and asked if I'm ok and need help. So that tells me their choices. Simon wants to walk away from his responsibilities too, well that's his choice. Maybe it's easier if he's not involved in even paying their school fees, means I can choose their school all by myself and don't have to refer to him. If he wants them to go to a private Christian school then he can help pay for it, if he doesn't want to help pay for it then I don't have to send them there, do I? So maybe it just means I have even more freedom about my choices, a blessing in disguise.

279 The judge ruled separately with respect to the admissibility of the evidence in the Facebook material in regard to the applicant's attitude towards Simon individually,[73] and towards Simon, Gail and Donald collectively.[74]

280 The applicant had first argued that the evidence in the Facebook material specifically about the applicant's attitude towards Simon — her general unhappiness, the child support issues and frustration that his religion prevented them from being divorced — was irrelevant.[75] The applicant also argued that, if relevant, the probative value of the evidence was low and outweighed by the danger of unfair prejudice.[76] The prejudice was identified as a risk of the jury overvaluing the evidence in the absence of any evidence of motive for the applicant to murder Simon or the other lunch guests. The respondent maintained that the impugned evidence was relevant as evidence of the

73*Ruling 7* [12]–[18].

74Ibid [28]–[37].

75*Evidence Act*, ss 55–6.

76Ibid s 137.

nature of the relationship between the applicant and Simon, and to rebut evidence expected to be adduced by the applicant from some of the prosecution witnesses, including Simon, that the relationship between the applicant and Simon was harmonious in the lead-up to the lunch.

281 The judge admitted the evidence as relevant, finding it demonstrated that the applicant harboured resentment towards Simon in the lead-up to the lunch. The judge observed that Simon was an invitee to the lunch and the applicant was particularly adamant that he should attend.[77]

282 In respect of the danger of unfair prejudice, the judge noted that the prosecution was not relying on the evidence of the applicant's animosity towards Simon (and Donald and Gail Patterson) as evidence of motive for the applicant to kill them. He said that '[a]s such, the danger of the jury overvaluing the evidence is minimal'.[78] The judge said that, if requested, directions could be given highlighting that the prosecution only relied on the relationship evidence as rebuttal evidence and not as evidence of motive. He concluded that, although the probative value of the evidence was 'modest', it was not outweighed by the danger of unfair prejudice.[79]

283 The judge dealt separately with the applicant's attitude towards Simon and his parents collectively, as revealed in the impugned Facebook messages.[80] The applicant submitted that the impugned evidence should be excluded under s 137 of the *Evidence Act*. The submission was that some of the disparaging remarks made by the applicant about Simon, Donald and Gail Patterson in the messages could inflame the jury. It was also submitted that the jury might treat the relationship evidence as evidence of motive, even though the prosecution was not relying on it in that way.

284 The judge ruled that the impugned evidence was of significant probative value with respect to the lunch to which Simon was invited but failed to attend.[81] The judge said that the evidence demonstrated 'considerable resentment' on the part of the applicant towards Simon, Donald and Gail Patterson at a time proximate to the lunch.[82] The judge held that the impugned evidence was 'significant rebuttal evidence', given that it was expected that the applicant would adduce evidence of her having had positive

77*Ruling 7* [17].

78Ibid [18].

79Ibid.

80Ibid [28]–[37].

81Ibid [36].

82Ibid.

relationships with Simon, Donald and Gail Patterson.[83] The judge observed that the prosecution 'will not be submitting to the jury that the [applicant's] resentment towards Simon Patterson, Donald Patterson and Gail Patterson amounts to a motive for her to murder them'.[84] He said that this minimised the risk of the jury 'over-valuing the evidence'.[85] Again, the judge said that directions could be given reinforcing the point that the prosecution did not rely on the relationship evidence other than for rebuttal purposes. The judge did not think that the disparaging comments made by the applicant would inflame the jury. The judge said, '[o]n the spectrum of inflammatory material, this falls at the very bottom end of the spectrum, if at all'.[86]

Applicant's submissions

285 As pleaded, proposed ground 4 concerns admissibility of the Facebook material and proposed ground 7 concerns the alleged improper use of that material in the trial by the prosecution to advance motive. The applicant's written case substantially blurred the submissions relevant to each ground and focussed primarily on the asserted improper use of the (allegedly wrongfully) admitted evidence. In so doing, the applicant made several allegations of serious prosecutorial misconduct.

286 The applicant submitted that the prosecution had maintained at all relevant times in the lead-up to the trial that the Facebook messages were only context or relationship evidence and that they would not be relied upon as providing a motive for murder. The prosecution said that the evidence would demonstrate that the applicant 'harboured a degree of resentment' towards Simon, Donald and Gail Patterson. It was said that the evidence provided 'appropriate context' to evidence that the applicant appeared to maintain a friendly relationship with the Pattersons after the separation. Counsel for the prosecution had said that the relationship evidence was not put as high as motive.

287 The applicant observed that the prosecution originally only sought to adduce evidence of two Facebook messages from December 2022,[87] but it ultimately tendered eight Facebook messages, which had not formed part of the case it opened before the jury. These messages were 'heavily redacted' and 'in a vacuum where their "true and realistic context" were rife for exploitation'. Moreover, the prosecution had tendered them through Mr Fox-Henry, rather than the applicant's Facebook friends.

83Ibid.

84Ibid [37].

85Ibid.

86Ibid.

87Extracted at [277]–[278] above.

288 The applicant submitted that, although the prosecution stated once during closing address that it was not said that the evidence demonstrated that the applicant had any ‘particular motive’, counsel went on to say that there had been a decline in the relationship between the applicant and Simon, and that Simon had said that there was ‘a lot of tension’ in the relationship between his parents and the applicant around October 2022. The prosecution had argued to the jury that the applicant had been ‘leading a duplicitous life’ when it came to the Pattersons in which she presented one side while expressing contrary beliefs to others.

289 In the defence closing address, Senior Counsel suggested that the messages were a distraction from the real evidence in the case. He noted that the prosecution did not say that the applicant had a motive to kill or really seriously injure the lunch guests. He posed a question as to why so much time had been dedicated to the messages throughout the trial. Senior Counsel submitted that it was an attempt to undermine the overwhelming evidence that the applicant had a loving, supportive and respectful relationship with Donald and Gail Patterson.

290 The applicant submitted that it was an ‘unavoidable conclusion’ that the prosecution had called the evidence one thing but squarely relied upon it as another, namely evidence of a motive to kill. It was submitted that ‘concerns’ about the prosecution’s ‘genuine intended use of the impugned evidence’ arose from five factors:

(a) there was no examination-in-chief or re-examination of relevant witnesses on the context of the Facebook messages;

(b) the Facebook messages were not adduced through the relevant witnesses, but through Mr Fox-Henry;

(c) there was no examination-in-chief or re-examination of Simon Patterson on the issue of changing the children’s school;

(d) the eight Facebook messages were heavily redacted and carefully selected, making them devoid of context and full of content capable of misleading; and

(e) the closing address of the prosecutor was presented in such a fashion that the jury was invited to use the evidence as evidence that the applicant had a motive to murder not only Donald and Gail Patterson, but also Ian and Heather Wilkinson.

291 The applicant submitted that in the latter part of the trial — particularly given the prosecution sought inclusion of its argument concerning relationship evidence as part of the direction to be given as to motive — it ‘crystallised’ that the prosecution ‘seemingly always intended to rely on purported “relationship”/“context” evidence as, in fact, evidence of motive to murder’. In a case where the absence of motive was a major problem for the prosecution, it was submitted that the only way this was possible was for the evidence to be ‘dressed as something else’. The applicant submitted that it was clear from the prosecutor’s closing address that the jury had been

invited by the prosecutor 'unequivocally and improperly' to rely on the relationship evidence as evidence of motive.

292 The applicant submitted that the case was identical to *Maskell v The King*.[88] In that case, this Court found that, notwithstanding its claim that the evidence was relied upon for a context or relationship purpose only (antipathy from the accused towards the victim), the prosecution in truth invoked post-incriminating conduct reasoning (in non-compliance with the requirements of the *Jury Directions Act 2015*). The applicant sought to draw a parallel with the prosecution's use of the relationship evidence in this case.

293 The applicant submitted that the prosecution's closing address segued from disclaiming an argument that the evidence demonstrated that the applicant had 'any particular motive' and stating that the question was not 'why' the applicant did what she had done, to dealing immediately with matters concerning the relationship between the applicant, Simon and the wider family. It was submitted that these were all topics that suggested some kind of discord or resentment and falling out between the applicant and Simon and other family members.

294 In written submissions, the applicant contended that the prosecution had thereby impermissibly changed its case at an extremely late stage by alleging an implied or 'latent' motive based on a combination of disparate matters. No directions had been given to the jury to ensure that speculation about a motive was not invited. Rather, the judge incorporated a direction about the evidence as 'relationship' evidence into the direction as to motive, giving the 'unintentional' appearance that the relationship evidence was, in fact, evidence of motive.

295 During the oral hearing of the application, the applicant's submissions changed materially.

296 The applicant began by arguing that the prosecution had conducted the trial 'by ambush', 'surreptitious[ly]' changing its case by claiming that it was relying upon the impugned evidence as relationship evidence — and in terms calling it so — but in reality using it as evidence of motive. Ultimately, the applicant's argument became more simple. It was put that the real issue was the wrongful admission of the evidence. The applicant argued that the mere tender of the evidence caused her irredeemable prejudice. It was put that the nature of the evidence was such that it was unavoidable that the evidence would be misused and acted upon by the jury as if it was evidence of motive, irrespective of what the prosecution or the judge said about it.

297 Moreover, the applicant accepted that if proposed ground 4 is unsuccessful, proposed ground 7 cannot succeed. Accordingly the applicant withdrew her allegation that the prosecution 'seemingly always intended to rely on purported "relationship"/"context" evidence as, in fact, evidence of motive to murder'.

88[2025] VSCA 170 ('*Maskell*').

Respondent's submissions

298 The respondent submitted that the nature of the relationship between the applicant and Simon Patterson, and between the applicant and the lunch guests, was relevant to the question whether the applicant had intentionally included death cap mushrooms in the lunch. Such evidence had the capacity to rationally affect the jury's assessment of the likelihood that the applicant had deliberately harmed the lunch guests, as opposed to the poisonings occurring accidentally. The respondent submitted that relationship evidence is relevant where a jury is asked to consider whether the death of the deceased came about through an intentional act of the accused or was due to an accident.[89]

299 The respondent submitted that there was evidence of the positive relationship between the applicant and Simon Patterson, and between the applicant and his parents. That evidence was adduced by both the prosecution and, more expansively, by the defence. Defence counsel addressed the jury extensively about the positive relationship between the parties in closing address. There was also negative relationship evidence, substantially given by Simon Patterson, without objection. The respondent submitted that such evidence was clearly relevant to the jury's task, especially in circumstances where positive relationship evidence was being relied upon by the defence to demonstrate the unlikelihood that the applicant would do anything to harm the lunch guests. The respondent submitted that, without the counterbalancing effect of the negative relationship evidence, the jury would have been left with an incomplete and thereby misleading impression of the nature of the relationships at the relevant time.

300 The respondent submitted that the prosecution had properly conceded that the negative relationship evidence did not rise to the level of revealing a motive or reason to kill. That did not, however, deprive the evidence of relevance.[90]

301 The respondent submitted that the applicant had not explained why the Facebook evidence lacked relevance. It was submitted that the Facebook evidence had significant probative value in the case of the extracted messages. The statements were made at a time prior to and relatively proximate to the lunch and coincided with other evidence of conflict within the relationship, given by Simon Patterson.

302 The respondent submitted that the applicant had not identified the unfair prejudice said to flow from admission of the Facebook evidence. The judge correctly summarised the way in which the prosecution sought to utilise the Facebook evidence during his charge, namely 'as demonstrating that [the applicant's] relationship with the Pattersons in the lead up to the lunch was not as rosy as it might seem'. The respondent submitted that the judge was correct to find that the risk of unfair prejudice arising from this evidence was very low and did not outweigh the probative value of the evidence.

89*Wilson v The Queen* (1970) 123 CLR 334, 337 (Barwick CJ) ('*Wilson*').

90Ibid 339 (Barwick CJ).

303 In respect of the specific ‘concerns’ raised by the applicant, the respondent argued that:

(a) the messages recorded statements made by the applicant about Simon, Donald and Gail Patterson in late 2022. It is unclear what context the Facebook witnesses might have added to what the applicant herself had written;

(b) Mr Fox-Henry was the relevant witness to adduce the contents of the recovered mobile phone. Although the messages could have been adduced through a member of the Facebook chat group, those witnesses had not seen or produced the messages. There was no error or unfairness in them being placed before the jury through Mr Fox-Henry. It was not in issue that the applicant had authored the messages or sent them at the times recorded in them;

(c) Simon Patterson had given evidence that he did not think that there had been a serious conversation about their son moving schools. There was no need to re-examine on this issue;

(d) the recovered messages were redacted to remove comments made by people other than the applicant and other irrelevant material. There was no objection by defence counsel to the form or content of the exhibit; and

(e) the fact that arguments about the use of the negative relationship evidence arose in the context of a direction about absence of motive did not mean that that evidence took on the character of evidence of motive, especially when the jury were specifically directed that there was no evidence of motive.

304 The respondent noted that trial counsel made no complaint to the judge that there had been a change in the prosecution case. To the contrary, during a discussion about the proposed direction on motive which took place after the prosecution closing, the applicant’s counsel stated that the prosecution had not changed its position from the way it opened, noting in terms that the prosecution had not relied on the evidence as providing any kind of motive. The judge agreed, stating that: ‘[R]ather than argue these aspects of the relationship are positive proof of a motive, they’ve said these aspects of the relationship suggest that things weren’t as rosy as the defence are making out.’

305 The respondent further submitted that no concern was ever raised that the jury might find a motive due to the way in which the prosecution conducted the trial. Senior Counsel for the applicant had not asked the judge to direct the jury on ‘latent’ motive. The direction ultimately given to the jury was highly favourable to the applicant’s case, including that the absence of motive was ‘a relevant consideration’ that the jury must ‘take into account in the [applicant’s] favour’. The judge described the absence of a motive as ‘a significant consideration to which [the jury] must have regard’.

306 The respondent submitted that no comparison could be drawn between the use of relationship evidence in this case and the use of incriminating conduct evidence in

other cases, to which specific provisions of the *Jury Directions Act* apply. Comparison with cases such as *Maskell* was therefore misplaced.

307 In response to the refinement of the applicant's contentions made at the oral hearing, the respondent submitted that there was no lurking unfair prejudice in the admission of the impugned evidence. It was not evidence of 'other misconduct' or akin to incriminating conduct. The risk of the jury conflating its true purpose as anticipatory rebuttal evidence of a 'not as rosy as it might seem' relationship between the applicant and Simon, Gail and Donald Patterson with evidence of motive was nil, even before regard is had to what the jury was told in addresses by the parties and the directions by the judge.

Analysis

308 The absence of motive in the prosecution case was, unsurprisingly, a central plank in the defence argument as to why the jury should prefer the explanation of accident over murder. In his closing address, Senior Counsel for the applicant called a finding of murder or attempted murder of the lunch guests in the absence of motive a 'ridiculous convoluted proposition'. He asked rhetorically why the applicant would

> intend to kill these four people, blowing her entire life up in the process without a motive. A thorough investigation, online friends, various devices, very many family witnesses — and yet no evidence of any motive.
>
> We get 18 years' worth of what we call anti-motive evidence, the reasons why she wouldn't want to do anything to these people …

309 That is, the applicant relied not only on the absence of motive to kill, but also on 'anti-motive evidence' of a long standing and positive relationship between her and Simon, Donald and Gail — evidence adduced largely through the cross-examination of prosecution witnesses. The applicant argued that acceptance of the 'anti-motive evidence' — separately from and in addition to the absence of any identified motive — made it more likely that the deaths were a result of accidental poisoning.

310 The prosecution expected that the applicant would do so. That is why the prosecution sought to introduce the Facebook evidence. It was anticipatory rebuttal evidence to the effect that the 18-year relationship between the applicant and the Patterson family was not unrelentingly and enduringly positive.

311 It is uncontroversial that evidence of the relationship between an accused and deceased may be admissible for reasons other than providing a motive to kill. In *Wilson*, the issue in the trial was whether the applicant shot his wife in the back of the head or whether a loaded gun placed on a load of hay in the back of a tractor which she was driving discharged accidentally. Barwick CJ held that the bad relationship between the applicant and his wife over a period to the time of her death was relevant to the question to be decided by the jury:

> Evidence of a close affectionate relationship could properly have been used by the jury to incline against the conclusion, which might otherwise have

> been drawn from the circumstances, that the applicant killed his wife. Equally, evidence that there had developed mutual enmity could be used to induce the conclusion that he had killed his wife and that his story of an accidental shooting lacked credibility.[91]

312 It follows that if the relationship evidence 'assist[s] the choice between the two explanations of the occurrence' then it is relevant and, thereby, admissible.[92]

313 Here the applicant relied upon a long-standing, friendly familial relationship as tending against intentional killing over accident. In seeking to rely upon the Facebook evidence, the prosecution sought no more than to provide the jury with a more nuanced (and complete) picture of that relationship at a relevant point in time. It was relevant for that purpose.

314 Moreover, the Facebook evidence was just a part of the evidence that the relationship between the applicant on the one hand and Patterson family members on the other, particularly in the lead up to the lunch, was not always friendly and cordial. The respondent also led evidence, largely through Simon, that the applicant had sent inflammatory messages to Donald and Gail in their Signal family group chat concerning the financial issues between her and Simon. There was evidence that the applicant told Katrina Cripps from child protection that her relationship with her in-laws had changed, that she was no longer being invited to family events and that she felt isolated by this.

315 No objection was taken at trial to the form of the Facebook evidence. That is, objection was not taken upon the basis that the Facebook messages were adduced through Mr Fox-Henry, rather than through a member of the Facebook chat group. The prosecutor, in a short adjournment during Mr Fox-Henry's evidence, raised with the judge that she intended to tender the Facebook evidence in this way. Still the applicant's trial counsel did not protest.

316 Nor was any objection at trial specifically tied to any asserted unfair consequence arising from the redactions to the Facebook messages. In fact, the applicant's trial counsel supplemented, through the informant, additional context to some of these redacted emails. This makes it more difficult to sustain the contention that the level of redactions itself caused the applicant prejudice.

317 The applicant has not shown how the manner in which these messages were adduced robbed the evidence of its relevance, diminished its probative force, or created impermissible prejudice.

318 The probative value of the Facebook evidence was not outweighed by the danger of unfair prejudice to the applicant. In particular, there was no danger that the jury could only have understood that the respondent relied upon the evidence as evidence of motive.

91 Ibid 337 (Barwick CJ). See also 344 (Menzies J).

92 Ibid 339 (Barwick CJ).

319 First, Senior Counsel for the prosecution made plain to the jury, both in opening and closing, that the prosecution case did not allege that the applicant had a motive for the killings.

320 Towards the end of her opening address, Senior Counsel said:

> I want to talk to you about motive. You might be wondering, now, why would the [applicant] do this? What is the motive? You might still be wondering this at the end of this trial.
>
> As I anticipate His Honour will direct you towards the end of the trial, motive is not something that has to be proven by the prosecution. You do not have to be satisfied what the motive was or even that there was one. The prosecution will not be suggesting that there was a particular motive to do what she did.
>
> What you will have to focus on, focus your attention on, is whether you are satisfied beyond reasonable doubt that the [applicant] committed the charges on the indictment, not why she may have done so.

321 Earlier in the address, Senior Counsel said that the applicant had communicated with Facebook friends about 'news, current affairs and their personal lives' but did not refer to the content of any particular communication. Senior Counsel had said that Simon noticed a 'sustained change' in his relationship with the applicant after he had listed himself as 'separated' on his tax return.

322 In her closing address to the jury, Senior Counsel said the prosecution anticipated that the applicant would argue that she had no motive to harm the lunch guests and that, with Donald and Gail particularly, she had a positive relationship. Counsel continued:

> As I said right at the start in my opening address to you, we don't say that the evidence demonstrates that the [applicant] had any particular motive.
>
> …
>
> When [counsel for the applicant] addresses you shortly, I expect that he will have a bit to say about the question of motive. Why would the [applicant] deliberately do this? She loved Don and Gail and they loved her. Her children were close to her. She hardly knew Ian and Heather, so she could hardly have an axe to grind against them, and even if she wanted to poison Simon, why would she go through with it after he pulled out of the lunch?
>
> It is only natural that you are going to wonder about these things. However, don't let this distract you from determining the question that you must answer as the jury.
>
> The question is not why she did this. The question you have to determine is: has the prosecution proved beyond reasonable doubt that the [applicant] did this deliberately?

323 Secondly, Senior Counsel for the prosecution expressly told the jury why the relationship evidence was led. This was immediately after counsel said that the prosecution did not allege a motive. Counsel told the jury:

> You have heard a significant amount of evidence about the relationships within the Patterson family, that they loved each other, they did kind things for one another over the years and [counsel for the applicant] showed you a number of messages between the [applicant] and Don and Gail in 2022, for example, the Mother's Day messages in May 2022 …
>
> The [applicant] professed her love for Don and Gail in her police interview. Even Simon told you that they got on well; that is, the [applicant] and his parents and that the [applicant] seemed to love his parents. On the surface, perhaps, it seemed that way, even to the family members themselves. But you have heard evidence which shows that the relationship between the [applicant] and Don and Gail was not always a harmonious one, particularly in the nine months or so leading up to the lunch.

324 Counsel then addressed that evidence, only some of which was sourced from the Facebook messages. At no point did Senior Counsel suggest that the relationship evidence was evidence of motive. Rather, counsel developed her argument that, in the months before the lunch, the applicant harboured resentment and anger towards Simon and her in-laws, but outwardly hid her true feelings.

325 The jury would have readily understood that the prosecution did not allege that the applicant had a motive to deliberately kill. Likewise, it must have been clear to them that the prosecution suggested that the applicant's (correctly anticipated) argument that the positive relationship between the applicant and her in-laws favoured tragic accident over murder — the 'anti-motive evidence' — fell to be considered against the full and more complicated relationship between the actors.

326 Thirdly, Senior Counsel for the applicant told the jury that the prosecution did not allege a motive to kill. In his final address, counsel variously said:

> So our submission to you that to prove the intention to kill or cause really serious injury to four good people who were important in [the applicant's] life, the prosecution has to be able to demonstrate a motive or provide evidence [of] one. And if they don't, then you might think they fall short of being able to prove intention as a matter of logic and common sense.
>
> …
>
> The prosecution doesn't say that [the applicant] had a motive to kill or really seriously injure any of the lunch guests.

327 Fourthly, Senior Counsel for the applicant argued that the prosecution was relying on the Facebook messages not as evidence of motive, but as a 'distraction from the real evidence' of the good relationship between the applicant and her lunch guests. Counsel said:

> They don't say that she had that motive, so why is so much time being dedicated to these messages throughout the trial and cross-examination of [the applicant], the Crown's closing address? Because, it was such a polite, kind and good relationship that these messages stand out, but they're not consistent with the whole of the relationship. It's just an attempt, we submit to you, to undermine the overwhelming evidence that [the applicant] had a loving, supportive, respectful relationship with Don and Gail.

328 The jury would have readily understood that the applicant relied on both the absence of motive established by the respondent and the 'anti-motive evidence' of a good relationship between her and the lunch guests as part of her argument that the prosecution could not exclude the reasonable possibility that the introduction of death cap mushrooms to the beef Wellingtons was a tragic accident.

329 Fifthly, Senior Counsel for the applicant, imbued with the atmosphere of the trial, understood that the Facebook evidence particularly, and the suite of evidence that demonstrated some anger and resentment on the part of the applicant towards the Patterson family generally, were not relied upon by the prosecution as evidence of motive, as confirmed during the discussions concerning the judge's proposed direction on the absence of motive. Counsel said, 'the prosecution doesn't rely on a motive'. He never suggested that the prosecution was surreptitiously advancing a motive nor did he seek any corrective direction.

330 Sixthly, in his direction on motive, the judge not only told the jury that the prosecution did not allege a motive to kill, but conceded that there was not one. He said this was a matter in the applicant's favour. The judge highlighted the applicant's 'anti-motive' argument and said that this was a 'significant consideration' for the jury. The judge explained the limited relevance of the negative relationship evidence in terms consistent with the manner in which counsel for both parties had addressed the jury.

331 The direction was very favourable to the applicant. It was as follows:

> For some murders there may be evidence of motive, but some murders occur for no apparent reason. The motives for such murders may only ever be known to the offenders.
>
> In this case the prosecution concede there is no evidence of a motive for the [applicant] to have murdered or attempted to murder her lunch guests. The defence argues that not only is there no evidence of a motive to kill, there is evidence that the [applicant] had good reasons not to kill her lunch guests. In other words, the defence argue that there is evidence of motive not to kill.
>
> In summary, the defence argues that the [applicant's] lunch guests were her relatives by marriage, they were all good people and over the years she had a positive relationship with each of them, particularly Donald and Gail. As for her tensions in her relationship with Donald and Gail Patterson over her seeking child support from Simon, those tensions were relatively short-lived and the issue was resolved many months before the lunch. Moreover, Donald and Gail loved her children and her children love them. Why would she want to deprive her children whom she loved of their only grandparents.

> Finally, the defence argues that the [applicant] was in a good place in July 2023, she had a beautiful new home for her and her children, she was financially secure and she and her children, who had started at a new school, had a bright future. Why would she risk throwing that all away?
>
> The prosecution argues in summary that the [applicant's] relationship with Simon and with his parents in the lead up to the fatal lunch was not as harmonious as the defence suggests. The prosecution points to the evidence of Cripps, that on 1 August [2023], [the applicant] told her that first Simon had become nasty towards her, since she claimed child support in late [2022], and second; that her relationship with his parents had changed recently and she felt isolated from them. The prosecution also points to the evidence of [the applicant's son] that the relationship between his mum and dad had recently been 'very negative'…
>
> I give you this direction: the prosecution does not have to prove motive in order to prove its case. It is the elements of murder, and attempted murder that the prosecution must prove and nothing else. But that does not mean that the absence of the evidence of a motive to kill is irrelevant. It is a relevant consideration, which you must take into account in the [applicant's] favour when weighing all the evidence in this case and deciding whether the prosecution have satisfied you beyond reasonable doubt that she committed the alleged offences.
>
> Moreover, if you find the [applicant] had good reasons not to kill or attempt to kill her lunch guests, in short, that she had a motive not to commit the alleged offences that is a significant consideration to which you must have regard in deciding whether the prosecution have satisfied you beyond reasonable doubt that she committed the alleged offences.

332 It follows that there was no danger that the limited negative relationship evidence, in particular the Facebook evidence, led by the prosecution could only have been (mis)understood by the jury as evidence of motive. The prosecution used the evidence as a shield against the 'anti-motive' evidence and not a sword to allege a motive to kill. The difference was plain. There was no danger of unfair prejudice to the applicant. The judge was correct to admit the evidence as relevant and to refuse to exclude it pursuant to s 137 of the *Evidence Act*.

333 Ground 4 cannot succeed and leave to appeal must be refused in that respect.

334 We note the applicant's concession that ground 7 cannot succeed if ground 4 does not. Leave to appeal on ground 7 is therefore refused. In light of the allegations of serious prosecutorial misconduct in the applicant's submissions, however, we observe the following.

335 Absent evidence or instructions of *mala fides*, it is wholly inappropriate to level accusations of deliberate impropriety. The most egregious accusation made by the applicant in this case was that 'the prosecution seemingly always intended to rely on purported "relationship"/"context" evidence as, in fact, evidence of motive to murder'. That is, the applicant positively asserted a sustained, deliberate deception on

the part of the prosecution as to the use to be made of the negative relationship evidence. That necessarily involved an accusation that the prosecution's counsel told deliberate falsehoods to the judge during pre-trial argument concerning the admissibility of the evidence and the telling of further deliberate falsehoods during the running of the trial. It is a most serious accusation.

336 Relatedly, the applicant has also asserted that:

(a) the prosecution 'impermissibly — and unannounced — changed its case at an extremely late stage by now alleging an implied or latent motive in the applicant based, it appears, on a combination of disparate matters which together, it seems, produced a motive to murder'; and

(b) 'a trial by ambush is not permitted and in our submission, it cannot be that trial by surreptitious change is something that could be permitted.'

337 As the analysis above reveals, the prosecution did not change its case — surreptitiously or otherwise — and at all times relied upon the negative relationship evidence to rebut the anticipated argument of the applicant that the positive, loving relationship between her and the lunch guests amounted to an 'anti-motive'. The prosecution did not engage in sustained deceptive behaviour. It should not have been necessary to ask the applicant's counsel during the oral hearing of the application if the allegation was pressed. Such an allegation is not to be lightly made and it was properly withdrawn.

Ground 5 — Cross-examination of applicant

338 As discussed above, the applicant gave evidence in her defence. The examination-in-chief took place on four days between 2 June and 5 June 2025. Cross-examination commenced on 5 June 2025 and concluded a week later on 12 June 2025.

Applicant's submissions

339 The applicant submitted that her cross-examination was 'doused with impermissible conduct' and was 'unnecessarily protracted'. It was submitted that the conduct of the prosecution during the cross-examination caused or created the risk of a denial of procedural fairness, invited impermissible reasoning by the jury, adversely affected the jury's assessment of the applicant's evidence, reversed or obscured the onus of proof, and diverted attention from the proper assessment of the credibility of the witness.

340 The matters the subject of complaint were divided into two categories.[93]

341 First, the applicant argued that the prosecution repeatedly questioned the applicant as to whether prosecution witnesses had been mistaken, or were otherwise incorrect or

93 Further categories advanced in the applicant's written submissions were not pressed at the hearing.

wrong, in their evidence (which we will call ground 5(a) for the purpose of these reasons). This was said to have happened in relation to witnesses including Simon Patterson, Matthew Patterson, Ian Wilkinson, Dr Webster and Dr Muldoon, the VARE evidence of the children, and in relation to the hearsay evidence of Gail Patterson.

342 The applicant submitted that repeatedly asking an accused whether another witness is mistaken or incorrect risks impermissibly reversing the onus of proof. It was submitted that it was unfair that the prosecution recited the undisputed evidence of prosecution witnesses at length. Further, such questioning simply rehashed the prosecution case and reduced the applicant's role to merely acknowledging that other witnesses had given certain evidence (ground 5(b) for the purpose of these reasons). It was submitted that this distracted the jury from the task of assessing the reliability and credibility of the applicant as a witness.

343 Secondly, the applicant submitted that it was unfair that the prosecution put to the applicant in cross-examination that she had an interest in death cap mushrooms. The judge had previously ruled that the fact that the applicant had access to the iNaturalist website about one year before the posts of local sightings of death cap mushrooms had insufficient probative value to justify tendency reasoning.[94] The applicant submitted that it was implicit in the proposition put to the applicant that she had an ongoing interest in death cap mushrooms until the fatal lunch. It was said that this blatantly invited impermissible tendency reasoning without the prosecution having sought to revisit the earlier ruling. Further, a series of unfair questions were put to the applicant about death cap mushrooms that were later withdrawn (together, ground 5(c)).

Respondent's submissions

344 The respondent submitted that the evidence-in-chief took around three days, spanning four sitting days, and that cross-examination also lasted about three days, when account was taken of a half-sitting day and a long weekend.

345 The respondent submitted that neither of the ways in which the applicant asserted that the prosecutor had departed from standards of fairness in the cross-examination were of any substance. The respondent emphasised that Senior Counsel for the applicant did not object at trial to the questions upon which the applicant relied in this part of her submissions.

346 First, the 'recitation' of undisputed evidence of prosecution witnesses was, the respondent submitted, not merely permissible, but was required or at least strongly justified by the rule in *Browne v Dunn*.[95] It was necessary to put the relevant accounts of prosecution witnesses to the applicant in order to ascertain where, if at all, there was conflict between the accounts of the prosecution witnesses and that of the applicant. The respondent submitted that, by putting to the applicant 'do you say [witness] is wrong about "X"', the prosecutor was doing no more than giving the

94*R v Patterson (Ruling 3)* [2025] VSC 104 [15] (Beale J) ('*Ruling 3*').

95(1893) 6 R 67.

applicant a fair opportunity to address a possible conflict, in orthodox discharge of the obligation in *Browne v Dunn*. It was submitted that it was necessary for the prosecutor to do more than simply put the essence of the allegations to the applicant. Instead, the prosecutor thoroughly and fairly took the applicant through the evidence and established where there was conflict. The respondent observed that it was said in *Browne v Dunn* itself that cross-examination 'which errs in the direction of excess may be far more fair' to a witness than 'to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth'.[96]

347 Secondly, the respondent submitted that there was no error in the way in which the prosecutor cross-examined on the issue of whether the applicant had an interest in death cap mushrooms. The applicant agreed in her evidence that her computer had been used to access information about death cap mushrooms via the iNaturalist website. She also accepted that it was possible that she was responsible for this interaction because 'at some point [she wanted] to find out if death cap mushrooms grow in South Gippsland'. Further questions were asked later in the cross-examination about searches on the website concerning death cap mushrooms in the Moorabbin area. The respondent submitted that the further questions tended to contradict the account given by the applicant in response to the first set of questions in which the applicant gave an innocent explanation for accessing information about death cap mushrooms.

348 The respondent submitted that these questions had nothing to do with tendency reasoning. Instead, they were a proper basis upon which to impugn the answers given by the applicant and were relevant to her credibility generally.

349 As to the series of unfair questions later withdrawn, the respondent argued that the cross-examination involved a loose question that was later rectified to the satisfaction of the applicant's counsel and the judge.

Analysis of grounds 5(a) and (b) — questions about other witnesses' evidence

350 Turning to the first category of complaint advanced by the applicant, it is instructive to detail the portions of the cross-examination specifically identified as 'typically' involving questioning of the applicant that another witness was 'mistaken … incorrect or wrong' and thereby being both unfair and serving as little more than a mechanism to rehash the prosecution case. These are as follows.

(i) Evidence given by Ms Hay

351 The applicant said that she did not know if she told her Facebook friends that she had foraged for mushrooms. She said that she might have, and said that the relevant group chat spanned four years and she could not remember everything. The following impugned questioning then occurred:

96Ibid 71 (Lord Herschell LC).

> Jenny Hay's evidence before this jury was that you never discussed foraging for mushrooms with the Facebook friends. Do you accept that evidence?---Ah, I agree she said that.
>
> Yes. Was it true or not true?---I don't know. She might be right. I'm not sure.

(ii) Evidence given by Ms Cripps

352 The applicant agreed in cross-examination that she wanted her guests to believe that she would be having treatment for cancer, although she disagreed that she had told them that she had received a cancer diagnosis. The applicant's evidence was that she did not say at the lunch that she was not sure how to tell the kids. The following impugned questioning then occurred:

> Katrina Cripps from Child Protection gave evidence that on 1 August 2023 at Monash Medical Centre, she spoke with you and you remember — of course you remember speaking with her, you gave some evidence to that effect, I think?---Yes.
>
> And her evidence was to the effect that you told her that you had invited Donald, Gail, Ian and Heather to lunch; correct?---I did say that, yes.
>
> To discuss a medical issue?---I wouldn't have put it like that because that wasn't the reason I invited people.
>
> Did you tell Katrina Cripps on the 1 August 2023 that you invited those people to discuss a medical issue?---No.
>
> Ms Cripps is wrong, is she?---Yes.

353 Later in the cross-examination, the applicant was being asked how much of her beef Wellington she ate. She disagreed that she had eaten the whole portion and denied that she had told Professor Stuart that she had eaten half in order to explain the relatively minor symptoms she displayed in comparison with the guests. The applicant said that she could not recall any conversation with Professor Stuart. The following impugned questioning then occurred:

> Katrina Cripps gave evidence that you told her and Naomi Schroeder on 1 August that you had eaten half of your beef Wellington. Do you remember Ms Cripps giving that evidence?---I do.
>
> I suggest that you told Ms Cripps this, in an effort to explain to the medical authorities why your symptoms were not as serious as for — the symptoms of the other lunch guests; correct or incorrect?---Incorrect.
>
> Do you agree that you told Ms Cripps that you had eaten half of your beef Wellington?---Um, my memory is that I would have said I ate about half.
>
> So your evidence is that Ms Cripps is mistaken?---I think what she said and what I said are quite consistent.

(iii) Evidence given by Matthew Patterson

354 The applicant said that there was a change in her relationship with Simon after the disputes about the child support payments and school fees. She said that Simon did not go on the family Christmas holiday because he wanted to visit friends in Brisbane rather than go to New Zealand. The following impugned questioning followed:

> Matthew Patterson gave evidence that in the recent years before the lunch, you didn't participate a lot in family functions. You heard him give that evidence?---Yeah. I'm — yeah, I did hear him say that, yes.
>
> And do you agree with that?---No.
>
> Is it your evidence that you did participate a lot in family functions?---Yeah.
>
> In the recent years before the lunch?---Um, so up until the first half of 2023, I don't believe there was a change in my participation. I think there was a change in the family events through some of that time, because there was a lot of COVID lockdowns in [2021] which affected how many gatherings there were. But other than that, if there was a gathering and I was invited, I went.
>
> So you say Matthew Patterson is incorrect when he says that in the recent years before the lunch, you didn't participate a lot in family functions?---I think he's wrong about the timeframe, yes.

(iv) Evidence given by Tanya Patterson

355 The applicant gave evidence that she knew by at least 2:30 pm on Sunday 30 July that Donald and Gail were sick, but denied knowing that Heather and Ian were also sick. She further denied knowing that Donald and Gail were in comas by Tuesday morning. The following impugned questioning then occurred:

> I want to refer you to the evidence of Tanya Patterson… . This is her evidence. 'You said you told her (that is, you) that you didn't know the latest about the other people?' Tanya Patterson said, 'Yes.' Question: 'Did she indicate to you what she knew?' Answer, (and I'll paraphrase), you told Tanya that you knew that Don and Gail were at least in a coma and I said that that was the latest I knew?---Yes, I heard her say that.
>
> Is it your evidence that you did not say that to Tanya Patterson?---Correct.
>
> At Monash?---Or anywhere, yes.
>
> On the Tuesday morning, 2 August [sic][97]? ---Correct.
>
> So Tanya Patterson is incorrect when she gave that evidence?---That's right.

97This seems to be an error for 1 August.

(v) Evidence given by Ian Wilkinson

356 The applicant was cross-examined about how much of the lunch Gail ate. The following impugned questioning then occurred:

> Ian Wilkinson's evidence was that Gail 'ate her vegetables and half of the beef Wellington'… You agree that that was the evidence that he gave?---It was.
>
> You heard him give that evidence?---Yes.
>
> And do you say that he is wrong?---No.

(vi) Evidence given by Dr Webster

357 The applicant said that Dr Webster told her when she presented at Leongatha Hospital on 31 July 2023 that there was a concern of death cap mushroom poisoning. She said that her memory was that he did not ask where she got the mushrooms. The applicant also said that although he told her that they were going to start treatment for suspected death cap mushroom poisoning, Dr Webster had not said that it would be intravenous treatment. The following impugned questioning followed:

> I've already asked you about Chris Webster — Dr Chris Webster giving evidence about that he told you — his evidence before this jury was that he told you there's a concern of death cap mushroom poisoning. You agreed that was his evidence?---It was.
>
> And that he told you this?---He did say that, yes.
>
> His evidence was that at that same point in time, he asked you, 'Where did you get the mushrooms?'?---Yes.
>
> At that point in time, did he ask you that, 'Where did you get the mushrooms?'?---No.
>
> You say that happened at a later time?---No. I'm saying he did not ask me where I got the mushrooms.
>
> At all?---Correct, unless he did when I came back the second time, but in that first conversation, I don't remember him asking me that.
>
> His evidence was that you said, 'Woolworths'?---Correct.
>
> And you say that that's not correct at that point in time on your first presentation at Leongatha Hospital? ---Yeah, my memory of that conversation is different, yeah.
>
> And how is your — what's your evidence around that?---So what I remember is when I told him my name, he immediately communicated that that meant something to him. Like, he recognised who Erin Patterson is, and he brought me through the doors - - -

Yes?---And I remember him saying to me something like, you know, 'Were you the chef' or, 'Were you the host', um, and he either asked me what I made or asked me — I remember him saying to me, 'Did you make the beef Wellingtons or buy them pre-made?'. And that stuck in my memory because I didn't know you could buy them pre-made. And I said to him that I made them. And my memory after that is that he said to me, 'Where did you get the ingredients from?', for the beef Wellingtons and my answer to that was, 'Woolworths.' So clearly that's quite different to what he said, but I can only deal with what my memory is.

He told you that you — that they were going to provide you with some treatment?---He did.

For the emergency — for the suspected death cap mushroom poisoning?---He did say they wanted to give treatment and transfer me to Melbourne.

Just focusing for the time being on him advising you that you needed to be treated - - -?---Yes.

- - - quickly, his evidence is that you did not ask him any questions at that point?---Yeah, I heard him give that evidence. Yes.

I suggest that you did not ask him any questions after he had told you [that] they have to give you some treatment for the suspected death cap mushroom poisoning?---I definitely tried to ask questions, yes.

Well, what do you mean by 'tried'?---Well, I asked questions and he didn't answer them.

So Dr Webster is wrong when he says that you did not ask him any questions?---Well, he may not have heard me. I asked him a question or two and he was very busy and walked off to do other things. Left me with the nurse. But I remember saying to him at the very least, 'Why do you think we've eaten death cap mushrooms?' And I remember him walking away. So whether he didn't hear me or not, I don't know.

And is that evidence that you gave before this jury in your evidence-in-chief?---I don't remember.

Dr Webster's evidence is that a triage nurse came over to take vital signs and so on from you?---Yes.

And he walked off?---Correct.

And then his evidence was that he became aware a little later through nurse Kylie Ashton that you discharged yourself from the hospital. You remember him giving that evidence?---I do.

And he was — his evidence was he was surprised and concerned for your immediate health?---H'mm.

You remember he gave that evidence?---I do.

And he rang your mobile three times and left three voicemail messages. Remember that part of his evidence?---I do.

It's correct, isn't it, that you did not respond to the phone calls from Dr Webster?---I tried to, yeah. I didn't answer his calls, but I did ring the hospital back a couple of times and couldn't get through to him.

How many times did you ring on - - -?---I think it was twice.

- - - on your evidence. I suggest that it was deliberate by you not to answer any of the three calls he made to your telephone; correct or incorrect?---Incorrect.

You did not respond to the voicemail messages that he left; correct or incorrect?---Incorrect.

And that they were deliberate decisions made by you not to respond to him; correct or incorrect?---I did try to respond twice.

And when do you say you tried to respond?---Sometime after his last call to me and before I got back to the hospital.

So sometime between, what, 8:05 am and 9:45 am?---That's not what I said.

You arrived at the hospital shortly after 8 am?---Correct.

You weren't there for very long?---Correct.

358 Later in the cross-examination, the applicant was asked about the source of the mushrooms included in the beef Wellingtons, including the 'strong smelling' dried mushrooms. The following impugned questioning then occurred:

I want to move on now to the dried mushrooms from a Chinese grocer. Dr Chris Webster's evidence, and we discussed — I asked you some questions about this yesterday, was that when you first presented to Leongatha Hospital, he asked you where you got the mushrooms and his evidence was you said Woolworths?---Yes.

And you yesterday disagreed that you had said that?---That's correct. Well, actually, no, I agree that I said 'Woolworths', but I disagree what the question was.

Dr Webster's evidence was that you said 'Woolworths' and that was it?---Yeah.

In relation to where you got the mushrooms?---That wasn't the question I remember him asking.

Yes. That's right. And we went through this yesterday?---Correct.

I'm really just trying to kind of make sure that I understand your evidence about Dr Webster's — this portion of his evidence?---Correct. I was just responding to — you said to me, you know, that I disagree that I said that and I'm saying what I disagree with is what he said; not what I said, so I was just trying - - -

- - - yes, I understood that. I understood that[.]---Okay.

So your evidence is that Dr Webster is mistaken when he says — he asked you where you had obtained the mushrooms from used in the beef Wellington and you replied 'Woolworths' and that was it. You're saying he's mistaken about that?---He's mistaken about the content of his question, yes.

In any event, you make no mention of using dried mushrooms to Dr Webster?---That's true.

No mention of an Asian grocer to Dr Webster at that point?---That's true.

(vii) Evidence given by Ms Ashton

359 The applicant denied in cross-examination that she had been told by medical staff at Leongatha Hospital that her life was at risk. The following impugned questioning followed:

Okay. So the evidence of Kylie Ashton … was that she told you that your life was at risk?---Yeah. I don't remember her saying anything like that.

Do you say she's mistaken?---Yes.

(viii) Evidence given by Ms Atkinson

360 The applicant said in cross-examination that she recognised through her discussion with Ms Atkinson that the potential for the poisonous mushrooms to have been sourced from an Asian grocer was being treated as a public health emergency. The applicant was asked if she was familiar with the text messages that passed between her and Ms Atkinson. She said that she was. The following impugned questioning then occurred:

SallyAnn Atkinson gave evidence that in the first phone conversation she had with you on that morning of 1 August at 8:33 am, that you told her that the dried mushrooms had been bought by you at an Asian shop in April, and we've already been over this. You say that it might have been around April or words to that effect — that was your evidence a moment ago?---My evidence is that I was saying to people it was possibly April, or likely April. I never gave a definite — because I don't have a memory of the purchase.

You told her that they smelt funny and you were worried they would overpower your other dish. Do you remember SallyAnn Atkinson giving that evidence?---She did.

> And did you say that to SallyAnn Atkinson in that first phone conversation?---No, I don't think I said smelled funny. My memory has always just been it was a very strong or pungent smell.
>
> So is your evidence that SallyAnn Atkinson is incorrect when she gave evidence that you told her they smelled funny?---Yeah. Yes, she's wrong about that word.
>
> Her evidence was that you put them — you told her you put them in a Tupperware container?---Yes.
>
> That's true?---Yes.
>
> And for — you told — her evidence was, that for the beef Wellington, you rehydrated the dried mushrooms before chopping them into pieces?---Correct.
>
> And did you tell her that?---Yes.

361 Later in the cross-examination, the applicant was asked about her asserted foraging habit and the evidence given by Ms Atkinson that Simon had told her that it was not something he had ever known the applicant to do. The following impugned questioning followed:

> Do you remember SallyAnn Atkinson giving that evidence?---I do.
>
> I suggest that in all the years that Simon had known you, he never knew you to pick mushrooms?---It sounds like that's his opinion, yeah.
>
> It sounds like?---That's his opinion.
>
> Yes. Are you saying that he's wrong?---No, I can't speak to what he knew and didn't know. That's not something I can comment on.

362 We note that before those questions were asked, Senior Counsel for the prosecution told the judge that she intended to do so, acknowledging that they concerned hearsay evidence. The applicant's counsel said that he did not object when the evidence was led from Ms Atkinson in-chief and did not object to the proposed questions in cross-examination.

(ix) Evidence given by Dr Muldoon

363 The applicant gave evidence that she did not lie when she told each of Ms Ashton, Ms Cespon, Dr Webster, Dr Foote and Ms Munro that her children had eaten leftover beef Wellington from the lunch and she was initially reluctant to have them medically examined because she knew their lives were not at risk. The following impugned questioning then occurred:

> Dr Laura Muldoon, we touched on her evidence as well yesterday?---M'mm.

She saw you at 4:30 pm at the Monash Health Emergency Department?---Yes.

Her evidence was that you told her that you did not present to hospital prior to the morning of 31 July because you thought you had a case of food poisoning?---Yeah, I didn't say that.

You - - -?---I didn't say that.

You didn't say it?---No. Until I got to Leongatha, I thought I had gastro.

So Dr Muldoon is wrong in her evidence when she says that you told her you did not present to hospital prior to the morning of 31 July because you thought you had a case of food poisoning?---Correct, she's wrong.

364 Counsel immediately put to the applicant that she did tell Dr Muldoon that she thought she had food poisoning from the lunch and also had fed the leftovers, minus the scraped off pastry and mushrooms, to her children.

(x) Evidence given by the applicant's son

365 The applicant said in cross-examination that she did not know if she mentioned to her son that she was feeling unwell after the lunch on 29 July 2023. The following impugned questioning followed:

[Your son] gave evidence via the recorded statement; you remember that?---Yeah, I do.

And at question 447 of his VARE, Question: 'No talk about being unwell or anything like that?' Answer: 'No.' Do you remember that evidence from [your son]?---I do.

Do you agree that you did not mention to [your son] that you were feeling unwell on 29 July?---I don't remember if I did or I didn't, but it's more likely that I didn't than I did.

Do you accept that you did not mention to [your son's friend] that you were feeling unwell on 29 July?---I definitely would not share that with [my son's friend], no.

In his VARE, [your son] did not say anything about you being sick on Saturday 29 July. Do you agree or disagree?---That he said that? Is that what you're asking me to agree or disagree with?

366 Later in the cross-examination, the applicant agreed that she knew on 30 July 2023 that Donald and Gail were ill. She disagreed that when she fed her children the leftovers minus the pastry and mushrooms that she suspected that the meal had made Donald and Gail ill. The following impugned questioning then occurred:

[Your son] gave evidence in his recorded interview that you told him

that Gail and Don were not well. Do you remember that evidence?---I do.

You told that to [your son]?---I'm sure I did, yeah.

On the Sunday night?---I don't know when on the Sunday or — I don't know when I told him that, but I did tell him.

All right. Exhibit 14, so this is at 8:32?---Yep.

'She did say Gail and Don were feeling a bit sick as well'?---Yeah.

'So she thought it might have been the lunch'. You see that?---Yeah, but he also said above that, 'Did she suggest why she thought she was unwell?' And his answer to that was, 'No'.

This is in relation to questions about you?---Correct.

Yes?---And if I — if I suggested any reason why I thought I was unwell.

Yes?---And he said, 'No'.

Yes. And then he said, 'She did say Gail and Don were feeling a bit sick as well'?---Yes, he does say that.

'And so she thought it might have been the lunch'?---Yes. But I think he's confused. I didn't say that to him on the Sunday and it's not clear when he's saying that I said that to him. Because I had several conversations with the kids in the hospital about all that.

So is it your evidence that he is wrong about that aspect of his evidence?---No. I think that it's not clear from his evidence when he's saying I said that to him.

367 Later again in the cross-examination, the applicant was asked about the absence of her children from the lunch. It was put to her that her son had said in his VARE that the applicant had wanted the lunch to be the five adults but did not say why. The applicant acknowledged that she had heard that evidence. The following impugned questioning then occurred:

Do you say that [your son] is incorrect?---Um, yeah, I don't think I said to him I wanted it to be just be the five of us.

[Your son] also said that on the morning of the lunch when he came down to see you on the Saturday, you said you had organised lunch and him, [his friend] and [your daughter] were going to go and watch a movie while you had lunch?---Yep.

You heard him give that evidence too?---I did.

And is it correct that you said that to him, or is he mistaken?---Can you remind me the question number, please?

> Sure. Question 222?---Thank you. Yeah, that's pretty much how I put it to him. I didn't really give [my son] a whole lot of choice once [my daughter] wanted to go to the movie.
>
> I suggest that you gave neither child the option to stay and have lunch with everyone; you disagree?---I do disagree.

368 Later still in the cross-examination, the applicant was asked about the meal she served to her children on the Sunday night. She had given evidence-in-chief that she gave leftovers, minus the pastry and mushrooms, to her children but only had cereal herself. The following impugned questioning followed:

> [Your son] also told the police about dinner on the Sunday night in his VARE … Again, can I put it up on the screen or I can just read you out his questions?---I'm happy for you to read it.
>
> Question 830: 'Given that mum had been unwell, did she eat dinner that night?' Answer: 'She made dinner for herself but she did not eat any of it. I had her leftover potato and beans.' You recall [your son] giving that evidence?---I do.
>
> Do you say that [your son] is incorrect about what you prepared yourself for dinner on the Sunday night?---Yes, he is.

(xi) Evidence given by the applicant's daughter

369 On the same issue of the meal prepared by the applicant for herself and her children on the Sunday evening, the applicant had said that she recalled her daughter giving evidence that the applicant had eaten the same meal as her children, namely meat with mashed potato and beans. The applicant's daughter had said that the applicant was not very hungry and didn't eat much. Her brother ate the rest of the applicant's meal. The following impugned questioning immediately preceded that extracted in paragraph [368] above:

> Did I just ask you — you recall [your daughter] giving that evidence?---You did.
>
> And do you say that [your daughter] is wrong about what you prepared yourself for dinner on the Sunday night?---She is.

370 All these extracts of the cross-examination illustrate that the manner in which the applicant was cross-examined was entirely appropriate (notwithstanding the single aberrant occasion on which counsel asked if the evidence of another witness was true).[98] As was her duty, the prosecutor took care to identify each issue on which the evidence of the applicant in-chief had differed from the prosecution case and to ensure that the applicant understood exactly what the prosecution evidence was by reference to the witness who gave it. Counsel was obliged to do so as a matter of fairness.

98The applicant abandoned any argument that the cross-examination breached the rule in *Palmer v The Queen* (1998) 193 CLR 1.

371 In *Lynn v The King*[99] this Court observed:

> As *Browne v Dunn* is a rule of fairness, the question of compliance will turn upon the facts and issues of each case. That said, where the matters are central to the prosecution case and involve the drawing of inferences, the rule is unlikely to be satisfied by an accused person pre-emptively giving evidence in response to what he or she perceives the prosecution case to be, where that evidence — if it is at odds with the prosecution case — is left unchallenged in cross-examination by the prosecutor.
>
> …
>
> *Lewington* confirms a number of indisputable propositions. Prosecutors have a duty to act with fairness and detachment. Prosecutorial fairness requires prosecutors to fairly assist the court to arrive at the truth. The duty of fairness flowing from *Browne v Dunn* requires the prosecutor in cross-examination to put to an accused person who gives evidence (or a defence witness) the nature of the case upon which the prosecution proposes to rely in contradiction of his or her evidence (particularly where the prosecution case relies upon inferences to be drawn from other evidence in the case). Not only must the prosecutor give notice of any inconsistency that he or she proposes to rely on before the jury, but the prosecutor must also afford the accused person (or defence witness) an opportunity to deal with the evidence.[100]

372 Moreover, the prosecution had a legitimate forensic purpose in testing the cogency and consistency of the applicant's evidence, and allowing the jury to observe the applicant's demeanour when challenged.

373 Using the language of variously 'wrong' or 'mistaken' or 'incorrect' in this task is not only unremarkable but proper. It is language that did not suggest to the jury that the onus of proof rested upon the applicant rather than the prosecution.[101] It did not, as argued by the applicant, suggest to the jury that the applicant had to provide a reason as to why the nominated witnesses were saying the things they had said. It merely gave the applicant the opportunity to deal with the specifics of the evidence founding the inconsistencies upon which the prosecution relied. That is so even before regard is had to the clear directions the jury received as to the burden and standard of proof. In this regard, we observe that Senior Counsel for the applicant did not once object to the language employed by Senior Counsel for the prosecution which is now impugned.

374 Further, the technique did not involve a wholescale 'rehashing' of the prosecution case. To the contrary, as the impugned extracts demonstrate, the attention of the applicant was drawn only to specific parts of the prosecution evidence that were at

99[2025] VSCA 315 ('*Lynn*').

100Ibid [58], [62] (Emerton P, Priest and Kidd JJA).

101*Flynn (a pseudonym) v The Queen* [2020] VSCA 173 [80] (Niall, T Forrest and Weinberg JJA).

odds with the evidence the applicant had given in her evidence-in-chief. The applicant was not reduced to merely acknowledging the prosecution evidence. Rather, she was being asked to respond to it. In doing so, the prosecutor was ably and fairly discharging her obligations.

375 Grounds 5(a) and (b) are not made out.

Analysis of ground 5(c) — interest in death cap mushrooms

376 We turn now to the complaint about the cross-examination in relation to the applicant's interest in death cap mushrooms within the context of her access to the iNaturalist website on 28 May 2022. The evidence of the search and navigation throughout the site on that day has already been summarised above.[102]

377 This was indisputably relevant evidence. Its admissibility was not challenged at trial or in this Court.

378 This proposed ground touches upon two rulings made by the judge: a tendency evidence ruling (which the applicant contended was traversed by the impugned cross-examination);[103] and a further ruling which identified the non-tendency relevance of this evidence.[104] The impugned cross-examination must be assessed in the light of these rulings, and how the evidence was treated by the parties in their final addresses.

379 For the reasons that follow, we are of the view that the impugned cross-examination did not invoke tendency reasoning. The cross-examination was ultimately directed at the permissible uses of the evidence in compliance the judge's rulings.

(xii) Permissible use of the iNaturalist site access evidence

380 The prosecution initially sought to rely upon the applicant's access to the iNaturalist website on 28 May 2022 as tendency evidence.

381 The applicant's tendency pleaded in the relevant tendency notice (the 'Notice') was as follows:

> To use a computer or other electronic device to access online content (including via the iNaturalist website) relating to amanita phalloides (death cap mushrooms), locations of amanita phalloides (death cap mushrooms) and/or locations of other poisonous flora.

382 The Notice pleaded that the tendency went to the following facts in issue:

102See [80] regarding Mr Fox-Henry's evidence, and [113] regarding the applicant's evidence.

103*Ruling 3*.

104*Ruling 7*.

> Whether the [applicant] deliberately sourced death cap mushrooms which went into the lunch that was served to the lunch guests on 29 July 2023 and, therefore, whether she acted with murderous intent in respect of charges 4, 5, 6 & 7.
>
> Specifically, the tendency reasoning applies to:
>
> i. Whether the [applicant] accessed online content via the iNaturalist website featuring a (since verified) sighting of death cap mushrooms in Loch, Victoria, posted by Christine McKenzie, using her iNaturalist username 'chrismck', on 18 April 2023; and
>
> ii. Whether the [applicant] accessed online content via the iNaturalist website featuring a (since verified) sighting of death cap mushrooms in Outtrim, Victoria posted by Dr Tom May, using his iNaturalist username 'Funkey Tom', on 21 May 2023.[105]

383 Relevantly the judge ruled:

> The fact that there is only admissible evidence of the [applicant] accessing the iNaturalist website once (28 May 2022) … makes it difficult to maintain that the evidence strongly supports the alleged tendency. The fact that the one instance of the [applicant] accessing the iNaturalist website occurs approximately a year prior to the postings on the iNaturalist website of the relevant sightings of death cap mushrooms in Loch and Outtrim also undermines the claim that the tendency evidence has significant probative value. Accordingly, I am not persuaded that the tendency evidence clears the first hurdle created by [s 97].[106]

384 It follows that the evidence could not be used for a tendency purpose.

385 Nevertheless, the evidence of the applicant's access to the iNaturalist website on 28 May 2022 remained relevant for non-tendency purposes. The admission of the evidence for non-tendency purposes was not objected to by the applicant's counsel at trial.

386 In a ruling focused upon the admissibility of the sightings of death cap mushrooms posted on the iNaturalist website on 18 April 2023 (in Loch) and 21 May 2023 (in Outtrim), the judge said the following:

> The impugned evidence of the iNaturalist posts summarised in [298] and [309] of the Summary of Prosecution Opening is not to be considered in isolation. In Ruling 1, I noted that the evidence summarised at [283] to [285] of the Summary of Prosecution Opening [regarding access to the iNaturalist website on 28 May 2022] was not objected to by the [applicant]. In other

105Emphasis altered.

106*Ruling 3* [15]. The ruling references s 98 of the *Evidence Act* (coincidence evidence) but it is clear the judge intended to reference s 97 (tendency evidence).

> words, there is admissible evidence *from which a jury could infer that the [applicant] was not only familiar with the iNaturalist website but knew how to utilise its worldwide map to find the locations of death cap mushrooms locally*. … In Ruling 2, I ruled that cell tower evidence of the [applicant] possibly visiting Loch twice (28 April 2023 and 22 May 2023) and Outtrim once (22 May 2023) was admissible. The possible visit to Loch on 28 April 2023 — 10 days after McKenzie's post — was followed by the [applicant] purchasing a Sunbeam food dehydrator on the same day. The possible visit to Outtrim on 22 May 2023 was a day after May's post on iNaturalist. It is not in dispute that on 29 July 2023, the [applicant] served her lunch guests Beef Wellingtons that were laced with death cap mushrooms. *When these pieces of evidence are considered in combination, they pass the test of relevance because, at the very least, they are evidence of opportunity for the [applicant] to have deliberately sourced death cap mushrooms locally, rather than having inadvertently purchased them from an Asian grocery, as she claimed to investigators.* I note that a thorough investigation by the Health Department found no support for that claim.[107]

387 As we have said, the relevance of the 28 May 2022 iNaturalist site access evidence for a non-tendency purpose has never been challenged.

388 In line with *Ruling 7*, the prosecutor closed the Crown case as follows:

> There is no direct evidence as to where the [applicant] sourced the death cap mushrooms. However, what the evidence does demonstrate is that she was *aware* of a website that could be used to locate death cap mushrooms and that she had the *opportunity* to source those mushrooms at a time approximate, or near to the lunch.
>
> ….
>
> There is evidence in the trial that the accused was *familiar* with iNaturalist and with its map feature.[108]

389 The prosecutor then surveyed the expert evidence taken from the applicant's computer relating to the applicant's access to the iNaturalist site on 28 May 2022.[109] In the course of these submissions, the prosecutor submitted to the jury:

> Clearly this was a *targeted* search, *not browsing on the internet*, so we can suggest that you can infer that she *knew* of iNaturalist even before conducting this search, or how else would she know what to specifically search for?
>
> …

107*Ruling 7* [41] (citations omitted) (emphasis added).

108Emphasis added.

109Given by Mr Fox-Henry.

> That was a world map of death cap mushrooms sightings. It had the heading 'Observations iNaturalist.' The [applicant] did not navigate to other types of mushroom. She did not meander around the website. She went directly to death cap mushrooms.
>
> At 7:23:03 pm, she navigated to a smaller zoomed in map of death cap mushroom sightings. This view of the map focused on death cap mushroom posts in Victoria, Australia. Thirteen seconds later at 7:23:1 pm, *she navigated to a specific post of a sighting of death cap mushrooms in Bricker Reserve Moorabbin.* That post was made on 18 May 2022, 10 days earlier. This indicates that the [applicant] *knew* how to use the map to click on the individual posts to get more detailed information and this is what we say she did. She clicked on the post for Moorabbin, which had been posted 10 days earlier and opened it up. The record shows she visited this page twice.
>
> …
>
> The point, though, is that she visited that web page, a web page about a specific location of death cap mushrooms.[110]

390 The prosecutor concluded this submission in the following manner:

> This evidence of the [applicant] using the iNaturalist website to navigate to the zoomed in map of death cap mushroom sightings in Victoria demonstrates that by at least 28 May 2022, she had the *knowledge* of how to locate, with precision, death cap mushroom in Victoria. While [defence counsel] might point out that this search was over a year before the lunch, we suggest that this is *knowledge that would have stayed with the [applicant]*.
>
> In addition to that *know-how*, we submit to you that the evidence also demonstrates that she had the *opportunity* to locate and collect death cap mushrooms at a time approximate to the lunch.[111]

391 The prosecution case acknowledged that there was no direct evidence that the applicant accessed the iNaturalist sightings of death cap mushrooms in Loch and Outtrim posted on 18 April 2023 and 21 May 2023, respectively. The import of the prosecution's case was that, notwithstanding this, it was significant that the applicant had knowledge of the iNaturalist site and how to access that information. The knowledge — which must have been abiding — came from her engagement with the website on 28 May 2022. This enduring knowledge supplied her with an opportunity to access information on the location of death cap mushrooms in the local area at a time proximate to the fatal lunch.

392 The scope of the controversy at trial on this issue is revealed by the arguments made by the applicant's counsel to the jury:

> [T]here's a number of possibilities open on this limited evidence,

110Emphasis added.

111Emphasis added.

> including the possibility that [the applicant] was *not previously familiar with iNaturalist*. And we submit to you that the result of this *brief interaction* on … 28 May 2022 is finding out or making sure that death cap mushrooms do not grow in Gippsland.
>
> …
>
> The prosecution says to you, well, that *knowledge of iNaturalist would have stayed with her*, and we say to you: what would have stayed with her was the *knowledge that there's no death cap mushrooms in Gippsland* as a result of a search that it appears that she did. So there's [the applicant] jumping on to an available computer, just about to order dinner, and as she does, that question about whether or not death cap mushrooms grow in Gippsland occurs to her. Maybe she had seen some mushrooms earlier that day, it's mushroom season. Who could possibly remember the details of why we might have searched something up on a single occasion three years ago.[112]

393 Defence counsel concluded with this submission:

> So the timing of these records should tell you something very important. This interaction on 28 May 2022 was *idle curiosity*, just before ordering dinner, three minutes before ordering dinner. The interaction with iNaturalist was two minutes, at most — don't hold me to it, I don't know if anyone wants to actually do the calculations, but it's not very long. And the time spent on the Bricker Reserve page was 21 seconds or 28 seconds — or something like that.
>
> *So this was not a person carefully studying this information doing research about it.* This was *not a deep and abiding interest in this subject matter*, it was *passing attention*, in exactly the same way as many of us would do on our devices, something pops in to your head in *an idle moment* and you go, 'Oh, I wonder about that?'. If you like shopping, you probably end up buying something, but there are questions that might pop up in your feed, or in your head, which you get the answer to.[113]

394 While the defence allowed that the jury could be satisfied that the applicant accessed the iNaturalist site on 28 May 2022, its case was that this was a passing interest of little or no consequence, and enduring knowledge of the iNaturalist site could not be inferred. The defence then emphasised to the jury that there was no evidence that the applicant accessed the posts of the sightings of death cap mushrooms in Loch and Outtrim on 18 April 2023 and 21 May 2023, respectively.

395 Importantly, no complaint was made at trial — and none is made on this application — about this portion of the prosecutor's address, nor the manner in which she deployed the iNaturalist site access evidence. The threshold issue at trial on this topic

112Emphasis added.

113Emphasis added.

was a quintessential, factual one for the jury: did the applicant's knowledge of the iNaturalist website endure as alleged by the prosecution?

(xiii) Cross-examination

396 With the above considerations in mind, we now turn to evaluate the prosecutor's cross-examination of the applicant. For the purposes of this ground, the questions that the applicant has highlighted in her written case have been emphasised.

397 The cross-examination on this topic commenced with the issue of whether it was the applicant who accessed the iNaturalist site on 28 May 2022:

> I suggest that it was you?---It's possible it was me, yes.
>
> And I suggest that you were not randomly browsing the internet; agree or disagree?---I don't know what I was doing before this.
>
> I suggest that you knew what website you were looking for; agree or disagree?---I can't say that 'cause I don't remember this.
>
> I suggest that you knew what search term to enter to find iNaturalist; agree or disagree?---I don't know.
>
> I suggest that you had used iNaturalist before the 28th of May 2022?---I don't remember using it this time.
>
> I'm sorry, I missed that?---I don't remember using it this time, so I can't comment on whether I did it beforehand.
>
> I suggest that you had used iNaturalist before this date in May 2022 and that allowed you to navigate to the iNaturalist website; agree or disagree? ---I don't know.

398 When asked again whether it was she who accessed the site on this day, the applicant said:

> Um, I don't have a specific memory of this day or this internet search, but my evidence is it's possible. Because I remember at some point wanting to find out if death cap mushrooms grow in South Gippsland and finding out that they do not, so it might have been this search.

399 The applicant was then asked a series of questions about what the website looked like. In substance, she said she did not know as she did not remember accessing the website. This questioning concluded with the following evidence:

> It was you, I suggest, who used your Cooler Master computer to navigate and/or search the iNaturalist website; agree or disagree?---It's possible, yeah.
>
> It wasn't [your son]?---I don't know.
>
> Not [your daughter]?---I don't know.

I suggest you had an interest in death cap mushrooms on the 28th of May 2022; agree or disagree?---It depends what you mean by an interest.

Well, it's a very straightforward question, Ms Patterson.[114]

400 At this point, the judge made the observation that it was time to adjourn until the Tuesday morning, when cross-examination of the topic resumed:

So it's your evidence that at some stage, you remember wanting to find out if death cap mushrooms grow in South Gippsland; correct?---Correct.

If we accept that it's you who was on the iNaturalist web page or website on 28 May 2022, you looked at a post relating to an observation of death cap mushrooms on 18 May 2022 in Moorabbin; agreed?---Yes.

And Moorabbin is not in South Gippsland; correct?---Correct.

…

The records show your computer observed this on 28 May 2022; agree or disagree?---Um, yeah, I agree. Yep.

I suggest that you had an interest in death cap mushrooms generally, which was not limited to whether or not they grew in Gippsland?---Incorrect.[115]

401 The applicant was then asked to clarify by reference to the evidence given by her on the previous Friday whether this was the first occasion on which she had visited this site:

Are you saying that this was the first time that you had visited iNaturalist?
---Ah, I don't — I don't remember ever visiting iNaturalist.

I want to be clear. While this record indicates you visited one time on this computer, and you can see that from the record - - -?---Yes.

- - - I suggest you were familiar with the iNaturalist website before this date, because you entered iNaturalist as the specific search term; agree or disagree?---I would have to disagree.

I suggest whether you used this device or other devices, you had visited the iNaturalist website before this date, 28 May 2022; agree or disagree?---Oh, well, I still don't remember ever using iNaturalist.

And I suggest you were familiar with the observation page for death cap mushrooms because you navigated directly to that page once you were on the iNaturalist website; agree or disagree?---Disagree.

114Emphasis added.

115Emphasis added.

> Now, where we left it at on Friday was that I asked you if you had an interest in death cap mushrooms on 28 May 2022; you remember that question?---I do.
>
> Did you have an interest in death cap mushrooms on 28 May [2022]?---I have no idea.
>
> I suggest that you had an interest in where they could be found; correct or incorrect?---My only interest ever was to find out if they lived in South Gippsland or not.
>
> Your interest in death cap mushrooms, I suggest, derived from their well-known toxicity; correct?---Well, that was a reason why I wanted to make sure they didn't grow in South Gippsland, so I suppose yes.
>
> You knew how to use the map function on iNaturalist; correct? Or is it your evidence that you don't remember?---I don't remember ever using the site, so questions like that are difficult to answer.
>
> Or did you use the site to utilise the map function?---I don't remember using the site.
>
> I suggest you knew how to click on the little icons on the map to bring up the relevant post; correct or incorrect?---I don't know.
>
> You did that for this iNaturalist post about death cap mushrooms in Moorabbin; correct or incorrect?---Well, somebody did, and that somebody could have been me.

(xiv) Conclusion

402 We have reached the following conclusions about ground 5(c).

403 First, the entire cross-examination — including the impugned questions in relation to the applicant's interest in death cap mushrooms — was directed at establishing the applicant's enduring knowledge of the iNaturalist site and a corresponding opportunity to source death cap mushrooms locally at a time proximate to the fatal lunch. The questioning laid the foundation for the argument that the applicant exploited this opportunity by accessing the iNaturalist site in April and May 2023, where she learned of the local sightings in Loch and Outtrim.

404 The questions concerning the applicant's interest in death cap mushrooms as at 28 May 2022 were relevant to establish that she was the person who accessed the iNaturalist site on that day (using the computer seized from her home), and that her access to the site was purposeful, rather than accidental or speculative. These answers shed light upon the strength of her interest in accessing the site.

405 A number of the questions concerned the level of her engagement with the iNaturalist site on 28 May 2022, including her use of the map function to identify local sightings of death cap mushrooms. The responses to these questions also informed the strength of the applicant's interest in the site and its functions.

406 The strength of the applicant's interest in the iNaturalist site (and its functions) in turn informed the likelihood of the applicant retaining enduring knowledge of the site, including its ability to search for local sightings of death cap mushrooms. The cross-examination — including the questions about the intensity of the applicant's interest in death cap mushrooms — was legitimately framed to shed light upon these issues.

407 To that end, the cross-examination sought to debunk the applicant's claim that her interest in the iNaturalist site was a narrow and transient one, confined to simply satisfying herself that there were no sightings in South Gippsland. The applicant's answer about South Gippsland implied that, as her momentary curiosity was fully satisfied, there was simply no reason for her to possess any lasting knowledge of the iNaturalist site, its contents or its functions. The prosecution was able to challenge this implication by taking the applicant to the records of a search on the site concerning death cap mushrooms in the Moorabbin area.

408 The cross-examination — including the questions about the strength of the applicant's interest in death cap mushrooms — was validly concerned to rebut any suggestion that the applicant's interest in the iNaturalist site was 'passing', or that her interaction with it was one of 'idle curiosity', as ultimately argued by the defence in their final address. It was designed to refute any suggestion that the applicant's interaction with the site was wholly forgettable, with the consequence that any knowledge that she acquired of it must have quickly dissipated.

409 In our view, the cross-examination did not invite the jury to engage in any reasoning from an asserted tendency on the applicant's part to access information about death cap mushrooms online. Rather, it asked them to reason from the nature of her 28 May 2022 interaction with the iNaturalist site (and its functions) that her knowledge of the site must have endured, providing her with a corresponding opportunity to source death cap mushrooms locally at a time proximate to the fatal lunch. The cross-examination was tethered to the possession of knowledge acquired from the 28 May 2022 search. This pathway of reasoning did not resort to tendency reasoning.

410 We are of the view that the impugned cross-examination of the applicant on this topic aligned with the judge's rulings,[116] as well as with the (unobjectionable) final address of the prosecutor on this topic.

411 Secondly, if — contrary to our conclusion — the questioning raised tendency reasoning, there was no real risk that the jury might have acted upon it.

412 The prosecution's clear and legitimate framing of their reliance upon this evidence for a non-tendency purpose in the final address would have steered the jury away from any impermissible reasoning. As we have said, no complaint was made — at trial, or on this application — about how the prosecution relied upon the evidence in their final address. We note that the applicant's counsel did not raise or seek any direction under s 29 of the *Jury Directions Act* to avoid the risk of improper use of evidence as tendency evidence. This omission is consistent with the absence of any perceived risk.

116 *Ruling 3*; *Ruling 7* [41].

413 This leads us to a make a third and related point. No objection was taken by the applicant's counsel to any of these questions in cross-examination during the trial. There was a weekend break in the middle of this line of questioning. Despite ample opportunity for reflection on the (now impugned) cross-examination, no exception was taken, or complaint made. This omission is consistent with defence counsel holding no concern that the line of questioning breached the earlier tendency ruling.

414 We conclude that ground 5(c) must also fail. Leave to appeal in respect of ground 5 is refused.

Ground 6 — Prosecutor's closing address

Overview

415 The applicant's sixth ground of appeal is that: 'The prosecutor's closing address caused a substantial miscarriage of justice'.

416 The applicant contended that the address contained misstatements of evidence, overstatements of evidence, selective use of evidence, distortions in the presentation of evidence, evidence from the Bar table, and arguments made without an evidentiary basis.

417 The applicant sought to make good her case — that the prosecutor's closing address departed from a firm and fair presentation of the prosecution case — by reference to 35 particulars.[117] An argument emerged from the applicant's oral submissions that the 35 breaches had a cumulative effect and were not necessarily to be considered as individual matters.

418 The respondent maintained that the prosecution closing was a fair presentation of a significant body of evidence given in a lengthy trial. The respondent contended that it is instructive that the significant majority of the 35 complaints now raised about the closing address concern matters that did not draw criticism from the applicant's counsel at trial, nor from the judge. It is a 'weighty and significant matter' that the applicant's counsel did not apply to have the jury be discharged. Regarding the force of the complaints taken together, the respondent maintained that 'the cumulative effect of zero is still zero'.

419 Recently, this Court in *Lynn* had reason to survey the authorities in relation to the duty of a prosecutor in a criminal trial, stating that:

> [T]his Court said in *Coleman*:[118]

117These 35 particulars were numbered (a)–(z) and (aa)–(ii) (inclusive).

118*Coleman (a pseudonym) v The King* [2025] VSCA 250 [85] (Priest, Osborn and Kaye JJA).

> The role and duty of a prosecutor in a criminal trial is well understood. Fundamentally, it is the duty of the prosecutor to fairly and impartially place before the jury all relevant and cogent evidence, and to conduct the prosecution of a trial in a manner which is conspicuously fair.[119] That duty must inform the manner in which the prosecutor advances submissions to the jury in final address. In *Bugeja v The Queen*,[120] Weinberg JA (with whom Bongiorno JA agreed) stated:
>
> > It is clearly established that the prosecutor should not invite the jury to accept any argument that does not carry conviction in his or her own mind. Nor should the prosecutor put forward any argument or submission that is misleading, unfair, or otherwise unsustainable. To do so is to act contrary to the basic responsibilities that the prosecution must shoulder, and may well lead, in a given case, to a miscarriage of justice.[121]
>
> The foregoing principles concerning the conduct of prosecutors[122]
>
> extend, of course, to the content of their closing address. They lead to the conclusion that a prosecutor must not, in that closing address, invite the jury to proceed upon a theory which is known to be, at the least, highly dubious, and has the very real potential to mislead the jury.

It is no part of the duty of a prosecutor to address a jury in language which is intemperate, inflammatory or overzealous in nature.[123] It is clear that a prosecutor should not invite the jury to proceed upon a theory which cannot properly be sustained.[124] An attempt by a prosecutor to invite the jury to draw inferences not properly open, or to deflect the jury from fairly considering a real weakness in their case can result in a trial miscarrying.[125]

> When a prosecutor fails to comply with the required standards of fairness an accused person may be denied a fair trial. As Deane J observed in

119*R v Bazley* (1986) 21 A Crim R 19, 29 (Young CJ, Marks and Southwell JJ agreeing at 31); *Richardson v The Queen* (1974) 131 CLR 116, 119 (Barwick CJ, McTiernan and Mason JJ); *Ritchie (a pseudonym) v The Queen* [2019] VSCA 202 [66]–[67] (Kaye, Weinberg JJA and Kidd AJA).

120(2010) 30 VR 493.

121Ibid 503 [58] (Weinberg JA, Bongiorno JA agreeing at 506 [76]).

122 Ibid 504 [65] (Weinberg JA, Bongiorno JA agreeing at 506 [76]).

123*Tran v The Queen* (2005) 105 FCR 182, 203 [132] (Black CJ, Weinberg and Kenny JJ).

124Ibid.

125Ibid 204 [140] (Black CJ, Weinberg and Kenny JJ).

Whitehorn:[126]

> Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused trial is a fair one. The consequence of a failure to observe the standards of fairness to be expected of the Crown may be insignificant in the context of an overall trial. Where that is so, departure from those standards, however regrettable, will not warrant the interference of an appellate court with a conviction. *On occasion however, the consequences of such a failure may so affect or permeate a trial as to warrant the conclusion that the accused has actually been denied his fundamental right to a fair trial. As a general proposition, that will, of itself, mean that there has been a serious miscarriage of justice with a consequence that any conviction of the accused should be quashed and, where appropriate, a new trial ordered*.[127]

420 We would emphasise a few points.

421 First, while it is correct that a prosecutor's address must be held to high standards, subjecting a prosecutor's address to overzealous scrutiny can deflect the enquiry away from the task of assessing whether the address — as a whole — was fair.

422 Secondly, while bound by the duty of fairness, a prosecutor is entitled to vigorously urge the prosecution's view about the facts in issue, and to robustly test defence theories and evidence. Prosecutors remain advocates within an adversarial system.

423 Thirdly, the fact that a sustainable argument is weak does not mean that it is unfair to advance it. Fairness is the touchstone for any assessment of a prosecutor's final address. There may be some circumstances where fairness will constrain a prosecutor from advancing a particularly weak argument, especially where it is critical to the resolution of a central question in the case. The propriety of advancing such an argument will involve matters of fact and degree.

424 Fourthly, the fact that mistakes or missteps are made by a prosecutor does not mean that a trial is necessarily rendered unfair, given that a 'fair trial according to law does not mean a perfect trial, free from possible detriment or disadvantage of any kind or degree to the accused'.[128]

126*Whitehorn v The Queen* (1983) 152 CLR 657, 663–4 (emphasis added) ('*Whitehorn*'). Part of these reasons for judgment were cited in *R v Lewington* [2021] QCA 258. See *Lynn* [2025] VSCA 315 [61] (Emerton P, Priest and Kidd JJA).

127*Lynn* [2025] VSCA 315 [119]–[122] (Emerton P, Priest and Kidd JJA) (emphasis in original).

425 Fifthly, any evaluation of prosecutorial error — and any consequential unfairness — must be undertaken within the procedural context of a trial. Errors can, and often will, be acceptably ameliorated by the counterarguments of the defence in their final address or by judicial directions to the jury.

426 For reasons which follow, we have concluded that there is very little, if any merit, in most of the 35 complaints raised under ground 6.

427 There were some blemishes in the prosecutor's address, as is apparent from the need for the judge to have given at least two corrective directions, which we discuss below. This final address ran for some two days. The trial itself was a complicated one. It was forensically challenging. It involved large bodies of diverse strands of evidence including extensive expert evidence. There were many facts in issue.

428 While always regrettable, indiscretions in prosecution addresses can occur, especially in cases of this magnitude and complexity.

429 Ultimately, we reject the applicant's central contention that the prosecutor persistently breached the duty of fairness. The closing address did not 'so affect or permeate a trial as to warrant the conclusion that the accused has actually been denied his fundamental right to a fair trial'.[129] Whatever shortcomings occurred in the final address were either acceptably dealt with in the defence final address or were otherwise sufficiently mitigated by the judge's directions.

430 In order to evaluate these complaints, it is important to first examine how the defence responded to the impugned submissions of the prosecutor at trial. It is necessary to examine what complaints were made,[130] and the forensic or strategic choices taken to these issues in the conduct of the defence case.[131]

431 We will then turn to address each of the specific complaints. For ease of comprehension, we will tackle the complaints thematically (rather than alphabetically, as labelled by the applicant) as follows:

(a) complaints about submissions on medical observations of the applicant (particulars (h)–(k), (m)–(p) (inclusive) and (w));

128*Jarvie v Magistrates' Court of Victoria* [1995] 1 VR 84, 90 (Brooking J, Southwell and Teague JJ agreeing at 100).

129*Whitehorn* (1983) 152 CLR 657, 663–4 (Deane J) (emphasis added).

130Encompassing particulars (e), (h), (l), (m), (o), (p), (r), (w) and (x)–(aa) (inclusive).

131Encompassing particulars (a)–(d), (f), (g), (i)–(k), (n), (q), (s)–(v) and (bb)–(ii) (inclusive).

(b) complaint about the submission that there was no evidence of *amanita* poisoning (particular (l));

(c) complaints about submissions comparing outcomes of lunch guests with those of the applicant (particulars (q)–(v) and (x)–(aa) (inclusive));

(d) complaint about submissions on the applicant's conduct prior to the offending (particular (c));

(e) complaints about submissions concerning the applicant's preparation and handling of the meal (particulars (b) and (d));

(f) complaints about submissions on the applicant feigning illness (particulars (e)–(g) (inclusive)); and

(g) complaints about submissions on relationships (particulars (a) and (bb)–(ii) (inclusive)).

432 The applicant made clear that the focus of ground 6 is upon the cluster of complaints concerning the prosecutor's treatment of the medical and expert evidence. In those circumstances, we will commence with the complaints that fall within this category.

Applications made to the judge about prosecutor's address

433 As we have said, the prosecutor addressed the jury over the course of nearly two days. At no point during the address, or immediately upon its conclusion, did the defence make any complaint about its content. Rather, defence counsel proceeded to address the jury and did so over the course of nearly three days.

434 After the judge had commenced his charge, the defence — for the first time — complained to the judge about the prosecutor's address. The applicant sought curative directions,[132] including directions under s 43 of the *Jury Directions Act*.[133]

435 Some seven complaints were made. The judge effectively upheld two complaints, but otherwise rejected the complaints.

132The directions were sought under s 12 of the *Jury Directions Act*. Pursuant to s 14, the judge must give a requested direction unless there are good reasons for not doing so.

133Where the prosecution fails to call or question a witness without providing a reasonable explanation, the defence may seek a direction under s 43. This direction informs the jury that it may conclude that the witness would not have assisted the prosecution's case.

436 The two complaints that were upheld were as follows:

(a) The prosecutor had made submissions that the amatoxins must have penetrated or remained on the cooked meat. It was then argued that the children would have been sick had they eaten the leftovers (as claimed by the applicant). The judge upheld the complaint about those submissions. This complaint is presently encompassed by particulars (x), (y), (z) and (aa). The judge accepted the applicant's contention that the prosecutor's submissions were not supported by the evidence. The judge agreed to give a corrective direction. We outline the direction and discuss its effect below.[134]

(b) The judge also provided a prudential or prophylactic direction on a separate matter concerning a submission made by the prosecutor about the effect of the PCR tests on the applicant's bowel movements. The judge wanted to ensure that the jury understood that the PCR test did not detect amatoxins and therefore could not be used to show that the applicant suffered from death cap mushroom poisoning. That direction was given not because the judge found that the prosecutor had erred, but out of a concern that the jury might misinterpret the submission. This is discussed below.[135]

437 The defence also made complaints to the judge about the prosecutor's address, which are — in substance — presently encompassed by the following particulars:

- particular (e) (the applicant's son's account);
- particular (h) (Ms Cespon);
- particular (l) (Dr Gerostamoulos);
- particulars (m)–(p) (inclusive) (Professor Bersten);
- particular (r) (the applicant's portion of the beef Wellington); and
- particular (w) (Ms Ashton).

438 The judge rejected the applicant's request to give directions in relation to these matters.

Forensic approach adopted by the applicant at trial

439 It is apparent that the majority of the complaints particularised under ground 6 were not raised at any time by the applicant's trial counsel with the judge. The 23 complaints never raised with the judge were as follows: particulars (a)–(d), (f), (g), (i)–(k), (n), (q), (s)–(v) and (bb)–(ii) (inclusive).

440 Rather than seek any remedy from the judge in relation to the impugned submissions, the defence elected to deal with them in Senior Counsel's final address. Defence

134See [625(a)(1)]–[628] below.

135See [518(a)(1)]–[521] below.

counsel mounted what could only be described as a full-throated attack upon the integrity and fairness of the prosecutor's conduct of the prosecution case.

441 The defence's closing address began with the following submission:

> The prosecution has referred, we say, *selectively* to the evidence, choosing the bits they like to suit their theory, in a *very deliberate way*, and then arguing to you that you should accept those bits that they like, while they don't draw your attention to the bits that they don't like. And we'll take you to a number of examples of that, where the prosecution has done that in the cross-examination of [the applicant] and in the closing argument that you have heard yesterday and today.
>
> Their approach is this: working from the assumption that [the applicant] is guilty of these crimes, pick and *choose the evidence that fits that theory*, and then tie it all together in an attempt to present a coherent narrative and ignore the things that don't fit.
>
> So they have constructed that case theory by, as I say, *picking and choosing evidence* while ignoring the context. *Cherry-picking convenient fragments, while discarding inconvenient truths*. I will give you some examples straight away, so you know what I am talking about.[136]

442 Senior Counsel also stated in closing that:

> The other part of the *duty of fairness*: when addressing you and when cross-examining the [applicant], for instance, is to put the evidence *fairly* to you — tell you what all of the evidence about a particular topic is, not just select a piece of it. Put all of the evidence to the [applicant] when you cross-examining her [sic]; not just a piece of it. So *there are many examples where they didn't do that*, and I'll take you to some examples of them in this address.[137]

443 Throughout the address, defence counsel repeatedly referred to the prosecution's arguments as being deliberately misleading, selective and unfair.

444 While not every one of the 35 complaints upon which the applicant now relies was specifically made in the final address, most were addressed in some form. Certainly, Senior Counsel for the defence was strident in his criticism of the prosecution for having made the impugned submissions now encompassed within particulars (b), (d), (h), (m)–(p), (r), (t)–(z) and (aa).

445 One of the recurring themes of the defence's final address was the persistent failure of the prosecution to address important questions and issues when expert and medical witnesses were giving evidence. The defence case was that the prosecution case was

136Emphasis added.

137Emphasis added.

incomplete and was missing evidence, especially expert evidence. By way of example, it was submitted by defence counsel:

> In conclusion, we say to you that the prosecution's argument is this: if you pick and choose, if you rely on *misleading* impressions, if you assume witnesses can never be honest but mistaken, if you use hindsight to reconstruct events to suit a theory, if you work backwards *without any expert evidence* to establish the fundamental propositions that you rely on, then you can *manufacture* a picture. And that's what happened here.[138]

446 We have selected a few examples earlier in the defence's closing address in which defence counsel attempted to substantiate their argument.

447 First, this can be seen in defence counsel's response to the submission encompassed by particular (o):

> [The prosecutor] said: 'A mild level of dehydration is not, we suggest to you, consistent with the [applicant's] story of having extensive diarrhoea up to 25 to 30 times over the past two days', at 2840.
>
> *Now, the prosecution can't answer [sic] submit that it's not consistent with that, unless they asked a witness about it*.[139]

448 The defence's approach can also be seen by reference to particular (w) regarding the prosecutor's account of Ms Ashton's evidence:

> A perfect example of *the prosecution choosing that piece of evidence to create that fact*, when the other evidence doesn't demonstrate that that fact is made out.[140]

449 As referenced by particular (y), regarding any remaining presence of amatoxins in the leftovers, defence counsel stated:

> And then [the prosecutor] said this: 'In other words, the amatoxins penetrated or remained on the cooked meat.' No expert evidence — no expert witness, gave that evidence and *we submit to you that's another invitation to speculation; to make an assumption rather than acting on the evidence*.[141]

450 The following observations can be made about the course that the defence took at trial.

138Emphasis added.

139Emphasis added.

140Emphasis added.

141Emphasis added.

451 First, it may be accepted that Senior Counsel for the applicant at trial considered that some unfairness had occurred as a result of the prosecutor's final address. This prompted his applications for some remedial directions during the charge.

452 Secondly, nevertheless we think it is significant that many of the 35 complaints now raised did not cause experienced trial counsel — imbued with the atmosphere of the trial — to make any application for judicial intervention. While the applicant now contends that these 35 matters caused irreparable unfairness or prejudice to her, we infer that most of them were not perceived to possess the same level of significance at the trial.[142] This can be the only explanation for why so many of these complaints were not raised with the judge. The failure to raise many of these complaints with the judge is consistent with the applicant's trial counsel taking the considered position that any unfairness could be sufficiently ameliorated, or exploited, in the defence's final address.

453 Thirdly, we infer that a forensic decision was taken by the applicant's trial counsel to take tactical advantage of what the defence perceived to be failures and unfairness in the prosecution's presentation of its case. Rather than complaining at the time of the prosecutor's address (which might have allowed the prosecutor an opportunity to correct the perceived failures) or seeking any judicial remedies, the defence chose to 'keep its powder dry' for its final address.

454 This was a calculated approach, aimed at capitalising upon any perceived overreach by the prosecutor. It was ultimately designed to shake the jury's confidence and trust in the prosecution team and in its case. This strategy was pursued to maximise the applicant's prospects of acquittal.

455 Fourthly, this was a case where trial counsel was very much alive to any perceived or claimed unfairness stemming from the prosecutor's final address. The fairness of the prosecutor's arguments dominated the defence's final address to the jury. Nothing was overlooked. The applicant's experienced counsel plainly reflected carefully upon how to tackle the asserted shortcomings in the conduct of the prosecution case.

456 Fifthly, and significantly, the foundation of ground 6 is that the asserted breaches and failures of the prosecution were so great — in number and consequence — that they resulted in an irretrievably unfair trial. Yet, an application for a discharge of the jury based upon the complaints now made was never foreshadowed or made by the applicant's trial counsel.

457 As this Court said in *Lynn*:

> A failure to seek a discharge is an obstacle — often a formidable obstacle — standing in the way of a conclusion that there has been a substantial miscarriage of justice, but it will not always be determinative. A failure to seek a discharge of the jury is but one factor — albeit often a very important factor — to be weighed in the balance with all other factors relevant to a determination whether there has been a substantial miscarriage of justice.

142*Lynn* [2025] VSCA 315 [149] (Emerton P, Priest and Kidd JJA).

…

> [A] calculated failure by defence counsel to make an application [to] discharge the jury for forensic advantage must assume great weight in any assessment of whether there has been a substantial miscarriage of justice.[143]

458 In *Martorano v The King*[144] Bell CJ said:

> A failure to seek a discharge of the jury will be *especially* significant where it is evident that counsel was alive to the potential for prejudice, turned their mind to the possibility of making a discharge application, made a rational forensic decision against taking that approach, and proceeded to agree with the manner in which the judge proposed to instruct the jury.[145]

459 We discern that a deliberate decision was taken by the defence trial team to refrain from seeking a discharge of the jury in relation to the 35 complaints now made. Through her legal team, the applicant made a considered forensic decision to exploit the perceived failures in the prosecution's final address, rather than contend that the trial had become irreversibly unfair. This strategy was pursued to enhance the prospects of an acquittal. Viewed objectively, the failure 'is explicable on the basis that it resulted or could have resulted in a forensic advantage'.[146]

460 To the extent that there were failures on the part of the prosecution in the final address, the forensic decision taken at trial not to seek a discharge of the jury strongly tells against a substantial miscarriage of justice having occurred. As a general rule, an accused is bound by the way in which their counsel conducted the case at trial. This has been described as a 'cardinal principle' of the adversarial system.[147] The applicant has made no criticism of the conduct of defence counsel at trial; incompetence of counsel is not pleaded. In our view, the applicant should be held to the forensic choices made on her behalf.

461 The applicant relies upon the decision of *Lynn* (a double murder trial) in which the Court concluded that there had been a substantial miscarriage of justice — largely because of failures in the prosecutor's final address — notwithstanding that a discharge of the jury was not sought at trial.

143Ibid [156], [169] (Emerton P, Priest and Kidd JJA) (citations omitted).

144[2025] NSWCCA 152.

145 Ibid [61] (Free JA agreeing at [78], McGuire J agreeing at [79]) (emphasis in original).

146*TKWJ v The Queen* (2002) 212 CLR 124, 133–4 [27]–[29] (Gaudron J, Gummow J agreeing at 157 [100]) ('*TKWJ*').

147*Nudd v The Queen* (2006) 86 ALJR 614, 618–19 [9] (Gleeson CJ); [2006] HCA 9, citing *TKWJ* (2002) 212 CLR 124.

462 The outcome in *Lynn* is not an invitation for inattentive or apathetic trial counsel to rely on an appellate court to rectify the effects of their failure to raise immediate and legitimate concerns apparent at trial.[148]

463 *Lynn* is very different from the applicant's case for the following reasons:

(a) The failures on the part of the Crown in *Lynn* were so numerous and consequential that the conclusion had to be reached that they occasioned a substantial miscarriage of justice. Whatever its shortcomings, we would certainly not characterise the prosecutor's address in the applicant's case in this way. As will become apparent, we have concluded that there was no persistent unfairness.

(b) In *Lynn*, the prosecutor mounted an illegitimate attack — in serious breach of the rule in *Browne v Dunn* — upon his own witness which improperly deflected the jury from properly considering a central defence theory. That submission was found to have represented 'a significant departure from the responsibilities and obligations of a Crown prosecutor to persuade a jury of an accused's guilt by way of balance[d] and rational argument based upon the evidence in the trial'.[149] The applicant has not established such a consequential breach or failure in this case.

(c) In *Lynn*, throughout the trial, the prosecutor flagrantly persisted in breaching the rules — including the rule in *Browne v Dunn* — in the face of judicial censure and warnings. None of this occurred in the applicant's case.

(d) In *Lynn*, the Court was satisfied that there had been a substantial miscarriage of justice despite the fact that the decision not to seek a discharge of the jury was a considered forensic choice. This was in large part because — in the unique circumstances of that case — the prosecution's misconduct placed defence counsel in an 'invidious' position; if the trial continued, the accused would suffer significant disadvantage in relation to one murder charge; if the jury was discharged he would suffer significant detriment in relation to the other murder charge. The Court effectively found that this dilemma — caused by prosecutorial misconduct — was intolerable. On appeal, trial counsel in *Lynn* explained this forensic dilemma;[150] no such dilemma or explanation has been advanced in the applicant's case (still less by trial counsel).

148[2025] VSCA 315 [171] (Emerton P, Priest and Kidd JJA), citing *R v Caine* (1990) 48 A Crim R 464, 475 (Crockett, McGarvie and Beach JJ); *Saddik v The Queen* [2018] VSCA 249 [55]–[57] (Kaye and Niall JJA, Whelan JA agreeing at [1]).

149*Lynn* [2025] VSCA 315, [123] (Emerton P, Priest and Kidd JJA), citing *Livermore v R* (2006) 67 NSWLR 659, 667–8 [36] (McClellan CJ at CL, Johnson and Latham JJ).

150[2025] VSCA 315 [167]–[168] (Emerton P, Priest and Kidd JJA).

464 *Lynn* was thus an extreme case at many different levels; the applicant's case is not.

465 For these overarching reasons, together with the more specific reasons set out below, ground 6 must fail. Leave to appeal should be refused in that respect.

Framing of prosecution case on the applicant's feigned illness

466 The applicant has advanced a number of complaints about the manner in which the prosecutor treated the evidence of medical officers or staff concerning the applicant's state of health. The impugned submissions can only be properly assessed by reference to the broader prosecution case in relation to the applicant's feigned illness.

467 Ultimately, the prosecution case was that the applicant feigned death cap mushroom poisoning. The only reason she would do this is that, otherwise, it 'would give her away'. The case that she feigned death cap mushroom poisoning rested upon a large body of evidence concerning claims made by the applicant about how severely unwell she became after the lunch.

468 The prosecutor addressed this evidence in her closing submissions to the jury, stating:

> [T]he [applicant] told Simon Patterson that she had some diarrhoea herself, which was quite frequent. Importantly, she told Simon Patterson that she'd started to feel unwell at 4 or 4:30 pm the day before after the lunch. So just over an hour, after the lunch guests had left her home.
>
> She described to Simon that she *had diarrhoea every 20 minutes* or so by the early evening when she took [her son's friend] home.
>
> …
>
> [S]he later reported to toxicology Registrar Dr Laura Muldoon that she had 'explosive diarrhoea every 10 minutes' which 'became watery/clear by Sunday'.
>
> …
>
> When the [applicant] presented to Leongatha Hospital for the second time on Monday, 31 July, she told Nurse Mairim Cespon that she had had *diarrhoea 'all day'* on Sunday, 30 July which she said it settled [sic] in the evening. The [applicant] also told Dr Muldoon that her *symptoms of nausea and diarrhoea 'had persisted throughout Sunday until Monday*.' [The applicant] told Ms Atkinson that her *explosive diarrhoea* continued through the night of 29 — that's the Saturday night through to the Sunday morning — occurring *every 15 minutes* and then throughout the rest of Sunday, but it slowed down to about every 45 minutes throughout Sunday. That was SallyAnn Atkinson's evidence about what she had been told.
>
> …
>
> She told paramedic — or both paramedics that she had suffered *extensive*

> *diarrhoea up to 25 to 30 times* over the past two days by the time she came to be transferred to Monash Medical Centre …
>
> …
>
> The [applicant] later told Nurse Cespon that she was experiencing 7 out of 10 pain. This is when she came back a little later.[151]

469 The prosecution case was that this illness — as recounted and described by the applicant — was a lie:

> [T]he prosecution says that over the course of Sunday, 30 July to Tuesday, 1 August, the [applicant] deliberately and falsely represented to various people, both by her words and her actions, that she was also sick as a result of a lunch, including by reporting that she had very frequent and explosive diarrhoea.

470 In her address to the jury, the prosecutor concluded:

> [W]e know that she then got better and didn't descend into a *very significant* illness.
>
> …
>
> In total, the [applicant] spent just over 24 hours in hospital care. Not one medical professional observed her appearing unwell. When one looks at all of the evidence in this case, we say that the [applicant] was not suffering from a *severe* illness. The evidence overwhelmingly indicates that she was certainly not sick with death cap mushroom poisoning.[152]

471 The prosecution closed its case upon the basis that:

(a) the applicant was claiming that she suffered significant diarrhoeal illness;

(b) that significant diarrhoeal illness comprised frequent and explosive diarrhoea over two days, nausea, cramps, and pain at 7 out of 10;

(c) it was that significant diarrhoeal illness — as described by the applicant — which was feigned in an attempt to falsely show that she was suffering from death cap mushroom poisoning; and

(d) ultimately, while it was not disputed that the applicant showed some symptoms of diarrhoeal illness and mild dehydration at presentation to hospital, this was not, on any view, the significant diarrhoeal illness claimed by the applicant.

151Emphasis added.

152Emphasis added.

Complaints about submissions on medical observations of the applicant

(xv) Professor Bersten's significant diarrhoeal illness evidence (particulars (o), (p))

(1) The prosecutor's overarching submission to the jury — as based upon Professor Bersten's evidence — is set out below.[153] Complaint is made about the two passages that have been emphasised to correspond with particulars (o) and (p), respectively.

> What did the [applicant's] blood tests reveal about possible dehydration?
>
> The Point-of-Care test conducted on her at Leongatha Hospital at 10:21 am on 31 July showed a creatinine reading which was in the upper reference range, which you can't make much of when viewed alone and that was Professor Bersten's evidence. But, he said the urea-to-creatinine ratio was only 41 and his evidence was that that's not consistent with … dehydration. When formal blood tests were done at Leongatha Hospital at 11:48 am that same morning, both the creatinine and the urea were within reference range. The creatinine to urea ratio was 62, again, according to Professor Bersten not consistent with dehydration.
>
> These tests were repeated at 3:57 pm and the results were consistent; that is, again the creatinine to urea ratio was not consistent with dehydration.
>
> *Overall, Professor Bersten gave the opinion that based on the [applicant's] elevated haemoglobin level, he could conclude that the [applicant] was 'somewhat dehydrated' and had a mild level of dehydration upon presentation. A mild level of dehydration is not, we suggest to you, consistent with the [applicant's] story of having extensive diarrhoea up to 25 to 30 times over the past two days.*
>
> When asked what he would expect in a significant diarrhoeal illness, Professor Bersten said: 'It will be dependent on severity but if you get significant dehydration, then you may get signs of shock, so low blood pressure; fast heart rate. You might see evidence of kidney dysfunction, so an elevated urea, elevated creatinine. You might see potassium loss because of diarrhoea or illness. They would be the main things that we might look for'.
>
> Other than the later results of low potassium and a fast heart rate which settled, the factors consistent with a significant diarrhoeal illness were simply not observed in the [applicant]. *Did she have a diarrhoeal illness? Looking at the records, Professor Bersten found that taking all factors into account, the blood test results, her — the [applicant's] self-report of diarrhoea and abdominal pain, although I suggest that it is very clear that Professor Bersten was clearly acting on the assumption that they were truthful reports from her,*

153The prosecutor's submissions were made against the background of her submissions which we have already set out at [468] above.

he said: 'That combination of factors could be consistent with the onset of a severe illness'.

> However, he also said that in addition to these test results, you would have to look at the timing and course of the illness that then transpired and, of course, we know that she then got better and didn't descend into a very significant illness.

472 The applicant contended that the first submission (particular (o)) had no evidentiary basis. The applicant observed that Professor Bersten was not asked about the applicant's account of her diarrhoeal symptoms.

473 In our view, there were two parts of the evidence of Professor Bersten that supported the impugned submission.

474 First, there is Professor Bersten's evidence-in-chief concerning the symptoms expected for a significant diarrhoeal illness:

> What is your opinion about whether there is evidence that supports or otherwise [the applicant] becoming ill from a diarrhoeal illness on 30 July 2023?---I thought there was evidence that she had a diarrhoeal illness; we had reports of diarrhoea. And despite the urea-creatinine ratio not being elevated, I would give preference to the elevated haemoglobin that she was somewhat dehydrated and therefore I thought it was consistent with a diarrhoeal illness; a mild level of dehydration at her presentation.
>
> In a significant diarrhoeal illness, what might you expect as a clinician?---It will be dependent on severity but if you get significant dehydration, then you may get signs of shock, so low blood pressure, fast heart rate. You might see evidence of kidney dysfunction, so an elevated urea, elevated creatinine. You might see potassium loss as a result of a diarrhoeal illness. They would be the main things that we might look for.

475 Secondly, there is Professor Bersten's evidence in re-examination. Professor Bersten gave evidence that a combination of the observations of the applicant could be consistent with the onset of a severe illness, but that one would have to look at 'the timing and the course of the illness, so what happens over time with illness as well'.

476 The prosecutor proceeded to invite the jury to consider the timing and course of the applicant's condition from her first presentation through to discharge, as observed by medical staff. Having surveyed that evidence, the prosecutor concluded with a submission to the effect that not one medical professional observed the applicant appearing unwell, and the evidence overwhelmingly indicated that she was not sick with death cap mushroom poisoning.[154]

477 There were thus two frames of reference supplied by Professor Bersten by which to assess the applicant's state of health: the observations made of her at initial presentation; and the clinical course that her health took thereafter through to

154 The prosecutor's submission to the jury is set out in full at [470] above.

discharge. Within that evidential framework, the jury was also entitled to apply their common sense and experience.

478 The following conclusions were open:

(a) The applicant's account of her illness — frequent, extensive and explosive diarrhoeal illness over two days, nausea, cramps and pain at 7 out of 10 — was self-evidently of a severe and debilitating nature.

(b) Whatever symptoms were observed in relation to the applicant, they were relatively mild. So much may be inferred when a comparison is made with what one might expect to see in a significant diarrhoeal illness (as described by Professor Bersten).

(c) The applicant's account of her illness was obviously of a vastly different severity than that revealed by medical investigation.

(d) The applicant had not suffered from a significant diarrhoeal illness and had not suffered death cap mushroom poisoning.

479 It was open to the prosecution to make these arguments. While the expert evidence on some of these matters might have been more extensive or focused, the submissions which were made were sufficiently tethered to the expert evidence that existed in the trial.

480 At the trial, the applicant's trial counsel made a complaint to the judge about the prosecutor's submission covered by particular (o). The judge accepted that the above evidence was sufficient for the prosecution to make the impugned submission. We agree with the judge's assessment.

481 Complaint was also made about the prosecutor's submission that Professor Bersten was 'clearly acting on the assumption that [the applicant's self-reports] were truthful reports' (particular (p)). According to the applicant, this submission mistreated the evidence of Professor Bersten, who was never asked whether his opinion depended upon the 'self-reports' of the applicant. In this way, the applicant contended, the prosecutor sought to undermine Professor Bersten's evidence that the applicant was suffering from a diarrhoeal illness.

482 For two reasons, the submission was, within context, not productive of unfairness.

483 First, Professor Bersten based his opinions upon his review of the applicant's medical records. Professor Bersten noted from the medical records that the applicant had 'complained of abdominal cramps, nausea and diarrhoea since Saturday evening, Saturday night'. Further, when addressing the specific question of whether there was evidence that supported diarrhoeal illness, Professor Bersten included in that catalogue of evidence the fact that 'we had reports of diarrhoea'. His opinions were based on a number of factors, which clearly and necessarily included the applicant's self-reported diarrhoea. The prosecution was entitled to make some reference to the

point that Professor Bersten appeared to take these self-reports at face value and thus relied upon their veracity.

484 Secondly, and importantly, the applicant's complaint must be that the prosecutor's impugned comment was designed to unfairly undermine Professor Bersten's ultimate opinions. Yet, the prosecution did not seek to challenge or contradict those opinions.

485 For example, the prosecution did not quibble with the evidence that the applicant suffered 'a diarrhoeal illness' with a 'mild level of dehydration'. The point sought to be made by the prosecution — in reliance upon the evidence of Professor Bersten — was that these observations were not consistent with the applicant's story of having suffered a significant diarrhoeal illness.

486 In another example, the prosecution accepted Professor Bersten's opinion that the 'combination of factors could be consistent with the onset of a severe illness'. Their point was that this was qualified by Professor Bersten's evidence that it was necessary to look at the clinical course of the illness. The prosecution then pointed to the applicant's favourable health outcome.

487 It might be asked why, if the opinions of Professor Bersten were not being challenged, there was a need to emphasise that Professor Bersten was relying upon the applicant's self-report. The answer to this is that the medical records are replete with the applicant's account of having suffered a very significant illness over the preceding two days. The prosecutor was eager — not unreasonably — to remind the jury that the applicant's account of this illness was fundamentally dependent upon her word.

488 In our view, the substance of the prosecution's arguments to the jury — when viewed overall — did not undermine or challenge the evidence of Professor Bersten. The submissions were not unfair. The arguments in particulars (o) and (p) are not sustained.

(xvi) Professor Bersten's vital signs and blood reading evidence (particulars (m), (n))

489 The prosecutor made specific submissions about the meaning of some of the applicant's vital signs and blood readings. Complaint was made about the prosecutor's submission (emphasised below) that the elevated fibrinogen seen in the applicant was most likely the result of stress:

> So what were the signs that [the applicant] may have been unwell? Let's examine them.
>
> The only abnormal blood test results documented for the [applicant] were, according to Professor Bersten, marginally elevated fibrinogen at Leongatha Hospital, low levels of potassium and elevated haemoglobin.
>
> Turning to elevated fibrinogen first, you heard Dr Bersten, Professor Bersten, rather, give evidence that her fibrinogen, which is a blood clotting factor was slightly elevated when she was tested at Leongatha

> Hospital in the morning of 31 July, but that it had settled back to normal range that afternoon at Monash Medical Centre. *Professor Bersten told you that elevated fibrinogen is consistent with an acute illness, that is, a sudden onset illness and is also something that you might see with stress.*
>
> *As with the [applicant's] heart rate and blood pressure given all the other evidence you have, you can conclude that the elevated fibrinogen seen in [the applicant] was most likely the result of stress.*

490 The applicant said that the prosecutor's reference to *stress* as an explanation for elevated fibrinogen was a reference to emotional or psychological stress, and that this was misleading. According to the applicant, while Professor Bersten gave evidence that elevated fibrinogen can be seen with 'stress', Professor Bersten meant physical stress on the body, and not psychological stress. By way of illustration, the applicant pointed out that in the cross-examination of Professor Bersten, it was established that a diarrhoeal illness constituted a physical stress to the body and that that was a possible cause of the elevated fibrinogen found in the test results for the applicant.

491 The applicant observed that the prosecutor in re-examination could have simply asked Professor Bersten about emotional stress but chose not to do so.

492 The applicant's counsel complained about this submission to the judge. The judge's understanding of Professor Bersten's explanation about 'stress' was that this term was not limited to physical stress. The judge said that he did not understand Professor Bersten's evidence to exclude emotional stress. The judge took the position that the prosecutor's submission made to the jury on this point was open on the evidence.

493 The respondent observed that the submission by the prosecutor was not based solely upon Professor Bersten's evidence. The prosecutor argued that as 'with the [applicant's] heart rate and blood pressure given all the other evidence you have, you can conclude that the elevated fibrinogen seen in the [applicant] was most likely the result of stress'. We take this to be a reference to Dr Foote's evidence concerning the relationship between stress, heart rate and blood pressure.

494 There is some force to the applicant's submission that the meaning of 'stress', as used by Professor Bersten, was ambiguous. Ultimately, it is for the applicant to demonstrate that the interpretation placed upon the evidence was simply not open. We have not been persuaded that the term 'stress' — as it was used by the witness — necessarily excluded emotional or psychological stress. With some hesitation, we find that the submission was open. We agree with the decision of the judge not to give the direction as requested by the applicant in relation to this submission, and note that the applicant has not challenged that decision.

495 We turn to the next complaint (particular (n)).

496 Complaint is made about the passage below (emphasised to reflect particular (n)) upon the basis that the argument that the potassium results were caused by stress was never

put to Professor Bersten. The prosecutor continued with her address in relation to the evidence of Professor Bersten as follows:

> The low potassium: Professor Bersten also gave evidence about a number of potassium results taken from the [applicant]. These varied, commencing with in reference range at Leongatha Hospital before falling to a low reading at Monash Medical Centre at 10:12 pm. The [applicant's] potassium levels returned to within normal range. As Professor Bersten said, whether that is a result of a supplement or not is another matter.
>
> You might think it strange that the [applicant's] potassium levels were normal when she came into hospital at Leongatha, but dropped after she started receiving treatment. You heard Professor Bersten explain to you that there are many causes that one might have for low potassium. You could lose potassium through the bowel, potassium also shifts in the cells. As Professor Bersten told you, stress can do that as a result of blood adrenaline going up. *Given the [applicant's] most frequent diarrhoea, on her account, all occurred before presenting to hospital and that her potassium levels were normal at presentation, we suggest that these potassium results were not caused by frequent diarrhoea but, rather, were again most likely to be due to stress.*

497 The emphasised passage was, according to the applicant, 'evidence from the Bar table'.

498 The substance of Professor Bersten's evidence on the applicant's potassium levels was that they were at relatively normal levels during the afternoon of her arrival at Leongatha Hospital. The levels dipped later that night. She was provided with some supplements and the levels were restored.

499 Professor Bersten gave the following evidence about the possible cause of low potassium levels:

> Are low potassium levels consistent with other features or causes?---There are many causes that one might have a low potassium. In general, it might be a diarrhoeal illness; you might lose it through the bowel, you might lose it through the urine. Or you might have shift of potassium in the body, so the potassium might stay the same — most of the potassium is in the cells, in the muscle cells, and under certain circumstances the potassium might shift from the blood into the muscle cells because there's an equilibrium across the two.
>
> What might be the reason for that shift across the cells?---It is common to see that when — you can see it with certain physiological conditions, so stress can do that. So if you — blood adrenaline goes up, you will see a shift. You can see with certain medication which stimulates certain similar receptors which causes a shift of that. So it is a shift in and out of the cells that can occur as well.

500 The substance of Professor Bersten's evidence was that low potassium levels can be caused by diarrhoea. The essence of the prosecutor's point was that when the

applicant presented at hospital, her potassium levels were not low, but normal. The levels did not drop until later that night. That was the objective evidence. The implication in the prosecution submission appears to be that the dropping of the levels of potassium is therefore unlikely to be due to any diarrhoea that the applicant experienced (on her account) before coming into hospital. Professor Bersten offered stress as another explanation, which the prosecutor seized upon.

501 There was some evidential basis upon which to make the argument. No complaint was made about this submission at trial.[155]

(xvii) Ms Cespon's bowel movement evidence (particulars (h), (j))

(1) The prosecutor made the following submission to the jury (with the passage the subject of particular (h) emphasised) in relation to the evidence of Ms Cespon:

> The [applicant] later told Nurse Cespon that she was experiencing 7 out of 10 pain. This is when she came back a little later.
>
> …
>
> When she did eventually return to Leongatha Hospital at 9:48, she was still claiming to be sick. When she re-presented, she was placed into a treatment cubicle and Nurse Mairim Cespon said she would monitor the [applicant's] output for a faecal test and created a bowel chart, and we all saw that Exhibit 52. What does the bowel chart show? There's one visit at 10:00 am, there's another visit at 10:04 am, there's another visit at 10:06 am, another visit at 10:15 am. Four visits to the toilet in a 15-minute window. That's even more frequent than [the applicant] told everyone she had been experiencing diarrhoea. In fact, the time immediately after the [applicant] returned to the hospital, after having spent one and a half hours away, was the only time anyone witnessed the [applicant] go to the toilet in such quick succession.
>
> The next documented trip to the toilet after 10:15 am was at 11:50 am, more than an hour and a half later and, again, that was the evidence of Nurse Cespon as well as Exhibit 52, the bowel chart.
>
> Nurse Cespon recorded that each output was watery, yellow clear in colour, looks like urine but patient saying it is a stool. When Nurse Cespon was about to collect the toilet output at 10:00 am, the [applicant] said to her, 'It does look like a wee, but it is a bowel motion.' You might find that an odd thing for the [applicant] to say to Nurse Cespon seeking to re-assure her that [these] were bowel motions and not urine. *Nurse Cespon did say that she had seen patients that have these bowel motions before, but Nurse Cespon was also reliant on the self-report of the [applicant] that that was what — in the pan was in fact a bowel motion.*
>
> What the [applicant] produced in the toilet pan and was labelled as a faecal specimen was subjected to what they call a PCR test. No viral or

155As to the significance of this failure, see [452]–[454] above.

> bacterial pathogens were detected in that PCR test. That, of course, does not tell us about whether or not it was a stool or poo or not, but ultimately the prosecution says that whatever these toilet outputs were, and even if you conclude that they could have been stool, they were not caused by eating death cap mushrooms.

502 The applicant first complained that the prosecutor had submitted that Ms Cespon's observations were solely based upon 'self-report'. The applicant said this was not factually correct.

503 In our view, the complaint is misplaced.

504 As the respondent submitted, the prosecutor quite clearly articulated that Ms Cespon was 'also' reliant on the self-report of the applicant. This does not amount to a submission that Ms Cespon's observations were solely based upon 'self-report'.

505 The prosecutor's submission that Ms Cespon was 'also' (ie, partly) reliant on the self-report of the applicant was supported by the other evidence. Ms Cespon said she took a history from the applicant. The applicant mentioned that 'she had diarrhoea all day' (on the Sunday). The applicant said 'she [felt] unwell … she's got this pain'.

506 Even the evidence of the bowel movements was partly reliant upon the self-report of the applicant. Ms Cespon gave evidence that the applicant told her after the first bowel movement that it 'does look like it's a wee, but it is a bowel motion'. Ms Cespon recorded in her notes, 'patient went to toilet times three. … Since arrival stool sample taken. Stool watery, yellow clear in colour, looks like urine, *but patient stating it is stool.* No blood.'[156]

507 The applicant also contended under particular (h) that the prosecution's submission unfairly challenged the effect of Ms Cespon's evidence concerning her observations that the sample may have constituted stool. The judge summarised that evidence in his charge to the jury as follows:

> Observed some clear liquid with small solid bits of brown. Took a sample of stool from one of those samples. Not unusual for bowel movement to look like that if they've had diarrhoea for a period of time. Did not observe any blood.

508 For several reasons, we do not accept that submission.

509 In the first place, the overall evidence as to whether the sample constituted stool was unclear. Ms Cespon did not confirm this one way or the other and was not asked to do so. It is true that at one point in cross-examination Ms Cespon agreed that she had taken a 'sample of stool'. Her agreement that she took a 'sample of stool' was not an unambiguous opinion that the contents of the sample constituted stool. In our view, the answer was intended to convey that a sample was taken of what was being presented by the applicant as stool. Ms Cespon's uncertainty as to whether or not the

156Emphasis added.

contents actually constituted stool is apparent from her notes (reproduced at [506] above).

510 In any event, ultimately the prosecution submitted that 'whatever these toilet outputs were, and even if you conclude that they could have been stool, they were not caused by eating death cap mushrooms'. In our view, this did not constitute a submission that the 'outputs' were not stools, or that the applicant had not experienced some adverse symptoms. Indeed, the submission allows for the possibility that they were stools. The submission did not discount, undermine or challenge Ms Cespon's own observations.

511 This complaint (particular (h)) was one of those made by the applicant to the judge during the charge. The judge declined to give any direction about it. We agree with the judge that there was no substance to this complaint. We note that the decision of the judge not to give any direction concerning the treatment of this evidence by the prosecutor is unchallenged.

512 We turn next to the complaint made under particular (j). The applicant contended that the prosecutor mischaracterised the number and timing of the bowel movements with a view to unfairly minimising or downplaying the applicant's symptoms.

513 The impugned prosecution submission to the jury was as follows:

> Diarrhoea: The only bowel motions that you heard documented by medical personnel in this case were those recorded by Nurse Mairim Cespon, in very short succession, and which subsided very quickly after about 10:15 am.

514 The applicant argued that this was misleading, it being said that there was evidence of five loose bowel movements documented between 10:00 am and 11:50 am, and of further bowel movements at approximately 11:50 am and 12:30 pm.

515 There is just no merit to the applicant's complaint. The impugned submission must be understood within the context of the whole of the prosecutor's submission about the documented bowel movements. The prosecutor had earlier summarised all of the recorded bowel movements. The prosecutor indicated that these were recorded on the bowel chart as five movements between 10:04 am and 11:50 am. There were no other bowel motions recorded in any hospital or ambulance records thereafter.

516 There was evidence in the trial that the applicant reported having one further bowel motion, which took place after ambulance staff suggested she use the toilet prior to their departure. Significantly, this was not observed or recorded in medical documents. This evidence did not render the prosecution submission about the documented bowel motions misleading. The prosecution submission was explicitly directed at bowel motions recorded in any hospital or ambulance records.

517 The prosecutor's submission to the jury that the bowel movements subsided 'very quickly after about 10:15 am' must be seen within the context of the evidence that four out of the five movements occurred between 10:04 am and 10:15 am. The implication in the prosecution submission was that the movement that occurred at

11:50 am was an outlier, and that any urgent bowel difficulties the applicant experienced had stopped some time before then.

518 The complaint has no substance.

(xviii) PCR test on bowel movement output

(1) We turn now to a submission made by the prosecutor to the jury that was the subject of a re-direction at trial. This is not the subject of a specific complaint under ground 6, but we mention it for the sake of completeness.

519 The prosecutor made the following submission:

> What the [applicant] produced in the toilet pan and was labelled as a faecal specimen was subjected to what they call a PCR test. No viral or bacterial pathogens were detected in that PCR test. That, of course, does not tell us about whether or not it was a stool or poo or not, but ultimately the prosecution says that whatever these toilet outputs were, and even if you conclude that they could have been stool, they were not caused by eating death cap mushrooms.

520 The judge read that submission to the jury in his charge and then gave the following direction:

> Now, if you took that argument to mean that the PCR test would have detect [sic] amatoxins, if the [applicant] had actually been suffering from death cap mushroom poisoning, you must disregard that argument. There is no evidence that PCR tests can detect amatoxins.
>
> On the contrary, Professor Bersten told you at p913 of the transcript, that the PCR referred to here: 'It doesn't look for everything but I think this one may have looked for 15 different pathogens which would be the common pathogens for infective gastroenteritis.'

521 In our view, this prudential or prophylactic direction removed any possibility of prejudice arising from this submission.

(xix) Dr Foote's examination of the applicant (particulars (i),(k))

522 Two complaints have been made about the prosecutor's treatment of Dr Foote's evidence. Neither complaint was made at trial to the judge.

523 In the first complaint, the applicant contended that it was misleading for the prosecution to submit that Dr Foote was reliant upon the applicant's own self-report. The prosecutor made the following submission to the jury, with the applicant taking particular issue with the section emphasised below (reflecting particular (i)):

> Now I come to the observations of medical personnel. As I said earlier, the prosecution says that over the course of Sunday, 30 July to Tuesday, 1 August, the [applicant] deliberately and falsely represented to various people, both by her words and her actions, that she was also sick as a result of

> a lunch, including by reporting that she had very frequent and explosive diarrhoea. Now, let's consider the observations that medical practitioners made about the state of her health over those days.
>
> Abdominal pain: When Dr Foote examined her on 31 July, Dr Foote noted some tenderness in the [applicant's] abdomen. However, remember Dr Foote's explanation for how she determined that there was tenderness. She said, ['Jas I'm examining a patient, I ask them if they have any tenderness where I am examining, but I am also looking for their reaction to see if they show signs off [sic] pain. I can't remember specifically if it was what she said or my examination but likely a combination of both.'
>
> *In other words, Dr Foote was relying on the [applicant] to either tell or show her that she was in pain. The prosecution says that this reported tenderness is in the same category as the claimed nausea and constant diarrhoea that was discussed earlier, reliant on her own self-report.*

524 The applicant argued that the 'diagnosis' by Dr Foote was 'likely a combination' of physical examination and self-report by the patient, as Dr Foote had said.

525 It seems to us that the import of Dr Foote's evidence was that even a physical examination rested to a significant degree upon the reaction and responses of the patient. So much is also clear from some of the evidence summarised in the impugned submission and from the following italicised passages of Dr Foote's evidence in cross-examination:

> And the other thing that you're testing for is tenderness?---Yes.
>
> And again, that's an assessment based on a physical examination?---Physical *and report by the patient* and watching *their reaction* to the examination.
>
> It requires, again, palpation, pushing into the area?---Yes.
>
> And watching and feeling for the patient's reaction?---Yes, and *asking them if they're* - - -
>
> I beg your pardon?---And *asking if they have* pain.
>
> But even without asking if they have pain, you would be able to determine whether there was pain by the reaction?---In some instances. *It's not always clear, depending on the patient*.
>
> Your normal practice would be to watch someone's face?---That's true.
>
> And see if there was any flinching - - -?---Yes.
>
> - - - as a result of the area that you were pushing?---Yes.
>
> And although you don't remember precisely whether that's what you did on this occasion, there's no reason to think that you wouldn't have adopted your normal practice in assessing this patient?---That is my normal practice, so

that is what I feel that happened.[157]

526 If the prosecutor's submission to the jury was understood as asserting that Dr Foote's examination was wholly reliant upon self-report, then this would have been an overstatement. But we do not think the jury would have understood it this way.

527 Sight should not be lost of the fact that the prosecutor made explicit reference to the following evidence of Dr Foote:

> Okay. And in terms of the tenderness, how does that — how do you determine that? Is that something you determine via touch or is that something that is determined by feedback from the patient?---Both. As I'm examining a patient, I ask them if they have any tenderness where I'm examining but I'm also looking for their reaction, to see if they show signs of pain.
>
> And what informed you about [the applicant's] presentation at that time?
> ---I can't remember specifically if it was what she said or my examination, but likely a combination of both.

528 Reference to this evidence carried some acknowledgment that Dr Foote's examination — and whatever view she formed — was not entirely dependent upon the applicant's self-report.

529 The prosecutor's submission about the reliance upon self-report was therefore anchored to Dr Foote's evidence that she would ask the patient questions about pain and would also look for their reaction.

530 In our view, the tenor of the prosecutor's argument was that Dr Foote's examination of the applicant was *significantly* reliant upon the applicant's self-report. The submission was not misleading. It is noteworthy that this complaint (particular (i)) was not made by the defence at trial.[158]

531 The second complaint made about the prosecutor's treatment of Dr Foote's evidence concerns the blood pressure submission. The prosecutor proceeded (with emphasis added to reflect particular (k)) as follows:

> Dr Foote gave the same evidence about the high blood pressure. You may recall that the [applicant's] blood pressure was high when her vital signs were first taken at Leongatha Hospital, sitting opposite the nurses' station immediately after Dr Webster had told her they suspected the lunch contained death cap mushrooms.
>
> Dr Foote explained that high blood pressure can be caused by: 'uncontrolled blood pressure, heart arrythmia and stress or anxiety', that's at transcript 635. The most likely cause of this high blood pressure which had

157Emphasis added.

158As to the significance of this failure, see [452]–[454] above.

gone down to a normal level by 11:00 am was stress.

The dissipation of stress was the only explanation offered by Dr Foote for the blood pressure coming down in that way.

532 The applicant suggested that this was misleading because of the following evidence, which Dr Foote gave about the applicant's heart rate:

> Are there common explanations for a heart rate having been high and then reducing over that period of time?---Yes. Several things can cause that to happen. Stress and anxiety can make your heart rate go up and settle down. Being unwell or dehydrated can make your heart rate go up and then, with treatment, come down.

533 It seems that the root of the complaint is that reference should have been made to the evidence that being unwell or dehydrated can increase a person's heart rate.

534 There is no substance in this complaint.

535 First, the impugned blood pressure portion of the prosecutor's address accurately reflected the evidence given by Dr Foote concerning fluctuations in blood pressure. Dr Foote's evidence was that there had been some fluctuations in the blood pressure of the applicant and that it had decreased somewhat. When asked if there was any possible explanation for that, Dr Foote said that it was 'possible that the stress of the situation had dissipated'.

536 Secondly, the applicant's complaint conflates Dr Foote's evidence concerning fluctuations in *blood pressure* with Dr Foote's evidence concerning fluctuations in *heart rate*. The prosecutor's impugned comment that Dr Foote's only explanation was the dissipation of stress referred to the applicant's blood pressure. Dr Foote's evidence about being unwell or dehydrated referred to the applicant's heart rate. These are distinct biological measures.

537 Thirdly, in any event, immediately preceding this part of the address, the prosecutor dealt with the evidence of heart rate. In so doing, the prosecutor explicitly referenced Dr Foote's evidence concerning the possible connection between being unwell and dehydrated, and fluctuations in heart rate. The prosecutor said this:

> As Dr Foote explained to you, several things can cause an initially high heart rate to settle as the [applicant's] did. Stress and anxiety can make your heart go up and settle down. Being unwell or dehydrated can make your heart go up and then with treatment go down. That was the evidence of Dr Foote.

538 The prosecutor then made the argument that being unwell and dehydrated could not apply to the applicant:

> Of course, when the [applicant's] heart rate went from 140 at 10:00 am to 110 at 11:00 am, she had not yet received any intravenous treatment, which Dr Foote ordered to be commenced at midday. The prosecution says that these fluctuations in heart rate are most likely the result of the [applicant's] own

stress and panic at the situation she was in.

539 There was an evidentiary basis upon which to make the argument. There was nothing misleading about any of the arguments on either blood pressure or heart rate.

(xx) Ms Ashton's account of the applicant's first presentation (particular (w))

(1) The applicant made two complaints about the following submission that the prosecutor made to the jury (with emphasis reflecting particular (w)):

> *In the initial conversation between the [applicant] and Kylie Ashton, Nurse Kylie Ashton at 8:05 am on the Monday morning at Leongatha Hospital, Nurse Ashton stressed to the [applicant] that it was really important that the children were also medically assessed, given the risk, and that simply scraping the mushrooms off would not guarantee their safety as they might 'have ingested the same toxin'.*
>
> Multiple medical professionals stressed the importance of having the children medically assessed numerous times to the [applicant]. You should reject the [applicant's] claim in evidence to you that she delayed making arrangements for the children to be assessed because she: 'Wanted to understand what the concerns were and why [Dr Webster] thought they might be at risk'.
>
> Her key concern, apparently, was the children not be 'panicked or stressed', or frightened, according to Dr Webster. Dr Webster gave unequivocal evidence to the [applicant] who said 'they can be scared and alive or dead' and he could not have been more blunt.

540 The first complaint is that the prosecution's own witnesses, Dr Foote and Dr Webster, contradicted Ms Ashton on the timing of the applicant's disclosure about the children having eaten the leftovers.

541 Ms Ashton gave evidence that when the applicant presented at the hospital for the first time, the applicant disclosed to Ms Ashton that the applicant's children had eaten the leftovers. On Ms Ashton's account, she told the applicant of the need to bring the children into hospital. Ms Ashton gave evidence that she 'believe[d] [she] did' pass on what the applicant had told her to the two doctors.

542 The effect of the evidence of Dr Foote and Dr Webster is that they first became aware of the children having eaten the leftovers when the applicant re-presented at the hospital later that morning. Dr Foote and Dr Webster did not give any evidence that Ms Ashton had told them about the children having eaten the leftovers (at the time of the applicant's first presentation at hospital) prior to this point.

543 The implication in the applicant's argument is that the evidence of Dr Foote and Dr Webster robbed the evidence of Ms Ashton of its reliability and/or credibility to such a degree that it was improper for the prosecutor to have relied upon it.

544 We do not agree.

545 The problem with this complaint is that Dr Foote and Dr Webster did not directly contradict Ms Ashton. Ms Ashton gave the following evidence about what was said concerning the applicant's children:

> And what was said in that conversation?---[The applicant] had identified that she was the person that cooked the meal served on that day and that she — sorry. That her children weren't present at the lunch on that day but that her children had consumed leftovers without the mushrooms, with the mushrooms scraped off, the next day for lunch.
>
> …
>
> What, if anything, did you say to [the applicant] about any assessment or treatment that would be required for the children?---I also asked her to, on return, bring the children back with her, that it was really important that the children were also medically assessed given the risk. She said that she had scraped the mushrooms off. I suggested that you couldn't — that that wouldn't guarantee that they wouldn't have ingested the same toxin and that they would need thorough assessment as well.

546 When challenged in cross-examination about whether this conversation occurred at the applicant's first or second presentation to the hospital, Ms Ashton insisted it occurred on the first presentation. Ms Ashton gave a logical reason for this: it was Ms Ashton's only conversation with the applicant. Further, the effect of Ms Ashton's evidence was that only the two of them were present for this conversation.

547 It follows that neither Dr Foote nor Dr Webster was in a position to directly contradict Ms Ashton about this conversation. They were not present. Both Dr Foote and Dr Webster gave evidence about separate conversations they had with the applicant at the time of her second presentation at hospital. They said they were told by the applicant that the children had eaten the leftovers.

548 There remained a discrepancy as to whether Ms Ashton told Dr Foote and/or Dr Webster about the children and the leftovers at the time of the applicant's first presentation to the hospital. That discrepancy did not, however, logically preclude the jury's acceptance of Ms Ashton's account concerning the conversation with the applicant at the time of the applicant's first presentation.

549 On Ms Ashton's evidence, the focus of her discussions with Dr Foote was upon persuading the applicant not to leave the hospital. It was open to the jury to find that the applicant had, in fact, told Ms Ashton about the children eating the leftovers when she first presented at the hospital, but that Ms Ashton was simply wrong about passing this information on to Dr Foote and Dr Webster.

550 In the circumstances, we are unpersuaded that the prosecutor's submission was unfair or contrary to the evidence.

551 The second complaint under particular (w) is that the prosecutor could not then go on in good faith to make the submission that '[m]ultiple medical professionals stressed

the importance of having the children medically assessed numerous times to the [applicant]'.

552 This further submission was not tied to the applicant's first presentation to the hospital. Within that context, there was extensive evidence from different medical professionals that supported this submission, namely Ms Ashton, Dr Webster (in the presence of Ms Cespon), Dr Foote and Ms Munro.

(xxi) A brief observation

553 We accept that some of the points made by the prosecutor about the applicant's vital signs (blood pressure, heart rate and associated stress) and her blood readings (potassium, fibrinogen and haemoglobin), while open, were on the weaker side.

554 However, we do not think that it follows that they were improperly made.[159] That is especially so in circumstances where the prosecution case concerning the applicant's feigned illness did not significantly depend upon these arguments.[160]

Complaint about submission of no evidence of amanita poisoning (particular (l))

555 Complaint was made concerning the following submission by the prosecutor to the jury (emphasis added to reflect particular (l)):

> Looking at all of those records and test results, Professor Bersten confirmed to you that there was no biochemical evidence of an acute liver injury. This accords with the assessment of clinicians who were treating the [applicant] at the time. *She was cleared by toxicology at Monash Medical Centre at 10:30 am on Tuesday, 1 August, with, according to Professor Bersten, looking at the records, no evidence of amanita poisoning or other toxic substance. This was just over 24-hours since she presented to Leongatha Hospital. The conclusion drawn by treating doctors that the [applicant] had not suffered amanita mushroom poisoning is corroborated by the toxicological analysis of Dr Gerostamoulos.*

556 The applicant contended that 'the real difficulty with these submissions lies not in the "facts" but how they are assembled by the prosecutor to create a set of "straw person" arguments that somehow bolster the prosecution case theory'.

557 The applicant pointed to the following facts which were purportedly assembled by the prosecutor to create the 'straw person' arguments:

159As we have said above, a weak argument does not necessarily equate to an improper one: see [419]–[425] above.

160We have also outlined how the prosecution framed its case with respect to the applicant's feigned illness in a way that extended beyond the evidence that she was suffering from mild dehydration or diarrhoea: see [466]–[471] above.

(a) staff at Leongatha Hospital ran no toxicological tests on the applicant and did not do *amanita* testing;

(b) Dr Gerostamoulos's evidence that amatoxin is quickly eliminated from the blood, and that after 24 or 30 hours it was very unlikely amatoxin would still be detected (in circumstances where a blood sample was not taken from the applicant until 51 hours after the lunch on 29 July 2023); and

(c) Dr Gerostamoulos's evidence that amatoxin 'persists' in urine (in circumstances where no urine sample was taken from the applicant).

558 The import of the applicant's complaint is that the prosecutor's submission (in particular, the section emphasised above) left the misleading impression that the applicant had, in fact, been tested for amatoxin poisoning and that toxicological tests affirmatively established that she had not been poisoned.

559 Importantly, in our opinion, the prosecutor's submission was framed by the following medical evidence.

560 First, there was clear and uncontested evidence before the jury that there is no test in clinical practice that identifies or confirms *amanita* toxin poisoning.[161]

561 Secondly, clinical diagnoses of *amanita* mushroom poisoning are made based on a number of factors.

562 When Professor Warrillow was asked to explain a clinical cause highly consistent with *amanita* mushroom poisoning, he said that:

> So from the time of initial ingestion there's a period between that point and then the later development of gastrointestinal symptoms such as severe diarrhoea and often very severe diarrhoea, sometimes with blood in it and vomiting. That can persist for a period of time, many hours often, followed by what may feel like some improvement for the patient. And then, after that, over a relentlessly progressive and quite frightening rapid deterioration into multiple organ failure, where the body's different organ systems essentially shutdown and the patient is extremely unwell and at a very high risk of dying.

563 In relation to the death of Heather Wilkinson, forensic pathologist Dr Brian Beer explained that her pattern of injury was very consistent with *amanita* poisoning:

> So by eating the toxin, there is damage to the bowel mucosa, which was responsible for the vomiting and the diarrhoea, and then as that toxin is brought through or absorbed through the portal circulation to the liver, it is then taken up into the liver and there is a relative preferential uptake into the liver by a specific protein mechanism, transporter mechanism and then that then enters into the liver cells and effectively it basically stops protein production. It just stops it completely and the cell dies. It takes some time for that to occur over a period of time. So the liver failure particularly becomes

161 For example, from Professor Stephen Warrillow, director of the ICU at Austin Health.

> very evident from about day two onwards. It is occurring, but they become very sick from that point onwards. In addition, I mention about the renal tubular changes which I'm not certain we can see, but that is also something that is a possibility. So the whole pattern is very consistent with this type of poisoning. Having said that, because we cannot actually say that there is amatoxin in the specimens from the deceased, cannot attribute directly to that, so it has been left open, but only to say the pattern is very similar to seen in that [sic]. And also, of the three post-mortems that were done from this dinner, one did show evidence of amatoxin present in that. So it's a reasonable supposition to make that this is what has occurred here but we cannot prove it.

564 Dr Gerostamoulos also gave evidence that *amanita* poisoning led to tissue death and significant impact upon the liver and kidney. When asked about the toxicity of *amanita phalloides* on humans Dr Gerostamoulos said:

> They are quite toxic in terms of their potency. They can lead to someone experiencing symptoms of diarrhoea, vomiting, feeling really unwell. And they progressively get worse if the toxins are not removed. They progress to tissue necrosis, organ failure and can obviously lead to death if not treated appropriately or supportively in hospital.
>
> …
>
> They essentially stop cell replication, they lead to tissue necrosis and they really do affect the function of the liver and the kidney which is essential for normal physiological function.

565 Dr Muldoon gave the following evidence:

> Did you see [the applicant] the following morning, 1 August?---I did.
>
> At what time?---It would have been about — between 9 and 10 am.
>
> And did you review her, clinically?---Yes, I did.
>
> And what did you note?---That she had remained well. She reported she was feeling better but all her blood tests had come back and were normal and all her vitals were also normal.
>
> Was there any clinical or biochemical evidence of amanita poisoning?---No, there were not.
>
> Or any other toxicological substance ingested or consumed?---No, there was not. No.

566 Professor Bersten agreed that this was the finding of the hospital:

> Do the notes indicate that whilst she was at Monash Medical Centre [the applicant] was cleared by toxicology 1 August at 10:30 in the morning?---They do.
>
> With no evidence of amanita poisoning or other toxic substance?---That's

correct.

….

No biochemical evidence of an acute liver injury, on the information that you've been provided?---No biochemical evidence.

And the absence of any change in particular coagulation tests and other liver function tests consistent with no significant liver damage?---Yes.

And the vital signs and other signs and tests were also not suggestive of other sudden illness or injury?---No.

567 The prosecutor's submission, that treating doctors had concluded that the applicant had not suffered *amanita* mushroom poisoning, had an evidentiary basis. For reasons which we outline below (particular (u)), this impugned submission found support in the evidence of Dr Gerostamoulos.

568 We accept the respondent's submission that the prosecution did not suggest by this submission that hospital staff tested the applicant for the presence of amanitin toxin or that testing of the applicant had affirmatively established an absence of poisoning. We do not think the jury would have understood the submission in this way. The case was put upon the basis — a correct one — that clinically, there was no evidence of *amanita* poisoning or poisoning from any other toxic substance. That was the clear state of the unchallenged evidence.

Complaints about submissions comparing condition of lunch guests with that of the applicant

(xxii) Misquoting Dr Gerostamoulos's expected adverse outcome evidence (particular (u))

(1) The prosecutor made the following submission to the jury (emphasis added to reflect particular (u)):

> *The defence will probably argue to you that the [applicant] suffered a lower grade of death cap mushroom poisoning which only involved gastrointestinal symptoms and that this was due to her higher weight and her younger age.*
>
> The defence took Dr Gerostamoulos to a German research article from 2017, which proposed a scale of severity for death cap mushroom poisoning.
>
> [Defence counsel] focused on what the authors called 'Grade 1 severity' which was: 'Patients exhibit gastrointestinal phase with typical delay but do not develop chemical signs of liver or kidney dysfunction.'
>
> No doubt [defence counsel] will ask you to consider that the [applicant] fell into this category of the Grade 1 severity.
>
> However, it is important to bear in mind what Dr Gerostamoulos had to say in

> re-examination about the symptoms you would expect to see in different patients. He was asked: 'What would be the expected health outcomes when two adults, with no serious pre-existing health conditions, consumed the same amount of the same meal containing death cap mushrooms and one person died?' What would he expect for the survivor. He said he would expect 'some adverse outcomes' for the survivor and he gave an example of two people eating the same meal of death cap mushrooms which occurred in 2024. One died. The other was 'significantly ill for a period of time and ended up in ICU.'
>
> That is a far cry from what we saw the [applicant] experience. She was in hospital for a day, although not because she was so unwell that she needed to be there, and she experienced no adverse outcomes at all.

569 The evidence referenced by the prosecutor came from the re-examination of Dr Gerostamoulos:

> [I]f two adults with … [n]o serious pre-existing health conditions consumed the same amount of the same meal which contained death cap mushrooms and one person dies, what would you expect the health outcomes to be for the person who did not die?---Yes, there [sic] would be likely that there would be some adverse outcomes for that person who survived, *the severity of which may vary depending on some of the factors that I've previously spoken about today.* But we have had examples where two people have consumed, um, the same meal, um, and more recently this happened last year here in Victoria where one person passed away and the other one was significantly ill for a period of time and ended up in ICU. *So it is possible but it's, um, it will depend on how much is eaten, the person's response to that amount of toxin as well.*[162]

570 The evidence of Dr Gerostamoulos was to the effect that if two people ate the same quantity of death cap mushrooms he would expect 'some adverse outcomes' for both, subject to variables such as pre-existing health vulnerabilities and their individual responses to toxins.

571 The applicant contended that Dr Gerostamoulos twice qualified his evidence (indicated in the above passage in italics). The applicant complained that the qualifications or caveats were omitted by the prosecutor in her summary of his evidence. This rendered the submission misleading.

572 The prosecutor was heavily criticised for this omission by Senior Counsel for the defence in his final address. On the one hand, the prosecutor left herself open to some legitimate criticism here, at least if the submission was viewed in isolation. Yet, that particular passage in the prosecutor's final address should not be read in isolation. In our view, the prosecutor's overall submission served to emphasise the significance of the different variables upon adverse health outcomes.

162Emphasis added.

573 In her submission to the jury, the prosecutor quoted the question asked of Dr Gerostamoulos:

> 'What would be the expected health outcomes when two adults, with no serious pre-existing health conditions, consumed the same amount of the same meal containing death cap mushrooms and one person died?' What would he expect for the survivor.

574 The question itself recognised that the expected adverse outcomes might depend upon differing variables, two of them being the quantity of death cap mushrooms consumed and the health vulnerability of the individual.

575 Importantly, immediately prior to the impugned passage, the prosecutor had spent some time arguing that it was inexplicable that four out of five people who ostensibly ate the same meal fell fatally ill, yet only one person — the person who prepared the meal — did not.

576 On the variable of the quantity consumed, the prosecutor argued that an explanation for the applicant not getting sick could not be because she ate less, submitting:

> But remember Gail Patterson only ate about half of her beef Wellington. That was Ian Wilkinson's evidence. In fact, Gail described herself as eating only about a third of her meal to Dr Mark Douglas, and she was not far behind Don in showing signs of being gravely ill.
>
> Ian Wilkinson remembers that the [applicant] certainly ate the beef Wellington, and not such a small amount that it would attract attention. However, the [applicant] told some people that she only ate about half of her meal. She said this to Professor Stuart, the director of the Local Public Health Unit, who interviewed her on the evening of 31 July at Monash Medical Centre and she said the same thing to Katrina Cripps, the Child Protection practitioner who interviewed her the day after on 1 August.
>
> Even if you accept the [applicant's] claim that she only ate half her beef Wellington, she still ate the same amount of the meal as Gail Patterson.

577 On the variable of Donald, Gail and Heather's respective vulnerabilities to death cap mushroom toxins because of their age or state of health, the prosecutor submitted:

> But remember that Dr Brian Beer, the forensic pathologist who conducted the autopsies on Don, Gail and Heather and who viewed their medical records and histories said that they did not have any serious pre-existing medical conditions just prior to their deaths. The state of health of the lunch guests prior to the lunch does not, I suggest, justify the huge difference in their state of their health compared to the [applicant] following the lunch.

578 Dr Beer gave evidence that none of the lunch guests had any serious pre-existing health conditions prior to death or co-morbidities that might make a person not able to 'deal with the amatoxin poisoning as well as somebody who is a very healthy individual'.

579 We would therefore make the following points.

580 First, the prosecutor's submission accepted that the severity of the adverse outcomes could depend upon different variables, consistent with the evidence of Dr Gerostamoulos. Read as a whole, the submission emphasised the significance of the variables to expected adverse outcomes. It was not misleading.

581 Secondly, in any event, any potential unfairness arising from the prosecutor's immediate summary of the evidence of Dr Gerostamoulos was more than sufficiently addressed by defence counsel in his final address. Senior Counsel for the defence quoted verbatim the full extract of Dr Gerostamoulos's evidence. Moreover, in the charge, the judge repeated Dr Gerostamoulos's answer in full. In those circumstances, it cannot be said that the jury were left with an incomplete or inaccurate understanding of the evidence.

582 Thirdly, while defence counsel emphasised this point to the jury, counsel never sought any corresponding remedy from the judge.[163]

(xxiii) Variables did not justify different health outcomes (particular (t))

583 Complaint was made about the prosecutor's submission to the jury that (particular (t)):

> The state of health of the lunch guests prior to the lunch does not, I suggest, justify the huge difference in the state of their health compared to the [applicant] following the lunch.

584 It was contended that the submission constituted 'evidence from the Bar table'.

585 As outlined above under particular (u):

(a) The evidence of Dr Gerostamoulos was to the effect that if two people ate the same meal of death cap mushrooms he would expect 'some adverse outcomes' for both subject to variables such as pre-existing health vulnerabilities, each individual's responses to toxins and the differences in quantities consumed.

(b) There was evidence from Dr Beer that the other lunch guests did not have any serious pre-existing medical conditions that would account for a different response to the toxin.

(c) There was evidence that the applicant consumed at least the same quantity consumed by Gail Patterson (who became very ill and died).

586 In our view, this evidence collectively provided an evidential foundation for the prosecutor's submission. It answers the complaint under particular (t).

587 Additionally, no complaint was made to the judge about the impugned submission.[164]

163As to the significance of this failure, see [452]–[454] above.

164As to the significance of this failure, see [452]–[454] above.

(xxiv) Applicant ate whole portion of beef Wellington (particular (r))

588 Complaint was made about the prosecutor's submission to the jury that (particular (r)):

> We suggest you can readily see that the [applicant] is trying to manufacture an explanation as to why she did not suffer the same fate as her lunch guests. You should reject these attempts by her to minimize the amount she consumed, and look to the evidence which demonstrates she ate her entire portion of beef Wellington.

589 The prosecutor sought to make good the point in her final address through the following argument:

> When [the applicant's son] and [his friend] arrived home after being at the movies on Saturday, they did not see any leftovers or partly eaten beef Wellington. You saw and heard descriptions about the leftovers of beef Wellington that remained after the lunch at several stages. You have the CCTV footage of Dr Veronica Foote, photographing one-half of a left[over] beef Wellington parcel that she removed from the paper bag, Exhibit 11. She said there was another portion about the same in the bag and that she put each of the two food portions into two separate bags.
>
> Then you have the photo that Dr Foote took and sent to Dr Muldoon, Exhibit 15. Clearly one-half of a single pastry.
>
> Dr Camille Truong reported receiving the leftovers as two food items. Then you have the photos from Dr Lovelock as to what those two food portions looked like when he received those two separate bags, which you should note was after Dr Truong had examined the items so they were less intact than when Dr Foote examined them.
>
> If I take to you Exhibit 27, these are the photographs — these were the four photographs taken by Dr Lovelock. The first image shows two bags that he received. The second image shows the contents of one of those bags, that's image 2. Image 3, his evidence was they were the contents of the second bag.
>
> Now, I suggest that when you look at images 2 and 3, they are clearly two halves, albeit broken up, of one single pastry.
>
> The leftover food eventually made its way to Dr Gerostamoulos as two portions of food in two bags. You will recall that the [applicant] told SallyAnn Atkinson that all of the leftovers went into the bin. So you can be satisfied that what you see in those photos that I have just taken you to, is the total sum of the leftovers. In other words, one single beef Wellington, which we say was obviously intended for Simon Patterson. You can therefore be satisfied that despite her assertions otherwise, the [applicant] ate the whole of her portion of beef Wellington.

590 In his final address, Senior Counsel for the defence criticised the prosecutor's submission:

> Now, there is no evidence at all as to how big these beef Wellingtons were. So how can the prosecution say the two images, which I'll show you, Exhibit 27 — can I ask you to go to that. Exhibit 27, photographs 2 and 3, this is what [the prosecutor] said to you in her address. About those two images, she said those are [quote] 'clearly two halves.' 'Clearly', I think she said that twice in one page. Watch out — watch out for the word 'clearly' in our submission, because unless you know how big the pasties are — the parcels, you will never be able to say 'that's clearly two halves'. You will never be able to say that those portions even came from the same pastry parcel. There is just not enough evidence or information to say that. 'Clearly two halves' — never put to the [applicant] shown these images, 'That's clearly two halves'. Never put to Ian Wilkinson: 'This is how big they were, does that look like a half?' Those are the questions they could have asked the people who were there at the lunch. That wasn't done.
>
> It's speculation, 'Clearly two halves' which you hear for the first time in closing address. Not in the opening; not in [sic] the people who were at the lunch.

591 Both submissions to the jury were framed by the evidence concerning the dimensions of the remnants of the beef Wellingtons. The broad dimensions were apparent from the photographs taken with an accompanying ruler. The main piece of beef Wellington was roughly 12 centimetres in width and it appeared to be about 10–15 centimetres in length.

592 While there was no evidence that directly established the size of each complete parcel or portion served to the lunch guests, common sense had some role to play here. When one has regard to the dimensions of the remnants, if they did amount to more than one portion, it could not have been by much.

593 The impugned submission made by the prosecutor that the applicant ate her entire portion was tenable. The argument rested on the remnants amounting to a single portion or parcel. We understand the prosecutor's argument to have been that if only one portion was left (which was earmarked for Simon Patterson), this meant that all other portions had been eaten, including the applicant's portion.

594 Ultimately, the amount of beef Wellington that the applicant ate at the lunch was a question of fact for the jury to determine. The impugned submission reflected the prosecutor's interpretation of the evidence, which she urged upon the jury. As can be seen from the prosecutor's final address outlined above, she took the jury to all of the evidence that she said supported the argument. It was not a dubious submission, without any evidential foundation. In his final address, Senior Counsel for the defence replied extensively to this argument and addressed its weaknesses. The jury was fully armed with all of the relevant facts and arguments.

595 Three specific criticisms were made by the applicant in this Court about the impugned submission.

596 The first specific criticism was that the prosecutor's submission to the jury 'ignored' the evidence of the police member Senior Constable Adrian Martinez-Villalobos. This officer found, and first dealt with, the 'leftovers' from the applicant's bin and described what he saw as 'maybe one and a bit beef Wellingtons'. On the application before us, the applicant seized upon this evidence, contending that more than one portion remained. According to the applicant, this meant that — contrary to the prosecutor's submission to the jury — the applicant could not have eaten an entire portion.

597 We do not think that the evidence of Senior Constable Martinez-Villalobos precluded the prosecutor from making the argument that the applicant ate an entire portion of beef Wellington. The description given by Senior Constable Martinez-Villalobos as to quantity and size — 'maybe' one and a bit beef Wellingtons — was equivocal, particularly given the circumstances in which he located the leftovers. He gave evidence that he located the beef Wellington(s) in a brown paper bag at the very bottom of a red-lidded bin, underneath two other brown paper bags, and that the contents were seeping liquid. Senior Constable Martinez-Villalobos did not elaborate as to the size or nature of the beef Wellington(s) found. Nor was he questioned further about this issue.

598 The second specific criticism was that the prosecutor misused the evidence of the applicant's son and his friend. Evidence from the applicant's son regarding his clearing of the plates after the lunch included the following exchange:

> Now, I asked you earlier — because you said you helped [the applicant] clear the plates up on the Saturday after lunch.---Yeah.
>
> And I asked you if there was any leftover food on the plates.---Yeah.
>
> *Do you recall if you saw any leftover food?---No, I don't remember any.*
>
> …
>
> When you cleared those plates and you stacked them up, was there anything left on there that sort of — like, food-wise. *Did everyone eat everything on their plates?---I think so.*
>
> …
>
> *So there was no leftovers that you had to scrape into the bin?---No.*[165]

599 The applicant in her written case made reference to an additional VARE answer given by the applicant's son which was excluded (by agreement) from the evidence. This was a statement to the effect that there were 'not really crumbs, like leftover bits that weren't eaten' left on the plates after the lunch. We are not persuaded that the applicant's son's additional statement regarding the 'leftover bits' — which itself is ambiguous — changed the clear import of his evidence before the jury.

165 Emphasis added.

600 The third criticism related to the evidence of the friend of the applicant's son. The friend's evidence was that he did not remember what was on the plate remaining on the dining table when he and the applicant's son returned to the applicant's home from the cinema. This, the applicant contended, fell short of a positive assertion that his memory (such as it was) was that nothing remained on the plate. The tenor of his evidence was to the effect that he just had no memory one way or the other about what was on the plate. His evidence was neutral on the matter. The complaint is that the prosecutor's submission wrongly created the impression that the friend did have some memory and positively asserted there was nothing on the plate.

601 There is some force in the applicant's submission, in so far as it relates to the prosecution's submission concerning the evidence of the friend.

602 In our view, however, even if it is accepted that the prosecutor's argument was something of an overreach — whether on the general point that the applicant ate her entire parcel, or on the interpretation of the evidence of the friend — it was a relatively minor indiscretion in the scheme of things for the following reasons:

(a) It is revealing that defence counsel did not complain to the judge — or to the jury in Senior Counsel's final address — about the prosecutor's reliance upon the evidence of the applicant's son and his friend regarding this issue.

(b) The contest about whether the applicant ate her entire portion was, in some respects, a side issue. The prosecution's essential thesis was that the applicant could not draw upon her smaller ingested portion to explain why she did not get sick. The legitimacy of this overarching argument did not turn on whether the applicant had eaten one entire portion. The prosecution's central thesis, that the applicant ate a sufficient quantity to get very sick like Gail Patterson, remained a valid one even if the applicant ate less than a whole portion.

(c) There was other evidence which plainly supported this central thesis. As outlined above in relation to particulars (u) and (t),[166] there was a body of evidence that the applicant consumed at least the same quantity as was consumed by Gail Patterson, who became very ill and died. The evidence of the applicant's son that he saw no leftovers lent some further support to the proposition that the applicant ate more than an insignificant amount.

603 No unfairness was occasioned by the prosecutor's impugned submission.

(xxv) No adverse outcomes at all for the applicant (particular (v))

604 Complaint was made about the prosecutor's submission that the applicant 'was in hospital for a day, although not because she was so unwell that she needed to be there, and she experienced no adverse outcomes at all' (particular (v)). The applicant contended that this submission implied that the applicant suffered no adverse health outcomes 'at all'. Such a submission was, according to the applicant, misleading in

166See [568(a)(1)]–[587] above.

circumstances where there was evidence before the jury of the applicant suffering from diarrhoea, nausea and low potassium.

605 As we have outlined at the beginning of this ground, the import of the prosecution argument was that whatever her state of health, the applicant did not present with a serious illness consistent with death cap mushroom poisoning. Unlike the other lunch guests, the applicant was the only one who did not fall seriously or significantly ill. Further, the applicant's claim of significant or 'severe diarrhoea' — persistent symptoms of 'frequent' and at times 'explosive' diarrhoea, cramping, nausea and pain (described as a 7 out of 10) over several days — was simply false.

606 The jury must have understood that the prosecution did not dispute, for example, that she had mild dehydration.

607 In the circumstances, we do not think the specific submission impugned under particular (v) would have been taken to mean that the applicant presented with no negative health outcomes at all.

608 Complaint was also made that that the prosecution had implied, by this submission, that the applicant contrived to remain in hospital. As far as we can tell, no such submission or suggestion was made by the prosecutor. Accurately stated, the submission was that the applicant remained in hospital for 24 hours as a medical precaution, rather than due to her being violently and obviously ill (like the lunch guests).

609 Defence counsel raised no concern about this submission with the judge.[167]

(xxvi) Illness development of lunch guests versus the health of the applicant (particular (q))

610 In one part of the final address, the prosecutor outlined the trajectory of the illnesses suffered by the lunch guests and compared this to the applicant's condition. This was undertaken to demonstrate that, although the lunch guests apparently ate roughly the same portion of the same meal as the applicant, the effect on them was entirely different.

611 The applicant complained that this juxtaposition of the circumstances that subsisted as between the lunch guests and the applicant over those days was inflammatory and emotive, and was inconsistent with the presentation of a fair closing address.

612 In order to evaluate this complaint it is necessary to set out the entire portion of this part of the address (with emphasis to reflect the sections specifically mentioned in particular (q)):

> *Let's compare the symptoms reported or observed about the [applicant] with the symptoms reported and observed in the lunch guests.*
>
> You will remember that Simon Patterson rang the [applicant] on

167As to the significance of this failure, see [452]–[454] above.

Sunday, 30 July at 11:08 am and 2:23 pm. During one of those phone calls, you remember the [applicant] told Simon Patterson that she had diarrhoea which was quite frequent. She said she started to feel unwell at 4 or 4:30 pm on Saturday after the lunch. This is about an hour or 90 minutes after the lunch concluded. She described to Simon that she had diarrhoea every 20 minutes or so by the early evening, when she took [her son's friend] home at about 7:00 pm and that that diarrhoea continued throughout the night. Now, I know I have already gone over this this morning, but this has got a very specific purpose about me repeating this evidence to you.

What the [applicant] told Simon about when her symptoms started was different to the experience of the four lunch guests. Remember: Don and Gail did not report feeling unwell when they spoke to their daughter Anna Terrington at around 5:00 pm on the afternoon following the lunch. Remember Anna Terrington rang them to see how the lunch had gone.

They first started experiencing vomiting and diarrhoea at around midnight or 1:00 am the night following the lunch. That was the evidence of Simon Patterson.

You heard evidence that the Wilkinsons appeared well when Angela Child and Jennifer McPhee, the treasurer and secretary of the Korumburra Baptist Church saw them at about 4:15 pm following the lunch, and you will remember that the statements of Angela Child and Jennifer McPhee were read into evidence.

Ian Wilkinson told you he and Heather did not feel unwell until sometime after they went to bed at around 10:30 pm or 11:00 and this history was repeated to various doctors, including Dr Chris Webster.

Don Patterson reported 30 to 40 episodes of vomiting and diarrhoea by the time he was seen at 8:12 pm on Sunday, 30 July at Dandenong Hospital. That was the evidence of Dr Beth Morgan, having read the medical notes of the doctor before her, Dr Constance Peters, who had dealt with Don Patterson.

You heard that Ian and Heather Wilkinson had vomiting and diarrhoea right through the night into the early hours of Sunday, 30 July, and did not even make it back to bed. That was Ian Wilkinson's evidence. Even early on Sunday morning, it was obvious just by looking at them that the lunch guests were very sick.

According to Simon Patterson, when Ian Wilkinson answered the door, he was looking 'grey' and 'stooped' and Heather: 'looked pretty crook'.

Nurse Lisa Shannon described caring one-on-one for Don and Gail when they first arrived at Korumburra Hospital. She told you that she was literally taking Donald to and from the bathroom, probably every 10 minutes or so, and in between taking Gail back and forth as well, after they were both admitted to the ward at 12:15 pm on Sunday [afternoon]. Don was unable to tolerate any fluids, continually vomiting and going to the toilet every 10 minutes.

The Wilkinsons presented to Leongatha Hospital on the Sunday at 10:57 am

with nausea, vomiting and diarrhoea. Dr Chris Webster the on-call doctor when they arrived, saw them both vomiting and was aware when they went to the toilet. Neither of them could hold down water. This is the same morning that, according to [the applicant's son's] evidence, *the [applicant] was sitting at her dining table drinking a coffee.*

When Simon first saw Don Patterson at Korumburra Hospital late morning on the Sunday, Simon Patterson said 'he was really struggling'. You might remember that he described his father as 'lying on his side, he was hunched quite noticeably. A really discoloured face. Speaking was an effort and taking the energy to speak was an effort and his voice was strained in a way that — he wasn't right inside. He was feeling pain.'

By 3:00 pm on the Sunday, Don Patterson's i-STAT blood tests were extremely abnormal. He had a lactate reading of 6 indicating a metabolic disorder, and that was the evidence of Nurse Lisa Shannon. This is during the period that *the [applicant] was driving [her children] to [her son's] flying lesson in Tyabb*.

By Sunday evening, Don Patterson had a lactate reading of 10, which was 'very, very high' and likely to be caused by organ damage and that was the evidence of Dr Beth Morgan. His haemoglobin reading was 200. His creatinine levels were elevated, indicating significant kidney damage. Again, the evidence of Dr Morgan. He was admitted to the ICU at 11:20 pm. *This was the same evening that the [applicant] apparently served herself and her children leftovers of the beef Wellington.*

Overnight, Gail Patterson's medical tests revealed that she was declining, in particular her liver function, and that was the evidence of Dr Morgan.

Her daughter Anna Terrington stayed with her overnight and helped her to the bathroom many times. Gail was also admitted to [the] ICU in the early hours of Monday, 31 July.

At 5:30 am on 31 July, Ian was unable to keep down water or ice. That was the evidence of Dr Webster. At 6:30 am that same morning, Heather was reported to have active vomiting and diarrhoea. Her loose bowels were foul smelling and pink in colour, again the evidence of Dr Webster.

Nurse Kylie Ashton observed that Ian was particularly unwell and did not move around, while Heather was back and forward to the bathroom.

Nurse Mairim Cespon did one-on-one nursing care for Heather Wilkinson, while another nurse did the same one-on-one care for Ian. *This is the same morning that the [applicant] drove her two children to the bus stop and then drove herself to hospital.*

On that same day, 31 July, by the time Ian and Heather Wilkinson were also transferred to Dandenong Hospital, Ian was reported to be extremely nauseated and constantly vomiting. That was the evidence of Dr Mark Douglas. *This is around the time that the [applicant] had discharged herself*

> *from Leongatha Hospital and drove home, she said, to pack her daughter's ballet bag.* You saw for yourselves how she appeared on the CCTV shortly after 8:05 am as she was discharging herself from Leongatha Hospital.
>
> Don and Gail Patterson were both transferred to the Austin Hospital on 31 July.
>
> At 2:30 pm that day, Don Patterson was critically ill and in multiple organ failure. He was on life support ventilation with a tube down his windpipe. *At this time, the [applicant] was being transported by ambulance to Monash Medical Centre and was calm and chatty.* By 1 August 2023, all four of the lunch guests had been conveyed to the Austin Hospital ICU on life support and in an advanced state of multiple organ failure, with their organs, essentially shutting down.
>
> Gail Patterson was in an advanced state of shock. That was the evidence of Professor Warrillow. This is the day the [applicant] was discharged home from the Monash Medical Centre with no clinical or biochemical evidence of amanita mushroom poisoning or any other toxic substance and no liver damage.
>
> Don, Gail and Heather each died with a clinical diagnosis of amanita mushroom poisoning. The only other survivor of the lunch, Ian Wilkinson, very nearly died, with the same diagnosis. That was the evidence of Professor Warrillow. And Ian Wilkinson did not return home until 21 September 2023.
>
> It's not in dispute that all four lunch guests suffered from death cap mushroom poisoning and that this caused the deaths of Don, Gail and Heather.

613 The applicant seized upon the prosecutor's use of a number of descriptions about the applicant's activities at the time the lunch guests were desperately ill. The applicant contended that the deployment of such phrases could 'only have inspired animus towards her as being callous, uncaring, and indifferent to the suffering of others'. The implication is that the prosecutor's submission was gratuitous, and devoid of proper forensic merit. It was argued that, in circumstances where the defence did not dispute that the lunch guests became very unwell from death cap mushroom poisoning, the submission was particularly unwarranted.

614 There is no substance at all to this complaint. The respondent's contention that this was a fair and legitimate argument to place before the jury — which did not occasion unfair prejudice — must be accepted. The vastly different medical and health experiences of the applicant and the lunch guests following the lunch was relevant to the issue of whether the applicant in fact ate the same meal as the guests. The applicant pointed to no evidential errors in the submission. The submission was factual. It was a telling submission, in no way gratuitous. In our view, inflammatory language was not deployed. The argument was there to be made.

615 We think it is especially significant that no complaint was made about this portion of the address at trial. This was a lengthy part of the final address. According to the

current complaint, the tone of the submission was highly prejudicial. It was, so the applicant now contends, littered with inflammatory language which 'inspired animus' towards the applicant. The silence of the applicant's trial counsel suggests otherwise.[168]

(xxvii) Vomit hypothesis (particular (s))

616 The applicant gave evidence-in-chief that after the lunch, 'I kept cleaning up the kitchen and putting everything away, um, and I had a piece of cake and then another piece of cake and then another'. When asked what happened after she ate the cake, she said, 'I felt sick. I felt over-full, so I went to the toilets and brought it back up again'.

617 When cross-examined about this, she was challenged about never having told anyone (including medical personnel) that she had vomited.

618 The prosecutor made the following submission to the jury about the applicant's account that she vomited after the lunch (with emphasis to reflect particular (s)):

> The second possible explanation we anticipate the defence will argue and might explain why she was not seriously unwell, is the [applicant's] account of binge eating cake — the cake after the lunch and vomiting afterwards. And you'll remember the evidence was that there had been a cake brought by Gail Patterson, an orange cake as her contribution to the lunch.
>
> *There is no evidence from any expert witness as to whether vomiting after ingesting a poison would prevent the absorption of the toxins and reduce any ill-effects that might be suffered.* Even if we assume that vomiting is likely to be of some help in reducing the absorption of the toxins, there is no evidence as to how soon after ingestion one would need to vomit for that to be effective.
>
> Dr Dimitri Gerostamoulos, the expert toxicologist, was not asked any questions about this at all, so you simply have no evidence that the [applicant's] claim that she vomited would, or even might, have prevented her from falling seriously ill.
>
> Further to that, the [applicant] was vague in cross-examination about the details of when she vomited and what she vomited up. She said she did know [sic] she did not know what time she vomited, and that she had 'no idea what was in the vomit'. So no evidence as to how soon after the meal it occurred; nor whether she even expelled any of the beef Wellington.
>
> Perhaps the most notable aspect of this vomiting claim, having vomited after the meal, is the fact that the [applicant] did not tell a single medical person over the course of her time in hospital on either 31 July or 1 August that she'd vomited sometime after the lunch. The whole reason that she was there in hospital centred around what she may or may not have consumed, and around whether she had symptoms of diarrhoea, nausea or vomiting. We suggest that if the [applicant] had truly vomited on the afternoon or evening after the lunch, that is a detail she would have shared with medical staff. The fact that she

168As to the significance of this failure, see [452]–[454] above.

> never made any mention of it, should cause you to seriously doubt this claim and, we suggest, reject her evidence about vomiting after the meal as a lie.

619 Complaint was made that the argument impermissibly suggested that the applicant carried a burden to adduce expert evidence (about the impact of vomiting) for it to be accepted or relied upon.

620 We do not accept this.

621 The vomit account emerged for the first time during the evidence-in-chief of the applicant. There was no prior opportunity for the prosecution to question any expert witness about its possible significance.

622 In the impugned part of the prosecutor's address, the prosecutor attempted to anticipate possible arguments that the defence might make, and address them. One such argument was that one reason the applicant did not fall sick like the lunch guests was because she had vomited up her meal. The prosecution did no more than point to an absence of evidence, demonstrating there was an insufficient evidentiary foundation for such an argument (should it be made). They were entitled to make the point.

623 Ultimately, the defence did make this argument in their closing address, despite there being no expert evidence about the impact of vomiting on the absorption of amatoxins:

> So to underline that point, members of the jury, people respond differently, even if they've eaten the same meal, even if it is still in their digestive tract. She didn't each as much as the others, she threw up, she is younger, she's heavier; she might have had a different toxic response. She's in category 1, and the scientific literature says very firmly from actual experts in [death cap mushroom] poisoning that that's a possible outcome.

624 Defence counsel did not complain to the judge about this submission.[169] We discern the following from this:

(a) The absence of any complaint is consistent with there being no perceived concern about the reversal of the onus.

(b) Defence counsel saw it as important to make the point about the applicant vomiting in their own address, notwithstanding the absence of supporting expert evidence. A tactical decision appears to have been made to refrain from complaining about the prosecutor's submission rather than risk highlighting to the jury the gap in the evidence.

625 There is no substance to the point that the burden of proof was reversed.

169As to the significance of this failure generally, see [452]–[454] above.

(xxviii) Leftovers, children and poisoning (particulars (x)–(z) and (aa))

(1) Complaint is made about the submissions made by the prosecutor extracted below (with emphasis to reflect particulars (x)–(z) and (aa)). Those passages substantially consist of the one compendious argument by the prosecutor that the amanitin poison must have penetrated the meat which the applicant claimed to have fed to her children after the lunch:

> You know from the evidence that the children did not fall ill; they weren't sick at all. They were completely symptom-free, despite both eating the steak served to them the following night, which the [applicant] said was taken from the leftover beef Wellington. They were completely symptom-free comes from the children themselves, both [the applicant's daughter] and [the applicant's son].
>
> *The evidence strongly suggests that if the children had eaten leftover meat from the poisoned beef Wellington then they, too, would have at least experienced some symptoms. You will remember that Dr Gerostamoulos gave evidence about the toxicological analysis which was conducted on the leftovers of the beef Wellington taken from the [applicant's] bin. These leftovers included a small piece of meat, which tested positive for the presence of beta-amanitin, and that is in Exhibit 25, in the table of toxicology results. In other words, the amatoxins penetrated or remained on the cooked meat.*
>
> The [applicant] attempted to explain why the children would not be sick, despite eating the leftovers by repeatedly stating that she'd scraped the mushrooms off their serves, because they didn't like mushrooms.
>
> *However, the scientific evidence in this case strongly suggests that simply scraping the mushroom paste away would not have been enough to prevent the children from ingesting amatoxins had they also eaten the leftover beef Wellington.*
>
> …
>
> *Maybe the toxin penetrated the meat, or maybe the mushroom paste just could not be separated so that the sample tested positive for beta-amanitin.*
>
> …
>
> *The meat from that dish carried beta-amanitin in it, even when a forensic toxicologist tried to extract the meat portion for analysis, it could not be entirely separated from the mushroom paste.*[170]

626 Complaint was made at trial — and is repeated in this application — that the expert evidence did not support the submission that amanitin poison must have penetrated the meat, which invited speculation.

170Emphasis added.

627 The judge accepted this complaint. Having referred to the prosecutor's arguments, and then to the evidence of Dr Gerostamoulos, the judge said the following to the jury in the charge:

> [Dr Gerostamoulos] was not positively saying that the amatoxins had penetrated the meat, because you will remember I took you to the photographs of the particular vial which had other material adhering to that small piece of meat. So [the prosecutor] overstated what the evidence was, so you disregard that argument that the amatoxins penetrated the meat. It is not necessarily so.
>
> Next, [the prosecutor] argued that the evidence strongly suggests that if the children had eaten leftover meat, they would have at least experienced some symptoms. This is what she was referring to, when she said earlier in her argument that you consider not only how [the applicant] behaved, but also you consider what happened to the children.
>
> Now, no expert was asked if the mushroom paste and the pastry had been scraped off the meat, would the children, if served the meat in that condition, would they have experienced some symptoms? You have no expert evidence as to whether that would be the case. And so I direct you to disregard that argument. You would be speculating if you were to go down that path.

628 In our view, the clear corrective direction sufficiently neutralised any prejudice created by the prosecutor's submission.

Complaint about submissions on use of iNaturalist website (particular (c))

629 In the final address, the prosecutor submitted to the jury:

> At 7:22:28 seconds pm, the [applicant] then navigated to the iNaturalist website. At 7:22:51 pm, she navigated to a URL, which you can infer was essentially the same website, save for additional observations added since 28 May 2022 that appeared at the URL when Detective Eppingstall entered that specific URL.

630 The applicant argued that a proper statement of the evidence on this issue would have revealed that the contents of the web 'landing page' for iNaturalist may have changed between 2022 and 2024, and that Detective Eppingstall produced no evidence for what was, in fact, on that website on 28 May 2022. The prosecutor, without the intermediary fact of what was on the web landing page on 28 May 2022, should not have made the submission.

631 The applicant's complaint is really one about the admissibility of the evidence of Detective Eppingstall.

632 As part of the police investigation, digital forensics experts recovered a number of unique resource locators ('URLs') from digital artefacts or records on the applicant's computer. In 2024, the informant entered these URLs into a web browser and produced screenshots of what websites appeared. The defence objected to the admissibility of the screenshots, but the judge admitted them, drawing an analogy with

the approach towards taking a jury on a view of a location. The judge noted that it would be obvious to the jury that the 2024 screenshots included data that postdated 28 May 2022, and that this could be amplified by directions.[171]

633 The prosecutor ultimately invited the jury to draw the inference that the website attached to the URL in 2022 was 'essentially the same' as what appeared in the screenshots in 2024. The submission allowed for possible additional observations added since 28 May 2022.

634 In our view, the submission made by the prosecutor accorded entirely with the basis on which the judge admitted the evidence. The evidence of the 2024 screenshots was properly before the jury because inferences could be drawn from them about the content of the website in 2022. Once it is accepted that the evidence was properly admitted — as it appears to have been — the submission was plainly open.

635 Finally, there was no risk here that the jury might have not have appreciated that there was data included on these pages downloaded by the informant in 2024 that postdated 28 May 2022.

636 The submission was not misleading. While the defence sought to have this evidence excluded, no complaint was made by the defence to the judge about the impugned submission.[172]

Complaints about submissions on the applicant's meal preparation and handling

(xxix) Blitzed death cap mushrooms (particular (b))

637 In the final address, the prosecutor submitted to the jury:

> The prosecution suggests to you that the death cap mushrooms which were included in the meal were most unlikely to have been simply chopped, like the button mushrooms the [applicant] used. They were most likely prepared differently, you may infer in such a way that they became unidentifiable.

638 The applicant submitted that there was no evidentiary basis for this statement and it instead 'amounted to evidence from the Bar table' (particular (b)).

639 The prosecution case was that the applicant had deliberately hidden death cap mushrooms in the lunch. To that end, the prosecution invited the jury to draw an inference that the applicant had dehydrated death cap mushrooms and blitzed them into a powder.

640 In our view, this inference was reasonably open on the evidence as a whole, as:

171*R v Patterson* (Supreme Court of Victoria, Beale J, 28 May 2025).

172As to the significance of this failure, see [452]–[454] above.

(a) death cap mushrooms were unquestionably included in the beef Wellingtons served to the guests. The toxicology results showed the presence of beta-amanitin in the mushroom paste and meat sample;

(b) Dr Truong twice examined the leftover beef Wellington under a microscope to try to identify the type of mushrooms included in it. She could identify little pieces of mushroom, all of which she identified as 'typical mushrooms that you find in a supermarket'. Dr Truong did not observe the physical presence of death cap mushrooms;

(c) debris of death cap mushrooms was recovered from the applicant's dehydrator after it was retrieved from the Koonwarra transfer station;

(d) admissions were made by the applicant in her own evidence that she had been drying mushrooms, then using a 'Thermomix' to blitz them into a powder to see if she could hide them in her children's food without them noticing; and

(e) admissions were made by the applicant in messages with her Facebook friends that she had, prior to the lunch, been dehydrating mushrooms and blitzing them into powder to include inside food, undetected.

641 We accept the respondent's contention that the prosecution submission did not amount to evidence from the Bar table.

642 This was another complaint that was never raised by the applicant's trial counsel with the judge.[173]

(xxx) Four grey plates and one odd plate (particular (d))

643 The applicant made complaint about the prosecutor's following submission to the jury about the plates used at the lunch (particular (d)), especially the emphasised passage:

> Ian Wilkinson told you that the [applicant] plated the food by herself. He gave clear evidence of four matching large grey dinner plates, not dark or light grey but a sort of middle grey colour was his evidence, and then a fifth smaller orangey tan coloured plate.
>
> Under cross-examination, he conveyed no doubt about what he had seen. There were four plates that were the same. They were grey and there was one smaller different coloured plate. Ian Wilkinson was a compelling witness who was able to recall a substantial amount of detail about the lunch. You might recall him describing the discussions at the house about a sick-looking tree and the [applicant's] pantry. He had a clear memory of where everyone sat at the dining table during the lunch, and you will remember that photo … where he marked where people were sitting at the dining table. He had a clear memory of exactly what was served at the lunch; the individual wholly encased pastie type beef Wellington, mashed potato and green beans. *You will have no trouble in being satisfied that he is a reliable witness and you can*

173As to the significance of this failure, see [452]–[454] above.

> *confidently accept what he told you about the details of the lunch, including the four grey plates and the fifth odd plate.*
>
> Of course, as you have heard, Ian was not the only person to notice the different plate. Heather Wilkinson said to Simon Patterson on the Sunday morning that she '... noticed [the applicant] served herself her food on a coloured plate, which was different to the rest.'
>
> This was clearly something that stuck in Heather's mind. It was noteworthy. What Heather was conveying, we suggest, is that there were four uniform plates and one odd plate. Heather even mentioned it a second time during the car trip from Korumburra Hospital to Leongatha. You will remember that was the evidence of Simon Patterson.
>
> You should reject the [applicant's] evidence that the meals were served on a collection of mismatched plates. You heard about the effort that went into the lunch and the importance of it to the [applicant]. You have heard how noticeable it was to both Ian and Heather that there was a single 'odd plate'.
>
> You should also reject any suggestion that the [applicant] just happened to eat from the different plate to her guests. Gail and Heather picked up and carried the four grey plates to the table. The [applicant] picked up and carried her own plate to her place at the table. That was the evidence of Ian Wilkinson. She allocated herself the different plate, by picking it up and carrying it to her place at the table.[174]

644 The applicant argued that the evidence regarding the colour of the plates given by the applicant's son and Simon Patterson was inconsistent with Ian Wilkinson's account. The import of the submission is that, in circumstances where Ian Wilkinson's evidence was contradicted, it was unfair and irresponsible for the prosecution to have urged the jury to act upon his evidence.

645 In our view, the applicant's argument rests upon a misconception that Ian Wilkinson's account is contradicted by Simon Patterson and the applicant's son.

646 Simon Patterson's evidence did not contradict Ian Wilkinson's evidence about the plates. Simon Patterson was not at the lunch. Further, he stated that the applicant had 'multiple, small uniform sets' of plates at her house, or 'a mismatched group'. It was not incumbent on the prosecution to address this evidence in the closing address.

647 The prosecutor said this about the applicant's son's observations:

> You heard [the applicant's son] give evidence that after he arrived home from the cinema on that day, Saturday, 29 July, he cleared plates from the dining table, took them into the kitchen, and stacked the dishwasher. He said the plates were white dinner plates. You might think that these were dessert plates, given the stage of the meal by the time [the applicant's son] and [his friend] arrived home, even though Ian was not 100 per cent sure whether there were other plates for the dessert. Either way, [the applicant's son's]

174Emphasis added.

> evidence should not cause you to reject Ian Wilkinson's very clear evidence about the plates that the main meal was served on and, most importantly, that the [applicant] had a different coloured plate, which was supported by Heather's independent recollection of that, which she recounted to her nephew Simon.

648 Whatever might be said of the proffered dessert plate explanation, the fact is that the applicant's son was not at the lunch. He did not observe the beef Wellington being served to the lunch guests. His evidence does not contradict Ian Wilkinson's evidence or Heather's evidence (as recounted by Simon).

649 The prosecutor's submission to the jury was plainly open to be made. It was a potent argument.

650 No complaint was made by the defence to the judge about this submission.[175]

Complaints about submissions on applicant feigning illness

(xxxi) VARE evidence discrepancy (particular (e))

651 The prosecutor submitted the following to the jury:

> On the morning of Sunday, 30 July, [the applicant's son] came downstairs to find the [applicant] drinking coffee at the dining table. She told him she felt sick and said she had to go to the toilet a few times over the night. [He] said she looked normal. …

652 The applicant complained that there was no reference to the applicant's son saying she looked 'normal' in his edited VARE which was tendered to the jury. The applicant noted that there were references to that issue in some of the original VARE answers, but those references were excised and were not part of the edited VARE that was before the jury.

653 At trial — before the judge and in the absence of the jury — it was conceded by the prosecution that they had inadvertently referred to a portion of the VARE that had been edited out. However, the respondent noted that no correction, direction or other remedy was sought by defence counsel at trial.

654 In his closing address, Senior Counsel for the defence made reference to the prosecutor's submission, saying the jury 'won't find that evidence in the VARE. [The applicant's son] did not say in evidence before you on the VARE that his mum looked normal'.

655 While defence counsel raised the error with the judge, counsel did not seek any remedy.

175 As to the significance of this failure, see [452]–[454] above.

656 In summarising the defence arguments, the judge made reference to the defence argument that the applicant's son 'did not say that'. Defence counsel did not raise the matter again with the judge.

657 We infer that Senior Counsel considered that he had adequately dealt with the issue in his own address and that judicial intervention was not required.

658 In these circumstances, this was a minor indiscretion in the scheme of the overall trial, and occasioned no unfairness to the applicant.

(xxxii) Stop at BP Caldermeade (particulars (f), (g))

659 The applicant gave evidence that when she and her son were on their way to the cancelled flying lesson, she needed to stop by the side of the road because she was urgently afflicted with diarrhoea. They later stopped at a petrol station. The applicant complained about the following submissions by the prosecutor (particular (f)):

> We suggest that if [the applicant] really did have diarrhoea in the bush and this was the first bathroom she had access to after that, it would take more than nine seconds to complete the process of cleaning herself up, or at a minimum to wash her hands.

660 The applicant has contended that the above prosecution submission raised a false flag; it suggested that the applicant did things — such as completing the process of cleaning herself up, or washing her hands — which she never said she did. When giving evidence, the applicant never said she cleaned herself up in the toilet or washed her hands at BP Caldermeade. What she did say was that she had cleaned herself up with tissues at the side of the road, put them in a dog poo bag and placed the bag in the rubbish bin in the bathroom at BP Caldermeade. According to the applicant, the prosecutor's submission unfairly suggested that her nine-second visit to the BP Caldermeade bathroom was inconsistent with her account of having experienced significant diarrhoea.

661 The answer to this complaint requires us to set out some of the evidence of the applicant and a more extensive passage from the prosecutor's final address.

662 The applicant gave the following evidence-in-chief:

> And what happened? You pulled over?---Yeah, so, and I went off into the bush and went to the toilet.
>
> What kind of going to the toilet was it?---So I had diarrhoea.
>
> And what — how did — what happened after that?---Ah, so I cleaned myself up a little bit with tissues, and put them in a dog poo bag and put it in my handbag and we hit the road again.
>
> There's evidence that on the way, at 3:20 pm, you stopped at the BP in Caldermeade?---Yep.

> And the internal footage shows you going into the bathrooms?---Yep.
>
> What — why did you go into the bathrooms?---I put the, um, the dog poo bag with the soiled tissues in the bin.
>
> And when you came out of the bathroom, you purchased some things?---I did.

663 In cross-examination, the applicant recalled giving evidence as to the above:

> You have given evidence before this jury that you had to pull over on the side of the road on the way to Tyabb on 30 July to go to the toilet or experiencing diarrhoea. You remember giving that evidence?---I do.

664 Having been taken to her son's VARE in detail, it was put to the applicant that she never had diarrhoea on the side of the road at all:

> You agree that [your son] makes no mention of you stopping to have diarrhoea in the bushes on the side of the road?---I do agree with that.
>
> I suggest he did not recall you stopping in the bushes on the side of the road in his VARE to police because it did not happen; agree or disagree?---Disagree.
>
> I suggest that this is another lie you've told this jury to try and explain how you managed the trip to Tyabb; agree or disagree?---Disagree.

665 The full submission made by the prosecutor to the jury is as follows (emphasised to reflect particular (g)):

> The flight instructor Ulysses Villalobos, whose statement was read to you, was running late. He rang the [applicant] and asked to push the session back from 2:00 pm to 4:00 pm. This was yet another opportunity for the [applicant] who, on her account was approaching 24-hours of frequent and, at times, explosive diarrhoea to cancel the lesson but she did not. They drove for one hour and five minutes before the instructor called to cancel the lesson due to poor weather. One hour and five minutes in the car.
>
> In her evidence, the [applicant] claimed that she had to pull up on the side of the road and go to the toilet in the bush. But [her son] did not refer to any such stop occurring during the trip to Tyabb. He was sitting in the front passenger seat. *We suggest that if his mother had had to make an emergency toilet stop on the side of the road, that is something he would have recalled when he was specifically asked whether she had gone to the toilet at all during the trip.*
>
> Now, there was actually one stop during this trip towards Tyabb, and that stop was at the Caldermeade BP. You might remember Detective Tran produced the CCTV footage from the Caldermeade BP, which he'd collected. The CCTV clip is at 3:20 pm on 30 July and that is Exhibit 48. In that clip, you can see the [applicant] leisurely enter the service station, going to the toilet for about nine seconds, which is obviously not enough time to use the

> toilet at all, before selecting and purchasing food items. These items were some confectioneries, a ham, cheese, tomato sandwich and a sweet chilli chicken wrap and that was the evidence of Detective Eppingstall. There was nothing in her behaviour on the CCTV to indicate that she was suffering from a serious illness, let alone frequent and explosive diarrhoea.
>
> In her evidence, she told you that she went into the toilets at the service station to dispose of the bag of tissues she had used to 'clean up myself a little bit' after toileting in the bush.
>
> We suggest that if she really did have diarrhoea in the bush and this was the first bathroom she had access to after that, it would take more than nine seconds to complete the process of cleaning herself up or, at a minimum, to wash her hands. It is not clear why the [applicant] only entered the bathroom for such a short period, but you should reject that it had anything to do with having diarrhoea in a bush on the side of the road to Tyabb.

666 The prosecutor never suggested that the applicant cleaned herself up or washed her hands when she went into the toilet at Caldermeade BP. The prosecution disputed that the applicant ever had diarrhoea on the side of the road in the first place. She had no reason to clean up.

667 The prosecution submission, when taken as a whole, was to the effect that the objective or independent evidence simply did not support the applicant's account of suffering from frequent and explosive diarrhoea. Three matters were relied upon:

(a) the applicant choosing to take a significant and unnecessary road journey while in such a condition;

(b) the applicant not needing to stop to go to the toilet during this journey (based on her son's evidence); and

(c) when an opportunity did arise to visit a bathroom (Caldermeade BP), the applicant only did so momentarily for nine seconds.

668 The Caldermeade BP evidence was relied upon as one amongst a number of items of evidence. The prosecution invited the jury to consider the evidence collectively or holistically. The evidence formed the basis of the submission that the applicant did not suffer from frequent and explosive diarrhoea. The argument was clearly open. The use of the Caldermeade BP evidence was legitimate. There is no substance to the complaint.

669 Complaint is also made about the prosecution's reliance upon the evidence of the applicant's son (particular (g)).[176]

670 The complaint is expressed in the following terms:

> In fact, [the applicant's son] was also asked during his VARE … whether there were any stops — when it was an uncontroverted fact that there

176 The impugned passage is emphasised at [665] above.

> was a stop — and he said 'No' but the prosecutor did not take the jury to that matter. But again, an unfairness divested [sic] because [the applicant's son] had not been called but that, again, did not stop the prosecutor from filling that evidentiary void.[177]

671 This complaint seems to be that the applicant's son did not recall any stops. He therefore did not recall the stop at the Caldermeade BP and his recollection of stops on the trip was not reliable. According to the applicant, in these circumstances, his failure to recall that his mother took a toilet stop on the side of the road did not preclude it having happened.

672 In our view, the prosecutor was entitled to rely upon the son's evidence.

673 The applicant's son's evidence was that the applicant said she 'was hoping that [they] could make it to Tyabb before she needed to go to the toilet again', but that she ultimately did not need to go to the toilet during the trip.

674 Critically, he was asked directly about toilet stops:

> O.K. And at any stage during the trip, did she need to go to the toilet?---No.
>
> And were there any stops?---No.

675 It was open to the jury to reason that had the applicant taken an emergency toilet stop (because of diarrhoea) on the side of the road, it is likely that this is something her son would recall as an unusual event. This is to be contrasted with a routine stop at a service station, which the jury might consider could be more readily overlooked.

676 It was entirely proper for the prosecution to advance this argument and, in so doing, to rely upon the evidence of the applicant's son.

677 We note that Senior Counsel for the defence made a counterargument in his final address in relation to the applicant's son's failure to recall the stop at the Caldermeade BP:

> Now, [the prosecution] suggest that if his mother had to make an emergency toilet stop, that's something he would have recalled. We suggest that if his mother made a stop at the BP in Caldermeade to buy food for everyone, that's something he would have recalled. He didn't recall either of them.

678 The jury was equipped with all of the relevant arguments. This point was an important one. The son's evidence contradicted the evidence of the applicant that there had been an emergency toilet stop on the side of the road. It aligned with the prosecution case.

177Citations omitted.

679 There was no unfairness arising out of the way in which the prosecutor treated this issue. Again, neither particulars (f) nor (g) were raised by the defence with the judge.[178]

Complaints about submissions on relationships

(xxxiii) Lunch with in-laws (particular (a))

680 The applicant made further complaint (particular (a)) about the following portion of the prosecutor's final address to the jury:

> While the [applicant] later told Professor Stuart … that it was not unusual to have lunch with her ex-partner's relatives, this is completely at odds with the other evidence. We know that that is simply not the case.

681 The applicant submitted that there was evidence from Simon Patterson that even after their separation, the applicant and the children had been to Donald and Gail Patterson's house for meals without Simon. It was therefore argued that the submission did not accord with the actual evidence and represented an overstatement of what the evidence is said to demonstrate.

682 Professor Stuart gave the following evidence:

> Did she tell you what the reason or the purpose of having the lunch was?---So I did ask her about the lunch and she told me she was having lunch with her ex-husband's relatives — his parents and aunt and uncle — and that's — and I just said, 'That's a nice thing to do', and she said — 'well, seeing you're separated from your ex' and she said that that was not unusual and she still had a good relationship with them.

683 It seems to us that the prosecutor's submission was directed at the rarity of the applicant hosting a lunch for Simon Patterson's extended family. In context, this embraced Ian and Heather Wilkinson as well as Donald and Gail Patterson. So much is apparent from the full part of the final address:

> You heard evidence from Simon Patterson that the [applicant] invited the four lunch guests and Simon to the lunch on 16 July, some two weeks in advance of the lunch. You heard that it was very rare for the [applicant] to invite people to her home. That was Simon's evidence. In fact, Don, Gail, Ian and Heather were surprised by that invitation and did not know the purpose of the lunch. You heard this from various family members who discussed the lunch invitation with them. Don and Gail's daughter Anna Terrington, Ian and Heather's daughter Ruth Dubois.
>
> As Simon Patterson later told SallyAnn Atkinson from the Department of Health, the lunch guests had not eaten a meal together with the [applicant] recently, if at all. Don and Gail were intrigued about why they were invited, and why Heather and Ian were invited. Ian and Heather also wondered why

178As to the significance of this failure, see [452]–[454] above.

> they were invited. In fact, Ian and Heather had never been over to the [applicant's] home at all, let alone for a meal.
>
> The Wilkinsons had an amicable relationship with the [applicant], but were more like acquaintances of her and did not see a great deal of each other which, you might think, makes it all the stranger that they were invited to a lunch to speak about a very personal and important medical issue, a cancer diagnosis.
>
> As [the applicant's son] said in his VARE, video recorded evidence, he had never known [the applicant] to go to Ian for support ever before. So you can be satisfied that this lunch invitation was a very unusual occurrence.
>
> *While the [applicant] later told Professor Stuart, the Director of Public Health that it was not unusual to have lunch with her ex-partner's relatives, this is completely at odds with the other evidence. We know that that is simply not the case.*[179]

684 The following evidence at trial supported the prosecution's submission:

(a) The Wilkinsons had never before been invited to a meal with the applicant or at the applicant's home. This evidence was given by Ian Wilkinson, Anna Terrington, Ruth Dubois and the applicant's son.

(b) Donald and Gail Patterson had been invited to (and attended) lunch at the applicant's home on one prior occasion, 24 June 2023, at which the children were present.

(c) Simon Patterson told Ms Atkinson that 'this group' of people (the lunch guests) 'had not eaten a meal together recently, if at all'.

685 The evidence supported the submissions. There is no merit to this complaint. No complaint was made by the defence to the judge about this impugned submission.[180]

(xxxiv)Latent motive (particulars (bb)–(ii))

686 It is convenient to deal with particulars (bb)–(ii) together as they involve similar imputations and complaints, none of which were raised with the judge at trial.[181]

687 By way of summary, the applicant complained about the following submissions made by the prosecutor in her closing address:

179Emphasis added.

180As to the significance of this failure, see [452]–[454] above.

181As to the significance of this failure, see [452]–[454] above.

- (bb): that the relationship between the applicant and Donald and Gail Patterson was ‘not always a harmonious one’ in spite of the applicant’s description in her police interview;
- (cc): that the deterioration in the applicant’s relationship with Simon Patterson was apparent to members of the extended family;
- (dd): that the applicant’s son was cognisant of the decline in the relationship between the applicant and the Patterson family, and gave evidence to this effect;
- (ee): that the applicant sent ‘inflammatory or even extremely aggressive messages’ to Donald and Gail Patterson;
- (ff): that Simon Patterson gave evidence that there was tension between the applicant and his parents;
- (gg): that the applicant disclosed her displeasure with the deterioration of her relationship with Donald and Gail Patterson to Ms Cripps;
- (hh): that the applicant’s ‘real feelings’ about Donald and Gail Patterson were unbeknownst to them and expressed only to her friends online; and
- (ii): that the applicant confined expression of her feelings and challenges about the Patterson family to her online dealings, outwardly portraying a different image.

688 Uniting the applicant’s complaints regarding the above submissions is the persistent assertion that the prosecutor proffered a ‘latent motive’ for murder. On the applicant’s account, this was contrary to the prosecution case theory as opened, and only materialised in the late stages of the trial and the closing address itself. The applicant highlighted that she was not questioned or afforded the opportunity to comment on the ‘latent motive’ postulated (particulars (bb)–(ee) (inclusive)).

689 A further theme emerging from almost all of these particulars is the alleged lack of evidentiary basis upon which the respective submissions were made. It was argued that the impugned submissions were:

(a) contrary to the evidence (in the case of particular (bb));

(b) misstatements of the evidence (in the case of particulars (cc), (gg) and (ii));

(c) overstatements of the evidence (in the case of particular (cc)); and/or

(d) unsupported by the evidence (in the case of particular (hh)).

690 The following three points are made in response to the applicant’s complaints.

691 First, the ‘latent motive’ argument present throughout these particulars is the same complaint as that which underpins grounds 4 and 7. Once grounds 4 and 7 fall away — as they do — this complaint also falls away. There is nothing to suggest that the prosecution relied on what the applicant deemed a ‘latent motive’. Nor can it be said

that the prosecutor intentionally and strategically attempted to circumvent the proper ventilation of evidence and issues relating to motive before the jury.

692 Secondly, the above considerations also dispel the concern relating to the prosecutor's alleged failure to question the applicant about the existence of a motive to murder.

693 Thirdly, there was an evidentiary basis for each submission made. The applicant alleged that the submission (in particular (bb)) that the relationship between the applicant and Donald and Gail Patterson was 'not always a harmonious one' was 'speculative'. We do not agree. There was a basis adduced from objective documentation and the accounts of multiple witnesses[182] to make the argument that leading up to the offending, the applicant had a strained relationship with Donald and Gail Patterson. The prosecution was entitled to put this to the jury.

694 Further, the respondent's written case in this appeal accurately pointed to the evidence of Tanya Patterson and Matthew Patterson to ground the submission that members of the extended family noticed the deterioration of the applicant's relationship with Simon Patterson. Similarly, the evidence of Ms Cripps resolves any issue taken with particular (gg). Ms Hunt gave evidence supporting the submission contained in particular (ii).

695 One qualification to this should be made in relation to particular (ii), concerning the prosecutor's reference to the applicant telling her online friends about her challenges with the Patterson family. In fact, only one friend (Ms Hunt) gave evidence to this effect. While it appears that the prosecutor extrapolated Ms Hunt's evidence so as to apply to multiple of the applicant's online interactions, it can hardly be seen as such a severe overstatement of the evidence so as to distort the jury's perception of the events. This is so in light of the significant objective evidence of the applicant's online interactions that was before the jury. We agree with the respondent's submission that it was not pertinent that the account was not corroborated by other online friends. We note again that no objection was raised by defence counsel at trial.[183]

696 We therefore reject the complaints contained in particulars (bb)–(ii).

182This includes the evidence highlighted by the respondent, including the evidence of Simon Patterson, regarding tension between the applicant and his family, Facebook messages between the applicant and her online friends, Signal messages between the applicant and the Patterson family, and the applicant's admission to Ms Cripps regarding her feelings towards Donald and Gail Patterson.

183As to the significance of this failure, see [452]–[454] above.

Inevitability of convictions

697 The respondent submitted that, in any event, this was a case where conviction was inevitable.[184] This submission was not made with respect to ground 1. In light of our conclusions on the applicant's grounds, it is not necessary to address this submission.

Conclusion

698 Leave to appeal is granted on proposed grounds 1 and 2, but is otherwise refused. The appeal against conviction is dismissed.

PART B: SENTENCE APPEAL

699 As indicated at the start of these reasons, after a plea hearing, the judge sentenced the applicant to life imprisonment with a non-parole period of 33 years.[185] The Director of Public Prosecutions appeals against the non-parole period fixed as part of that sentence.

Judge's sentencing remarks

700 In his sentencing remarks, the judge first summarised the offending before turning to a summary of aggravating circumstances. Those circumstances included the substantial premeditation that the offending involved, the applicant's behaviour after offending which the judge characterised as 'pitiless', the suffering of the victims (both the lunch guests and more indirect victims), the elaborate covering up of the offending and the betrayal of trust involved.[186]

701 The judge was satisfied that by the time the applicant invited Simon Patterson to the lunch on 16 July 2023, she did so with the intention of killing all the guests.[187] He found that, after learning on Sunday 30 July 2023 that some or all of the guests had been hospitalised, the applicant showed no pity, and instead of informing those treating them that she had used foraged mushrooms to prepare the meal, she repeatedly denied having foraged for mushrooms and insisted that the mushrooms she used had been sourced solely from Woolworths and an Asian grocery. The judge

184*Baini* (2012) 246 CLR 469, 480–2 [30]–[33] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

185*R v Patterson* [2025] VSC 557 [114] (Beale J) ('Sentencing Remarks'). Although Ms Patterson is the respondent to the Director's appeal, we will continue to refer to her as the applicant in the hope of avoiding confusion.

186Ibid [51]–[54].

187Ibid [50].

inferred from the applicant's behaviour that her intention to kill was ongoing and found that this constituted an additional aggravating circumstance.[188]

702 The judge found that the suffering of the lunch guests was protracted, and that Ian Wilkinson suffers ongoing health issues. The judge found that the applicant must have anticipated that the victims would suffer in the way that they did.[189]

703 Finally, the judge found that the applicant engaged in an elaborate cover-up of her guilt, including disposing of the four grey plates on which she had served the poisoned meals. She falsely asserted that she had fed the children leftovers from the lunch with the pastry and mushrooms scraped off. She feigned illness and disposed of the dehydrator as soon as she was released from hospital. She disposed of her phone and provided police with a dummy phone. She lied in her recorded police interview about various matters.[190]

704 The judge said that, most importantly, the offending involved an 'enormous betrayal of trust'.[191] The victims were all the applicant's relatives by marriage. Apart from cutting their lives short and causing lasting damage to Ian Wilkinson's health, thereby devastating the extended Patterson and Wilkinson families, the applicant had 'inflicted untold suffering' on her own children whom she robbed of their beloved grandparents.[192]

705 The judge referred to 29 victim impact statements.[193] He referred to the four generations of the Patterson and Wilkinson families who had been traumatised by the applicant's crimes, as well as their friends.[194] The judge noted that there was great anger at the callousness of the applicant's actions and stated that her failure to exhibit any remorse 'poured salt into all the victims' wounds'.[195]

706 The judge said that, having regard to the aggravating circumstances of the offending and the victim impact statements, he had no hesitation in finding that the applicant's

188Ibid [51].

189Ibid [52].

190Ibid [54].

191Ibid [55].

192Ibid.

193Ibid [56] n 40.

194Ibid [57].

195Ibid [59]–[60].

offending fell into the worst category for the offences of murder and attempted murder. He said that the gravity of the offending warranted the imposition of the maximum penalties.[196]

707 The judge then turned to the personal circumstances of the applicant. No psychiatric or psychological reports were provided and there were no references from character witnesses. She maintained her innocence, such that there was no evidence of remorse. She had no relevant criminal history.[197]

708 Next, the judge considered the applicant's conditions of imprisonment. An affidavit sworn by Jennifer Hosking, Assistant Commissioner, Sentence Management Division at Corrections Victoria, confirmed that the applicant had a maximum security rating and major offender status. She had been assessed as being at significant risk from other prisoners because of the nature of her crimes and her notoriety. She had spent approximately 16 of the previous 22 months imprisoned in a management unit and the rest of the time in a protection unit. A management unit is more restrictive than a protection unit. She had been in a management unit continuously for the 15 months prior to sentencing. She was not permitted to mix with other women in the unit and had spent at least 22 hours in her cell every day. On 16 days since November 2024, because of lockdowns, the applicant had been confined to her cell for the entire day.[198]

709 Ms Hosking's evidence was that the maximum period that a prisoner in the management unit could have out of their cell on any given day is four hours, which would not happen very often. The applicant was entitled to have at least one hour out of her cell per day. Meals and medicine were being delivered through a flap in the cell door at the time of sentencing. The applicant had access to a small concrete yard approximately 2 by 1.5 metres in size adjoining her cell, which she was able to access for fresh air with permission. She was not able to use that area if prisoners were using a larger exercise yard adjacent to it.[199]

710 During her time in the management unit, the applicant had barely any contact with other individuals. She was required to obtain permission to communicate with any other prisoner, which was complicated by the fact that she was not informed of the identities of the other prisoners in the unit. At the time of sentencing, she had approval to communicate with one other prisoner in the unit through a wire mesh when the two of them were permitted to use their adjoining exercise yards. The other prisoner was undergoing a sentence for terrorism offences and had attacked other prisoners. Ms Hosking could not say whether the applicant had communicated with the other prisoner. There is an intercom in the applicant's cell which she may use to

196Ibid [70].

197Ibid [72]–[89].

198Ibid [92].

199Ibid.

communicate with one other prisoner in the unit at a time, with permission, but she had not done so.[200]

711 In order to attend any other part of the prison, such as the visitor's centre or the library, the applicant needed to be driven there, escorted by two Corrections officers. In theory, prisoners in the management unit are able to access the prison library twice a week for 20 minutes at a time, but the applicant had not been able to do so because of staff shortages and a rule that she may not access the library if another prisoner was doing so. As a result, she had only been able to access the library a handful of times during her time in the unit.[201]

712 Ms Hosking was unable to say whether the applicant would ever be moved from the management unit. Her placement in the unit was reviewed monthly.[202] The judge inferred that, 'given the unprecedented media coverage of [the] case, and the books, documentaries and TV series about [it] which are all in the pipeline', the applicant was 'likely to remain a notorious prisoner for many years to come, and, as such, remain at significant risk from other prisoners'.[203]

713 The judge referred to the purposes of sentencing, namely just punishment, specific and general deterrence, rehabilitation, denunciation and protection of the community.[204] He said that he had had regard to these purposes but that rehabilitation 'has taken a back seat' because of the gravity of the offending.[205]

714 The judge recorded that, under ss 6A–6F of the *Sentencing Act*, the applicant was sentenced as a serious violent offender in respect of the three murders, meaning that the protection of the community was the principal purpose for which the sentences must be imposed.[206]

715 The judge said that the main issue in dispute was whether it was inappropriate to fix a non-parole period under s 11(1) of the *Sentencing Act*. He recorded that sentencing

200Ibid.-

201Ibid.

202Ibid [93].

203Ibid [94].

204Pursuant to s 5 of the *Sentencing Act 1991*: ibid [96].

205Sentencing Remarks [97].

206Ibid [99].

law establishes that, as a general rule, harsher than normal conditions of imprisonment will warrant mitigation of penalty.[207]

716 The judge noted that the prosecution had conceded that the fact that the applicant's conditions of imprisonment were more burdensome than those for a mainstream prisoner, and were likely to remain so for the foreseeable future, was not just relevant but 'important' and 'weighty'. The prosecution had, nonetheless, submitted that the appropriate sentence was life imprisonment without parole.[208]

717 The judge stated that there was 'at the very least, … a substantial chance that, for your protection, you will continue to be held in solitary confinement for years to come'.[209] The judge considered that the only way of making these 'important and weighty considerations' count was by fixing a non-parole period.[210]

Grounds of appeal

718 The Director advances two grounds of appeal, as follows:

> 1. The sentencing judge erred in finding that there was a 'substantial chance' the [applicant] would be held in 'solitary confinement for years to come' when such a finding was not open on the evidence, and that finding infected his assessment of the [applicant's] likely future conditions in custody and his decision to fix a non-parole period.
>
> 2. The sentence imposed on the offender is manifestly inadequate, in that:
>
> a) it was inappropriate for the sentencing judge to fix a non-parole period; or
>
> b) the non-parole period of 33 years is manifestly inadequate.

Director's submissions

Ground 1

719 Under the first ground of appeal, the Director submitted that it was not open to the judge to have found that there was a substantial chance that the applicant would be held in solitary confinement for years to come. It was submitted that the finding

207Ibid [102]–[103]. The judge referred to *Yat v The King* [2024] VSCA 93 ('*Yat*'); and *R v Males* [2007] VSCA 302.

208Sentencing Remarks [104].

209Ibid [105].

210Ibid [106].

overstated the position, particularly when regard is had to the following important aspects of Ms Hosking's evidence:

(a) the applicant's placement in the management unit was subject to monthly review and was 'certainly' not permanent;

(b) the applicant's future placement would be affected by which other prisoners are housed in the unit at any particular time;

(c) while the applicant did not currently mix physically with other women in the unit, some women in the unit can mix with each other;

(d) mixing between prisoners is determined on a case by case basis and is therefore subject to change;

(e) staff shortages were expected to improve considerably by the end of 2025 or the start of 2026 with the recruitment of additional staff; and

(f) the applicant's access to education would increase once she was sentenced.

720 The Director submitted that, having regard to these matters, the judge's characterisation of the applicant's conditions as 'solitary confinement' was in error and his prediction as to her future years separated in a management unit was not open on the evidence.

721 The Director submitted that the impact of the applicant's notoriety will necessarily dissipate with time and a reduction in media interest. The variability of her risk profile was said to have been demonstrated already with her moving to the less restrictive protection unit, where most women can mix with one another and interact more freely, between 14 December 2023 and 9 March 2024, and again between 15 March 2024 and 9 June 2024. Her movement back into the management unit on 9 March 2024 coincided with increased media attention.

722 The Director submitted that for these reasons, the evidence was not capable of supporting a finding on the balance of probabilities that there was a substantial chance that the applicant would be separated in a management unit for many years to come. That erroneous finding was material to the judge's conclusion that a non-parole period should be fixed. It was the sole factor that informed that decision. Accordingly, a different sentence should be imposed.

Ground 2

723 Under the second ground of appeal, namely manifest inadequacy, the Director submitted that the offending was 'truly dreadful' and accompanied by significant aggravating factors. The offending was premeditated and elaborate. It involved an enormous betrayal of trust. The applicant's murderous intention continued long after she served the lunch. She had ample opportunity to intervene to try to save the lives of the guests and could have done so without admitting that she had deliberately

poisoned their meals. Instead, she took no action as the guests fell sick, and repeatedly denied that she had used foraged mushrooms, even when she knew that some of the guests were on life support. It was submitted that her callous disregard for the fate of her victims significantly aggravated her offending.

724 The Director submitted that the cruelty of the applicant's chosen method of murder was highly aggravating. It was noted that Ian Wilkinson continues to suffer the ill effects of the poisoning years after the event.

725 In addition, the applicant had engaged in an elaborate cover-up involving multiple lies, disposing of evidence, and actively misleading police in their investigation.

726 It was submitted that there was almost nothing to mitigate the offending. The applicant showed no remorse and her extraordinarily high moral culpability was not ameliorated by the considerations in *R v Verdins*,[211] *Bugmy v The Queen*[212] or of youth. She enjoyed the benefits of intelligence, education, wealth, relatively good health and a stable family life. The Director submitted that the judge had taken the view that, in circumstances where the appropriate sentence was life imprisonment, the only scope for affording mitigatory weight to the applicant's conditions in custody was by the imposition of a non-parole period. It was submitted, however, that a sentence of life without parole can be imposed on an offender who is able to call upon mitigating features. For example, life without parole may be a proper sentence even where an offender pleads guilty and even where such a plea is given considerable weight.[213]

727 The Director submitted that, in all the circumstances, and notwithstanding the applicant's conditions in custody, the nature of her offending and the requirement to give primacy to community protection in the sentencing exercise on the application of s 6D of the *Sentencing Act* made the fixing of a non-parole period inappropriate and it was not open to the judge to have done so.

728 Alternatively, it was submitted that the period fixed was manifestly inadequate.

729 Under the standard sentence scheme, the judge was obliged to fix a non-parole period of at least 30 years, unless he considered it inappropriate to fix a non-parole period.[214] It was submitted that a sentence that exceeds the statutory minimum non-parole period by just three years for offending that took the lives of three people and nearly took the life of another fails to reflect the gravity of the offending or vindicate the dignity of

211(2007) 16 VR 269.

212(2013) 249 CLR 571.

213*Cardamone v The Queen* [2019] VSCA 190 ('*Cardamone*'); *Hunter v The Queen* (2013) 40 VR 660 ('*Hunter*').

214*Sentencing Act*, s 11A.

each of the victims. The Director referred to *Shaptafaj v The King*,[215] *Todd v The Queen*[216] and *R v Lowe*.[217] It was submitted that in each of these cases the offender pleaded guilty to less than three murders but received a non-parole period greater than, or equal to, that imposed in the present case (or in the case of *Lowe* — albeit it was not a standard sentence scheme case — no non-parole period at all).

Applicant's submissions

Ground 1

730 The applicant submitted that there was a threshold question in respect of ground 1 as to whether it raised in substance a question of weight rather than specific error. The applicant submitted that the Director's arguments under ground 1 amounted to a complaint about the weight that had been accorded to a mitigating factor, which was not a basis under *House v The King* for interfering with the judge's exercise of the sentencing discretion.

731 Alternatively, the applicant submitted that it was well open on the evidence of Ms Hosking for the judge to find that there was a substantial chance that the applicant would be held in solitary confinement 'for years to come'.[218] It was submitted that the judge applied orthodox sentencing principles to the effect that harsh conditions of confinement can be a substantial matter in mitigation.[219]

732 Counsel for the applicant emphasised that the prosecution had accepted on the plea that the applicant's conditions of incarceration were clearly a relevant and important consideration in the sentencing exercise. The prosecution had accepted at the plea

215[2023] VSCA 91 ('*Shaptafaj*').

216[2020] VSCA 46.

217[1997] 2 VR 465, 490 (Winneke P, Brooking JA and Southwell AJA) ('*Lowe*').

218Sentencing Remarks [105].

219The applicant referred to *R v Howard* [2001] NSWCCA 309 [18] (Wood CJ). See also *AB v The Queen* (1999) 198 CLR 111, 152 (Kirby J); *R v Davies* (1978) 68 Cr App R 319, 322 (Lord Widgery LCJ, Cumming-Bruce LJ and Drake J); *DPP v Faure* (2005) 12 VR 115, 121 [28] (Williams AJA, Callaway and Batt JJA agreeing at 116 [1]–[2]); *Tognolini v The Queen [No 2]* [2012] VSCA 311 [22] (Maxwell P, Buchanan and Redlich JJA); *Mokbel v The Queen* (2013) 40 VR 625, 656 [117] (Maxwell ACJ, Buchanan and Weinberg JJA); *Yat* [2024] VSCA 93 [81] (Walker and Boyce JJA); *Callanan v Attendee X* [2013] QSC 340 [36]–[45] (Applegarth J); and *DPP v Pearson* [2023] VSC 483 [70]–[90] (Jane Dixon J).

hearing that there was every reason to conclude that the applicant's sentencing conditions would continue for the foreseeable future. It had been submitted, however, that to sentence on the basis that the applicant might spend the entirety of her sentence in such conditions was getting into the realm of prediction or mere speculation.

Ground 2

733 The applicant submitted that appellate intervention on the basis of manifest inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, the Court is 'driven to conclude that there must have been some misapplication of principle'.[220] That test was not met in this case. An onerous term of imprisonment had been fixed, likely to be served in especially oppressive circumstances.

734 The applicant also submitted that the case warranted the exercise of the Court's residual discretion to dismiss a Director's appeal even where the Court is satisfied that a different sentence ought to have been passed.[221] It was submitted that a primary consideration relevant to the exercise of the residual discretion is whether the case raises a question of principle that needs to be addressed for the governance and guidance of sentencing courts or to maintain proper sentencing standards.[222] It was submitted that the present appeal raises no point of principle, in view of the unusual combination of circumstances it presents.

Analysis

Ground 1

735 In our opinion, the Director's first ground cannot succeed. In circumstances where the prosecution accepted at the plea hearing that there was 'every reason to conclude' that the applicant would continue to be held under the onerous conditions in which she was then imprisoned 'for the foreseeable future', the judge's finding that 'at the very least, there is a substantial chance' that the applicant would 'continue to be held in solitary

220*Craft (a pseudonym) v The Queen* [2021] VSCA 66 [25] (Priest and Niall JJA), citing *R v Pham* (2015) 256 CLR 550, 559 [28] (French CJ, Keane and Nettle JJ) ('*Pham*'); *DPP v Dalgliesh (a pseudonym)* (2017) 262 CLR 428, 447−8 [59] (Kiefel CJ, Bell and Keane JJ); *DPP v Zhuang* (2015) 250 A Crim R 282, 295–300 [39]–[49] (Redlich, Priest and Beach JJA); [2015] VSCA 96; and *DPP v McInnes* [2017] VSCA 374 [75] (Priest and Beach JJA).

221*DPP v Karazisis* (2010) 31 VR 634, 657–8 [100] (Ashley, Redlich and Weinberg JJA) ('*Karazisis*').

222*Green v The Queen* (2011) 244 CLR 462, 477 [36] (French CJ, Crennan and Kiefel JJ).

confinement for years to come'[223] amounted to a difference in degree only. It is hard to see how, in that circumstance, the judge's finding was not reasonably open.

736 That conclusion is confirmed by the fact that the judge's reasons for sentence appear to treat the two formulations as equivalent. The judge said:

> In their written submissions, the prosecution conceded that your conditions of imprisonment are more burdensome than for a mainstream prisoner and that they are likely to remain so for the foreseeable future. The prosecution submitted that this is a 'relevant consideration for sentence'. In oral submissions, the prosecution conceded that this consideration was not just relevant but 'important' and 'weighty', whilst still pressing for life imprisonment with no possibility of parole.
>
> You have effectively been held in continuous solitary confinement for the last 15 months and, at the very least, there is a substantial chance that, for your protection, you will continue to be *held in solitary confinement for years to come*. The Court of Appeal in *Yat v The King* referred without criticism to the observation that 'the adverse health effects of solitary confinement are well established'. I note too that Ms Hosking stated at the plea hearing that 'being separated has negative outcomes for people … we're very aware of that'.
>
> The harsh prison conditions that you have experienced already and *the likely prospect of solitary confinement for the foreseeable future* are important and weighty considerations which should count for something in the sentencing exercise. In my view, the only scope for making them count is by the fixing of a non-parole period.[224]

737 The closeness between the two formulations employed by the prosecution and the judge not only undermines the force of the first ground, it indicates a strong case for exercising the residual discretion in respect of that ground in any event. That is because, to the extent that the two formulations are substantially the same, the Director is seeking to depart from a position taken at the plea hearing. It is also because, in any event and without deciding the first point, the ground raises no issue of sentencing law or wider public importance. It instead seeks to contest shades of meaning in respect of one very specific finding of fact.

Ground 2

738 We therefore turn to the second ground. The ground, read as a whole, raises an overarching claim that the sentences imposed on the applicant are manifestly inadequate. It is expressed as having two elements. The first contends that it was inappropriate for the judge to fix a non-parole period. The second, in the alternative, is that the non-parole period of 33 years is manifestly inadequate. For the reasons that follow, however, the two issues are not truly independent. They are both ways in

223Sentencing Remarks [105].

224Ibid [104]–[106] (emphasis altered) (citations omitted).

which manifest inadequacy may be established, but they are two aspects of a single sentencing exercise.

739 The first limb of this ground references the language of s 11(1) of the *Sentencing Act*, which provides:

> **11 Fixing of non-parole period by sentencing court**
>
> (1) If a court sentences an offender to be imprisoned in respect of an offence for—
>
> (a) the term of his or her natural life; or
>
> (b) a term of 2 years or more—
>
> the court must, as part of the sentence, fix a period during which the offender is not eligible to be released on parole unless it considers that the nature of the offence or the past history of the offender make the fixing of such a period inappropriate.

740 Section 11A(4) provides in respect of a standard sentence offence (which includes the offences in this matter):

> (4) Unless the court considers that it is in the interests of justice not to do so, the court must fix a non-parole period of at least—
>
> (c) 30 years if the relevant term is the term of the offender's natural life; or
>
> (d) 70% of the relevant term if that term is a term of 20 years or more; or
>
> (e) 60% of the relevant term if that term is a term of less than 20 years.

741 The 'relevant term' is the total effective sentence or the sentence for a single offence.[225]

742 The effect of the court not fixing a non-parole period is that the condition for eligibility for parole stipulated in s 74(1) of the *Corrections Act 1986* is not satisfied. While the court does not, and cannot, affirmatively forbid the future release of a prisoner on parole, it imposes sentence in the knowledge that this is the effect of not fixing a non-parole period under the law as it stands.[226]

225*Sentencing Act*, s 11A(5).

226*Crump v New South Wales* (2012) 247 CLR 1, 19–20 [36] (French CJ), 26–7 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), 29 [72] (Heydon J). See also *R v Jamieson* (1992) 60 A Crim R 68, 80 (Gleeson CJ, Lee AJ and Hope AJA agreeing at 80), and compare

743 Section 11(1) expresses the question of inappropriateness to be a matter for the judge's subjective consideration, rather than an objective determination. The fixing of a non-parole period, or otherwise, is described as 'part of the sentence'.[227] In this regard, it is relevant that the High Court has held that the decision whether it is appropriate or not to provide for a prisoner's potential release on parole is to be made having regard to all considerations relevant to the sentencing process generally.[228]

744 These features of s 11(1) serve to confirm that the consideration of whether or not to fix a non-parole period forms part of a single sentencing exercise. The Director correctly submitted that s 11(1) does not create a form of two-stage sentencing. In other words, it would be wrong to conceive of the sentencing judge's task as requiring, first, that the judge pose and answer the question whether it is inappropriate to fix a non-parole period, and only after deciding that question in the negative, proceed to address the length of that period. Instead, s 11(1) prescribes a condition that must be met before a sentencing judge decides not to fix a non-parole period. The 'inappropriateness' condition may appear tautological, but its effect is to ensure that the judge specifically addresses the point as part of the sentencing process and is affirmatively satisfied that a non-parole period is inappropriate, before imposing a sentence to that effect.

745 The provision therefore embodies the caution enunciated by this Court in *R v Coulston*:[229]

> Sentencing judges must remain fully conscious of what has been said in decisions of the highest authority about rehabilitation and the beneficial objects to be served by the fixing of a non-parole period. They will remain well aware that a sentence of life imprisonment with no possibility of parole is a sentence of the utmost severity.[230]

the legislation considered in *Mitchell v The Queen* (1986) 184 CLR 333, 339–40 (Dawson, Toohey, Gaudon, McHugh and Gummow JJ). The court takes no account of any potential change to the law in this respect: *Sentencing Act*, s 5(2AA)(a).

227*Sentencing Act*, s 11(1).

228*R v Shrestha* (1991) 173 CLR 48, 67–8 (Deane, Dawson and Toohey JJ) ('*Shrestha*') (referring to the former *Penalties and Sentences Act 1985*, s 17(2) of which provided that a court was not 'required to fix a minimum term if the court considers that the nature of the offence and the antecedents of the offender render the fixing of a minimum term inappropriate'). See also *Lowe* [1997] 2 VR 465, 487 (Winneke P, Brooking JA and Southwell AJA); *Hunter* (2013) 40 VR 660, 666 [22] (Maxwell P and Coghlan JA).

229[1997] 2 VR 446 ('*Coulston*').

746 Put differently, the 'inappropriateness' question posed by s 11(1) is a reflection of the aspect of the principle of parsimony found in s 5(3), namely that (subject to presently irrelevant exceptions) the court 'must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed'.

747 The literal terms of ground 2 might suggest that the two elements of the ground can be examined separately as part of the manifest inadequacy argument. Even if that were so, despite the elements forming part of a single sentencing exercise, there is a difficulty in proceeding that way in this case. The first limb of the ground appears to assume that, if we formed our own view that it was inappropriate to fix a non-parole period, manifest inadequacy would be established. That in turn assumes that appellate review of the sentence, in so far as it concerns the inappropriateness decision under s 11(1), proceeds according to the correctness standard. In our opinion, the standard for review of a judge's decision as to whether it is inappropriate to fix a non-parole period is *House v The King*, rather than the correctness standard. In particular, the Director would need to establish that it was not reasonably open to the judge to reach the view as to inappropriateness that he did.

748 The applicability of *House v The King* as the relevant standard of review emerges from the construction of the statutory provisions under which the judge's decision was made.[231] The relevant features of s 11(1) for this purpose have already been noted: first, the fact that the question of inappropriateness is posed by reference to what the judge 'considers', rather than any objective criterion; secondly, the fact that the issue is to be addressed as part of the sentence, quintessentially a discretionary matter attracting *House v The King* review (as *HCZ* confirms); and thirdly, because s 11(1) involves a single question rather than a two-stage exercise.

749 Maxwell P and Coghlan JA observed in *Hunter*, in the context of a prisoner's appeal asserting that the sentencing judge's failure to fix a non-parole period produced a manifestly excessive sentence, that:

> In the present case, the ground of manifest excess could only succeed if we were persuaded that it was not reasonably open to the judge to conclude, on the basis of the applicant's offending and past history, that the fixing of a non-parole period was inappropriate. Put another way, it would have to be shown that, if proper weight had been given to all relevant matters, no other conclusion was open but that a non-parole period should be fixed.[232]

750 Similarly, if the inappropriateness question were to be decided on its own, the Director would need to show that, if proper weight had been given to all relevant matters, no

230Ibid 463 (Winneke P, Brooking JA and Southwell AJA).

231*R v HCZ* [2026] HCA 24 [31] (Gageler CJ, Edelman, Gleeson, Jagot and Beech-Jones JJ) ('*HCZ*').

232(2013) 40 VR 660, 663 [10].

other conclusion was open other than that no non-parole period should be fixed. In other words, it was not reasonably open to the judge, having regard to the applicant's offending and past history, to fix a non-parole period.

751 The ground as drafted is not expressed that way. Although the applicant took no point on that account, and the 'reasonably open' test was used in the Director's written submissions, the ground asserts that it 'was inappropriate' to fix a non-parole period. This is another reason why we do not consider it desirable to address the application of *House v The King* to the judge's conclusion as to inappropriateness as a discrete issue on the appeal.

752 The issue then, as with any Director's appeal against sentence on the ground of manifest inadequacy is: was it reasonably open to the sentencing judge to arrive at the non-parole period of 33 years, giving proper weight to all the circumstances of the offending and the offender?[233] The Director must demonstrate that the period fixed was 'wholly outside the range' available to the judge.[234] It must be shown that something has gone 'obviously, plainly or badly wrong'.[235] The Court must be 'driven to conclude that there must have been some misapplication of principle'.[236] If so, the sentencing discretion would be reopened and it would fall to this Court to determine whether a different sentence should be imposed.[237] In accordance with the operation of s 11(1) we have described, that determination by way of resentence would involve this Court considering for itself whether it is inappropriate to fix a non-parole period.

753 On any view, these were heinous crimes. On the judge's findings in his sentencing remarks, which were not challenged on appeal:

233See, eg, *DPP v Tawdros* [2026] VSCA 74 [64] (Emerton P and Walker JA), [102] (McLeish JA); *Karazisis* (2010) 31 VR 634, 662–3 [127] (Ashley, Redlich and Weinberg JJA, Warren CJ and Maxwell P agreeing at 637 [1]).

234 *Karazisis* (2010) 31 VR 634, 662–3 [127] (Ashley, Redlich and Weinberg JJA, Warren CJ and Maxwell P relevantly agreeing at 637 [1]).

235 *DPP v Lombardo* (2022) 302 A Crim R 329, 346–7 [95] (McLeish, Niall and Kennedy JJA); [2022] VSCA 204, citing *Ayol v The Queen* [2014] VSCA 151 [30] (Maxwell P); and *Clarkson v The Queen* (2011) 32 VR 361, 384 [89] (Maxwell ACJ, Nettle, Neave, Redlich and Harper JJA).

236 *Pham* (2015) 256 CLR 550, 559 [28(7)] (French CJ, Keane and Nettle JJ).

237*Criminal Procedure Act*, ss 289(1), 290(1).

(a) the applicant invited four family members on 16 July 2023 to lunch, with the intention of killing them all;[238]

(b) at the lunch, on 29 July 2023, the applicant deliberately served the victims poison meals, intending to kill them;[239]

(c) after learning on the day after the lunch that some or all of the guests had been hospitalised, the applicant falsely insisted that the mushrooms in the meal had been sourced from shops and not foraged, thereby delaying the administration of drugs targeted at treating death cap mushroom poisoning;[240]

(d) the applicant's intention to kill was ongoing after the guests were hospitalised;[241]

(e) the applicant anticipated that her guests would endure severe illness and protracted suffering;[242] and

(f) the applicant engaged in an elaborate cover-up of her guilt.[243]

754 As the judge found, the offending involved an enormous betrayal of trust. The victims were all relatives of the applicant by marriage who had been good to the applicant and her children over many years.[244] There was no evidence of remorse.[245]

755 As has been noted, there was little by way of mitigation, the applicant relying at the plea hearing only on the hardship caused by the conditions of her imprisonment. But it is important not to leave out of account that the case also involves the absence of some aggravating features that are commonly seen in instances of extremely serious offending. In particular, the applicant has no prior convictions and, while protection of the community is, by force of statute, the principal purpose of sentencing the applicant

238Sentencing Remarks [50].

239Ibid [1], [26].

240Ibid [51].

241Ibid.

242Ibid [52].

243Ibid [54].

244Ibid [55].

245Ibid [89].

for the three murders,[246] it is not put that she presents a significant threat to the community.

756 The age of the applicant is also relevant. By the time the 33-year non-parole period expires on 2 November 2056, she will be 82 years old.[247]

757 The Director invited us to have regard to the fact that the non-parole period of 33 years was only three years longer than the minimum specified in s 11A(4). The minimum 30-year period is not, however, a sentencing guidepost. It is just a floor.[248] That is apparent from the fact that, unlike a statutory maximum sentence, the minimum periods in s 11A(4) do not apply where the court considers that it is in the interests of justice to fix a lesser period.

758 Be that as it may, we are driven to conclude that a non-parole period of 33 years fails to reflect the calculated criminality of the applicant in committing three murders and attempting a fourth. It also fails to reflect the grave seriousness of the judge's findings that the applicant's murderous intent was sustained for nearly three weeks, from the time of the invitations, through to the preparation and serving of the poisonous meal, and then further throughout the protracted suffering and ultimate deaths of the three murder victims. The applicant's conduct was characterised by an elaborate series of deceptions, including the false cancer claims deployed to explain the absence of the children, the false denials of having foraged for mushrooms, the repeated false assertions as to the source of the mushrooms and the destruction of evidence. The offending was carefully planned and deliberate. It represented a cruel breach of trust to members of the applicant's extended family.

759 The taking of three lives (and the attempt on another) in these circumstances called in our view for much stronger denunciation. A non-parole period represents the minimum time that the court considers that justice requires to be served, having regard to all the circumstances of the case.[249] In deciding the length of the non-parole period, due weight needed to be placed on the sentencing objectives of condemnation and denunciation. The following observations of the Court in *Shaptafaj* are pertinent:

246*Sentencing Act*, s 6D.

247The applicant was arrested and remanded in custody on 2 November 2023. Her date of birth is 30 September 1974.

248*Watkins (a pseudonym) v The King* [2023] VSCA 203 [83] (Priest JA and J Forrest AJA) (referring to s 11A(4)(c)).

249*Power v The Queen* (1974) 131 CLR 623, 629 (Barwick CJ, Menzies, Stephen and Mason JJ); *Bugmy v The Queen* (1990) 169 CLR 525, 530–1 (Mason CJ and McHugh J), 536 (Dawson, Toohey and Gaudron JJ).

> Specifically, it was necessary that the sentence be sufficient to vindicate, unequivocally, the primary value that our society places on each individual human life. The … murders committed by the applicant in this case each constituted an abhorrent violation of that most fundamental value.[250]

760 Although the sentences of life imprisonment imposed in this case served these purposes, the non-parole period indicated that justice would be served if the applicant was to be released after 33 years. In our respectful opinion, that conclusion was not reasonably open. The sentences must be set aside on that account.

761 The sentencing discretion being reopened, and there being no dispute about the life sentences imposed, it is necessary for this Court to decide whether to fix a non-parole period and, if so, to determine its length. We observe at the outset that, while the hardship caused by the conditions of the applicant's imprisonment is a relevant sentencing consideration, it does not compel the fixing of a non-parole period. That much is clear from this Court's decision in *Hunter,* in which the majority upheld a sentence of life imprisonment without parole imposed after a guilty plea. The majority explained:

> It may be accepted that, but for the plea of guilty, the applicant would have had no prospect at all of having a non-parole period fixed. Certainly, in a case as grave as this, the entry of a plea of guilty was a *necessary* condition of the fixing of a non-parole period. But it is not correct, in our view, to view it as also being a *sufficient* condition. As the sentencing judge correctly pointed out, this Court has recently reaffirmed that some cases are of such gravity that the maximum sentence remains appropriate notwithstanding the entry of a plea of guilty.[251]

762 The parties substantially agreed, as they did before the sentencing judge, that there are no comparable cases to which resort may usefully be had in order to identify current sentencing practices for the purpose of sentencing the applicant. By virtue of the present offences being standard sentence offences, current sentencing practices are confined, in any event, to sentences imposed under the standard sentencing scheme.[252]

763 The advent of the standard sentence scheme does not, however, deny the precedential authority of decisions of this Court in cases decided under previous legislation. Those decisions remain authoritative, even though they cannot be relied on as indicators of current sentencing practices.

250[2023] VSCA 91 [58] (Priest, Kaye and Hargrave JJA).

251(2013) 40 VR 660, 663–4 [14] (emphasis in original) (citations omitted). See also, as to sentences of life imprisonment after a guilty plea, *Phillips v The Queen* (2012) 37 VR 594, 613 [67] (Redlich JA and Curtain AJA, Maxwell P agreeing at 598 [1]–[2]); *Shaptafaj* [2023] VSCA 91 [54]–[57] (Priest, Kaye and Hargrave JJA).

252*Sentencing Act*, s 5B(2)(b).

764 Some of the considerations bearing on whether to fix a non-parole period in a case where more than one person has been murdered were canvassed by Winneke P, Brooking JA and Southwell AJA in *Coulston*:

> As regards what may for brevity be called multiple murders, generally speaking at all events, the fact that the offender has committed not one but two or more murders is an important matter in considering whether to decline to fix a non-parole period. Judges who sentence murderers must not fail to have a proper regard to what used to be called the sanctity of human life … in considering what justice according to law requires having regard to the terms of s 11(1). Perhaps in recent years other considerations have at times been allowed to overshadow this. The criminal who kills not one but two, three or four human beings can be given no longer sentence than the killer of a single victim. Two, three or four life sentences, served, as they must be, concurrently, are of the same duration as a single one. Differentiation is possible only as regards the non-parole period — by increasing that period or by refusing to fix one at all. Of course, everything depends on the circumstances. The perpetration of multiple killings may in a given case not even warrant the imposition of a life sentence, let alone the further momentous step of denial of the possibility of parole. We wish only to make it plain that, while everything depends on the circumstances of the particular case, those who kill a number of victims in horrendous circumstances, where no substantial factor pointing towards clemency is present, must in general expect to be seriously considered for the possible imposition of life sentences unmitigated by the hope of parole.[253]

765 The majority in *Hunter* endorsed this passage.[254] The last observation in it applies to the present case. The Court in *Coulston* had earlier warned against 'undue reluctance' to refrain from fixing a parole period.[255] They had gone on to say, in terms we have already partly set out:

> Sentencing judges must remain fully conscious of what has been said in decisions of the highest authority about rehabilitation and the beneficial objects to be served by the fixing of a non-parole period. They will remain well aware that a sentence of life imprisonment with no possibility of parole is a sentence of the utmost severity. It is a dreadful sentence, at all events for an offender who is not of an advanced age. But dreadful crimes, especially where the past history is bad, may require a dreadful punishment.[256]

766 These last observations were cited by the sentencing judge in *Cardamone*.[257] In that case, this Court upheld a sentence of life imprisonment without parole, having quoted

253[1997] 2 VR 446, 463.

254(2013) 40 VR 660, 665 [20].

255[1997] 2 VR 446, 463.

256Ibid.

the above passage from part of the reasons of the sentencing judge.[258] The observations remain a useful guide and we have had regard to them to the present case.

767 The Court in *Coulston* also warned, in terms again adopted by the majority in *Hunter*,[259] that:

> [S]entencing and appellate judges must not allow their familiarity with horrifying crime to blunt their sensibility. Sentencing is governed by the intellect, but the emotions also have their proper part to play. These include abhorrence of what is abhorrent as well as merciful compassion. Often a moral judgment from which emotion cannot be absent must be made about the wickedness of a crime. Victim impact statements may … serve as a reminder to judges to whom vile crimes are no novelty of their effect on the indirect victims and of the lasting grief and legitimate indignation to which they may give rise.[260]

768 We record that, as discussed earlier in these reasons, we have taken account of all considerations relevant to the wider sentencing task in deciding the inappropriateness question posed by s 11(1).[261] That includes the applicant's age.[262] It also includes the prospect that she will be held for a considerable time in highly restrictive conditions, as the judge recognised.

Conclusion

769 As already noted, the applicant's murderous intent dated back to the invitations to lunch. It persisted through the lunch when the poison was administered and for nearly a week after that, during which time the applicant repeatedly tried to hide the truth about the source of the mushrooms, even as the victims continued to suffer. This offending was extraordinarily cold and calculated and stands to be denounced in the strongest terms.

770 Necessarily, we have given the question whether it is inappropriate to fix a non-parole period anxious consideration, in light of the gravity of such a conclusion and the

257[2017] VSC 493 [93] (Lasry J).

258*Cardamone* [2019] VSCA 190 [77] (Ferguson CJ, Maxwell P and Weinberg JA).

259(2013) 40 VR 660, 665 [20] (Maxwell P and Coghlan JA).

260[1997] 2 VR 446, 463.

261*Shrestha* (1991) 173 CLR 48, 67–8 (Deane, Dawson and Toohey JJ): see n 228 above.

262*Lowe* [1997] 2 VR 465, 488 (Winneke P, Brooking JA and Southwell AJA), cited with approval in *Hunter* (2013) 40 VR 660, 666 [21]–[22] (Maxwell P and Coghlan JA).

different view to which the experienced sentencing judge came. But the features of the offending identified above lead each of us to conclude that this is a case of such shocking criminality that it is inappropriate to fix a non-parole period.

771 This is not a case for the exercise of the residual discretion. It would be perverse to decline to resentence the applicant, having identified the need for proper denunciation of her crimes.

772 The Director's appeal will be allowed on ground 2. The non-parole period fixed by the judge will be set aside and in its place it will be ordered that the Court considers that the nature of the offences makes it inappropriate to fix a non-parole period.
