FEDERAL COURT OF AUSTRALIA

Roberts-Smith v Fairfax Media Publications Pty Ltd (Closed Court Reasons) [2025] FCAFC 67

File numbers:

NSD 689 of 2023

NSD 690 of 2023

NSD 691 of 2023

Judgment of:

PERRAM, KATZMANN AND KENNETT JJ

Date of judgment:

16 May 2025

Legislation:

Evidence Act 1995 (Cth), ss 76, 77, 79

Cases cited:

Dasreef Pty Limited v Hawchar (2011) 243 CLR 588

Ludmila Stern, "Non-English speaking witnesses in the Australian legal context: the War Crimes Prosecution as a

case study", Law Text Culture 2, 1995, 6-31

Division:

General Division

Registry:

Sydney

National Practice Area:

Other Federal Jurisdiction

Number of paragraphs:

223

Date of hearing:

5 - 9, 12, - 16 February 2024

NSD 689 of 2023

BETWEEN:

BEN ROBERTS-SMITH

Applicant

AND:

FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357

720) (and others named in the Schedule)

First Respondent

NSD 690 of 2023

BETWEEN:

BEN ROBERTS-SMITH

Applicant

AND:

THE AGE COMPANY PTY LTD (ACN 004 262 702) (and others

named in the Schedule)

First Respondent

NSD 691 of 2023

BETWEEN:

BEN ROBERTS-SMITH

Applicant

AND:

THE FEDERAL CAPITAL PRESS OF AUSTRALIA PTY LTD

(ACN 008 394 063) (and others named in the Schedule)

First Respondent

REASONS FOR JUDGMENT

THE COURT:

INTRODUCTION

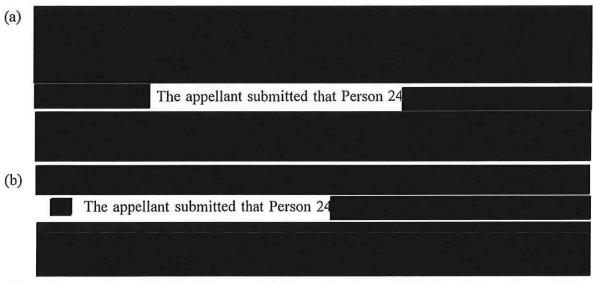
These reasons deal with the issues arising on the appeal from the primary judge's closed court reasons (CCJ) and the submissions of the parties in closed court. Familiarity with defined terms used in the open court judgment is assumed.

WHISKEY 108

In this part of the reasons, we deal with the appellant's challenges to the credibility of Persons 14 and 24 and his submissions concerning various contemporaneous documents. In response, the respondents advanced submissions in writing about the effect of Person 27's evidence and the terms of the Exploitation Report, which were said to provide powerful support for the conclusion that the appellant had committed the crimes alleged against him. We have not found it necessary to deal that aspect of the respondents' submissions.

The appellant's submissions concerning Person 24 (particular 6)

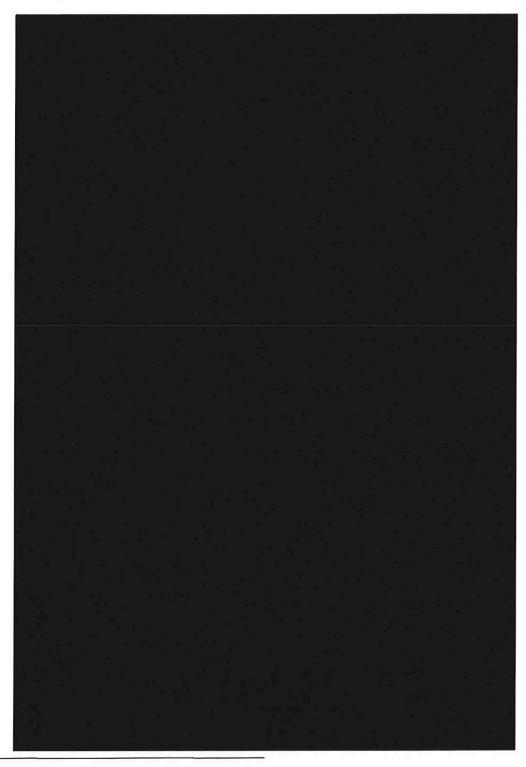
The appellant submitted that the primary judge had erred in placing any weight on the evidence of Person 24. He raised three matters:

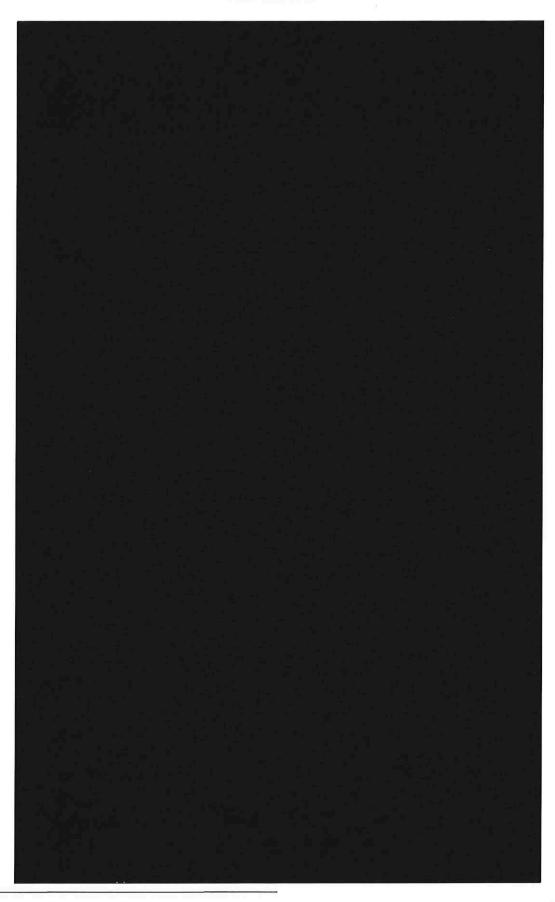


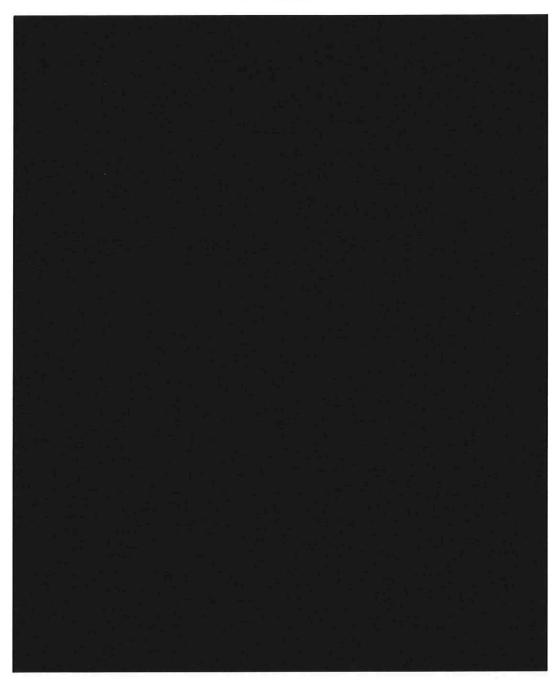
(c) Persons 14 and 24 had discussed their recollections of Whiskey 108 so Person 24's evidence was materially contaminated. 4 Submissions (a) and (b) concern

It is convenient to begin with the relevant portions

of the transcript of that interview.







To assist in understanding with clarity the nature of the appellant's submissions about Person 24 it is convenient to begin by observing that

Having made these initial observations, it is necessary to consider the three submissions the appellant advanced about Person 24.

Person 24's evidence at trial about his conversations with Person 14

6	Person 24 gave evidence in closed court on 14 April 2022 and was cross-examined about hi	is
	discussions with Person 14. At T11/26–29 this exchange with the cross-examiner occurred:	

Did you discuss with Person 14 Person 14 your respective recollections about what occurred at Whiskey 108? --- No.

You're lying to the judge, aren't you? --- I am not, your Honour.

- While it is literally true that the cross-examiner first asked whether Person 24 had had a conversation with Person 14 at any time this is not the only possible meaning. Nor, in context, is it the most likely meaning. Moreover, that is not what the witness took the question to mean. The question suggested a close temporal connection between the conversation and Person 24's As the respondents put it, the premise of the cross-examiner's question was wrong. Read in context, Person 24's response to the question was a denial that he had discussed with Person 14 He never denied speaking to Person 14 about the events at Whiskey 108.
- The appellant's submissions about this evidence ignored this important aspect of the meaning of the cross-examiner's question. This cross-examiner put to Person 24 at T21/17–25 of the 14 April 2022 closed court transcript:



He was then asked some further questions about that statement before being asked this question at T22/1-7 of the 14 April 2022 closed court transcript:

Does that refresh your memory

-- No. It

does not. As discussed your Honour, we'd never – we did not discuss that incident. If it was discussed, it would have been in the patrol room most likely.

You're lying aren't you? --- No, I'm not.

10	There was no basis for this question.
	Person 24's evidence about this was clear. He did have discussions with Person 14
	about the events at Whiskey 108
	We therefore reject the appellant's submission.
11	In his reply submissions, the appellant submitted that there was "overwhelming evidence" that Person 24 had spoken to Person 14 about the events at Whiskey 108 on numerous occasions.
	However, that is not the issue. The appellant's submission in chief was that Person 24
	The respondents'
	submission, which we have accepted, was that
	It is not a reply to that submission to submit that there was overwhelming evidence that Persons 14 and 24 had discussed Whiskey 108 on many occasions. The appellant's reply submission is therefore misconceived.
12	At [1.10] of his reply submissions, the appellant advanced a submission which was to the effect that Person 24's evidence about his discussions with Person 14 about the events at Whiskey 108 was inconsistent. This was not a submission in reply because it did not respond to the respondents' submission we have explained in the preceding paragraphs. The appellant's submission will be disregarded.
	Person 24's
13	The appellant submitted that
	He told the primary judge that he saw the appellant frogmarch a man out of the compound and execute him with a burst of machinegun fire before experiencing a stoppage, which he cleared as he walked back into
	the compound.

The appellant's submission is overstated.

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It may be accepted However, the appellant's submission that there were no circumstances in which the primary judge could ever accept Person 24's evidence — the submission he made to this Court when asserting that Person 24's evidence is "completely unreliable" — is wrong. The primary judge was not bound to reject Person 24's evidence

the rejection of a witness's evidence depends upon the nature of the inconsistency, the explanation for the prior inconsistent evidence, and any other relevant contextual matters.

It is clear from the primary judge's reasons that he gave anxious consideration to whether Person 24 should be accepted as a reliable witness. After considering the inconsistencies in his evidence (and other problems not raised on appeal), the primary judge said this at CCJ[64]–[66]:

Person 24's explanation for the differences

was difficult to follow. He
referred to protecting the soldier and, in that context, he was referring to the
applicant

He also referred to supporting Person 4 and later he mentioned
Persons 4, 66 and 56 and the context of that observation was the more detailed
account that he gave to this Court. He also mentioned his mental health
difficulties

- Despite the inconsistencies and other difficulties with Person 24's evidence, I did not consider that Person 24 was deliberately dishonest in the evidence he gave before this Court. With respect, I formed the view that he was somewhat unsophisticated and, at times, had difficulty in understanding the questions. He seemed impulsive and somewhat disinhibited on occasions.
- Person 24's evidence must be approached with considerable caution. Had the respondents' case about the alleged execution of EKIA57 by the applicant depended solely upon the evidence of Person 24, then there may well have been an insufficient basis to find the case proved, having regard to the proof required in the case of such a serious allegation. However, Person 24's evidence does not stand alone and it is to be considered with the evidence of Persons 14 and 41.
- We detect no error in this approach. We do not accept the appellant's submission that it was not open to the primary judge to proceed in this way. His submission in reply that the primary judge did not give adequate regard to the lack of Person 24's credibility cannot be sustained in light of the above-quoted paragraphs.

Unreliability arising from discussions between Person 24 and Person 14

- There is no doubt that Person 14 and Person 24 discussed events at Whiskey 108 perhaps many times but there is no evidence that they did so in the lead up to the IGADF interview or Person 24's testimony before the primary judge. This is not then a case where it may be said that they colluded about their evidence so that their evidence was contaminated to the extent of that collusion.
 - The primary judge was aware that Person 14 and 24 had discussed events at Whiskey 108 including probably in the patrol room on the day of the killings and maybe later. It is not clear that the present argument was pursued before the primary judge because his Honour does not record it as one of the submissions made to him. We are unpersuaded that the fact that Person 24 and Person 14 had discussed events at Whiskey 108 since 12 April 2009 means that the primary judge could not accept Person 24's evidence. Having read Person 24's evidence with care, we are not inclined to think that there are any reasons for interfering with the primary judge's conclusions about him. We therefore reject the submission.
- We also think it significant that Person 41 corroborated Person 24's testimony when there was no evidence that Person 41 had had contact with Person 24 since the mission.

The appellant's submissions concerning Person 14

- In his written submissions in chief the appellant advanced only one argument concerning Person 14 and this was that his evidence was made unreliable because he had discussed the events at Whiskey 108 with Person 24 prior to his IGADF interview. This submission had been advanced to the primary judge but the appellant submitted that it had not been dealt with.
- We accept that his Honour appears not have addressed the appellant's submission about the significance of the discussions between Person 14 and Person 24 about Whiskey 108 in respect of Person 14's credibility. Assuming this to constitute an error, we are not persuaded that it has been shown in any way to be material.
- As we have explained, the fact that the two men had discussed the events at Whiskey 108 was known to the primary judge since his Honour dealt with the evidence concerning this when he assessed the evidence of Person 24. It seems to us unlikely that it slipped his Honour's mind when assessing the evidence of Person 14. In any event, the fact that Person 14 and Person 24 had discussed events at Whiskey 108 does not come close to demonstrating that Person 14's evidence was for that reason unreliable. Any assessment of that submission would need to focus on the nature of the discussions and their purpose. For example, were the discussions evidence of collusion? Did the nature of the conversations have the effect of blurring each witness's recollection? Were they discussions which did not have the effect? It is not permissible to subsume serious submissions of this kind into a general a submission that, because two witnesses had discussed an event which they both saw, their evidence is unreliable. None of this was attempted. We reject the submission.
- In his oral submissions in closed court, Mr Moses repeated the submissions made in open court concerning the unreliability of Person 14 in light of Mr Masters' file note. With one exception, nothing was said by Mr Moses which we have not dealt with in our open court reasons.
- The one exception concerns a submission that Person 14 had told a lie. The appellant's oral submissions about this were a little unclear. It was submitted that Person 14 had said in open court that the first time he had discussed the events at Whiskey 108 had been in April 2018

 The Court was provided with a transcript reference to the open court transcript at T1566/20–30:

And you told us yesterday that the first time was 2017 when you told anyone about the

narrative you relayed to the court about what you allege you saw and heard on 12 April 2009 concerning Whiskey 108; that was correct?---I did say that and I believe that was thereabouts, yes.

This shows that Person 14 said that he had not spoken about Whiskey 108 to anyone before 2017 (not 2018)

Next, the submission mentioned that Person 14 had spoken to Mr Masters in February 2018, so that the statement at T1566/20–30 was not true. This submission only makes sense if the reference to 2017 in the transcript is taken to be 2018. Since Person 24

appropriate to proceed on the basis that 2018 is in fact the correct year, even though the question the appellant relies upon in this Court refers to 2017.

Next senior counsel referred to Person 14's evidence in the open court transcript at T1472/–2 which was in these terms:

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After you met with the representatives of the media in 2018, did you tell the Department of Defence?---I did not.

It is possible this is what the submission recorded above is driving at, however, it is quite unclear. Clearer, however, is a submission recorded in the 8 February 2024 closed court transcript at T81/36 where the Court was taken to a closed court exhibit. That was a document signed by Person 14. By way of background, on 30 June 2020 Person 14 had an interview with a warrant officer and as a result completed a form headed "Record of Conversation". The discussion concerned unauthorised contact with the media. The form reminded Person 14 that it was an offence to speak to the media without authorisation and it noted that Person 14's unit had been specifically directed not to speak to the media. The form included these two questions and handwritten answers by Person 14:

Have you contacted, been contacted by or communicated with any journalist or media representative in the past ten years? Yes.

If so what was the nature of this engagement? Ben Roberts-Smith: IRT SOTG/2Sqn - Ops, June 2018, Canberra.

As at 2018, the appellant was employed by 7 West Media. The effect of this form, which Person 14 signed, was that he was representing that he had not spoken to any member of the media, apart from the appellant, about the events at Whiskey 108. In closed court on 8 February 2024, the appellant submitted that the answer must be a lie, presumably because it

seems not to be in dispute that Person 14 had spoken with Messrs Masters and McKenzie in February 2018.

At T82/27 in the 8 February 2024 closed court transcript, the appellant submitted in this Court that Person 14 had admitted lying about this at trial in closed court but the Court was not provided with the transcript reference (and this part of the appellant's case does not appear in his written submissions). It is likely that the missing reference is at T9/46-10.8 in the 9 February 2022 closed court transcript where Person 14 admitted he had lied in the form to cover up the fact that he had had contact with Mr Masters and McKenzie.

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We were not taken to any submission made by the appellant in closed court about the significance of this lie, apart from the appellant's general submission that Person 14's contacts with journalists should be taken to undermine his credibility, and there does not appear to be any treatment of it in the primary judge's closed court reasons. But the primary judge dealt in his open court reasons with the fact that Person 14 admitted that he had been dishonest with the Defence Department in his dealing with journalists. At J[750] his Honour gave extensive reasons for why he thought that there were acceptable reasons for having made this false statement:

Fourthly, Person 14 was cross-examined extensively about his contact with journalists. Save and except with respect to alleged inconsistencies between his account as given to the Court and his account as given to journalists, Person 14's dealings with journalists are not relevant to any matter of substance, or his credit, in this case. The respondents accept that Person 14 was not at the start completely honest in answering questions about his dealings with journalists. Initially, Person 14 did not wish to speak about that topic and he indicated he was not willing to give evidence about it even with the protection of a certificate under s 128 of the Evidence Act. The respondents submit that Person 14 candidly accepted that he was dishonest about his contact with the media when asked by the ADF. Person 14 explained that the reasons he had been untruthful with the ADF was because he was focussed on self-preservation, security and safety, because in that period of time people who were seen to have spoken to the media were being targeted and because there was a quick turnaround for the record of conversation and he was under a lot of pressure. The record of conversation was conducted with the unit at short notice in an attempt to determine who had disclosed information to the media about an address given to the unit by Special Operations Commander Australia (SOCAUST). The respondents submit that it is clear from the evidence that there was a very strong feeling within the regiment against members who had spoken to the media. Person 7 gave evidence that at a meeting there was concern being raised about people speaking to the media rather than following proper processes and that view was put, according to Person 7, "very strongly". The respondents submit that, in the circumstances outlined, Person 14's lack of complete honestly was confined to a discrete topic, of no substantive relevance to these proceedings, in circumstances where there were particular reasons for him to fear personal and professional consequences if he were to speak candidly. They submit that Person 14's initial lack of complete candour about his contact with journalists does not provide a basis not to accept his evidence on other issues.

In his submissions in closed court, the appellant did not address why this reasoning was erroneous. On the face of it, these appear to us to be entirely appropriate reasons for the primary judge to have accepted Person 14's evidence even though he admitted to having lied to the Department of Defence about his dealings with journalists.

As we have said, we have had considerable difficulty in understanding the nature of the appellant's submissions on this matter in closed court, a problem no doubt exacerbated by the failure of the appellant to include any reference to this in his closed court written submissions and the unexplained decision to repeat most of his open court submissions on Person 14 in his oral argument in closed court. However, we proceed on the basis that the appellant intended to submit that Person 14 had admitted to lying to the Department of Defence and this meant that it was not open to the primary judge to accept his evidence. It will be apparent that we do not accept this submission.

Contemporaneous documents (particulars 7 and 8)

The appellant's written submissions

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The appellant's written submissions in closed court concerned a document entitled "Mentoring and Reconstruction Task Force Report" (Exhibit R284), dated 12 April 2009. It contains this statement

It is also relevant to know that the Sametime chat records for Whiskey 108 (Exhibit R178) record that the compound was declared secure at approximately 1706 local time,

At trial, a large issue was whether the compound had been declared secure at the time the tunnel had been discovered. It was the appellant's case that the tunnel was found and cleared before the compound had been declared secure (and that when the tunnel had been discovered, no men had been found within it).

- The appellant relied upon the Mentoring and Reconstruction Task Force Report to support his case that the engagements of the old man and the man with the prosthetic leg had occurred before the compound had been declared secure and that they were thus killed no later than 1710. In submissions recorded by the primary judge at CCJ[40]–[43], he submitted that the report was the only contemporaneous evidence indicating their time of death and should be relied on for that purpose.
- A step along the way in that submission (recorded by the primary judge at CCJ[40]) was a subordinate submission that the total of 10 EKIAs referred to the Mentoring and Reconstruction Task Force Report was subsequently confirmed to be nine in the Patrol Debrief (Exhibit R192.1), which it will be recalled referred to an engagement with two squirters. This is because, as the appellant submitted, the two squirters were included in the report's reference to
- Among other reasons, the primary judge rejected this submission because he did not think that the documents on which the submission depended (the Patrol Debrief and the Mentoring and Reconstruction Task Force Report) were "sufficiently clear to enable the conclusions he seeks to be drawn".
- In this Court, the appellant did not seek to revive his submission that the Mentoring and Reconstruction Task Force Report showed that the two men had been killed before the compound was declared secure. Instead, he sought to utilise the subordinate submission we have identified above to advance an argument that the 10 EKIAs referred to in it included the old man and the man with the prosthetic leg. Whereas at trial this was as part of an attempt to show that the men had been killed before the compound had been declared secure, in this Court the gravamen of the submission is that the document is evidence that the old man and the man with the prosthetic leg were killed in a lawful engagement. Here the reasoning is that they must be among the 10 EKIAs referred to, hence that they were EKIAs and therefore that they were killed in lawful engagements.
- The primary judge did not assess the appellant's subordinate submission. His Honour was not prepared to utilise the Mentoring and Reconstruction Task Force Report on the question of the timing of when the compound was declared secure. Perhaps recognising this eventuality, the appellant submitted that "[t]o the extent that the primary judge rejected the proposition that the

reference to did not include [scil. included] the old man and the man with the prosthetic leg, there was no objective basis for his Honour to do so".

- Since we do not think that the primary judge made such a finding, the question then becomes whether this Court can find that the primary judge erred in making a finding his Honour did not make. Posed in those terms, the question tends to answer itself.
- The appellant then confronts the difficulty that there is no finding by the primary judge that the 10 EKIAs referred to in the Mentoring and Reconstruction Task Force Report in fact included the old man and the man with the prosthetic leg. Assuming all procedural obstacles in the appellant's favour, the question would then arise whether this Court should make its own finding to that effect.
- Although the appellant submitted that the evidence provided no objective basis for the finding the primary judge did not make, he did not explore the evidence in a way that would permit this Court to form its own view of the matter. The respondents, however, did make submissions about this. They submitted that four of the contemporaneous documents produced on the day were inconsistent in their treatment of the old man and the man with the prosthetic leg.
- The first of these documents was an intelligence report dated 12 April 2009 produced at 2300DE entitled "Australian Special Operations Task Group TF66 Intelligence Report 004-09" (Exhibit R182). It includes a statement that

The primary judge addressed this CCJ[9]-[16]. He noted that the respondents submitted at trial that the three insurgents referenced by the intelligence report were those engaged by Gothic 4 en route to Whiskey 108. The primary judge then explained that the appellant, in contrast, submitted that the Court should not draw that inference and that instead one of the three people in the intelligence report must be the insurgent the appellant testified to killing (namely, the man with the prosthetic leg). His Honour rejected the appellant's submission on the basis that the three deaths at the northern end of the compound (including the appellant's engagement on his own account) could not be said to have occurred "en route" to the compound and accepted the respondents' submission, it being uncontroversial that G Troop approached the compound from the south. It is clear that

the primary judge's conclusion about this was correct. What this means is that this report makes no mention of the old man or the man with the prosthetic leg.

The other three reports seem to contain conflicting, or at least inconsistent information in relation to the old man and the man with the prosthetic leg.

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- The second report was the Patrol Debrief. As we explained in the open court reasons, it refers to the old man and the man with the prosthetic leg as squirters. The primary judge concluded that this statement could be sourced to Person 5 and was therefore unreliable.
- The third report was the SUPINTREP report dated 15 April 2009 (Exhibit R192.2). The respondents submitted that it refers to the man with the prosthetic leg as a body found five metres from the northwest corner of Whiskey 108 but makes no mention of the old man. In his submissions, the appellant accepted it was likely that the body referred to there was that of the man with the prosthetic leg.
- The fourth report was the operational summary dated 5 July 2009 (Exhibit A.10.1.6). It makes no mention of the deaths of the old man or the man with the prosthetic leg.
- This suggests that the official records in relation to the deaths of the old man and the man with the prosthetic leg are unreliable. The two men do not appear in the first report at all; they are misdescribed in the second as squirters; the old man is not mentioned in the third; and both men have disappeared from the fourth. We therefore accept the respondents' submissions about this. It is apparent that the official records on the day are contradictory on the deaths of the two men. Recourse to the whole body of the reports shows that the appellant's central submission in open court that the official records are inherently reliable cannot be accepted in relation to the old man and the man with the prosthetic leg. In these circumstances, we do not consider that the documents are at all probative on the question of the reliability of the eyewitness testimony of Persons 14, 24 and 41.
- We would not therefore find that the reference to the 10 EKIAs in the Mentoring and Reconstruction Task Force Report includes the old man and the man with the prosthetic leg. We do not consider that it would be safe to act on any of these reports for the reasons we have just given.

The appellant's oral submissions

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In his oral argument, the appellant submitted that it could not be said that any of the four contemporaneous documents, apart from the Patrol Debrief, could be laid at the feet of the appellant or Person 5. Since the primary judge did not suggest that any of the contemporaneous documents apart from the Patrol Debrief were unreliable because they could be sourced to Person 5 or the appellant, this submission appears to go nowhere.

In relation to the Operation Harpoon Exploitation Report (Exploitation Report) (Exhibit A10.1.11) the appellant submitted that the primary judge had erred at CCJ[33] by referring to PUCs, that is, persons under control or confinement, rather than PCs, that is, patrol commanders. But the appellant did not submit that the error was material to anything and was accepted to be a typographical error. The appellant then developed a submission that many people were involved in the preparation of the Exploitation Report including Person 18. The report has detailed information about the bodies of the old man and the man with the prosthetic leg. It refers to both as EKIA and neither is suggested to be a PUC.

The appellant's submission at T55.37-47 of the closed court transcript dated 8 March 2024 was that Person 18 could not be a reliable witness where he gave evidence of having seen the old man placed under control whereas the Exploitation Report into which he had substantial input does not refer to the old man as a PUC. The primary judge does not record any such submission. That is because the submission made about Person 18 in closed court at the trial was different. That submission appears at T7/19-20 in the closed court transcript for 26 July 2022. The submission was that the man who Person 18 saw in the courtyard could not be the man who appears in the Exploitation Report because, if that were case, Person 18 would have said so. This involved accepting the reliability of Person 18 in relation to the Exploitation Report and the photographs in it of the old man. It is not permissible to adopt the opposite position on appeal and argue that the Exploitation Report shows that Person 18 was not a reliable witness. In any event, even if that were not the case, we would not accept the submission for a number of reasons. First, it assumes that Person 18 would have recognised the body of the old man in the photographs as the old man he had seen. While it is easy to imagine that Person 18 might have recognised the body of the old man as the same man he had earlier seen, it is just as easy to imagine that he did not. Secondly, even if he had recognised the body, it does not follow from the fact that Person 18 did not record that a PUC had been

executed in the Exploitation Report that Person 18 was an unreliable witness. As we have explained in the open court reasons, there were understandable reasons why soldiers who were aware of the murders might choose not to speak up.

The appellant next made submissions about the intelligence report dated 12 April 2009 discussed above at [46]. The appellant made six submissions about this document. First, he submitted that it was not clear who prepared the document and noted that no evidence had been adduced about its preparation. Secondly, he submitted that it did not record the commission of any war crimes. Thirdly, he noted the primary judge's acceptance at CCJ[11] and [16] that the report did not mention the old man or the man with the prosthetic leg. Fourthly, he did not take issue with that. Fifthly, he submitted that the document did not assist the respondents in proving that the two men had been executed. Sixthly, he appeared to accept that the highest the matter could be put was that at the time the report was prepared the killing of the two men had not been brought to the attention of the people who had prepared it.

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The primary judge did not use the intelligence report against the appellant. Rather, he merely rejected the appellant's submission that the three insurgents to which the report refers must have included the man with the prosthetic leg. The report in fact says nothing about the old man or the man with the prosthetic leg. It does not appear to us to be material to any issue.

The next document the appellant made oral submissions about was the Mentoring and Reconstruction Task Force Report referenced above initially at [35]. The primary judge recorded at CCJ[39]–[42] the appellant's submission that his Honour should infer from that document that the two men had been killed before the compound was declared secure, in part because it was consistent with the Sametime chat records and the Patrol Debrief. His Honour did not accept the submission (at CCJ[44]):

I do not accept the applicant's submissions for the following reasons: (1) the documents to which the applicant refers are not sufficiently clear to enable the conclusions he seeks to be drawn; in any event, they cannot prevail over the clear evidence, including evidence from eye witnesses to the contrary; (2) the Troop's standard operating procedure about declaring a compound secure may be accepted, but it depends on the Troop knowing about the tunnel before the compound is declared secure; (3) the source of the statement in the Patrol Debrief was likely the applicant and/or Person 5; and (4) as appears in the open Court reasons, I do not accept Person 29's evidence.

So his Honour was declining to draw an inference that the killings occurred before the compound was declared secure. In this Court, the appellant accepts that the killings occurred after the compound had been declared secure. It is in that context that the appellant now submits that CCJ[44] asks the wrong question and that the correct question is "whether there was evidence that the contents of these documents that did not record essential elements of the respondents' case contained, as it were, wrong information or false information, such that it could be put to one side". As we understand the submission, the appellant contended that the primary judge should have considered whether there was evidence to show that the omission from the Mentoring and Reconstruction Task Force Report (MRTF Report) of any reference to the appellant and Person 4 having executed PUCs was false or incorrect.

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But that contention has nothing to do with the issue the primary judge was considering. The appellant had asked the primary judge to draw an inference from the MRTF Report and the primary judge declined to do so because it was not sufficiently clear. His Honour did not utilise the fact that the MRTF Report did not record the commission of war crimes. It thus makes no sense to submit that the primary judge should have considered whether the omission of war crimes from the MRTF Report was false or incorrect. That proposition is divorced from the primary judge's actual conclusion which is that the MRTF Report is insufficiently clear to warrant drawing the inference suggested by the appellant. We reject the appellant's submission.

The next document the appellant referred to was entitled "Headquarters Task Group 633.11" (Exhibit R181). Other than to note the document, the appellant did not make any submissions about it.

The next document referred to by the appellant was entitled "TF66 – Op HARPOON Phase 2B" (Exhibit R180). The appellant did not take the Court to any particular part of this two-page document but emphasised that it did not refer to any PUCs. The document refers to there being three insurgents KIA found which on any view is wrong. The appellant did not direct our attention to any part of the primary judge's reasons where this document was considered.

The next document referred to by the appellant was the Sametime chat records set out by the primary judge at CCJ[5]-[6]. However, the appellant did not appear to advance any submissions about this.

- The final document referred to by the appellant was a second set of Sametime records (Exhibit R178). The appellant took the Court to this document only to note it.
- Although the appellant's oral submissions about the contemporaneous documents were unusually difficult to follow, we are satisfied that there is nothing in them.

Conclusions

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No error was shown in the primary judge's reasoning. Having reviewed the evidentiary matters identified by the appellant, we are satisfied that the material upon which the primary judge acted was sufficiently cogent to support his findings having regard to the seriousness of the allegations and the presumption of innocence.

DARWAN

The primary judge dealt with a number of issues in closed court, four of which were addressed in submissions in the appeal. Two of the issues related to the credibility of the Afghan witnesses, including their evidence about the identity of the dead man in the cornfield and

The other issues concerned the significance of the reports of the aerial scans to the question of whether the deceased was a spotter, as the appellant had claimed, rather than Ali Jan, as the respondents had reported; and two other matters raised by the respondents going to the credit of the appellant and Person 11.

The credibility of the Afghan witnesses (particular 20)

As we indicated in the open court judgment, although the attack on the evidence of the Afghan witnesses at the trial was largely an attack on their honesty, on the appeal the appellant abandoned the allegations of dishonesty but maintained that their evidence was nonetheless unreliable.

The appellant submitted that the most important matters affecting the reliability of the Afghan witnesses were dealt with in the closed court judgment. This was a reference to the evidence these witnesses gave in closed court session

These matters were

said to relate to the following allegations in particular 20 to grounds 5–9 of the notice of appeal:

- (a) that the primary judge accorded insufficient weight to the discrepancies in the closed court evidence of Hanifa and Mangul (particular 20(a));
- (b) that the evidence Hanifa and Shahzada gave about the number of soldiers in the southern compounds and in a position to observe Ali Jan being kicked off a cliff was both inconsistent with the evidence of Persons 4 and 56 and inherently improbable (particular 20(c));
- (c) that other aspects of the evidence of the three Afghan witnesses were inherently improbable and/or inconsistent with SASR practice (particular 20(d));
- (d) that the primary judge engaged in speculation at J[1169], J[1181] and J[1195] by finding that a possible explanation for their evidence that they saw and heard shots fired from planes or helicopters was that at about that time the task force had destroyed some caves (particular 20(e));
- (e) that his Honour failed to advert to the possibility that many of the details given by the Afghan witnesses and upon which his Honour relied as corroboration for their accounts could have been drawn from other raids on the village (particular 20(f)); and
- (f) that his Honour failed to accord sufficient weight to their hatred of infidels and the extended period during which they and their families had been financially supported by Dr Sharif, as agent for the respondents (particular 20(g)).

70	As argued, the appellant's grievances largely fell into two broad categories.	They were the
	manner in which the primary judge dealt with	

No submissions were made in closed court about particulars 20(f) or (g). The submissions made in open court are addressed in our open court reasons.

Inconsistencies in the evidence of Mangul and Hanifa

The question raised by the notice of appeal is whether the primary judge gave insufficient weight to "discrepancies" in the evidence of the Afghan witnesses. In large part, it relates to the evidence of Mangul and Hanifa.

He

claimed that the evidence exposed the following inconsistencies.

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The appellant submitted that this was a "shift" in Mangul's evidence on an important point "in lockstep" with Hanifa,

The appellant described Mangul's evidence as "a mirror reflection of Hanifa's own change of position". He argued that the primary judge failed to assess the effect of the alleged shift, either together with Hanifa or separately and that "the change in the position" of these two witnesses was sufficient to destroy their reliability.

75 In assessing the apparent inconsistency

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the primary judge said (at CCJ[108]):

He was otherwise a satisfactory witness and was careful to distinguish between what he saw with his own eyes and what he heard.

Mangul

Rahmi's evidence is otherwise supported by the evidence of Person 4 and, to some extent, by the evidence of Person 56. In addition, as previously stated, he has given evidence as to matters which could only be known by a person present on the day. The other matter to be noted is that, assuming there is an inconsistency, the evidence to this Court is a more "conservative" account from Mangul Rahmi.

76 His Honour accepted the appellant's submission that

but he did

not consider that that was sufficient to discredit him altogether (at CCJ[125]):

I consider that it is an inconsistent statement which may be explained on any number of grounds, the most likely of which are translation difficulties or embellishment where he moved from what he saw to what he saw and inferred, or a combination of both. However, I do not consider that he was deliberately dishonest or that this has a major effect on [his] credit, particularly when regard is had to the extent to which his evidence is supported by other evidence in this case.

- 77 The appellant submitted that this was "speculative reasoning".
- In considering the evidence of the Afghan witnesses it is important to bear in mind that they were being cross-examined in English, and the questions put to them interpreted into Pashto,

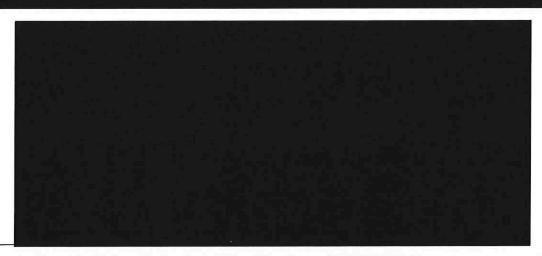
It is notorious that the meanings of

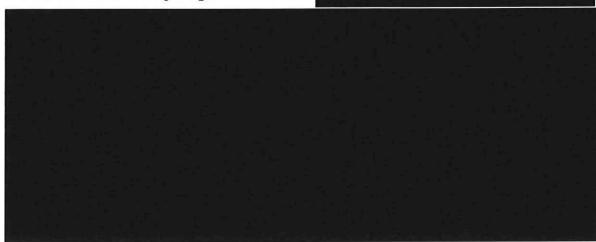
words and expressions are often lost in translation. It is also a fact of life that the quality of interpreting, even in courts, is extremely variable.

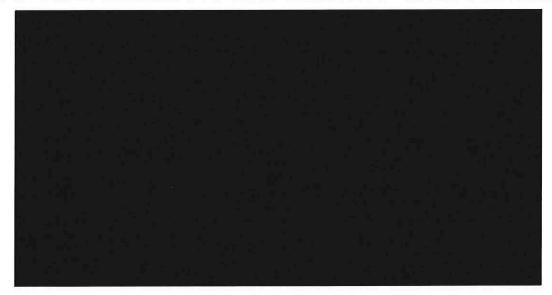
Hanifa's account

While the primary judge accepted that



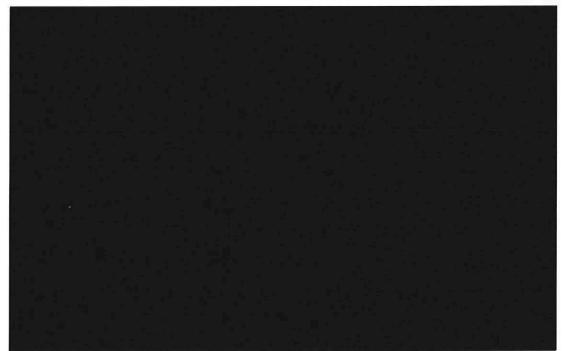






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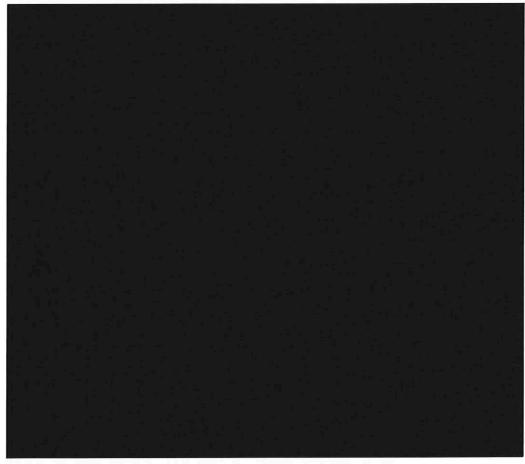
That is, Hanifa's evidence to the Court was that

unknown whether that choice was made by the witness or the interpreter.

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The appellant also submitted that Mangul's evidence "moved in lockstep" with Hanifa's supposed change of position.



- It is important to bear in mind that the Afghan witnesses were uneducated, illiterate, and unsophisticated, in each case answering questions through an interpreter in an alien environment. Some of the nuances of the cross-examination may well have been lost on them.
- As the respondents submitted in oral argument:

that's an initial issue to be aware of

94

made more challenging because the process that it has to be obviously is we read a written document in English which has itself been translated by something an Afghan witness has said previously in Pashto [scil.] into English.

That is then read out, translated by a different translator back to the Afghan witness
And one doesn't know - because one doesn't know what the original Pashto [scil.] words are - whether the Pashto [scil.] words that have been put back are the same words that were said previously. One doesn't know what differences or shades of difference in meaning or any of that kind of thing. So

The primary judge was correct to conclude that language or translation difficulties likely contributed to the apparent inconsistencies

(at CCJ[107] and [125]).

Interpreting is an art, not a science. There will inevitably be differences between the evidence given by a non-English speaking witness and its rendition into English

In this case there were additional problems. For example, at one point the interpreter at the trial informed his Honour that he had difficulty understanding a word used by Hanifa because he, the interpreter, was speaking "standard Pashto", whereas Hanifa was not. Educational, regional and class disparities between interpreter and witness are also likely contributors. For this reason, it was entirely proper for the primary judge to make allowance for the possibility of translation difficulties.

The difficulties associated with which have been interpreted from the witness's native tongue into English and then from English into their

native tongue have long been recognised. Judges are trained to be alert to such problems when evaluating the evidence of foreign language speakers.

Nearly 30 years ago, in the context of problems that arose with evidence adduced from non-English speaking witnesses during the trial of Ivan Polyukhovich, the first man to be charged in Australia with war crimes, the linguist, Prof Ludmila Stern wrote:

[I]n Australian courts constant references were made by lawyers to the witnesses' earlier statements and the phrasing of those statements ('Did you not say earlier in your statement ...'). This procedure was conducted with the assistance of interpreters, who were translating from English into Russian/Ukrainian the supposed exact words of the witness that had been previously translated from Russian/Ukrainian into English. No original documents or recordings were produced for this purpose, and as a result the witnesses were pinned down on the evidence that they had difficulty in recognising as their own.

...

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The referral to earlier statements made by the witness also caused difficulty because what was quoted by the interviewer in English was in itself a translated version of the original words used by the witness. These were translated back into the Ukrainian, and, having undergone a process of double translation, the quote might resemble the original only remotely. These words should not be presented to the witness as his/her own words once said.

(Emphasis added)

See Ludmila Stern, "Non-English speaking witnesses in the Australian legal context: the War Crimes Prosecution as a case study", *Law Text Culture* 2, 1995, 6–31 at 16, 21–22.

The very same thing occurred in the present case. The primary judge alluded to the problem in his reasons, particularly at CCJ[125]. Contrary to the appellant's submission, his Honour was not engaging in "speculative reasoning" when positing that the inconsistency "may be explained on any number of grounds, the most likely of which are translation difficulties or embellishment". He was exhibiting an appropriately cautious approach to drawing adverse credit findings from evidence which had been given through an interpreter in a language the witness did not understand, and which was not necessarily a verbatim translation of what the witness was saying. That was an orthodox method of reasoning.

Furthermore, there was an evidentiary basis for that reasoning. When it was put to Hanifa that

It will be recalled that the appellant's principal argument below was that all the Afghan 98 witnesses were liars. . At CCJ[125] his Honour was explaining why he rejected that argument by pointing to an innocent alternative explanation. Having seen and heard the witnesses give their evidence, albeit through an interpreter, he was in a much better position than this Court to make such an assessment. 99 Further, the question for the primary judge was whether the evidence that Hanifa and Mangul gave to the Court was reliable, deciding what weight should be given to apparent inconsistencies, his Honour was bound to take into account the extent to which other evidence (including the evidence of Person 4) supported their testimony. The appellant also submitted that there were other aspects of their evidence which were 100 "significant for their credibility". They related to the following matters: the number of soldiers standing around the riverbed when Ali Jan was kicked (a) (Hanifa mentioned no more than five soldiers in a statement served on the appellant before the trial, and testified that he did not know how many were present); (b) the assault upon Hanifa by "the big soldier" (he testified that he was not only kicked but was also punched many times); Hanifa's evidence at the trial that he was shot at from the overwatch position (c) when, as the primary judge observed at CCJ[135], the evidence received in closed court was to the effect that the appellant submitted that firing from the overwatch position as the witness had described it was improbable; and

(d) Mangul's

testimony that "the big solider" had hit him twice.

The number of soldiers present at the time of the cliff kick

101 With respect to (a), the primary judge said this (at CCJ[134]):

In his statement of 7 May 2021, he described the presence of soldiers on the roof of Mangul Rahmi's compound, on the roof of the guesthouse and on the ground. He also described a few soldiers down in the riverbed. He said that they were there before Ali Jan was kicked off the cliff. The applicant submits that Mohammed Hanifa's evidence in the trial was that he did not know how many soldiers were present. The applicant submits that this points to another credit issue of sufficient significance to cast doubt on the reliability of anything said by the witness. These type of details are matters I need to take into account in assessing Mohammed Hanifa's honesty and reliability, but having regard to the supporting evidence, they fall well short of casting doubt on the reliability of anything said by Mohammed Hanifa.

- The appellant submitted that the finding in the last sentence is "unsupportable". He contended that "the primary judge is not even prepared to entertain the notion that such evidence casts (any) doubt on the reliability of the witnesses".
- 103 We reject the appellant's submissions.
- First, the appellant's submission does not fairly represent Hanifa's

with what he told the Court.



106 Fairly read,

and we do not accept the appellant's submission that his Honour accepted (at CCJ[134]) that this was the effect of what he said. Indeed, as the respondents put it in their written submissions,



This is what the transcript discloses about what was said at the trial:

MR MCCLINTOCK

INTERPRETER:

That is unremarkable. It beggars belief that anyone in Hanifa's position and in the circumstances in which he found himself would have been able to give any accurate evidence about

As counsel for the respondents put it in oral argument, the numbers 20 or 30 were random figures. He described it as "a figure of speech". More accurately, they were figures the witness plucked out of the air to emphasise his inability to provide a number. This was not the only time he had spoken in this way. Earlier, the transcript records the following exchange:

MR MCCLINTOCK: Could you give me an approximation of how many soldiers

were in the manda?

INTERPRETER: Even if my father is coming in the dry riverbed, I can't say in

a situation like this. I cannot come up with a number from

(indistinct) 10, 20 or 30. I cannot lie to you.

The proposition that there was an inconsistency in the statement served before the trial is also misconceived. Hanifa did not say that there were no more than five soldiers in the riverbed. As the respondents submitted, he merely described the actions of five soldiers at the time Ali Jan was being dragged across the riverbed.

Finally, Hanifa's testimony was that two soldiers, who had previously been on the roof of the compound, had dragged Ali Jan across the riverbed. There was no dispute that soldiers had been on the roof. The appellant, himself, said that at least one soldier could be seen on the roof in the overwatch photograph. Thus, as the respondents submitted, far from this being a credit point against Hanifa, both the number (two) and the previous location of the soldiers who dragged Ali Jan were consistent with both the objective evidence and the evidence of Person 4 that he and Person 11 dragged Ali Jan across the dry riverbed.

112 Mangul also

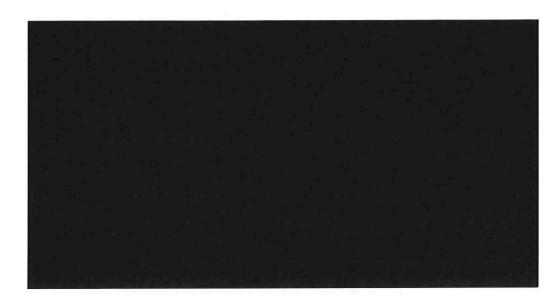
There were five members in the appellant's patrol if the working dog operator is included and six if you include the interpreter.

The number of assaults on Hanifa

The matter raised in [100(b)] above relates to

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evidence was said to have been given in both open and closed court. The 115 The transcript of the open court evidence switches from a translation to a description. It reads as follows:

THE INTERPRETER: And then there - when he would ask - the interpreter would

ask me a question, I would turn around and look at him. And then, at this time, the big soldier will punch me and tell me don't look at him. And then the witness was just sharing how he - he was looking or turning toward his back and then how he was - he was gesturing with his right hand with a fist.

MR OWENS:

Was he just punched once?

THE INTERPRETER: No, no, no. Many times, many times.

Later, after Hanifa gave some evidence about the interrogation by "the big soldier", the 116 transcript records the following exchange:

MR OWENS:

What happened next?

THE INTERPRETER: I told - the interpreter, "Is the big soldier, is he asking me questions or he's beating me?' And then, at this time, the the big soldier, he kicked me and he - the - the witness was pointing to his upper abdomen area – and he kicked me hard in this - in this area and pushed me back towards the back.

Hanifa adhered to this evidence when questioned again about this matter in closed court the 117 following day.

The primary judge dealt with the matter at CCJ[129]–[131]. The appellant's criticism is that his Honour discussed the inconsistencies but did not consider their implications for the reliability of the witness:

129	Thirdly, the applicant submits that Mohammed Hanifa's evidence to this Court is inconsistent In his evidence before this
	Court, Mohammed Hanifa said that the big soldier would punch him and tell him not to look around. He was asked whether he was punched just once. He said no, that he was punched many, many times.
130	
131	Mohammed Hanifa has consistently said that there was an interrogation and that he was physically assaulted.

It is true that his Honour did not explain what, if any, bearing the variations may have had on the reliability of the witness's testimony. But we are not satisfied that much weight should attach to the inconsistencies. As the primary judge said, Hanifa consistently said that he was physically assaulted during the interrogation

He also gave consistent evidence

The primary judge rightly took it into account. When taken into account with all the other evidence, including the evidence of Persons 4 and 56 and the unchallenged wholesale rejection of the credibility of the account given by the appellant and Person 11, it is of no consequence.

It is also true, as the appellant submitted, that neither Person 4 nor Person 11 testified that the tactical questioning of persons in the last compound involved assaulting them. But as we

pointed out in the open court reasons, they were not involved in the tactical questioning. They were otherwise engaged at the time.

Shots from the overwatch position

- During the trial Hanifa testified that he was shot at from the overwatch position. Hanifa's testimony on this subject was corroborated by Mangul and Shahzada and the place Hanifa identified as the place from which the shots were fired corresponded precisely to the location of the overwatch team.
- The primary judge referred (at CCJ[135]) to sensitive evidence to the effect that and to the appellant's submission that it was highly unlikely in these circumstances that Hanifa's testimony was correct. His Honour said he took that matter into account, adding that "[a]t the same time, it does seem to be an odd detail to make up and it is not at all surprising that, if people were leaving during a raid, the Force Element would wish to dissuade them from doing so".
- The appellant submitted that, in effect, his Honour found that the implausibility of Hanifa's evidence increased its reliability and then engaged in speculation about the way the soldiers would operate.
- This submission is unfair to his Honour and we reject it. Rather, we accept the respondents' submission:

The trial judge afforded appropriate weight to the fact that
(CCJ [135]). His Honour took into
account that members of society do not ordinarily engage in criminal conduct (in this
instance,): see J [108]
[114] and CCJ [135]. However, his Honour had three witnesses give evidence that shots were in fact fired. No witness gave contrary evidence. Mr Roberts-Smith did not call any evidence in reply (for example, from a member of the
overwatch team) to say that no shots were in fact fired. The highest Mr
Roberts-Smith put this aspect of his case was
his Honour made no error in accepting Hanifa's evidence on this point in circumstances where Hanifa was corroborated and where no witness was called to refute the collective evidence of Hanifa, Shahzada and Mangul. There was no element of "speculation" on his Honour's part (cf BRSCC [21.7]) in accepting the evidence of three witnesses who
gave evidence that shots were in fact fired.

The assault on Mangul

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The appellant submitted that, although Mangul 125

Yet in the trial he testified that "the big soldier hit him twice".

The primary judge considered the appellant's submission at CCJ[109]–[110]: 126

> The applicant also submits that there is an "inconsistency" | concerning whether Mangul Rahmi was hit by the big soldier. He said in his evidence to this Court that during his interrogation, the big soldier was sitting next to him and that he looked at the big soldier. The big soldier hit him and he looked at him again and the big soldier hit him again. The interpreter told Mangul Rahmi not to look at the big soldier because "they" do not like people looking at them.

and obvious difficulties brought about by the need to translate and. to some extent, the limitations of the witness' education. The issue is far from black and white when regard is had to the following evidence



110 Nevertheless, to the extent there is an omission, I take it into account. and I do not consider the fact that Mangul Rahmi adversely affects his credit when all of the evidence is taken into account.

- There are a number of problems with this submission.
- First, it assumes that there was a shift in Mangul's account and that the differences could not reasonably be attributed to translation or educational issues.

Secondly, it pays no attention to the context

Thirdly, the questioning at the trial was

We respectfully agree with the primary judge that "the issue is far from black and white". In any event, in the scheme of things is of no moment.

Nor do we consider it significant in the circumstances

The identification issues

- The appellant submitted that there were issues with the identification of Ali Jan by Hanifa and Mangul
- We are not at all persuaded that the primary judge erred in accepting the identification by Hanifa and Mangul of Ali Jan.
- The appellant submitted that

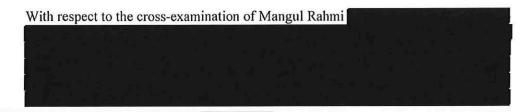
he had no hesitation at the trial in identifying him from the photograph.

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- 137 The appellant submitted that,
- 138 It is true that,



- The primary judge dealt with the submission at CCJ[104] and [111].
- 140 At CCJ[104] his Honour said:



and the respondents submit that no adverse credit finding can reasonably arise in the circumstances. I accept Mangul Rahmi's explanation.

141 At CCJ[111] his Honour said:

Finally, the applicant submits that Mangul Rahmi's evidence involved a significant "contradiction" because

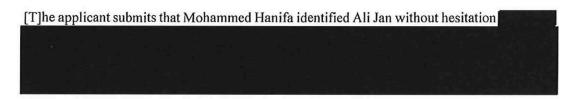
I have already referred to this point. To the extent that

- 142 The appellant submitted that the primary judge "erred in
- 143 That is an inaccurate representation of his Honour's reasoning.
- The impugned paragraphs of the closed court judgment cannot be considered in isolation from the primary judge's consideration of identification issues in his open court judgment, particularly at J[1359]–[1362]:
 - The applicant submits that the only evidence of the identification of the deceased man in the cornfield as Ali Jan is that given by the Afghan witnesses and that evidence should not be accepted for two reasons.
 - 1360 First, the applicant submits that in-court identification evidence from a photograph is notoriously unreliable because it is usually performed in circumstances that strongly suggest the answer that is ultimately given. The applicant submits that this is what occurred in this case with the Afghan witnesses. He submits that in each case, the identification was made after the witnesses had just described the events surrounding Ali Jan's assault and execution. In those circumstances, the presentation of an image of a deceased Afghan male with bullet wounds lying in a cornfield strongly suggested the answers that were ultimately given. The applicant submits that although each of the witnesses claimed to know Ali Jan, which if accepted, would render their identification less prone to error, they had not seen him alive in nine years. A substantial portion of the deceased man's face, mouth and right eye is obscured by blood. The applicant submits that even relatives can make mistakes of identification from photographs (Smith v The Queen [2001] HCA 50; (2001) 206 CLR 650 at [55] per Kirby J).
 - 1361 The respondents' answers to these submissions are correct. The evidence of the Afghan witnesses that the body they saw in the cornfield was that of Ali Jan does not depend on the photographs. That is evidence that they gave as to

, (! . !

their recollection of what they saw on the day. They went to the cornfield and they saw the body of Ali Jan. The submission made by the applicant confuses the two related concepts of recognition and identification (*Trudgett v R* [2008] NSWCCA 62; (2008) 70 NSWLR 696 at [23]–[31] and *Gardiner v R* [2006] NSWCCA 190; (2006) 162 A Crim R 233 at [68]–[69]). The Afghan witnesses knew Ali Jan from their lives in Darwan and they gave evidence that they recognise in the photographs the man that they know.

- As the respondents put it, the identification of the deceased person in the photographs does not "move the dial terribly much on this" because there is no dispute that the body in those photographs was in the cornfield. The real question is how he came to get there and in what circumstances did he die. The respondents submit that if the evidence of the Afghan witnesses and Persons 4 and 56 is otherwise accepted, then it follows that the deceased man was Ali Jan.
- We respectfully agree with his Honour.
- His Honour recorded the appellant's submission about Hanifa's evidence at CCJ[132]:

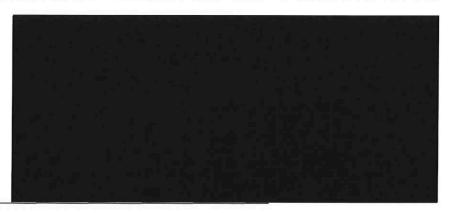


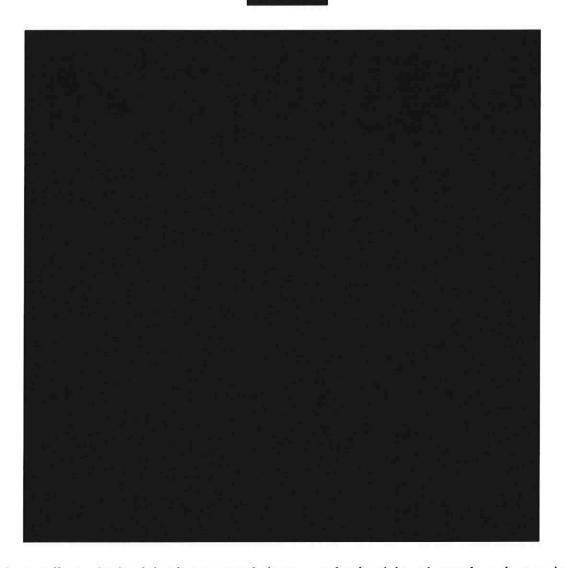
147 At CCJ[133], the primary judge said:

The respondents took me to a photograph of the man said to be Ali Jan with a full beard and blood on his face and a photograph of Yara [sic] Mama also with a full beard and blood on his face

I agree.





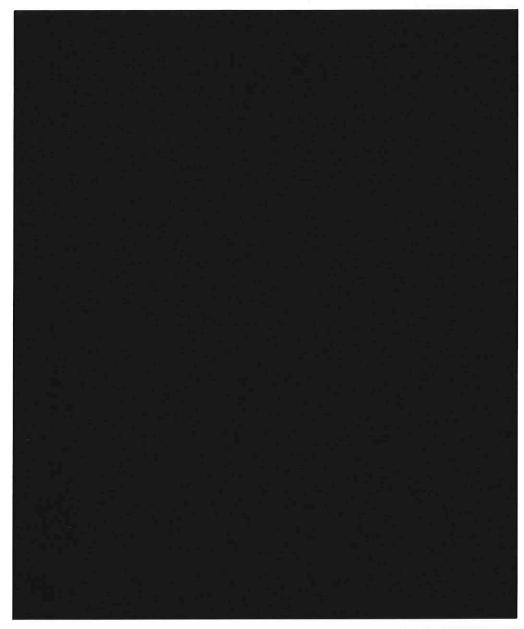


The appellant submitted that it was speculative to say that it might at least take a short period to distinguish between Yaro Mama and Ali Jan from the photographs

We reject

the submission.

150 In Hanifa's case



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His Honour quite rightly observed (at CCJ[133]).

153 As the respondents submitted,

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Two photographs of the body said to be Ali Jan's were tendered at the trial.

The photographs are confronting. One's instinctive reaction is to recoil. Both depict a dead man covered in blood. Both photographs show an ICOM radio on his body, nestled under his right arm with the antenna over his torso, though it is more obvious in one than the other. Both show the body in a supine position. One shows the body from a side angle, with the deceased's left eye obscured by the angle of his face and the right eye obscured by blood. A stalk of maize also obscures a small portion of the man's face. The other photograph is taken from directly above the man's body, with his face squarely in frame. It shows blood pooling in the man's mouth, obscuring his right eye and covering much of the rest of his face.

Most people would find it difficult to identify anybody photographed in such a manner, particularly from the photograph in which some of the man's features are obscured. The photographs are unlikely to depict the man as Hanifa and Mangul would have remembered him. Even if they retained a memory of his bloodied corpse, they had never seen him with a "walkie talkie". Nor did the photographs depict the deceased at the time when they saw the body. By that time the sensitive site exploitation was complete, the ICOM radio had been removed, and the soldiers had left.

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As senior counsel for the respondents put it in oral argument, the difference between his appearance in the photograph, what the witnesses saw at the time and "their usual memory of Ali Jan" was a more than adequate explanation

The capabilities of the scanning assets (particular 24)

- The scanning assets consisted of a Heron drone and the Apache helicopters which had the capacity to undertake aerial scans and were deployed for that purpose on numerous missions to Afghanistan.
- The primary judge accepted that the aerial scans were not infallible (a matter which the respondents conceded) but considered that "there [was] a high probability ... that if there had been a spotter in the cornfield next to the HLZ, he would have been picked up by the scans" (at J[1340]). In his closed court reasons his Honour discussed some of the evidence about the scans, in particular evidence given by Person 7 in closed court, and concluded at CCJ[81] as follows:

The overall effect of this evidence is that the cornfield was scanned twice by the Heron drone and the Apaches once before the Turn 1 extraction once before the Turn 2 extraction. It seems to me that, in those circumstances, the respondents' submission must be correct that the strong probability is that a human hiding in the cornfield would have been detected by at least the on one of those scans and that that inference should be drawn even if the cornfield was scanned only once; it is an irresistible inference in circumstances where the scanning was performed twice.

- These findings are challenged in particular 24. Before explaining why, it is useful to provide some context.
- Evidence was adduced at the trial about the use that was made in 2012 of the Apache helicopters and an unmanned Heron drone, controlled by an RAAF pilot in Kandahar, in detecting threats to the coalition forces in Uruzgan Province. That evidence was both oral and written.
- The written evidence included a sensitive document entitled Electronic Warfare Summary (EWSUM) , tendered by the respondents in closed court, (Exhibit R30) and a document (the Special Operations Task Group INTREP), tendered by the appellant in open court (Exhibit A10 tab 33), which reported on the The EWSUM

The INTREP included

While both documents referred to the possibility of spotters at certain locations, none of the nominated locations included the cornfield next to Eurodos 1, which was the helicopter landing zone (HLZ) next to the cornfield where the appellant claimed EKIA4 was killed and the Afghan witnesses testified they found the body of Ali Jan. The sensitive Sametime chat record indicated that Eurodos 1 was used for both the Turn 1 extraction of the commandos and the Turn 2 extraction which included the appellant's patrol (Gothic 2) and Person 7's patrol (Gothic 1). It also showed that Turn 1 extracted at 1052DE and Turn 2 at 1121DE and that the appellant's report of a fourth insurgent killed in action was made at 1109DE, that is, 12 minutes before extraction. In order to protect the safety and security of the troops on extraction, aerial scans were conducted by both a Heron drone and Apache helicopters before each extraction in the area around Eurodos 1.

At CCJ[89] his Honour referred to the documentary evidence about ICOM activity:

With respect to whether there was a spotter in the cornfield with	the radio on
11 September 2012, the respondents referred to a sensitive document,	an la
(exhibit R30)	
[2] - [2] - [2] - [2] - [2] - [3] - [3] - [4] -	
In terms of whether spotters were seen by aircrew, a	report of the
mission [the "Special Operations Task Group INTREP"] indicates that	
10. 12. 42. 15. 15. 16. 16. 16. 16. 16. 16. 16. 16. 16. 16	(exhibit A10
tab 33). The same document indicates that	

As the respondents submitted, his Honour was correct to observe that the EWSUM and that the INTREP indicates that

166 At CCJ[90] his Honour observed:

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The information in these documents bears on the plausibility of the respective accounts of the applicant and Person 11 about seeing a spotter in the cornfield with an ICOM radio. It is possible, but hardly likely, that a spotter hid in the cornfield with an ICOM radio

The appellant submitted that the finding that the information in the two documents "bears on the plausibility" of a spotter remaining in the cornfield for the duration of the mission

His Honour's finding at CCJ[90] was not erroneous. It is the appellant, not his Honour, who misinterpreted the effect of the EWSUM.

The appellant also complained about his Honour's reliance on

He argued that neither document purported to be a comprehensive account of spotter activity. He submitted that the EWSUM was "just a selection

Even if the EWSUM included "just a selection of material", the fact that the documents did not record the presence of a spotter in the cornfield meant that there was no independent evidence (that is, evidence independent of that given by the appellant and Person 11) that the man killed in the cornfield was a spotter. While it was not conclusive, it was also evidence which supported the respondents' case that the deceased was not a spotter. Other evidence in support of the respondents' case and upon which the primary judge relied is discussed in the open court judgment. It included the evidence of Person 4 and the Afghan witnesses who corroborated Person 4's evidence in material respects. It also included evidence given by Person 7, to which his Honour did not refer in the closed court reasons.

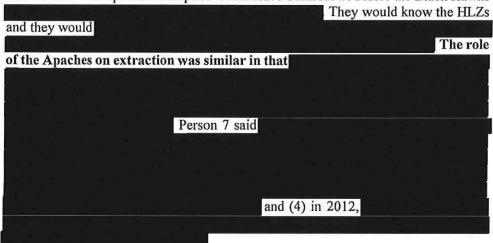
of material".

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- Person 7 testified that, at the time he and his patrol started hearing the calls over the radio of "helos 10 minutes out", there was no ICOM chatter and they were receiving "ice calls" from the Apache pilots, meaning there were no threats (in particular, no threats around the helicopter landing zone) and it was safe to go. Person 7 explained that, together with the Heron drone, the Apache pilots were providing "situational awareness".
- In these circumstances it is reasonable to infer that, if there were spotter activity at the time, it was unlikely to have been in the vicinity of Eudoros 1.
- The oral evidence upon which his Honour relied came from Person 7. Person 7 had undertaken eight deployments to Afghanistan in the years between 2002 and 2012 inclusive. In 2012 he was a sergeant and patrol commander. He planned the mission to Darwan. During the mission he was third in command behind the troop commander and the troop sergeant.
- His Honour accurately summarised most of Person 7's evidence at CCJ[78]:

Person 7, whose evidence I accept, said the following: (1) that throughout the whole six hours, the Heron drone used in support of the mission to Darwan on 11 September 2012 remained on station and its role was to look for threats in and around the HLZs, in and around the compounds, and in and around the hills and mountains in the area; (2) the Heron drone had imaging capability as well as

(3) the Apache helicopters are part of the two and four package the Force Element would have. The Apache helicopters would leave Tarin Kowt before the Black Hawks



(Emphasis added.)

No objection was taken to any of that evidence and none of it appears to have been controversial as Person 7 was not cross-examined on it. Moreover, as senior counsel for the appellant

accepted in oral argument, the effect of this evidence is that the equipment the purpose of which was to detect human activity did not detect human activity.

After he gave that evidence, Person 7 was asked the following question to which objection was taken:

Based on the knowledge you had of the technology at the time, are you able to express an opinion about the likelihood that

177 The objection was put in these terms:

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Your Honour, just in terms of that question, I object. If the question is being asked of this individual's understanding, then that is fine, but if it's being sought to be asked in order for some sort of expert opinion in respect of that, well I object, because he doesn't have the expertise to be able to be expressing that view.

- 178 His Honour allowed the question, observing that it was a matter of weight. Senior counsel for the appellant did not ask to be heard further.
- Person 7 asked that the question be put again. On this occasion it was put a little differently and no objection was taken to the question as reframed:

Based on your knowledge and experience of the technology used by the Apaches in 2012 and standard procedures for what is your opinion about the likelihood that a person

180 Person 7 replied:

Based on my understanding of the technology at the time,

181 His Honour accepted this evidence at CCJ[79], saying:

I accept Person 7's evidence and consider that it should be given some weight, while same time noting that it is not from a person who is engaged in the scanning or who operates the sophisticated equipment which is used.

The follow-up question (to which no objection was taken) and Person 7's answer should also be recorded although His Honour did not refer to it, at least expressly, in his closed court reasons:

MR OWENS: If an Apache or a Heron operator had detected any , what would the standard operation procedure have been?

PERSON 7: They

- A "cherry call", Person 7 explained, was a call to alert troops on the ground of a perceived threat to their safety, in contradistinction to an "ice call", in which the troops were informed that there was no perceived threat.
- The appellant submitted that Person 7's evidence as recorded by his Honour at CCJ[79] should not have been admitted in the first place and, once admitted, should not have been given any weight to support the finding that the man lying in the cornfield was an unarmed Afghan, particularly in the face of unchallenged evidence, which his Honour accepted, that FE Alpha had been attacked on extraction on previous missions (J[1337]).
- So was this evidence admissible and, if so, was it entitled to the weight his Honour apparently accorded it?
- 186 With certain exceptions, evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed: Evidence Act 1995 (Cth), s 76(1). This is referred to in the Evidence Act as "the opinion rule". There are only two possible exceptions which may operate in the particular circumstances in which the evidence was given. The first is contained in s 77, which provides that the opinion rule does not apply to evidence of an opinion that is admitted because it is relevant for a purpose other than proof of the existence of a fact about the existence of which the opinion was expressed. The second is contained in s 79(1), which provides that, if a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence given by that person which is wholly or substantially based on that knowledge. The respondents did not submit that the evidence was admissible under s 77. The question then is whether Person 7's impugned evidence was wholly or substantially based on specialised knowledge derived from training, study or experience.

The respondents submitted that Person 7 had firsthand experience in how the scanning assets were used in Darwan, both as the planner and as a patrol commander on the ground, as well as experience in how information was fed back to the force element during the mission to Darwan. That much is true. But the respondents made no real attempt to qualify Person 7 as a person with specialised knowledge of the fallibility or otherwise of the detection systems in the Heron drone or the Apaches. They did not adduce any evidence of relevant training or study. Person 7 testified that he was unfamiliar with the and he gave no evidence

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Person 7 did give evidence about his experience on missions in Afghanistan where drones and Apaches were routinely used and, while he said that his evidence was based on his understanding of the technology, in truth it was based on his experience of the use of the technology. Whether that gave him any specialised knowledge is debatable, but, if it did, it was only knowledge about the uses to which the Apaches could be deployed, albeit including He gave evidence about that matter without objection. But their no proper foundation was laid for a question about his understanding or opinion on the chance that the equipment would fail to detect a human being in a cornfield. While no objection was taken to the witness giving evidence of his understanding, it is difficult to see how his understanding was entitled to any weight in the absence of evidence that he had specialist knowledge of this subject. In our respectful opinion the question should have been rejected. To the extent that the answer was given in the absence of a proper basis for it and without the witness exposing the reasons for his opinion, no reliance should have been placed on it: Dasreef Pty Limited v Hawchar (2011) 243 CLR 588 at [35]-[43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); [91]-[94], [128]-[130] (Heydon J).

Nonetheless, it is important to put the impugned finding in context. It was merely one of numerous reasons given by the primary judge for rejecting the appellant's evidence (and that of Person 11) that the man who had been identified as EKIA4 was a spotter. It was by no means essential to his Honour's reasoning to that decision. While his Honour did find that there was a high probability that a spotter in the cornfield would have been detected by the scans, we do not accept that he reached this conclusion only because of Person 7's impugned evidence. There was other evidence about the reliability of the scans to which no objection

was taken. That included the evidence about the ICOM chatter and the subject of evidence from Person 7. It also included the following evidence given by Person 11 in cross-examination in open court.

Person 11 agreed that, before extraction, "very comprehensive scans [are] performed of the area around an HLZ by both drones and Apache helicopters". He volunteered that "the area will be scanned as best as possible". This exchange ensued:

And again, without in open court talking about the specific equipment, you agree, don't you, that the Apaches had the ability to identify insurgents even if they were concealed underneath foliage?--- Well, they are very capable sensors, I'm not sure about the extent.

Well, it's your understanding, isn't it, that they have the capability to detect a person in a cornfield even if the person was underneath foliage?--- I don't run those sensors but I know that they are very good.

And it's a very important part of pre-extraction procedure for a thorough scan of the area around HLZs to be performed by those aerial assets; correct?--- It is. It's a vulnerable time.

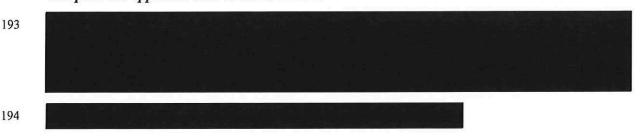
Moreover, the exclusion of Person 7's evidence about the chances of the Apache helicopters detecting in a cornfield does not detract from the evidence about the absence of ICOM chatter in the vicinity of Eurodos 1 at the relevant time, Person 4's eyewitness evidence or the remarkable fact that the Afghan villagers corroborated that evidence in material respects. The appellant's success in relation to particular 24 does not defeat the respondents' justification defence.

The matters raised by the respondents

The two matters raised by the respondents concerned the credit of the appellant and Person 11.

The appellant did not respond to them in his submissions in reply or in oral argument, so we take them to be uncontentious.

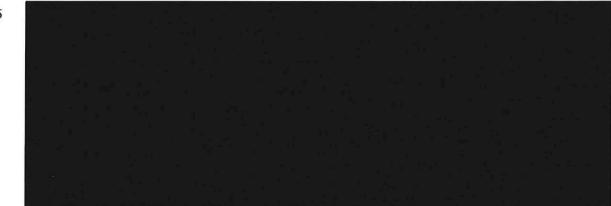
The path the appellant took to the creek bed



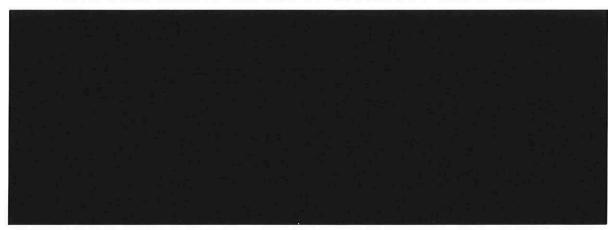
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Person 11's credit

This matter was said to relate to particular 29 [scil.] in the notice of appeal and, specifically, the allegation that the primary judge erred by making adverse credit findings about Person 11 on the basis that, because he was unreliable about some specific matters, he was unreliable about all matters relating to Darwan. The respondents addressed the allegation in writing, but the allegation was not pressed. Consequently, nothing more needs to be said about it.

CHINARTU

- 199 The primary judge's closed court reasons in relation to Chinartu addressed four issues:
 - the reliability and accuracy of the ADF records of the two engagements during the mission;
 - (b) whether Person 12 was on the mission;
 - (c) what inference, if any, is to be drawn from the fact that the respondents did not call Person 12 as a witness; and
 - (d) the use of the acronym "VRI".
- Only the first of these issues needs to be addressed in the appeal. (The respondents' closed court written submissions briefly canvassed the evidence relating to the Person 12 lie, but this aspect of the primary judge's findings was not challenged by the appellant.) The appellant's submissions emphasise the point that the respondents' case necessarily involves the falsity of official Commonwealth records and the primary judge's reasons do not (it is said) deal adequately with submissions concerning the absence of evidence as to how false records came to be made.
- The documents which are the subject of the appellant's closed court submissions are:
 - (a) the SSE report recording and describing items purportedly found following the engagement at 1405DE; and
 - (b) a personnel record indicating the identity of an NDS soldier who shot a person on 12 October 2012.

The SSE report

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The SSE report indicates that it was prepared by Person 34 and records the exploitation of an area and a small cache. It bears a date and time of 12 October 2012 at 1400DE. This was seven minutes after the helicopters on Turn 2 arrived at Chinartu. The engagement involving an EKIA armed with an AK-47 shot by a NDS soldier (which the primary judge found did not occur) is recorded in the Operational Summary or OPSUM as occurring at 1405DE. The document itself was obviously prepared at some later time. The time 1400DE may have been included in the document as an approximation of when the "circumstances" leading to the site exploitation occurred.

Those circumstances are described in the SSE report as follows.



An engagement described in this way does not appear elsewhere in any records or other evidence to which we were taken. It clearly does not align with the engagement at 1410DE recorded in the OPSUM. It has some similarities to the purported 1405DE engagement in the OPSUM but also some differences. The similarities are that both accounts involve an insurgent, armed with an AK-type assault rifle, engaged in or in the vicinity of a compound and killed, followed by recovery of the weapon and a pair of binoculars. (A mud-map later in the SSE report shows the EKIA in a room of a compound, in the middle of a room with what appears to be an enclosed area outside.) The SSE report identifies the weapon as a 1953 AKM prototype, rather than an AK47, but we do not regard this as significant. The differences are:

(a) The coordinates given for the compound are very similar but not the same: 3763 1521 in the OPSUM and 37638 15230 in the SSE report. The difference does not seem explicable by rounding. It is unclear whether this has any real significance, as there was no detailed map of Chinartu in evidence. The SSE report also gives the grid reference 37638 15230 as the location for "Cache 1" and that reference is attached to photographs of the contents of a cache found nearby. Provision of the same grid reference for the compound where the engagement occurred may be a simple error. The

- grid reference 37633 15219 is provided in the SSE report as the location of "EKIA Items".
- (b) The SSE report describes an insurgent "moving tactically" towards a compound, who is pursued and engaged. The OPSUM entry describes an NDS soldier entering a compound after conducting a "call-out" and identifying an armed insurgent inside.
- (c) The SSE report does not identify the FE involved in the engagement as an NDS soldier.
- The SSE report on its face therefore provides some support for the 1405DE entry in the OPSUM, although that support is qualified by the differences in the accounts of the events. The differences could be accounted for by the author of the SSE report having relied on what he was told about the engagement in the minutes following it rather than adopting the account that was recorded later at the debrief.
- The SSE report goes on to report as follows.



- The SSE report thus encompasses what purport to be two sets of physical items: items recovered from the location where the EKIA was killed and items found as part of a cache during a subsequent search of the area.
- The SSE report includes five photographs apparently taken at the site, as well as photographs of the "returned items" presumably taken later at base. The photographs taken at the site are the same as five of the six photographs that became Exhibit R38 (sensitive) and Exhibit R100 (non-sensitive), which are discussed in our open court reasons. In the SSE report, the photographs taken on site are separated so that two (showing an assault rifle with magazines and a pair of binoculars) are described as "EKIA effects" and the remainder show the cache *in situ* and rocket launchers recovered from it.
- 209 Taken at face value, therefore, the SSE report supports the theory that an engagement occurred at or soon after 1400DE in which an insurgent was killed and an AK-type assault rifle and a pair of binoculars were recovered. This aligns in important respects with the 1405DE entry in

the OPSUM, although (as noted above) the differences between descriptions of the event create some uncertainty.

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It is tolerably clear, as the primary judge noted (CCJ[164]), that the SSE report does not address the cache that Person 14 said he discovered. The SSE report touches on the credibility of Person 14's account of discovering a cache after 1534DE only in one respect. That is that the SSE report does not include any reference to that cache. Nor, despite extensive document production, was there evidence of any separate SSE report for that cache. Some reporting would usually be expected. However, for reasons explained in our open court reasons, we do not consider that the primary judge erred by failing to give this point proper weight.

The respondents' submissions describe the SSE report as "the clearest illustration of the falsification of the official records". We agree that, to the extent that the SSE report provides support for the 1405DE entry in the OPSUM, it cannot be accepted as an honest and accurate report of events. While it is not necessary for the respondents to go this far, the inference that the SSE report was concocted in order to bolster a false story concerning an engagement at 1405DE is clearly open. We have reached this conclusion for the following reasons.

First, the sequence of the photographs in Exhibit R38 and Exhibit R100 indicates that the AKtype assault rifle and binoculars shown in those photographs were part of the same cache as the other items shown. This is strongly reinforced by the fact that the assault rifle shown in the photographs is carefully laid out with two magazines (neither of which is fitted to the weapon) on top of what appears to be a white bag, and has a plastic bag tied over its muzzle. The SSE report described the contents of the cache as being contained in "wheat type' bags". The covering of the weapon's muzzle, in particular, is strongly indicative of it having very recently been stored in a place where such a covering was thought necessary. It makes it implausible that this was a weapon that a short time earlier had been in the hands of an insurgent preparing to engage coalition forces. The photographs are presented in a different sequence in the SSE report, with those showing the assault rifle and binoculars separated out and described as "EKIA effects". That sequence and subdivision is inconsistent with the order in which the photographs appear to have been taken, and very hard to reconcile with how the assault rifle is presented in the photograph showing it. The inference is at least open that this was a deliberate attempt to mislead.

- Secondly, the SSE report asserts that "nil cardinal photos" were taken due to "time limitations". Reading that expression in context (where "cardinal photos" are distinguished from "cache photos"), we understand "cardinal photos" to mean photographs of the purported EKIA and any weapons or items of interest in the immediate vicinity.
 - (a) The first point to note about this is that the source of any time limitations is not explained and it is not clear what that source might have been. Uncontroversial records of the Chinartu mission show that the SSE process was under way by 1408DE and do not record any engagements after 1410DE until 1539DE. Metadata associated with the photographs in Exhibit R38 showed that they were taken around 1524DE, about 80 minutes after the purported engagement. Notification that the helicopters were leaving Tarin Kowt for extraction came a further ten minutes later. Despite production of documents by the Department of Defence, we were not referred to any evidence of other engagements or discoveries requiring the combat engineers' attention in that time. There is evidence from Person 14 that, by the time he discovered a further cache (between 1534DE and 1539DE), at least one combat engineer was outside the compound in which the appellant was questioning the middle aged man.
 - (b) The second point is that, as discussed in our open court reasons, the evidence includes two photographs of Afghan men killed at Chinartu. One of those men must be either the man whom Person 14 saw being executed or an insurgent killed in an engagement at 1405DE. If there was an engagement around that time resulting in an EKIA, somebody took a photograph of the EKIA. Yet the photographer did not also take a picture of the items that would have confirmed that he was an insurgent (the assault rifle and binoculars). Instead, these items were purportedly taken outside and photographed along with the contents of a cache discovered at some later time.
- Thirdly, "time limitations" were also said to be the reason why "minimal cache photos" were taken. Again, the source of the time limitations is not explained and it is far from clear what it might have been. The cache was necessarily found at some time between 1400DE (when it is said the engagement occurred) and 1524DE (when the first of the existing photographs was taken).
- Fourthly, the timing of the photographs indicates that the cache was discovered close to 1524DE. That might go some way to explaining the existence of "time limitations" in

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connection with photographing its contents, but does not completely resolve the issues mentioned in the previous paragraph. However, if the search of the area was prompted by an engagement around 1400DE in a nearby compound, it becomes rather surprising that the cache was not discovered until more than an hour later. The SSE report

In the absence of evidence indicating what else the combat engineers were doing in that time, the material canvassed in the SSE report cannot be regarded as reliable evidence of an engagement having occurred at or shortly after 1400DE. The only material in the SSE report that is truly supportive of that account is the summary of the engagement itself, which is unsourced hearsay and, as noted above, inconsistent in some respects with the 1405DE entry in the OPSUM.

Oral submissions advanced in closed court by the appellant sought to suggest that the primary judge had erred by first accepting the evidence of Person 14 and then discounting documents (including the SSE report) that were inconsistent with it. At CCJ[164] his Honour simply noted that the SSE report was not addressing the cache Person 14 said he had discovered and that the report contained a description of an engagement with some similarities to the purported engagement at 1405DE recorded in the OPSUM. No specific finding is expressed concerning the weight to be given to the SSE report. We therefore understand his Honour's discussion of the SSE report to be subsumed under the general observation (at CCJ[158]) that consistency between ADF reports is not surprising (an observation which, with respect, is unexceptionable).

The SSE report does not directly contradict any evidence given by Person 14. It is inconsistent with his account to the extent that it supports the occurrence of an engagement around 1405DE in which an insurgent was killed and a weapon and binoculars were recovered. To the extent that it does so, for the reasons outlined above, we do not consider that it can be given any weight. To the extent that the primary judge treated the SSE report as one of several records whose contents did not prevent the acceptance of Person 14's evidence, his Honour did not err.

Relatedly and somewhat obliquely, the appellant criticised the primary judge's inference (at CCJ[158]) that once a version of events was adopted it was repeated in subsequent official reports. The point was made that his Honour had made no findings as to what occurred at the debrief that preceded the writing of the OPSUM. However, this point, while it is a reason for caution in accepting that aspects of the OPSUM were not correct, does not deny the probability

that the authors of later reports reproduced the version of events which appeared in earlier reports.

The NDS personnel record

- Exhibit R34 was a bundle of personnel records of Afghan soldiers who served in conjunction with the SASR in 2012. The record of one soldier includes the notation "12 Oct Shot TB on tgt". The respondents relied on this notation—and the absence of similar notations in the other records in the bundle—to identify the soldier who, on their case, shot the middle-aged man in the incident witnessed by Person 14. Other documents indicated that that soldier was on the mission to Chinartu and was attached to the patrol led by Person 35.
- The appellant submitted that, if the respondents' case is correct, the notation "Shot TB" (which presumably means that the soldier shot a Taliban affiliate) is a further instance of the respondents' case involving a complex and far-reaching falsification of records. We do not consider that this point leads anywhere.
- First, the entry is very brief. Its author may have intended to convey no more than that the soldier had shot a person on that day, and assumed that any person shot by an NDS soldier would be an insurgent.
- Secondly, as the primary judge observed, consistency between the official accounts generated after the debrief is hardly surprising. Unless the person who updated the personnel record had also witnessed the actual engagement, they would be expected to use the existing records as the basis for any reference to events on the day.
- Thirdly, as to the broader submission that the respondents' case involves widespread falsification of records, falsity in official records may properly be regarded as *prima facie* unlikely and thus something as to which persuasive evidence is required. However, for reasons just mentioned, it does not follow that each additional step in the chain of false records calls for further proof. Further, and importantly, as we have already observed, it was not incumbent on the respondents to prove how particular inaccuracies or falsehoods found their way into the records. A finding of inaccuracy or falsity may simply be a function of the acceptance of evidence to the contrary of what is recorded. Of course, contradiction by the official records is a factor that must be considered before accepting such evidence. We do not accept that the primary judge failed to engage in that consideration.

I certify that the preceding two hundred and twenty-three (223) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Perram, Katzmann and Kennett.

Associate:

Dated:

16 May 2025

SCHEDULE OF PARTIES

NSD689 of 2023 NSD690 of 2023 NSD691 of 2023

Second Respondent

NICK MCKENZIE

Third Respondent

CHRIS MASTERS

Fourth Respondent

DAVID WROE