

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Not Restricted

S ECR 2022 0260

DIRECTOR OF PUBLIC PROSECUTIONS

Crown

v

PM

Accused

JUDGE: Incerti J
WHERE HELD: Melbourne
DATE OF HEARING: 25-28, 31 July, 1-4, 8-10, 17-18 August 2023
DATE OF VERDICT: 20 September 2023
CASE MAY BE CITED AS: DPP v PM
MEDIUM NEUTRAL CITATION: [2023] VSC 560

CRIMINAL LAW - Trial by judge alone - Murder - Complicity - Deceased died as a result of multiple stab wounds during group attack - CCTV of attack available - Accused 13 at time of alleged offending - Accused did not stab the deceased but participated in the attack by kicking and stomping - Trial severed from co-accused - Presumption of doli incapax - Whether accused knew his conduct was seriously wrong in a moral sense - Consideration of moral development of a child - Expert psychiatric and psychological evidence - *RP v The Queen* (2016) 259 CLR 641 - *BDO v The Queen* [2023] HCA 16 - *Crimes Act 1958* (Vic) s 324 - *Children, Youth and Families Act 2005* (Vic) s 534.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Crown	Ms K Churchill with Mr J Manning	Office of Public Prosecutions
For the Accused	Ms S E Lacy with Ms D Price	Stary Norton Halphen

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HER HONOUR:

Summary

- 1 On 12 March 2022, Declan Cutler also known by his nickname DJ, went to a party in Reservoir with his friends. Declan was 16 years old.
- 2 On that same night, the accused, PM,¹ was with a group of seven other boys including his older brother. PM was the youngest of the eight boys being 13 years and three weeks old at the time. The eldest member of the group was 17 years old.
- 3 One of Declan's friends, who was with him at the party, was known to be associated with a group from Heidelberg. This same friend was in conflict with a group from the western suburbs. Declan did not know PM or any of the other seven boys.
- 4 In the early hours of 13 March 2022, Declan and his two friends left the party on foot. Shortly after leaving the party, Declan and his friends were approached by a car, a stolen Mazda, carrying PM and the other seven boys. Some of those boys were said to be in conflict with Declan's friend. Upon seeing Declan and his friends, four of the boys got out of the Mazda and ran towards Declan and his friends, who all managed to run away.
- 5 Very shortly after, at 2:28am on 13 March 2022, Declan entered Horton Street from Elizabeth Street, Reservoir. He was walking alone when the Mazda entered the street. Closed-circuit television footage ('the CCTV footage') depicts the Mazda stopping near Declan, who turns and faces the Mazda before all eight boys hurtle out of the vehicle and quickly move towards him.²
- 6 Declan is subsequently attacked and killed by the group of eight boys. The entire attack is captured on the CCTV footage and lasts approximately two minutes. The CCTV footage emits no sound but screams of horror. In approximately two minutes, Declan is repeatedly stabbed and kicked and stomped on. Autopsy results found Declan suffered 66 blunt force injuries to his face and limbs, 56 sharp force injuries,

¹ A pseudonym, pursuant to *Children, Youth and Families Act 2005* (Vic), s 534.

² Tendered as Exhibit P66.

comprising 29 stab wounds, 27 incised wounds, and 30 puncture wounds. The cause of death was from four of the stab wounds to his chest.

7 PM did not stab Declan. He did however repeatedly kick and stomp on Declan. This occurred while Declan was being stabbed by some of the other boys.

8 PM is charged with murder by complicity. His trial has been heard separately from the other seven boys alleged to have been involved in Declan's death.

9 In this case, there has been little evidence about Declan, other than the fact that he went to a party, as teenagers do, left the party with his friends and the circumstances of how he died. Declan was alone and unarmed when he was set upon, and he was utterly defenceless against the group of eight boys. Declan was entitled to feel safe leaving the party.

10 The age of criminal responsibility in Victoria is 10 years. When a child is over ten but under 14 years old, as PM was at the time of Declan's death, the common law presumes that the child lacks the capacity to be criminally responsible for their actions. This rule is known as *doli incapax* (meaning, incapable of crime).³ To rebut the presumption, the prosecution must prove that at the time of the offence the child knew that their actions were seriously wrong in a moral sense. The prosecution bears a heavy burden when prosecuting children. It must be emphasised that the starting point is that a child under 14 years is presumed in law incapable of bearing criminal responsibility for their acts.

11 I have approached this case by determining the question of *doli incapax* first, rather than the other elements of murder by complicity. The evidence relevant to determining if the presumption of *doli incapax* has been rebutted beyond reasonable doubt focused on PM's life, his family background, his upbringing, schooling, his development, his prior interface with the criminal justice system and expert opinions about PM's intellectual and moral development. In addition, there was careful

³ *R v AHL* (2003) 6 VR 276, [75].

consideration of PM's actual conduct captured on the CCTV footage and the circumstances surrounding the attack on Declan.

12 I have had regard to the extremely serious nature of the allegation of murder by complicity and the disturbing nature of PM's conduct.

13 A review of the evidence in its entirety leaves open a reasonable possibility that at the time of the offence, PM did not know that his conduct was seriously wrong in a moral sense. Although the evidence suggests that PM had a wide range of opportunities for learning, the evidence of his capacity and cognitive development means that he had not necessarily gained the requisite knowledge.

14 In all the circumstances, I find the prosecution has not rebutted the presumption of *doli incapax* beyond reasonable doubt. As such, this leads to the conclusion that PM cannot be found guilty of murder and the alternative charge of manslaughter.

15 I therefore find PM not guilty of murder and not guilty of the alternative charge of manslaughter.

Introduction

16 PM is charged with the murder of Declan Cutler ('the deceased') on 13 March 2022.

17 The deceased died from 'stab wounds to the chest' following an attack on him by eight individuals in a suburban street in Reservoir, Victoria.⁴ The fatal assault on the deceased was captured on the CCTV footage.⁵ The attack involved the use of four knives by five individuals.

18 PM was born on 20 February 2009 and was aged 13 years and three weeks at the time of the alleged offence on 13 March 2022. PM accepts that he is depicted kicking and stomping on the deceased in the CCTV footage of the attack.⁶ It is not alleged that PM used a knife in the attack.⁷ Instead, the prosecution contends that PM is

⁴ Exhibit P1, [111].

⁵ Tendered as Exhibit P66.

⁶ Exhibit P1, [13].

⁷ *Ibid* [71].

guilty of murder on the basis of complicity. In particular, the prosecution puts its case against PM pursuant to s 323(1)(c) of the *Crimes Act 1958 (Vic)* ('*Crimes Act*').

19 Sections 323 to 325C of the *Crimes Act* provide a statutory codification of complicity. Section 324(1) provides that a person who is 'involved in the commission of an offence is taken to have committed the offence and is liable to the maximum penalty for that offence'. Section 323(1)(c) provides that a person is 'involved in the commission of an offence' if he or she 'enters into an agreement, arrangement or understanding to commit the offence'.

20 Furthermore, as PM was under the age of 14 at the time of the alleged offending, the presumption of *doli incapax* applies.

21 PM's trial proceeded by judge alone in accordance with the temporary arrangements for trial by judge alone contained in Ch 9 of the *Criminal Procedure Act 2009 (Vic)* ('*Criminal Procedure Act*').

Procedural history

22 On 6 October 2022, PM was committed to stand trial for murder by the Children's Court of Victoria, along with his seven co-accused.

23 On 7 October 2022, PM made an application for trial by judge alone pursuant to s 420D(2)(b) of the *Criminal Procedure Act*. Between 7 and 10 October 2022, each of PM's co-accused also filed an application for trial by judge alone.

24 On 11 October 2022, indictment C2215271 was filed charging PM and each of his co-accused with the murder of the deceased.

25 On that same day, the Court granted the application for a trial by judge alone ordering pursuant to the *Criminal Procedure Act* s 420E(1), the charge of murder alleged against each of the accused is to be heard and determined by judge alone and fixing the date for trial for 19 June 2023.⁸

⁸ See *Justice Legislation Amendment (Trial by Judge Alone and Other Matters) Act 2022 (Vic)* s 3, which

26 For numerous reasons, which were not the fault of any party, the commencement of a joint trial was delayed on a number of occasions.

27 At a hearing on 20 July 2023, it became clear there would be further delays to the possible start date for any joint trial. Consequently, the prosecution indicated that it would file a fresh indictment in relation to PM so that his trial could be heard separately from the other co-accused.

28 A fresh indictment, N10577110, was filed on 20 July 2023 naming only PM.⁹

29 PM's trial commenced on 25 July 2023 where he was arraigned, and he pleaded not guilty to the charge of murder.

Judge alone trial principles

30 In October 2022, when PM made application for a judge-alone trial, provision for criminal matters to be heard in this Court by a judge sitting alone existed by virtue of Ch 9 of the *Criminal Procedure Act*. While those provisions are now repealed, in this case, I am to apply Ch 9 as it was in force immediately before its repeal.¹⁰

31 I may make any decision which could have been made by a jury and my decision has the same effect as a jury verdict.¹¹

32 Section 4A of the *Jury Directions Act 2015* (Vic) (*'Jury Directions Act'*) applies to this case.¹² This means that my reasoning with respect to any matter to which Parts 4, 5, 6 or 7 of the *Jury Directions Act* applies must be consistent with how a jury would be directed according to the *Jury Directions Act*. Similarly, I must not accept, rely on, or adopt a statement, suggestion or direction that Parts 4, 5, 6 or 7 of the *Jury Directions*

inserted Ch 9 into the *Criminal Procedure Act 2009* (Vic). Section 420E of the *Criminal Procedure Act 2009* (Vic) specified an order may be made for trial by judge alone if a pandemic order is in force. A pandemic order was in force as at 11 October 2022.

⁹ This fresh indictment did not commence a new criminal proceeding and PM's trial could still proceed by judge alone in accordance with the Court's order of 11 November 2022: *DPP v SA & Ors* [2023] VSCA 145.

¹⁰ See *Criminal Procedure Act 2009* (Vic) s 461.

¹¹ *Ibid* s 420F.

¹² *Justice Legislation Amendment (Trial by Judge Alone and Other Matters) Act 2022* (Vic) s 420ZF.

Act prohibit a trial judge from making or giving a jury.¹³

33 Part 3 of the *Jury Directions Act* concerning requests for directions does not apply to judge alone trials. Nevertheless, counsel addressed me at the conclusion of evidence on the directions and principles to which I should, and have had, particular regard.¹⁴

34 The onus of proof is on the prosecution and the accused comes to this Court with the presumption of innocence in his favour. The accused is regarded as innocent unless and until the prosecution has proved his guilt beyond reasonable doubt. To do so, the prosecution must prove each of the elements of the relevant offence beyond reasonable doubt.¹⁵ The prosecution does not need to prove every fact that it alleges to this standard; however, facts must be clearly proved before they can be treated as established.¹⁶

35 In this case there was a combination of direct and circumstantial evidence. Where, as here, a case rests substantially on circumstantial evidence a verdict of guilty cannot be returned unless the circumstances are such as to be inconsistent with any reasonable hypothesis other than the accused's guilt. I therefore cannot be satisfied of PM's guilt unless his guilt is the *only* reasonable inference that the circumstances of the case would enable me to draw.¹⁷ For an inference to be reasonable, it must rest upon something more than mere conjecture. All the circumstances established by the evidence are to be considered and weighed in deciding whether an inference consistent with innocence is reasonably open. The evidence cannot be considered in a piecemeal fashion.¹⁸

36 I must consider all the evidence and decide the facts of the case. I must then apply

¹³ Ibid s 420ZF; *Jury Directions Act 2015* (Vic) s 4A ('*Jury Directions Act*'). See *Makeham v Sheppard* [2020] VSCA 242 for the operation of s 4A of the *Jury Directions Act* in the context of the Magistrates' Court of Victoria.

¹⁴ See T666-T711.

¹⁵ *Jury Directions Act* ss 61-62.

¹⁶ *R v Dickson* [1983] 1 VR 227, 235 (Starke ACJ, Crockett and McGarvie JJ); *R v Van Beelen* (1973) 4 SASR 353, 374-80 (Bray CJ, Mitchell and Zelling JJ).

¹⁷ *R v Baden-Clay* (2016) 258 CLR 308, 323 [46]-[47] (French CJ, Kiefel, Bell, Keane and Gordon JJ).

¹⁸ Ibid 323 [47] (French CJ, Kiefel, Bell, Keane and Gordon JJ).

the law to the facts I have found to determine whether the accused is guilty or not guilty of the offence charged.

37 To decide what the facts are in this case, I must assess the credibility and reliability of the witnesses who gave evidence. It is for me to decide whether a witness' evidence is to be believed and the weight which should be attached to any evidence.

38 No adverse inference may be drawn from the fact that PM chose not to give evidence at trial.¹⁹

39 The expert evidence in this case is to some extent disputed. As a starting point, if expert evidence is undisputed, I must have a very good reason not to accept it. A very good reason includes: the facts underlying the opinion not being present; the process of reasoning leading to the opinion being unsound; or a factor that casts doubt on the validity of the opinion.²⁰

40 However, the mere resolution of disputes about the conclusions of the expert evidence does not itself determine whether the relevant elements have been proved and I must independently consider the entire body of evidence. Furthermore, it is not necessary that I accept the evidence of the expert witnesses called by PM to find PM not guilty and, even if I prefer the evidence of the prosecution expert, I must acquit PM if the evidence gives rise to a reasonable doubt.

41 In this case there is a body of evidence introduced for the purposes of the issue of *doli incapax*, which included PM's 'no comment' record of interview with police on 23 March 2022. The right to remain silent is a fundamental right at common law,²¹ and no adverse inference may be drawn from PM's 'no comment' answers.²² However, PM's conduct during the police interview is relevant to this Court's

¹⁹ *Jury Directions Act*, s 41.

²⁰ *Taylor v R* (1978) 22 ALR 599; *R v Matusevich & Thompson* [1976] VR 470; *R v Matheson* [1958] 1 WLR 474; *R v Hilder* (1997) 97 A Crim R 70; *R v Klamo* (2008) 18 VR 644.

²¹ See Judicial College of Victoria, *Criminal Charge Book* [4.15]; *Petty v R* (1991) 173 CLR 95.

²² *Evidence Act*, s 89.

assessment of PM's cognitive development and capacity for moral reasoning.²³

42 The prosecution also submits that a number of statements made by PM to Ms Cidoni should be treated as admissions. Before I can treat these statements as admissions, I must be satisfied that PM made the alleged statements and, secondly, I must accept that PM's alleged statements were truthful. A number of the statements made to Ms Cidoni were the subject of a statement of agreed facts. I therefore can readily accept that they were made.²⁴

43 There is also some evidence suggesting that PM was intoxicated at the time of the fatal assault on the deceased. The fact of his intoxication does not give rise to any specific defence or excuse. However, I acknowledge that, if I am satisfied that PM was intoxicated, his intoxication may be relevant to my assessment of some matters such as whether he formed the requisite intent.²⁵

Evidence

44 At trial the prosecution called the following witnesses to give *viva voce* evidence:

- (a) TW,²⁶ the leader of wellbeing at the secondary college where PM was enrolled from the start of 2021;
- (b) Leading Senior Constable Gavin Williams ('LSC Williams'), a member of the North West Metro Division 4, Proactive Policing Unit, who had interactions with PM and his family;
- (c) Detective Senior Constable Brendon Stack ('DSC Stack'), the informant in this matter; and
- (d) Dr Karen Owen ('Dr Owen'), a clinical and forensic psychologist.

45 The defence called four witnesses to give *viva voce* evidence:

²³ *Jury Direction Act*, s 27.

²⁴ *Evidence Act*, s 191.

²⁵ See Judicial College of Victoria, *Criminal Charge Book* [8.7].

²⁶ A pseudonym, pursuant to *Children, Youth and Families Act 2005* (Vic), s 534.

- (a) Ms Louise Conwell ('Ms Conwell'), partner of Stary Norton Halphen criminal lawyers and PM's solicitor from March 2021;
- (b) Dr Yolisha Singh ('Dr Singh'), a child and adolescent forensic psychiatrist;
- (c) Ms Gina Cidoni ('Ms Cidoni'), a clinical and forensic psychologist; and
- (d) Ms Laura Scott ('Ms Scott'), a clinical neuropsychologist.

46 The point is worth making at this earlier stage, that the Court had access to quality expert assessments and evidence.

47 The police statement of R²⁷ was also read into evidence.

48 In addition, the parties provided three statements of agreed facts.²⁸ The first in relation to the circumstances of the alleged offending, the second in relation to the issue of doli incapax and the third in relation to statements PM made to Ms Cidoni.²⁹

49 There was a large volume of documentary and audio-visual evidence tendered throughout the course of trial, primarily relating to the issue of doli incapax. Transcripts were provided for some of the audio-visual evidence. I note that the videos themselves are the only evidence. The transcript is just an aid and if what I read in the transcript differs from what I hear or see, I am to use what I hear or see not what is in the transcript.

Elements of the offence

50 PM is charged with murder. As discussed, the prosecution alleges that PM is liable for the offence of murder on the basis of complicity in the commission of the offence under Div 1 of Pt 2 of the *Crimes Act*.

51 Pursuant to s 324(1), a person who is involved in the commission of the offence is taken to have committed the offence. In this case, the prosecution relies upon

²⁷ A pseudonym, pursuant to *Children, Youth and Families Act 2005* (Vic), s 534.

²⁸ *Evidence Act 2008* (Vic) s 191.

²⁹ Exhibit P1; P3; P89.

s 323(1)(c) which provides that a person is involved in the commission of an offence if the person 'enters into an agreement, arrangement or understanding with another person to commit the offence'.

52 In particular, the prosecution put their case against PM on the basis that he participated in an agreement, arrangement or understanding to attack the deceased with the joint intention to at least cause really serious injury or death.

53 Proof of complicity requires proof that a person committed the offence charged. In the context of group offending, such as this case, the prosecution must also prove that the commission of the offence occurred in accordance with, or within the scope of, the agreement, arrangement or understanding to which the accused was a party.

54 Pursuant to s 323(1)(c), offending as part of a group requires proof of four elements, that:

- (1) two or more people reached an agreement, arrangement or understanding to commit an offence, which remained in existence at the time the offence was committed ('agreement, arrangement or understanding'); and
- (2) the accused had the state of mind required for the commission of the relevant offence at the time of entering into the agreement (here, 'intention'); and
- (3) the accused engaged in an overt act to support or participate in the agreement ('participation'); and
- (4) in accordance with the agreement, one or more parties to the agreement performed all the acts necessary to commit the offence charged, in the circumstances necessary for the commission of that offence ('commission of the offence').

55 Both parties addressed me on the element of participation. However, during closing submissions the prosecution identified that – at some point during the trial – the Judicial College of Victoria's *Criminal Charge Book* was amended to remove the

reference to participation as an element of an offence by way of statutory complicity under s 323(1)(c).³⁰ This was done following the Court of Appeal's decision of *DPP v Gebregiorgis*,³¹ where the Court of Appeal made no reference to participation when discussing what needs to be proved for the purposes of s 323(1)(c). In the circumstances of that case there was no issue as to the participation of the accused and the Court of Appeal was concerned with a question – in a case stated – directed to the content of an agreement, arrangement or understanding for the purposes of the offence of murder. I do not consider the Court to have implicitly found that previous decisions identifying that participation remains an element to an offence pursuant to s 323(1)(c) were incorrect.³²

56 Thus, for the offence of murder by complicity, the necessary elements that the prosecution must prove beyond reasonable doubt are that:

- (1) PM entered into an agreement, arrangement or understanding with another to cause really serious injury or death to the deceased and that agreement, arrangement or understanding remained in existence at the relevant time; and
- (2) at the time of entering into the agreement, arrangement or understanding PM had the requisite mens rea for murder – an intention to cause really serious injury or death; and
- (3) PM acted in furtherance of the alleged agreement, arrangement or understanding; and
- (4) in accordance with that agreement, arrangement or understanding one or more of the parties to the agreement, arrangement or understanding formed all the acts necessary to commit murder ('commission of murder').

57 It was accepted that if I find that PM did not enter into an agreement, arrangement or understanding to kill or cause really serious injury, or did not have the requisite

³⁰ T736.5–12.

³¹ [2023] VSCA 166.

³² See, eg, *R v Semaan (Ruling 7)* [2016] VSC 170.

intention for murder, then I must turn to consider the statutory alternative of manslaughter by unlawful and dangerous act.

58 Further, as PM was under the age of 14 at the time of the alleged offending the presumption of *doli incapax* applies in this case.

The Law of Doli Incapax

59 The High Court in *RP v The Queen* has confirmed the common law presumption that a child under 14 years lacks the capacity to be criminally responsible for their acts.³³ The child is said to be *doli incapax*, meaning ‘incapable of crime’.³⁴

60 In Victoria it is conclusively presumed that a child under 10 years of age cannot commit an offence.³⁵ This minimum age of criminal responsibility is consistent with all other Australian jurisdictions.

61 The legislature in Victoria has not otherwise interfered with the common law position. The result is that in Victoria, the common law rebuttable presumption of *doli incapax* is applied to children between 10 and 13 years of age inclusive.³⁶

62 It is a fundamental premise of the criminal law that unless a person has the capacity to freely choose to do something they understand to be wrong, they should not be liable to conviction and punishment in criminal proceedings. Children lack this ability, but gradually develop it as they grow up. The law prevents prosecution of young children under 10 years but allows prosecution of older children where there is proof that they are sufficiently developed to understand the wrongfulness of their behaviour.³⁷

63 In *RP*, the High Court faced the question of whether sufficient proof had been brought to rebut the presumption of *doli incapax* in a case involving a boy aged 11

³³ *RP v The Queen* [2016] HCA 53; 259 CLR 641, [4] (*RP*).

³⁴ *R v AHL* (2003) 6 VR 276, [75].

³⁵ *Children Youth and Families Act 2005* (Vic), s 344.

³⁶ *R v AHL* (2003) 6 VR 276 (*AHL*) at 20, 24, 87.

³⁷ See, eg, Thomas Crofts, ‘Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of *Doli Incapax*’ (2018) 40(3) *Sydney Law Review* 339.

years and six months accused of committing sexual offences against his younger brother. In finding that there had not been sufficient proof, the Court made some important observations about the operation of the presumption of *doli incapax*.

64 The plurality explained that the common law presumes that a child under 14 years lacks the capacity to be criminally responsible for their acts. The rationale for the presumption of *doli incapax* is the view that a child aged under 14 years is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for *mens rea*.³⁸ The plurality of the Court stated:

From the age of 10 years until attaining the age of 14 years, the presumption may be rebutted by evidence that the child knew that it was morally wrong to engage in the conduct that constitutes the physical element or elements of the offence. Knowledge of the moral wrongness of an act or omission is to be distinguished from the child's awareness that his or her conduct is merely naughty or mischievous.³⁹ This distinction may be captured by stating the requirement in terms of proof that the child knew the conduct was 'seriously wrong' or "gravely wrong".⁴⁰ No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts.⁴¹

65 Justice Gageler, in a separate judgement, said:

Doli incapax - incapacity for crime - is a common law presumption in the same way as innocence is a common law presumption. To establish that a child under the age of 14 years has committed an offence in a jurisdiction in which the common law presumption continues to apply, the prosecution must prove more than the elements of the offence. The prosecution must prove beyond reasonable doubt that the child understood that the child's conduct which constituted the offence was seriously wrong by normal adult standards.⁴²

66 Whilst restating the existing law, the decision in *RP* is useful in its statement of the principles, its emphasis on the moral quality of what is to be proved and the need for evidence to be adduced to prove it.

³⁸ *RP*, [4], [8].

³⁹ *C v DPP* [1996] AC 1, 38; *BP v The Queen* [2006] NSWCCA 172, [27]-[28].

⁴⁰ *R v Gorrie* (1918) 83 JP 136; *C v DPP* [1996] AC 1, 38; *Archbold: Criminal Pleading, Evidence & Practice*, (1993), vol 1 at 52 [1-96].

⁴¹ *R v Smith (Sidney)* (1845) 1 Cox CC 260 per Erle J; *C v DPP* [1996] AC 1, 38; *BP v The Queen* [2006] NSWCCA 172, [29]; *R v T* [2009] AC 1310, 1331 [16].

⁴² *RP*, [38].

67 The onus is on the prosecution to rebut the presumption of *doli incapax*. It is not a defence in the sense that it must neither be raised nor proven by an accused. Accordingly, the prosecution must bring evidence to rebut the presumption to the criminal standard of beyond reasonable doubt, alongside proof of all the elements of the offence.⁴³

What needs to be proved?

68 If the presumption of *doli incapax* applies, the prosecution must prove beyond reasonable doubt that when doing the act charged, the child knew that their conduct was seriously wrong in a moral sense. An understanding that something is seriously wrong in a moral sense has been distinguished from acts of mere naughtiness or mischievousness.⁴⁴ While the test is simply stated, it is difficult in application.

69 In *RP*, the High Court made it clear that the test is directed to ‘knowledge of moral wrongness’.⁴⁵ Although not new, this emphasis is an important part of the decision in *RP*. A child’s acknowledgement that they understood that an act was ‘seriously wrong’ will not, of itself, provide an indication that the child appreciated the moral wrongness of the act or omission. The child might view conduct as ‘seriously wrong’ in the sense that they are likely to be in trouble if caught, without the requisite understanding of the act for the purposes of moral wrongfulness. Furthermore, focusing on the child’s belief that the act was more than mischievous, or naughty may obscure what it is that must be established.

70 The most recent High Court case to consider *doli incapax*, *BDO v R*,⁴⁶ dealt with *Criminal Code Act 1899 (Qld) s 29(2)*, which provides that:

A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission the person had capacity to know that the person ought not to do the act or make the omission.

⁴³ This is so notwithstanding *Jury Directions Act 2015 (Vic) s 61*.

⁴⁴ *BP v The Queen* [2006] NSWCCA 172 (1 June 2006), [27]; *RP*; *R v ALH* (2003) 6 VR 276; *R v M* (1977) 16 SASR 589.

⁴⁵ *RP*, [9].

⁴⁶ [2023] HCA 16, [23] (*BDO*).

Thus, while the common law focuses on a child's actual knowledge of the moral wrongness of their action, that provision focuses on the child's 'capacity to know' that they ought not engage in the conduct in question.

71 Despite the differences between the legal tests in Victoria and Queensland, the High Court in *BDO* made the following helpful observations about the principle of *doli incapax* at common law:

Capacity to know and knowledge

The requirement of the common law that it be shown that the child had knowledge of the moral wrongness of an act or omission, before the presumption can be rebutted, is not new. Drawing on what Bray CJ discussed in *R v M*, the plurality in *RP v The Queen* held that the nature of the knowledge on the part of the child necessary to rebut the presumption is that an act is wrong according to the standards or principles of reasonable people. The standard, obviously enough, is that of an adult person. ...

The plurality in *RP v The Queen* went on to say that what suffices to rebut the presumption that a child defendant is *doli incapax* will vary according to the nature of the allegation and the particular child. No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts. There needs to be evidence from which an inference can be drawn, beyond reasonable doubt, *that the child's development is such that they knew it was morally wrong, in a serious respect, to engage in the conduct. The development in question is the intellectual and moral development of the child.*⁴⁷

72 The High Court in *BDO* accepted the proposition in *RP* that the child's understanding of 'moral wrongness' is at the heart of the inquiry and directs attention to the child's education and environment in which they were raised.⁴⁸

73 In the present case, the prosecution submits that the statements 'seriously wrong' or 'gravely wrong' are designed to capture the distinction between something which is morally wrong as opposed to naughty or mischievous.⁴⁹

74 The prosecution submits that the test is not whether PM understood *why* the act or acts were seriously wrong in a moral sense, knew the difference between right or

⁴⁷ *BDO*, [13], [14] (footnotes omitted) (emphasis added).

⁴⁸ *Ibid* [16].

⁴⁹ Prosecution Closing Submissions 25–26.

wrong in the abstract, or had sophisticated moral reasoning.⁵⁰ Instead, the prosecution contends the question should be framed as whether PM knew the acts were seriously wrong in a moral sense, as distinct from believing that the acts were merely naughty, rude or mischievous. That question is to be judged by the standards of reasonable adults.⁵¹

75 The defence on the other hand submits that the need to prove that PM knew his acts were seriously wrong in a moral sense was wider than that posited by the prosecution. The defence emphasises that care must be taken not to pose the question as a simple choice of characterisation, being whether PM knew his actions were seriously morally wrong or whether he thought them merely naughty or mischievous.⁵² Posing the question as a simple dichotomy would be to apply a civil standard of proof. The burden remains on the prosecution to prove beyond reasonable doubt that PM knew his actions were seriously wrong in a moral sense. If it fails to do so PM must be found not guilty.

76 There has been some criticism of the contrast between behaviour which is known to be seriously wrong as opposed to merely naughty. In the New South Wales Court of Appeal decision in *RP v The Queen*, Hammill J stated:

I confess that I find the distinction unhelpful and, in jury directions could give rise to an erroneous process of reasoning whereby a finding of the act was more than naughty or mischievous may lead to a finding that the child knew that what they did was seriously or gravely wrong without proper attention being paid to that question. *There is a vast chasm between something that is 'naughty' or 'mischievous' and something that is gravely or seriously wrong. The trouble with introducing a comparison is that it is easy to fall into the trap of thinking that if something is more than naughty, it must therefore satisfy the test. It does not.*⁵³

77 Despite this criticism the plurality of the High Court in *RP* referred to the distinction stating:

Knowledge of the moral wrongness of an act or omission is to be

⁵⁰ Ibid 28.

⁵¹ Ibid 27.

⁵² Defence Closing Submissions, [11].

⁵³ *RP v The Queen* (2015) 90 NSWLR 234, 129.

distinguished from the child's awareness that his or her conduct is merely naughty or mischievous. This distinction may be captured by stating the requirement in terms of proof that the child knew the conduct was "seriously wrong" or "gravely wrong".⁵⁴

78 Similarly, in *BDO*, the High Court averted to the distinction, stating:

The knowledge is of the wrongness of the act as a matter of morality, not as contrary to the law. Because it is knowledge of a child it is necessary to prove knowledge of a serious wrongness, as distinct from mere naughtiness.⁵⁵

79 Later in their judgment, the High Court also stated:

In the first place, wrongness is expressed by reference to the standard of reasonable adults, from which it takes its moral dimension. It is not what is adjudged to be wrong by the law or by a child's standard of naughtiness. The capacity of a child to know that conduct is morally wrong will usually depend on an inference to be drawn from evidence as to the child's intellectual and moral development. It may be added that there may be a disability from which the child suffers which affects their capacity to know or understand. Such a disability may be a factor which is relevant, but the lack of disability – or proof that a child is of "normal" mental capacity for their age – will clearly not be sufficient to prove the capacity to know or understand.⁵⁶

80 Considering *RP* and the High Court's further clarification in *BDO*, I accept that this Court must take care not to pose a question as a simple choice of characterisation, being whether the child knew their actions were seriously morally wrong or whether they thought them to be merely naughty or mischievous. I consider that to pose the question as a simple dichotomy would be an oversimplification of the test as set out in *RP* and confirmed in *BDO*. The test always maintains the burden on the prosecution to prove beyond reasonable doubt that the child – in this case PM – knew his actions were seriously wrong in a moral sense, not merely that he knew that his actions were more than 'naughty' or 'mischievous'.

81 Furthermore, while the distinction provides some clarification to what the test is directed to, it is important to identify that the distinction is repeatedly stated to be between knowledge of *serious* and/or *moral* wrongness and naughtiness. It is not merely a distinction between knowledge of right and wrong as opposed to

⁵⁴ *RP*, [9].

⁵⁵ *BDO*, [13].

⁵⁶ *Ibid*, [23].

naughtiness.

82 It remains that the prosecution must prove that the accused had, at the time, actual knowledge that their conduct was seriously wrong in a moral sense. This ‘will usually depend on an inference to be drawn from evidence as to the child's intellectual and moral development’. As stated in *BDO*:

To be capable of rebutting the presumption, the evidence must be such as to enable a conclusion that the appellant was able to understand that it was morally wrong. That is not a low standard.⁵⁷

83 The test was applied in *EL v R*, where the Court said:

In accordance with *RP v The Queen*, the test is whether this child, EL, at the time of the offence, knew that what he was doing was “seriously wrong” or “gravely wrong”. Knowing that something is “seriously wrong” has been defined as involving “more than a childlike knowledge of right and wrong, or a simple contradiction. It involves more complex definitions of moral thought involving the capacity to understand the event, the ability to judge whether their actions were right or wrong (moral sophistication), and an ability to act on that moral knowledge.”⁵⁸

84 In *EL*, the Court rejected the prosecution’s submission that the appellant was repeatedly delinquent because of his oppositional defiant disorder, which was the ‘simple answer’ for his behaviour. The Court said that this submission:

[Ignores] the complex symptomatology suffered by the appellant, and the history of his diagnoses from an early age and treatment therefore. For this appellant, there is no simple answer, but rather a far more nuanced approach is required to determine whether the test as set out in *RP v The Queen* has been met. Here, the evidence of Dr Llosa of the mismatch between the appellant’s biological age and his emotional maturity, which I accept, is a relevant factor, and to the extent that the Crown submitted otherwise, I reject that submission. The essential element that the Crown must prove beyond reasonable doubt is whether EL knew that the act was seriously wrong as a matter of morality, not that it was a crime contrary to law.⁵⁹

85 The Court concluded:

Having regard to the whole of the evidence, I am not satisfied that the Crown has proved beyond reasonable doubt that EL knew, at the time of the offence, that what he was doing was seriously or gravely wrong. *His knowledge of right*

⁵⁷ Ibid, [48].

⁵⁸ [2021] NSWDC 585, [171] (citation omitted) (*EL*).

⁵⁹ *EL*, [173] (*EL*).

or wrong as a child was clearly established by Dr Llosa's evidence, but it had little if any impact on his conduct which, in respect of school delinquency, was repeated over and over again despite the consequences to him of disciplinary action. No amount of letters to his parents from the school setting out those consequences, or warnings from police officers, had any impact on his behaviour. I accept his father's evidence that "he's just not getting it" and reject the Crown's submission that at the time of the offence he was "on a trajectory of seriously wrong behaviour that culminated in the commission of the offence", as not reflecting the proper use of the evidence nor the correct test to be determined.

I accept Dr Llosa's evidence that EL had no understanding of the extent of the impact of his conduct on others, given the complex nature of his multiple diagnoses. *Notwithstanding Dr Llosa's concession in cross-examination that the appellant would know that robbing someone at knife point is very seriously wrong, his lack of impulse control and the circumstances leading up to the offence must be taken into account, together with his diminished emotional maturity by comparison to his biological age.* Whilst the appellant would have understood that his behaviour was wrong, and would be likely to get him into trouble with the authorities, his understanding of the wrongfulness of his conduct was superficial and not underpinned by any meaningful understanding of the construct of criminal responsibility.

In all of the circumstances, I am not persuaded he had the necessary mens rea to be guilty of the offence and I find that the Crown has not rebutted the presumption of doli incapax beyond reasonable doubt.⁶⁰

What must the knowledge relate to?

86 In this case, the prosecution must prove beyond reasonable doubt that PM knew his conduct was seriously wrong in a moral sense. There are two aspects to this task. The first is to identify the conduct. The second is directed at PM's knowledge of the serious moral wrongness of his conduct at the time he engaged in that conduct.

87 In *RP*, the plurality said in relation to the conduct in the context of doli incapax:

From the age of 10 years until attaining the age of 14 years, the presumption may be rebutted by evidence that the child knew it was morally wrong to engage *in a conduct* that constitutes a *physical element or elements* of the offence.⁶¹

88 The High Court in *BDO* cited the above passage in *RP* with approval, and further said:

The requirement of the common law is that it be shown that the child had knowledge of the moral wrongness of an *act or omission* before the

⁶⁰ Ibid [175]–[177] (emphasis added).

⁶¹ *RP*, [9] (emphasis added).

presumption can be rebutted, is not new.⁶²

89 Accordingly, the presumption of *doli incapax* applies with respect to the conduct which constitutes the physical element or elements of the offence charged. In this trial, the presumption of *doli incapax* attaches to the two physical elements of the charge of murder by way of complicity, being:

- that PM entered into an agreement, arrangement or understanding to kill or cause really serious injury; and
- participated or acted to support that agreement, arrangement or understanding, by stomping on and kicking the deceased.

90 The defence suggests, and I agree, I should first consider whether the prosecution has rebutted the presumption of *doli incapax* beyond reasonable doubt. In doing so I will primarily focus on PM's conduct in participation and support of the alleged agreement to kill the deceased. While I have of course had regard to all the evidence, I have adopted this approach in this judgment as:

- (a) it is not disputed that PM participated in the assault of the deceased and is depicted in the CCTV footage kicking and stomping the deceased. What is in dispute is whether PM did so in furtherance of any agreement, arrangement or understanding with the other boys to kill or to cause really serious injury to the deceased (for the purposes of the offence of murder) or to assault the deceased including with the use of knives to stab him (for the purposes of the statutory alternative offence of manslaughter);
- (b) the submissions of both parties in relation to *doli incapax* primarily focused on his conduct in participation of the alleged agreement rather than his conduct in entering into the alleged agreement;
- (c) in the circumstances of this case if PM did not know that his conduct in participation was seriously wrong in a moral sense then it is unlikely that he would nonetheless know that the entering into such an agreement was

⁶² *BDO*, [13] (emphasis added).

- seriously wrong in a moral sense;
- (d) the evidence relating to *doli incapax* made up a significant part of the evidence at trial and the parties rely upon much of that evidence in relation to the questions of: whether PM entered into an agreement, arrangement or understanding; the content of any agreement, arrangement or understanding he was a party to; and his intention at the time any agreement, arrangement or understanding was entered into; and
 - (e) if, as the defence contends, the prosecution has not rebutted the presumption of *doli incapax* in respect of his conduct forming the physical element of participation, this would dispose of both the charge of murder and the alternative charge of manslaughter by unlawful and dangerous act, rendering it unnecessary to consider the contested elements of murder and manslaughter by complicity.⁶³

91 The defence described the conduct to be assessed for the purposes of conduct making up the element of participation as PM's acts of kicking and stomping the deceased as depicted in the CCTV footage. However, as I discuss below, I consider that the relevant conduct includes not only PM's individual actions during the assault (kicking and stomping) but necessarily the context in which they occurred.

Factors relevant to rebutting the presumption

92 Despite the presumption's longevity, understanding how the presumption operates and what evidence is sufficient to rebut it is not straightforward.

93 Whether the prosecution can prove beyond reasonable doubt that PM knew that his actions were seriously wrong in a moral sense requires consideration of PM as an individual and unique child. This involves consideration of a wide variety of matters, including his cognitive, intellectual and moral development, his disabilities,

⁶³ Indeed, the prosecution have conceded that if the presumption of *doli incapax* is not rebutted for the purposes of the physical elements of murder on the basis of complicity, it would not be open for me to find PM *doli capax* for the purposes of the statutory alternative of manslaughter by unlawful and dangerous act.

his upbringing, his education and environment.

94 In this respect, the work of Lennings and Lennings cited in *EL* is of assistance:

The concept of knowing something is 'seriously wrong' involves more than a childlike knowledge of right and wrong, or a simple contradiction. It involves more complex definitions of moral thought involving the capacity to understand an event, the ability to judge whether their actions were right or wrong (moral sophistication), and an ability to act on that moral knowledge. Moral reasoning involves interpretation individuals make of information for evaluating rightness or wrongness. Such interpretative systems are influenced by social factors (eg, modelling), manipulation of the perceived effect of the action (such as whether the action causes slight or severe harm) and information processing biases.⁶⁴

95 In this case there is little dispute between the parties about relevant factual matters. As already addressed, three detailed statements of agreed facts were tendered at trial, which provide the relevant evidentiary background and context to the offending.⁶⁵ For the purpose of determining if the prosecution has proved beyond reasonable doubt that the presumption of *doli incapax* has been rebutted in relation to PM participating in the agreement, arrangement or understanding by stomping on and kicking the deceased, PM has admitted he was at the scene and participated in the assault of the deceased, as shown in the CCTV footage.⁶⁶

96 There is no dispute between the parties about PM's background of extreme disadvantage, experiences of serious family violence, interface with the criminal justice system or limited engagement with school and education.

97 However, it is important to emphasise that the fact PM voluntarily engaged in the conduct depicted in the CCTV footage does not constitute *prima facie* evidence that he is *not doli incapax*. Nor would evidence that he intended to kill or cause really serious injury to the deceased constitute *prima facie* evidence that he is *not doli incapax*.⁶⁷ The evidence relevant to the question of *doli incapax* can be broadly

⁶⁴ Nicholas J Lennings and Chris J Lennings, 'Assessing Serious Harm Under the Doctrine of *Doli Incapax*: A Case Study' (2014) 21(5) *Psychiatry, Psychology and Law*, 791-800, 792.

⁶⁵ Exhibit P1; P3; P89.

⁶⁶ See Exhibit P89.

⁶⁷ *R v JA* (2007) 161 ACTR 1, 12 [81].

grouped into the following categories:

- (a) PM's conduct and the circumstances of the alleged offending;
- (b) PM's social development, upbringing and family environment;
- (c) PM's education;
- (d) PM's interactions with the criminal justice system; and
- (e) the expert evidence of Dr Owen, Dr Singh, Ms Cidoni and Ms Scott.

98 This case is particularly unusual given the breadth of evidence available to the Court on the question of *doli incapax*. Based on all of this evidence the Court is tasked with making inferences as to PM's knowledge or understanding at the time of the alleged offending and whether he knew what he was doing at that moment was seriously wrong in a moral sense. This necessarily requires consideration of PM's moral development.

99 Unlike other areas of development, moral development is a skill that improves, in most cases, incrementally over an extended period. It involves an individual's capacity for abstract thinking, which again develops throughout adolescence, and an assessment of cognitive development. As such, in this case, it is necessary to consider PM's psychiatric, neurological and psychosocial development, and his life experiences to reach a conclusion on the question of *doli incapax*.

100 It is the Court's task, having regard to the rich matrix of evidence, to conclude what inferences can be made about PM's knowledge or understanding about his conduct or participation in the assault. Did PM know what he was doing was seriously wrong in a moral sense? Put another way, has the prosecution proven beyond reasonable doubt that PM knew his conduct at the time was seriously wrong in a moral sense?

The circumstances of the alleged offending

- 101 On the evening of 12 March 2022, the deceased and his friend, TH,⁶⁸ attended a party held by R at her family home in Reservoir ('the party'). The party commenced at around 9:30pm.⁶⁹
- 102 At 1:38am on 13 March 2022, PM and seven other boys, aged between 14 and 17, left a home in Tarneit in a stolen Mazda vehicle. Among the other boys was PM's older brother, AM,⁷⁰ who was then aged 14 years.⁷¹
- 103 Some of those with PM were known to be affiliated with a group from the western suburbs.⁷² There were tensions between that group and the group from Heidelberg.⁷³ TH was known to be affiliated with the Heidelberg group.⁷⁴
- 104 Throughout the evening of 12 March 2022 and the early hours of 13 March 2022, H⁷⁵ – an associate of PM's group who was at the party – was communicating with members of PM's group.
- 105 Following its departure from Tarneit, the Mazda containing PM and seven others travelled to Reservoir. It arrived in Reservoir at ~2:24am. CCTV footage from the relevant area shows that as the Mazda comes close to the location of the party, it stops and H and her friend, G,⁷⁶ approach the vehicle.⁷⁷ The Mazda then moves off, performing a U-turn and travelling along Livingstone Street towards Elizabeth Street.⁷⁸ H and G then walked off in the same direction.⁷⁹
- 106 At 2:26am the Mazda turns right into Elizabeth Street and travels north. At 2:27am

⁶⁸ A pseudonym, pursuant to *Children, Youth and Families Act 2005* (Vic), s 534.

⁶⁹ Exhibit P1, [25]; T126.8–10.

⁷⁰ A pseudonym, pursuant to *Children, Youth and Families Act 2005* (Vic), s 534.

⁷¹ Exhibit P1, [11].

⁷² Ibid [14].

⁷³ Ibid [15].

⁷⁴ Ibid [2]–[3].

⁷⁵ A pseudonym, pursuant to *Children, Youth and Families Act 2005* (Vic), s 534.

⁷⁶ A pseudonym, pursuant to *Children, Youth and Families Act 2005* (Vic), s 534.

⁷⁷ Exhibit P1, [57]; P69; P68, item 43.

⁷⁸ Exhibit P1, [58]; P69; P68, item 44.

⁷⁹ Exhibit P1, [59].

the Mazda turns into Nocton Street travelling east.⁸⁰

107 The deceased, TH, and another young male, KH,⁸¹ were walking on the northern footpath in a westerly direction when the Mazda approached the three boys by performing a U-turn and pulling up adjacent to them.⁸²

108 Within seconds, four individuals alighted the Mazda and ran towards the deceased, TH, and KH. The four individuals got back into the Mazda as the deceased and the other two boys ran. The vehicle then drove off in the same direction as the three boys.⁸³ CCTV from the eastern end of Nocton Street then depicts the Mazda vehicle speeding past.⁸⁴

109 At 2:28am the deceased enters Horton Street from Elizabeth Street. He is now alone and walking along the footpath down Elizabeth Street.⁸⁵ CCTV from a residential premises then depicts the Mazda driving past before stopping at the location.⁸⁶ The deceased turns and faces the vehicle before all eight co-accused exit the vehicle.⁸⁷

110 The deceased is then attacked, the entirety of which is captured on the CCTV footage.⁸⁸ In short, the attack involves the use of four knives by five co-accused, as well as kicking and stomping. PM did not use a knife in the attack.⁸⁹ The attack upon the deceased lasts approximately two minutes.⁹⁰

111 The CCTV camera faces north towards the intersection, overlooking the southern footpath of Horton Street. The CCTV footage commences at 2:28:25am. It does not include any audio. The view provided by the camera shows the bottom left corner of the yard of the property, a fence bisects the frame travelling from the upper left to

⁸⁰ Ibid [60].

⁸¹ A pseudonym, pursuant to *Children, Youth and Families Act 2005* (Vic), s 534.

⁸² Exhibit P1, [61].

⁸³ Ibid [62].

⁸⁴ Ibid [63].

⁸⁵ Ibid [64].

⁸⁶ Ibid [65].

⁸⁷ Ibid [66].

⁸⁸ Exhibit P66; T202.4-5; T204.23-27.

⁸⁹ Exhibit P1, [71].

⁹⁰ Ibid [68].

the lower right, and on the street-side of the fence there is a large tree, a small portion of nature strip, a parked car⁹¹ and the street beyond.

- 112 For convenience, it is useful to describe the attack as occurring in two waves:
- (a) the first wave is the initial assault on the deceased involving PM and seven other individuals, which commences at approximately 2:28:35am and concludes at 2:29:44am when all the co-accused have exited the frame; and
 - (b) the second wave occurs when PM, and three other individuals, return to the deceased, lasting from approximately 2:30:00am to 2:30:30am.
- 113 Subsequently, between approximately 2:31:45am and 2:33:05am, one individual returns onto the screen while the deceased lies motionless in front of the parked car.
- 114 The CCTV footage is in greyscale and during the waves of the attack shows a frenzied scene with the various participants moving around and assaulting the deceased in a variety of ways. At times it is difficult to comprehend exact movements or items. This is exacerbated by the fact that the fence and tree, as well as individuals moving about, often obscure actions and the precise location of the deceased during certain events. The CCTV footage has therefore been subject to a number of detailed and concentrated viewings.

The 'first wave' of the attack

- 115 At the beginning of the footage, a car – the Mazda – can be seen travelling into the frame from the left side of the screen and stopping on the far side of the road with only its headlights and numberplate area visible through the branches of the tree. The deceased can be seen walking on the footpath south of the tree, in the direction of the Mazda.
- 116 Indistinguishable movement can be observed through the tree behind the Mazda headlights: one of the driver's side doors being opened.

⁹¹ This car is a Mazda owned by a nearby resident. To avoid confusion, I will refer to it as the 'parked car' when discussing the footage.

- 117 Further indistinguishable movements can then be seen by the driver side of the Mazda through the branches of the trees, before at 2:28:35am the deceased can be seen re-entering view from the left side of the screen running down the east footpath near the trunk of the tree.
- 118 The deceased is being pursued and is pulled backwards by one individual when he reaches the parked car and, in the space of seven seconds, is on the ground surrounded by all eight individuals.
- 119 PM first appears in frame at 2:28:38am running along the road from the Mazda and onto the nature strip near the deceased. Four other individuals have already reached the deceased and are striking and kicking him. PM reaches the deceased at 2:28:40am and immediately begins kicking or stomping towards the deceased.
- 120 In the following moments, in a frenzied scene, PM and the others surround the deceased. All appear to be kicking or stomping towards the deceased while one of them appears to repeatedly stab the deceased. Two of the individuals then move away from the deceased while the others continue the attack.
- 121 At ~2:28:46am, one of the individuals can be seen with a knife in his right hand, stabbing towards the deceased. PM is behind this individual and appears to be looking down at the deceased over the left shoulder of the stabber. The deceased is still being stabbed and struck while on the ground. PM can be seen moving around the back of the other individuals before continuing to kick and stomp the deceased, pushing one of the other individuals out of the way as he does so.
- 122 PM continues to kick towards the deceased as the three others continue their assault, two of whom appear to be stabbing towards the deceased while PM is faced towards them. PM can be observed at 2:29:00am holding onto the shoulder of the individual on his left while that individual appears to stab the deceased.
- 123 Around 2:29:02am, PM is pushed slightly behind another assailant in front of the parked car but away from the deceased. PM appears to watch for approximately five

seconds as the deceased continues to be assaulted and stabbed. At ~2:29:09am, PM appears to re-commence kicking towards the deceased while the others present continue the assault.

124 At ~2:29:13am, PM is standing just behind the deceased's head and appears to move back to steady himself on the parked car. PM then watches the attack for a further eight seconds while two others stab directly towards the deceased on the ground. PM re-commences kicking at 2:29:20am.

125 At ~2:29:22am, four of the boys move away from the deceased and towards the Mazda still parked in the street. One continues stabbing the deceased as PM and two others kick towards him.

126 At ~2:29:30am, two further boys move away from the deceased, leaving only PM and one other. PM continues to kick and stomp down towards the deceased's head. As PM kicks and stomps, the other individual continues to stab towards the deceased's right side before departing.

127 At ~2:29:33am, one of the individuals moves away from the deceased as another comes closer to the deceased. During this time PM continues kicking. PM then strikes down at the deceased while leaning on the parked car. PM then runs around the back of the parked car, down the street towards the Mazda and out of frame.

128 From ~2:29:44am to 2:30:00am none of the co-accused can be seen on screen. The deceased's upper body and head can be seen as he lies on the nature strip in front of the rear tyre of the parked car.

The 'second wave' of the attack

129 At 2:30:00am, an individual moves back on screen towards the deceased from near the Mazda. This individual arrives where the deceased is laying at ~2:30:03am and continues the attack while two others return to the frame.

130 At ~2:30:12am, PM returns to the deceased. PM arrives at the deceased while the first assailant to arrive during the second wave moves around the deceased and appears

to be crouching down near his head and looking at him. PM immediately begins stomping on or near the deceased's head several times as the other individual stands up and watches. PM then steps back and watches as the other individual puts his hand on the parked car and starts kicking or stomping on the deceased. PM then leans on the parked car himself and kicks at the deceased's head as the other individual goes around the parked car and returns towards the Mazda. After some more kicks PM then himself turns back and moves towards the Mazda.

131 By ~2:30:29am, PM and the other individual are out of screen and at ~2:30:44am the Mazda drives down the street and out of screen as the deceased remains prone on the ground with his head and upper body visible near the rear wheel of the parked car.

132 At ~2:32.13am the lighting illuminating the street and the deceased from the right of frame disappears. Shortly later, at ~2:32.19am, a car, which is the Mazda, drives on the street from the right to the left of the frame. The cars headlights are off. During this time the deceased has remained motionless on the nature strip.⁹²

Autopsy

133 An autopsy on the deceased's body was performed by Dr Joanna Glengarry at 10:00am on 14 March 2022. The deceased's cause of death was 'stab wounds to the chest' and Dr Glengarry's findings noted that the deceased suffered:

- (a) 66 blunt force injuries to the face and limbs;
- (b) 56 sharp force injuries, including four stab wounds to the chest region 'associated with lethal injuries'; and
- (c) 30 puncture wounds.⁹³

Events following the attack on the deceased

134 At 2:32am, H is recording on her phone. A vehicle can be heard approaching and

⁹² Exhibit P69, ~36:45.

⁹³ Exhibit P1, [110]-[111].

slowing. It can then be heard stopping and an individual yells out, 'Hey'. H responds with, 'what', and the male says, 'He's around there. He's dead. Mum's life he's dead'.⁹⁴

135 At 2:38am, CCTV depicts the Mazda travelling east on Bell Street. PM is in the front seat wearing a Champion Brand hoodie.⁹⁵

136 At 11:33am PM, his brother AM, and another individual were captured on CCTV as they arrived at an address in Hoppers Crossing.⁹⁶

137 At 5:48am on 16 March 2022, a Holden Cruze with licence plate 1FZ6ZG was captured on CCTV at a BP Service Station on Pascoe Vale Road, Coolaroo. A male gets out of the car and fills up two McDonald's cups with petrol before getting back into the Holden Cruze and departing at 5:50am. The car then travels south along Pascoe Vale Road.

138 At 6:00am the Mazda driven on the night of the deceased's death is set on fire at a carpark in Meadow Heights. The carpark is a five-minute drive from the BP petrol station in Coolaroo. Footage shows five males run from the car fire towards the Holden Cruze and depart the area.⁹⁷ In a later interview with Ms Cidoni, PM acknowledged he was present when the Mazda was burnt.⁹⁸

Arrest

139 At 11:54am on 23 March 2022, PM was arrested in North Melbourne in the company of AM and others by members of the Special Operations Group.⁹⁹

PM's social development, upbringing and family environment

140 PM was born on 20 February 2009 and is now 14 years and seven months old. PM was age 13 years and three weeks in March 2022.¹⁰⁰ Both parents, MJ and DM,¹⁰¹

⁹⁴ Ibid [78]-[79]; Exhibit P69, 38:00-38:35.

⁹⁵ Exhibit P1, [81]; Exhibit P69, ~40:00.

⁹⁶ Exhibit P1, [87].

⁹⁷ Ibid [89]-[90].

⁹⁸ Exhibit P89.

⁹⁹ Exhibit P1, [97].

¹⁰⁰ Exhibit P3, [1].

were born in Sudan and commenced a relationship in or around 1991.¹⁰²

141 The family migrated from Sudan to Australia as refugees in 2004. PM was born in Queensland in 2009 and raised in Toowoomba. In 2013 the family moved to Tarneit, Melbourne.¹⁰³ PM's parents remained in an intermittent relationship until late 2015.¹⁰⁴

142 PM has eight siblings. His two youngest siblings are born from relationships between MJ and other partners, in 2019, and 2021, respectively.¹⁰⁵

143 MJ has made multiple reports to police of family violence perpetrated by DM, in some instances in front of the children.¹⁰⁶ These reports resulted in a number of intervention orders against DM.¹⁰⁷ PM and his family have been the subject of multiple Interim Accommodation Orders¹⁰⁸ and Family Preservation Orders,¹⁰⁹ and were in receipt of crisis accommodation throughout 2020 and 2021.¹¹⁰

144 Commencing on 7 November 2019, regular multidisciplinary family care meetings were held in relation to PM and his family. These meetings were attended by various organisations including Victoria Police, the Department of Health and Human Services (as it then was), the Department of Education and representatives from the children's schools.¹¹¹ Evidence of 10 different family care meetings is before the

¹⁰¹ Pseudonyms, pursuant to *Children, Youth and Families Act 2005* (Vic), s 534.

¹⁰² Exhibit P3, [3].

¹⁰³ Ibid [4].

¹⁰⁴ Ibid [3].

¹⁰⁵ Ibid [2].

¹⁰⁶ Ibid [6], [8]; P4.

¹⁰⁷ Ibid [7], [10].

¹⁰⁸ Per a joint Aide Memoire handed up 2 August 2023, "an interim accommodation order is an order made by the Children's Court for the temporary placement of a child pending a final determination of an application".

¹⁰⁹ Per a joint Aide Memoire handed up 2 August 2023, "A family preservation order gives the Department of Families, Fairness and Housing the responsibility for the supervision of the child for a specified period but does not affect a person's parental responsibility for the child. This order provides for the child to live with and be placed in the day-to-day care of one or both of the child's parents. The Department of Families, Fairness and Housing supervise the care for the child during the period of the order".

¹¹⁰ Exhibit P3, [15].

¹¹¹ Ibid [16].

Court.¹¹² It was documented in the care team meetings that PM should receive trauma counselling,¹¹³ but despite it being identified as a need, none was organised.¹¹⁴

145 The Proactive Policing Unit within Victoria Police attempted to engage with PM and his family on multiple occasions, as there had been a number of negative interactions and many of the children were deemed ‘high risk’ because of contact with the criminal justice system.¹¹⁵ PM was noted as uncomfortable and resistant to engage.¹¹⁶

PM’s education

146 PM attended four different primary schools before moving to a high school for Year 7.¹¹⁷ PM’s 2021 school reports reveal minimal attendance, resulting in a grade of ‘did not participate – low participation’ for most subjects.¹¹⁸ The prosecution submits that PM’s school results are of limited weight in assessing his intellectual ability or moral reasoning because they are so sparse.¹¹⁹

147 TW is the leader of the Wellbeing Team at PM’s high school,¹²⁰ and first had contact with PM when he and his brother enrolled in early 2021. PM’s attendance was initially satisfactory, but ‘fell away fairly quickly’.¹²¹ PM displayed difficulty following the rules at school,¹²² and his ability to read and write ‘was not great’.¹²³

148 PM was suspended from a school in 2019 when he was found in possession of cannabis, resulting in a five-day suspension.¹²⁴ PM was again suspended in early 2021 for punching another student during physical education, and for stealing

112 Ibid [17]-[18], [19]-[28].

113 T63.27-29.

114 T64.27-T65.2.

115 T94.26-T95.11.

116 Exhibit P3, [68]-[70].

117 Ibid [34]-[39].

118 Exhibit P2.

119 Prosecution Closing Submissions, 32.

120 T45.6-9.

121 T46.14-17.

122 T50.17-18.

123 T49.1-6.

124 Exhibit P3, [40]-[42].

another student's bike, and threatening to assault that student.¹²⁵ In mid-2021 PM was reported to have punched another student at least three times over the use of the 'n word',¹²⁶ and to have sworn at a teacher and 'invited them outside to fight'.¹²⁷

149 At the end of 2021, PM was suspended from school for saying he would 'shoot all the teachers and throw a grenade into the front office'.¹²⁸ In early February 2022, PM was involved in an incident in the school toilets which culminated in PM holding his fingers in the shape of a gun and pointing them at a teacher. PM 'wasn't really apologetic' about the incident or the impact it had on the teacher.¹²⁹

150 TW gave evidence that he had discussions with PM on multiple occasions about his behaviour and the importance of reparations as opposed to punishment.¹³⁰ PM was suspended and never returned to school after the incident in early February 2021.

PM's prior interactions with the criminal justice system

151 Prior to his arrest on 23 March 2022 in relation to this matter, PM was remanded in custody and granted bail on the following dates:¹³¹

Remanded	Bailed
31 March 2021	1 April 2021
28 April 2021	6 May 2021
10 May 2021	11 May 2021
25 May 2021	26 May 2021
1 June 2021	2 June 2021
14 February 2022	15 February 2022
1 March 2022	11 March 2022

152 PM has never pleaded guilty to, or been found guilty of, a criminal offence. He does not admit to engaging in activities, criminal or otherwise, which are alleged to have taken place between 2019 and 2022.¹³²

153 The prosecution submits that the evidence tendered at trial allows the Court to

¹²⁵ Ibid [46]-[47]; Exhibit P22, 2.

¹²⁶ T66.19-T67.3.

¹²⁷ Exhibit P3, [50].

¹²⁸ Ibid [54].

¹²⁹ T51.10-11.

¹³⁰ T48.21.

¹³¹ Exhibit P3, [194]; T169.1-5.

¹³² Exhibit P3, [58].

directly observe PM on approximately 28 occasions over three years of his life, between the ages of 10 and 13.¹³³ This evidence is comprised of body worn camera ('BWC') footage, records of interview and custody and attendance records. I have paid close regard to all this material which is too voluminous to fully summarise here.

154 It should be noted that the recordings of BWC footage, are incomplete in that the recording only starts when the police officer turns on their camera. Furthermore, DSC Stack was unable to locate some of the BWC footage either because it was not saved, or it was mislabelled by the police members who captured it.

155 In June 2019, PM (then age 10) was observed by police as being part of a large group fighting amongst themselves at a train station. PM was losing the fight but did not make any complaint to police, and the group was moved on without arrest.¹³⁴ The following month, PM was arrested for the first time in relation to an altercation with security personnel at Tarneit Central Shopping Centre. BWC footage shows PM being handcuffed and surrounded by police members. PM can be observed getting the spelling of his surname wrong.¹³⁵ The arresting member tells PM, 'You're too young to be getting mixed up with people who cause trouble just because they feel like it.'¹³⁶ PM maintained that he was not involved in the incident and that he walked away.¹³⁷

156 PM and various associates have eight recorded interactions with Protective Services Officers ('PSOs') and police at train stations between 14 January 2021 and 21 February 2022.¹³⁸ During these interactions, PM often gives false details and becomes frustrated and heightened when PSOs or police will not let him leave. Much of PM's behaviour in these interactions demonstrates unsophisticated, immature and volatile responses to the situations he finds himself in.

¹³³ Prosecution Closing Submissions, 35.

¹³⁴ Exhibit P3, [60].

¹³⁵ Exhibit P5, 5:24-5:30.

¹³⁶ Ibid 9:28-9:34.

¹³⁷ Ibid 14:19-5:30.

¹³⁸ Exhibit P3, [71], [79], [99], [135], [171]; P23; P37; P43; P56-P62.

- 157 An interaction with PSOs on 14 February 2022 results in PM's arrest. On this occasion PM swears at PSOs while handcuffed and becomes very frustrated when asked to take his shoes off before being placed in the divisional van.¹³⁹ During the relevant record of interview, PM is asked various questions by police about how he thinks the victims of his crimes might feel. PM says he would feel 'mad' if he was in the shoes of the victims.¹⁴⁰
- 158 During an interaction with PSOs on 21 February 2022, PM can be observed as extremely emotionally dysregulated and shouts at PSOs demanding them to explain 'why is [his cousin] getting arrested' for not carrying a Myki card.¹⁴¹ He accuses PSOs of being racist and implies that the arrest is targeted.
- 159 PM can be observed being questioned or arrested by police for car-related matters on 11 different occasions.¹⁴² It is repeatedly alleged that PM and associates enter 24-hour gyms, steal keys from unattended lockers and drive away in stolen vehicles. PM takes part in 11 different records of interview, including an interview in relation to the death of the deceased, recordings of which are before the Court.¹⁴³ Due to his age, PM is supported during each interview by an Independent Third Person who ensures that he understands the questions being put to him and his legal rights and obligations.
- 160 During an arrest on 30 January 2021, PM refuses to give his mother, father and brother's names, and is told by the police member 'not to fuck [the police] around'.¹⁴⁴ Later, a Dinka police member can be observed interacting with PM and chiding him for crying after he is arrested.¹⁴⁵ PM is taken to the Werribee Police station where he

¹³⁹ Exhibit P59, 3:00–3:22.

¹⁴⁰ Exhibit P60, Q138.

¹⁴¹ Exhibit P62, 0:38–1:00.

¹⁴² Exhibit P3, [81], [106], [115], [136], [149]–[153], [163]; P7–P11; P13–P22; P28–P32; P38; P39; P45; P46; P49–P55; P63; P64.

¹⁴³ Exhibit P9; P14; P17; P20; P26; P31; P38; P50; P54; P60; P79.

¹⁴⁴ Exhibit P7, 5:30–7:25.

¹⁴⁵ Exhibit P8, 1:30–2:00.

is interviewed between 2:25am and 2:49am on 31 January 2021.¹⁴⁶

161 On 19 February 2021, PM can be observed saying to the arresting officer words to the effect, 'how are you going to let him [another police member] say that to me? [He] called me the "n-word" like ten times and you didn't say anything'.¹⁴⁷ The arresting officer can be heard responding with words to the effect, 'so it's okay for you to steal cars...and then people call you the "n-word"'.¹⁴⁸ PM is taken to the Werribee Police station where he is interviewed between 3:12am and 3:27am.¹⁴⁹

162 During an arrest on 6 March 2021, PM can be observed giving his correct details, but becomes emotionally heightened when challenged by police about his truthfulness.¹⁵⁰ While being arrested, PM says, 'Do you see this? For our safety, I'm in cuffs', and then tells his associate to 'record this shit'.¹⁵¹ The prosecution described PM as 'upset, hostile and aggressive' on this occasion.¹⁵² The prosecution pointed to evidence from the record of interview to assert that PM knew right from wrong;¹⁵³ knew stealing was 'obviously bad';¹⁵⁴ knew that hurting someone is bad;¹⁵⁵ expressed vehemently that killing someone is bad with the words 'that's fuckin' dumb';¹⁵⁶ and could identify the negative consequences of bad behaviour.¹⁵⁷ That interview with PM took place at Werribee Police Station between 11:26pm and 11:42pm.¹⁵⁸

163 BWC footage of an arrest on 31 March 2021 shows that PM and two others had been sleeping rough in a home under construction. The Victoria Police Air Wing and Dog Squad were in attendance. During the record of interview, PM confirmed that he

¹⁴⁶ Exhibit P9, Q3, Q141.

¹⁴⁷ Exhibit P13, 0:50–1:09.

¹⁴⁸ Ibid 0:55–1:17.

¹⁴⁹ Exhibit P14, Q2, Q94.

¹⁵⁰ Exhibit P16, 0:08–0:30.

¹⁵¹ Ibid 7:05–7:15.

¹⁵² Prosecution Closing Submissions, 38.

¹⁵³ Exhibit P17, Q52.

¹⁵⁴ Ibid Q57.

¹⁵⁵ Ibid Q58–Q59.

¹⁵⁶ Ibid Q60.

¹⁵⁷ Ibid Q61.

¹⁵⁸ Ibid Q1, Q163.

knows the difference between right and wrong,¹⁵⁹ and uses ‘getting arrested’ as an example of something that would be wrong.¹⁶⁰ During a record of interview three weeks later on 21 April 2021, PM indicated that it was ‘obviously’ wrong to steal.¹⁶¹ That interview took place between 3:26am and 3:42am.¹⁶²

164 On 10 May 2021, PM gave a mixture of ‘no comment’ and short answers during a record of interview.¹⁶³ On 11 June 2021, PM referred to ‘opp block territory’,¹⁶⁴ which the prosecution submits is indicative of his adherence to an alternate moral code.¹⁶⁵

165 On 15 December 2021 Victoria Police withdrew all 44 charges against PM which related to alleged offending between January and June 2021.¹⁶⁶ The Withdrawal report’ by Prosecutor Christopher Aitken dated 16 December 2021 notes:

Defence have supplied an expert report by [Ms] Cidoni which was written in July, 2021 -- surprisingly [PM] has somehow remained offence free since this report. I note he was processed by [Informant Jones] however it was for being located in his mother’s vehicle which she had reported as stolen – an offence which is not in the public interest to pursue. The expert report details how [PM] does not come from a pro-social family environment which the court considers as extremely important particularly for a child to develop the insight into long term consequences or impact of wrongful actions. [PM]’s older brother is often with him at the time of the offending and has also had extensive involvement with police. [PM] responds to police on one occasion “he would rather be in custody with his brother than at home” – his answers to police clearly demonstrate immaturity – “for laughs and just for fun”. We are limited in our ability to rebut by the fact that his interviews are no comment (learnt from his brother) and it’s clear due to his lack of attendance of [sic] school we could raise this in support of the rebuttal. All these factors add up to the conclusion [PM] is doli incapax.¹⁶⁷

166 During an arrest on 22 January 2022, PM can be heard yelling to an associate that he will ‘see [them] in lock up’,¹⁶⁸ and when he is accused by the arresting officer of

¹⁵⁹ Exhibit P20, Q31.

¹⁶⁰ Exhibit P20, Q33.

¹⁶¹ Exhibit P26, Q82.

¹⁶² Ibid Q1, Q105.

¹⁶³ Exhibit P31.

¹⁶⁴ Exhibit P38, Q280–Q290.

¹⁶⁵ Prosecution Closing Submissions, 41.

¹⁶⁶ Exhibit P3, [196].

¹⁶⁷ Exhibit P48, 2.

¹⁶⁸ Exhibit P49, 5:49–5:51.

stealing cars, PM replies, 'allegedly'.¹⁶⁹

167 Six days later 28 January 2022, PM can be heard saying to an associate 'is this your first time getting done? Fucking criminal'.¹⁷⁰ He also indicates to his associate that when they get to the police station, they can refuse to have their photos taken.¹⁷¹ On that occasion, he repeatedly tells the arresting police officer to 'shut the fuck up',¹⁷² refused to consent to his fingerprints being taken, and can be observed giving some 'no comment' answers during the record of interview.¹⁷³ That interview took place between 3:37am and 3:55am.¹⁷⁴ PM is emphatic that he understands right from wrong,¹⁷⁵ and it is explained to him that the charges being brought against him are 'significant' and 'serious' because they involve the potential for someone to be killed. PM says he understands the seriousness of this.¹⁷⁶ PM states 'why would I snitch?' when asked who was driving the stolen car on that occasion.¹⁷⁷

168 Police attempted to arrest PM on the evening of 8 February 2022, but he was not home. MJ said that PM was missing. She was reluctant to formally report that information. Contact was made to Child Protection for a safe custody warrant.¹⁷⁸

169 Early on the morning of 1 March 2022, PM is arrested and can be observed giving his correct name but does not give his address.¹⁷⁹ Whilst his hands are cuffed behind his back, police ask PM to get up and he refuses to stand at which time an officer to his left says, 'use your fucking legs'.¹⁸⁰

170 PM appeared before the Children's Court where he refused to apply for bail. He was then remanded to the Parkville Youth Justice Precinct and granted bail by the

¹⁶⁹ Ibid 11:30–11:45.

¹⁷⁰ Exhibit P53, 16:15–16:23.

¹⁷¹ Ibid 19:22–19:30.

¹⁷² Ibid 6:12–6:40; 12:35–12:50.

¹⁷³ Exhibit P54.

¹⁷⁴ Ibid Q3, Q136.

¹⁷⁵ Ibid Q115.

¹⁷⁶ Ibid Q120.

¹⁷⁷ Ibid Q77.

¹⁷⁸ Exhibit P3, [169]–[170].

¹⁷⁹ Exhibit P63, 0:30–0:37.

¹⁸⁰ Ibid 1:20–1:27.

Children's Court on 11 March 2022,¹⁸¹ two days prior to the alleged offending.

171 On 16 March 2022, a safe custody warrant was issued for PM and on 18 March 2022 at a curfew check, PM failed to present at the front door of the family home.¹⁸²

172 There is a contrast in PM's behaviour in the records of interview compared with the BWC footage. He is far more subdued during the interviews. To some extent it is undoubtedly due to fatigue, given the times most of the interviews were conducted. PM can be observed to be falling asleep on occasions.

173 PM's body language in the interviews with police is consistent with fatigue and disinterest; someone who finds themselves repeatedly in the same situation having to answer the same types of questions. PM frequently repeats the same pattern of behaviour such as denying his identity in clear CCTV images of himself. PM's behaviour is consistent with boredom and frustration with the interview process, reflecting a childish and immature approach to the situations he finds himself in.

Youth Justice Supervised Bail

174 PM had his first interactions with the Youth Justice Supervised Bail Program on 1 April 2021.¹⁸³ Seven Youth Justice Supervised Bail program reports have been viewed by the Court.¹⁸⁴ PM's non-compliance with bail conditions is a frequent theme in the reports,¹⁸⁵ and this non-compliance resulted in numerous arrests during 2021.¹⁸⁶ PM is consistently noted as engaging well with Youth Justice workers during appointments when he attends.¹⁸⁷ Overcrowding in the family home and 'sporadic' school attendance are consistently discussed by the Youth Justice report-writers.¹⁸⁸ PM is also noted in the reports as experiencing difficulties comprehending the

181 Exhibit P3, [186]–[187].

182 Ibid [33].

183 Exhibit P22, 1.

184 Ibid; Exhibit P40; P41; P42; P44; P47; P65.

185 Exhibit P40, 5; P41, 3; P47, 2; P65, 3.

186 Exhibit P3, [126]–[127], [130]–[132].

187 Exhibit P41, 5; P42, 3; P47, 3; P65, 4.

188 Exhibit P42, 4–5; P44, 3–4; P65, 4.

impact of placing himself in high-risk situations.¹⁸⁹

175 Between mid-June 2021 and 1 November 2021, PM had minimal interactions with police.¹⁹⁰ During this period PM was reported to be compliant and receptive to the intensive support being offered by Youth Justice through the supervised bail program.¹⁹¹

176 PM's Youth Justice Bail support concluded in December 2021 when all charges against him were withdrawn. He re-engaged with the program on 15 February 2022 and in a report dated 8 March 2022, Youth Justice indicated that PM was again a suitable candidate for Youth Justice Supervised Bail.¹⁹² This was five days prior to the incident.

Arrest on 23 March 2022

177 On 23 March 2022, PM was arrested in relation to the matter now before this Court. Ms Conwell, solicitor, has had carriage and conduct of PM's criminal matters since approximately March 2021.¹⁹³ Ms Conwell's evidence was that she spoke with PM twice via telephone on the day of his arrest.¹⁹⁴ Ms Conwell spoke with PM initially at 5pm and explained that police suspected PM was involved in a murder; that this was very serious; that PM could not discuss anything with police prior to the interview, which was about to be conducted; that police were applying to obtain his fingerprints; and that PM should request to call the office if he needed anything.¹⁹⁵ Ms Conwell recalled that during this phone conversation:

I was very firm with [PM] and said, you must not speak to police. This is very serious. The police have arrested you for a murder. Um, you can't speak to them. We can come to the station if you can't - um, if you're unsafe or you're confused. I was direct with him and firm with him.¹⁹⁶

¹⁸⁹ Exhibit P44, 3; P47, 2.

¹⁹⁰ Exhibit P3, [141]-[146]; P42, 5.

¹⁹¹ Exhibit P42, 4-5.

¹⁹² Exhibit P65, 5.

¹⁹³ T385.5-22.

¹⁹⁴ T389.30.

¹⁹⁵ T390.2-29.

¹⁹⁶ T391.5-10.

178 Ms Conwell then received affidavit material from Detective Tim Bell which was to be used in an application to the Children’s Court that evening to obtain PM’s fingerprints.¹⁹⁷ This affidavit described in broad terms the allegations against PM.¹⁹⁸ The application was adjourned to 24 March 2022.

179 Ms Conwell was advised that after the adjournment PM would be interviewed. Victoria Police called Ms Conwell at approximately 10:45pm and she was able to have a second conversation with PM, via phone, the purpose of which was to give PM advice ‘as close to the interview as possible’.¹⁹⁹ Ms Conwell told PM that even if police asked questions that ‘seemed really silly or dumb’, he was to answer ‘no comment’ to everything.²⁰⁰ She recalled practicing a script with PM twice so she was sure he could identify when he was to start answering ‘no comment’ to police questions.²⁰¹ Ms Conwell confirmed during cross-examination that this was the first time she had advised PM to make a ‘no comment’ record of interview.²⁰²

180 PM then gave a ‘no comment’ record of interview.²⁰³

Calls made while on remand

181 The Court has listened to seven telephone calls (‘Arunta calls’) made between PM and various associates while he has been on remand.²⁰⁴ PM can be heard on each occasion requesting that various members of his family merge calls with people who are not on his approved call list.²⁰⁵

182 In the calls, PM can be relevantly heard relaying the circumstances of his arrest;²⁰⁶ telling the person to beat GD up;²⁰⁷ asking his associates to steal cars;²⁰⁸ directing

¹⁹⁷ *Crimes Act 1958* (Vic) s 464M.

¹⁹⁸ T391.28–T392.7.

¹⁹⁹ T393.14–21.

²⁰⁰ T395.1–11.

²⁰¹ T395.5–11.

²⁰² T398.25–26.

²⁰³ Exhibit P79.

²⁰⁴ Exhibit P3, [202]; P82–P88.

²⁰⁵ Exhibit P82, 4, 12–13; P83, 33; P86, 101; P87, 131; P88, 157–158.

²⁰⁶ Exhibit P82, 8.

²⁰⁷ *Ibid* 10; Exhibit P83, 40.

²⁰⁸ Exhibit P88, 171.

messages to be passed onto others;²⁰⁹ asking about goings on at 'the block';²¹⁰ discussing the potential of his charges being lowered;²¹¹ discussing previous arrests where he was granted bail;²¹² and telling associates to 'go and do a burg for a nice car' in various locations around Melbourne.²¹³

Expert evidence

183 Except for Ms Scott, in preparing their reports, all expert witnesses relied (inter alia) on the doli incapax brief provided to them as well as the following sources of information:

- (a) police materials, including (inter alia):
 - (i) records of interviews with police;
 - (ii) the CCTV footage;
 - (iii) withdrawal of charges report dated 16 December 2021;
 - (iv) Youth Justice reports;
 - (v) Arunta call records;
 - (vi) bail records;
- (b) family-related police materials, including (inter alia):
 - (i) matters relating to PM's older brother, AM;
 - (ii) matters relating to PM's father, DM;
 - (iii) FVIOs obtained by PM's mother against his father dated 8 January 2016 and 13 January 2020;

²⁰⁹ Exhibit P86, 114.
²¹⁰ Exhibit P87, 144.
²¹¹ Exhibit P88, 162.
²¹² Ibid 164.
²¹³ Ibid 162, 170, 171.

- (c) school materials from the period 28 January 2021 to 30 September 2022; and
- (d) letter from the Department of Families, Fairness and Housing dated 7 March 2022.

184 The collateral information was not provided to Ms Scott, as her involvement with PM was for the discrete purpose of providing a neuropsychological assessment of PM.

185 All four expert witnesses gave *viva voce* evidence in addition to providing their reports.

Dr Owen

186 Dr Owen is a registered consultant clinical and forensic psychologist and clinical director of private practice at Vicpsychplus. Dr Owen specialises in violent and sexual risk assessment of adult offenders. However, in the past decade has also worked with juvenile offenders. She prepared a report dated 27 September 2022, which was tendered into evidence.²¹⁴ After receiving the reports of Dr Singh and Ms Scott, Dr Owen prepared an addendum report dated 14 July 2023, which was also tendered into evidence.²¹⁵

187 In oral evidence, Dr Owen said that *doli incapax* is not a focus of her practice but that she has completed approximately 20 *doli incapax* assessments across her career.²¹⁶ Of those, Dr Owen reported that approximately half have been commissioned by the Office of Public Prosecutions.²¹⁷

Limitations of report

188 Dr Owen stated that PM was not made available to be assessed by her.²¹⁸ Dr Owen conceded from the outset that the absence of direct assessment with PM represents a significant limitation of her expert opinion. Dr Owen explained that ‘it is exceedingly

²¹⁴ Exhibit P90.

²¹⁵ Exhibit P91.

²¹⁶ T276.4–5.

²¹⁷ T276.10–11.

²¹⁸ Exhibit P90, [52].

difficult to discern [PM's] intellectual capacity on [the day of the offending] ... without access to direct assessment of the individual (which is universally the case in prosecution of *doli incapax* assessment)^{.219}

189 Dr Owen explained that the lack of opportunity to ask PM a number of questions directly, and to 'drill down on those questions' meant that to some extent she was 'reliant on other people's observations which may or may not be correct'.²²⁰

PM's upbringing

190 Dr Owen made a number of observations about PM's upbringing and family history. Namely, that PM's father perpetrated extreme family violence against PM's mother, MJ;²²¹ that MJ demonstrated an inability to cope with her children, including PM, with the result that PM experienced significant maternal neglect; and that MJ failed to attend numerous police interviews involving PM.²²²

191 Dr Owen reported that Child Protection services became involved because of concerns due to environmental neglect, lack of school attendance, parenting issues and concerns about MJ's mental health, MJ's failure to act protectively for her children, or to report them as missing when they absconded from the home.²²³

192 In Dr Owen's opinion, the home environment appeared to have been characterised by an anti-authoritarian attitude, on the basis that MJ had been handcuffed on one occasion for hindering police and described by police as 'belligerent'.²²⁴

Theoretical underpinnings

193 Dr Owen's assessment of PM was underpinned by social learning theory and contemporary clinical practice.²²⁵ Dr Owen explained that social learning theory emphasises a person's experience and exposure to different circumstances, including

²¹⁹ Ibid.
²²⁰ T279.9-16.
²²¹ Exhibit P90, [18].
²²² Ibid, [20].
²²³ Ibid.
²²⁴ Ibid, [21].
²²⁵ T294.12-15.

the family environment and education, which provide opportunities for learning skills.²²⁶

194 Dr Owen stated that an integrated approach is the preferable approach to assessing doli incapax. According to Dr Owen, such an approach would consider:²²⁷

- (a) cognitive development;
- (b) education;
- (c) experience;
- (d) history of trauma;
- (e) history of offending; and
- (f) exposure to the criminal justice system.

195 According to Dr Owen, the above factors all provide 'opportunities for learning'.²²⁸ In particular, in relation to exposure to the criminal justice system, Dr Owen elaborated:

[You] know, if you have a child who doesn't have any contact with the criminal justice system, who doesn't have a family exposure to the criminal justice system, then you would expect their learning and their understanding of those factors to be different to a child who has repeatedly had exposure to the criminal justice system, repeatedly been interviewed by police, repeatedly been assessed for doli incapax, and been exposed to all of those processes. You cannot not learn from those experiences.²²⁹

Cognitive development

196 In cross-examination Dr Owen was asked a series of questions about her opinion that PM has had adequate social experience to aid in the development of moral maturity. It was put to Dr Owen that the moral development of a neurologically compromised child differs from that of a cognitively intact child. Dr Owen asserted

²²⁶ T294.17–22.

²²⁷ T296.26–31.

²²⁸ T296.31–297.1.

²²⁹ T297.6–15.

that moral development needs to be taken into consideration ‘individually’.²³⁰

197 It was put to Dr Owen that when she authored her report, she assumed that PM was cognitively intact. Dr Owen did not dispute this and explained that she made this assumption in part based on the Weschler Intelligence Scale for Children results obtained by Ms Cidoni when preparing her report.²³¹

Education

198 In relation to education, Dr Owen conceded that it is difficult to assess PM’s intellectual and moral capacity given PM’s poor attendance at school and the fact that ‘no results are provided in school reports to provide indication of his intellectual function’.²³²

199 Nevertheless, Dr Owen expressed the opinion that on the materials provided, the school had regarded PM as knowing right from wrong and that ‘there were no cognitive issues present, he had clarity in his responses and did not struggle in decision making’.²³³ Dr Owen further noted that ‘given [PM]’s poor engagement in the education system it is highly likely that any formalised assessment of intelligence, such as the [Weschler Intelligence Scale for Children] could underestimate his cognitive ability’.²³⁴ In Dr Owen’s view, lack of engagement is the issue in PM’s case, not deficits in capacity.²³⁵

200 Dr Owen’s evidence is that PM has had opportunities for experiential learning. Dr Owen illustrated this point by reference to the fact that PM had previously lost a friend who had died by stabbing:

I think in terms of, um, other family members’ exposure also to the criminal justice system. And one that struck me in reading, and I’m not 100 per cent sure of the source of it, it might have been Ms Cidoni’s second report as well, was that there was an experience apparently where he had a friend who had been killed by stabbing. And one of the things that often children, even, you

²³⁰ T336.12.

²³¹ T336.31–337.3.

²³² Exhibit P90, [52].

²³³ Ibid [53].

²³⁴ Ibid [54].

²³⁵ Ibid [55].

know, some older children, don't understand is that when someone dies, they don't come back. Um, and that influences obviously, sort of ... moral learning and consequential thinking, um, if you don't understand those concepts. But having direct experience, would have provided, I believe, a significant enough circumstance and learning for him to understand that, you know, stabbing someone is dangerous, that it's more than being naughty, and that someone - you know, if they're injured, um and they die, they're not coming back tomorrow.²³⁶

Exposure to the criminal justice system

- 201 According to Dr Owen, PM has learned what is appropriate social behaviour through his encounters with police.²³⁷ Dr Owen pointed to the fact that it is evident in the BWC footage that PM's behaviour changes over the years. Dr Owen explained that behaviour is modified through learning. Therefore, in her view, 'it is not a huge conceptual leap to say that [PM] has learnt something through the process'.²³⁸
- 202 Dr Owen agreed in cross-examination that PM 'might have learnt how to mimic his peers in those environments' rather than developing moral reasoning.²³⁹ However, she considered that there is no meaningful 'difference between understanding the consequences and mimicry'. Dr Owen asserted that there is no difference between mimicry and learning 'because it's still altering behaviour'.²⁴⁰
- 203 Despite this, Dr Owen conceded that the shift in PM's behaviour identified in the BWC footage and police interviews can be understood in terms of his reaction to prior distressing experiences of exclusion, racism, bullying or mistreatment by police.²⁴¹
- 204 Dr Owen agreed that a possible explanation for why PM's behaviour becomes more confrontational in the BWC footage is that he is 'triggered into a fight response'.²⁴² Dr Owen further agreed that the experience of being placed in handcuffs and ridiculed at the age of 10 by authorities might have an impact on the way he behaves

²³⁶ T297.19-298.7.

²³⁷ T350.15-19.

²³⁸ T350.17-19.

²³⁹ T350.20-22.

²⁴⁰ T350.25-28.

²⁴¹ T350.29-351.2.

²⁴² T351.5.

in the future.²⁴³ In cross-examination Dr Owen was asked:

Q. And that doesn't necessarily say anything about his development in moral reasoning, rather, it might say something about him reacting to an earlier traumatic experience.

A. It could be, and it could be assisting in entrenching that kind of anti-authoritarian view.²⁴⁴

205 Dr Owen watched 10 or 11 ROIs between PM and police. In Dr Owen's view, PM displayed an aggressive and abusive attitude towards those authority figures, which 'strongly suggest[s] he understands that his behaviour is wrong, and more wrong than being naughty'.²⁴⁵

206 Dr Owen accepted that PM's interactions with the criminal justice system did not 'necessarily teach [him] right from wrong'.²⁴⁶

Experience of prior doli incapax assessments and bail

207 Dr Owen explained that PM's exposure to the doli incapax assessment process provided further opportunity for learning, stating 'there must be some learning, there must be some understanding'.²⁴⁷ While Dr Owen acknowledged that she did not know how or whether the doli incapax assessment process was ever actually explained to PM, her evidence was that 'it would be hard to argue that it wasn't a process of learning'.²⁴⁸

208 Dr Owen stated that the environment in which PM was raised provided further opportunities for learning. Dr Owen said:

I think that there was some evidence both in the other assessments and also in my observations of particularly one of the instances where the police went to his home, and [had] interactions with his mum where there was quite a sort of anti-authoritarian attitude that was prevalent. Um, and that again is going to influence, you know, how he sees, how he interacts with the police, how he

²⁴³ T352.2-6.

²⁴⁴ T352.7-11.

²⁴⁵ Exhibit P90, [63].

²⁴⁶ T369.14-15.

²⁴⁷ T298.14-15.

²⁴⁸ T298.15-22.

sees conforming to rules, all of those kind of things.²⁴⁹

209 Dr Owen reiterated these opinions under cross-examination, explaining that ‘you can’t not learn from those experiences ... if you’re functioning in any way ... you’re going to learn from those interactions’.²⁵⁰

210 Dr Owen pointed to the fact that PM had previously been granted bail as an opportunity for ‘understanding whether something is just naughty or if it’s seriously wrong’.²⁵¹ Dr Owen asserted that:

[Being] on bail is a, is a fairly clear experience in which one would assume that it’s more serious than his prior contact with the criminal justice system. Then being remanded in a youth justice training centre is another more serious experience than his previous experiences. ... [Unless] he’s not functioning at all, which the, ah, IQ assessment clearly doesn’t suggest, it would be ... impossible for him not to have learnt something from those experiences. And that then has to equate to moral development.²⁵²

211 However, Dr Owen conceded that the extent that PM’s moral development can be attributed to experiential learning depends on precisely what he has learned out of those experiences and that ‘this is a question that the rest of the assessment – and having direct contact [with PM] – would have been better answered’.²⁵³

Criticism of other theories

212 Dr Owen was critical of the theories – specifically Kohlberg’s theory – relied upon by Ms Cidoni (and to a lesser extent, Dr Singh) because in her view they are ‘single factor theories’²⁵⁴. Dr Owen stated that while a lot of the assessments for doli incapax are based around the Kohlberg model, in her view ‘it’s irresponsible, to be truthful, to expect a model of cognitive development that was based in 1936 to still apply’.²⁵⁵

213 Dr Owen asserted that the expectation of contemporary clinical practice is that a practitioner draws on all the theories in a much more integrated way. However, she

²⁴⁹ T299.8–16.

²⁵⁰ T319.16–20.

²⁵¹ T320.4–6.

²⁵² T320.6–15.

²⁵³ T320.19–20.

²⁵⁴ T296.2–3.

²⁵⁵ T286.9–12.

explained that ‘different emphasis will be placed on different aspects for each individual you’re in front of’.²⁵⁶

214 Dr Owen’s major criticism of the Kohlberg theory is that it was developed in the 1930s and therefore, in her view, is now outdated.²⁵⁷ According to Dr Owen, the Kohlberg model (and its revisions) are ‘based on that single factor theory model, which is around ... cognitive development and the sequential nature of it’.²⁵⁸ In this way, Kohlberg ‘applies moral reasoning to those cognitive stages’ which accord with specific age ranges.²⁵⁹ Dr Owen opined that it does not take ‘into consideration ... personality factors, environment, experience ... all of those other things that we now know influence people’s development’.²⁶⁰

215 Dr Owen was critical of the fact Ms Cidoni assessed PM as having pre-conventional or low moral reasoning, using the socio-moral reflection measure, because it draws on Kohlberg’s theory of moral fulfilment.²⁶¹

216 Dr Owen explained that ‘pre-conventional’ is the first stage of Kohlberg’s moral reasoning. She said:

[It] is generally applied to children from the age of three to seven...because he had arbitrarily linked those stages to Piaget’s ages of cognitive development. That’s why the two [theories] are linked. Um, and it essentially says that in that first stage, so pre-conventional, you’re just worried about not getting into trouble ... and you’re very self or internally focused. So you’re not worried about, you know, what anyone else thinks of you, really. You behave based on you just don’t want to get into trouble, really. You don’t want to get caught.²⁶²

217 While Dr Owen conceded that the Kohlberg model represents ‘a crucial part of an assessment process’ on moral reasoning, ‘it is not an assessment in and of itself’.²⁶³ Dr Owen’s evidence is that it would be inappropriate to make a judgement about

²⁵⁶ T295.13–15.

²⁵⁷ T331.27–28.

²⁵⁸ T296.3–5.

²⁵⁹ T296.5–7.

²⁶⁰ T296.9–12.

²⁶¹ T299.20–21.

²⁶² T299.27–300.7.

²⁶³ T296.19–20.

PM's capacity for moral reasoning based only on the Kohlberg model of assessment.²⁶⁴

218 In Dr Owen's view, 'it would be extremely unusual to find someone of [PM's] age at the time of offending, which was 13 years and one month was my understanding, um, to be still sitting in a moral reasoning phase around what would generally be attributed to a seven year old, at best'.²⁶⁵

219 It was put to Dr Owen that both Dr Singh and Ms Cidoni referred to a delay in PM's moral development. Dr Owen's evidence was that PM 'may well come up as being delayed in moral development, but it doesn't mean it's an accurate assessment'.²⁶⁶ Dr Owen said that there 'are some people who ... have less empathy, who are more antisocial, who ... are driven to not conform to authority'.²⁶⁷

220 While Dr Owen opined that the numerical/age-based system of Kohlberg's original theory is outdated, she accepted that the principles underlying the theory—of looking at how a young person approaches the world, their capacity to perceive themselves and perceive others—are all valid things to take into account in terms of assessing moral reasoning.

Dr Owen's criticism of the expert testing

221 Dr Owen accepted that part of her formulation of opinion that the presumption of *doli incapax* 'could' be rebutted relies on the fact that she has drawn the conclusion that PM does not suffer from any cognitive impairment.

222 Dr Owen also accepted that comprehensive testing has since been conducted by neuropsychologist, Ms Scott, who undertook nine tests of PM. However, Dr Owen cavilled with the interpretation of PM having a cognitive impairment, instead describing ADHD as a neurodevelopmental disorder.²⁶⁸ She accepted that Ms Scott's

²⁶⁴ T296.22–23.

²⁶⁵ T300.9–13.

²⁶⁶ T301.7–9.

²⁶⁷ T301.1–3.

²⁶⁸ T325.23–29.

testing was comprehensive and she has no reason to dispute the testing and results.²⁶⁹ She accepted that she did not have access to that information when she completed her report and was questioned as follows:

Q. ... it is certainly something that ought to be taken into account when moral reasoning is evaluated?

A. Yeah, of course.

Q. It's something you didn't have access to, but you say, look, you're not willing to change your ultimate opinion, not unless you yourself get to see and assess the child?

A. Well, I, I, I, in my view that's fair enough, isn't it? I mean what you're asking me to do is change my opinion based on the reported observations of someone else, of which I've had no access to.²⁷⁰

223 Dr Owen's evidence is that while PM's results show that he has a slower processing speed, this does not 'suggest in any way whatsoever that he's unable to make decisions'.²⁷¹

224 Although Dr Owen did not challenge the opinions of any of the three other expert witnesses, she disagreed that PM's deficits in cognitive function affected his moral reasoning.²⁷²

225 Dr Owen also disputed the proposition that adverse childhood events slow down adolescent brain development and the capacity for self-regulation. Dr Owen asserted:

There's certainly an impact. I think, um, slow down, again, it depends on the context. So in some instances, as I said before, exposure to certain types of trauma is going to impact on the neurobiological system without question. But whether that actually slows down development or ... increases a child's sophistication in thinking, um, sometimes it actually does.²⁷³

PM's no comment interview in relation to the index offence

226 Having reviewed police BWC footage over the period between January 2021 and

²⁶⁹ T326.31.

²⁷⁰ T328.20-29.

²⁷¹ T309.5-9.

²⁷² T349.1-11.

²⁷³ T353.24-31.

23 March 2022, Dr Owen opined that PM had undergone ‘an observable physical maturation, which would have included parallel cognitive development’.²⁷⁴

227 Dr Owen considered that in the final record of interview in relation to the index offence, ‘there was a degree of seriousness that had shifted’ in PM’s approach to police interview.²⁷⁵ Dr Owen described the change in PM’s maturation and how he interacts with police during interview, in this way:

[How] he interacts with the police during interview, um, the change that occurred over the period of time from sort of making statements to adopting a no comment interview. Ah, and also obviously being able to observe as I said before the physical maturation that occurred over that period of time. ... I mean, obviously the primary change is around the adopting a no comment interview. Um, one of the things I think was, um, evident, particularly in the last interview, was that, um, in my view, in watching it, he was much less confrontational and much more subdued. And I think much more aware then, that this was ... he was in serious trouble. And that’s not to say that I don’t think he knew that he was in serious trouble in the previous interviews, but I think there was a degree of seriousness that had shifted. And as I said before ... one of the things ... is in terms of that physical maturation. ... [You] know, he was significantly more physically developed. And whilst, in and of itself, that’s not an indicator of anything much, it actually – cognitive development, it parallels physical development. So, um, one would assume that there’s a degree of cognitive development that’s occurred during that period of time.²⁷⁶

228 Dr Owen considered that PM’s election to exercise his rights ‘even if under advice ... suggest[s] strategies to avoid implication which implies understanding of potential consequences’.²⁷⁷ Dr Owen considered PM’s avoidance of responding to police questions suggestive of ‘a deliberate attempt to avoid incriminating himself and others, from which it is inferred he understands to do so has grave consequences and thus, his conduct was more than just naughty’.²⁷⁸

229 Dr Owen’s evidence is that PM’s ability to maintain a no comment interview for the alleged offence requires developed executive function.²⁷⁹ Dr Owen gave evidence

²⁷⁴ Exhibit P90, [23].

²⁷⁵ T284.29–30.

²⁷⁶ T280.29–281.3; T284.21–285.8.

²⁷⁷ Exhibit P90, [76].

²⁷⁸ Ibid [73].

²⁷⁹ T357.10–12.

that Dr Singh's observation that PM's no comment interview on 23 March 2022 was not evidence of mature executive functioning does not necessarily 'hold weight' because in her view 'moral development isn't incumbent on a high level of executive functioning'.²⁸⁰

230 Dr Owen expressed the view that, regardless of whether he received legal advice, PM's no comment interview demonstrates 'that he has some degree of consequential thinking'.²⁸¹ Dr Owen continued:

He understands that by implicating himself in that interview, that something is going - that [something] not in his best interest is going to happen. And I think that is an important - I mean, that's an important aspect of moral reasoning... it certainly demonstrates a degree of - a degree of cognitive function that is suggestive of understanding ... being able to sustain attention and maintain a position for a long period of time, particularly in police interviews where it's an adversarial process and they're being pressured to respond differently and they're still maintaining a no comment interview is actually quite a sophisticated skill. ... And I think it certainly for me indicated that it's a combination of him being able to sustain that all the way through the interview, um, and his understanding that he needed to sustain that all the way through the interview, um, are fairly significant in my view ... Significant in indicating that his cognitive function and therefore capacity to reason and make judgements, um, is more sophisticated than someone who doesn't understand, um, that he was, you know, being more than naughty.²⁸²

231 In cross-examination on this topic, the following exchange occurred:

Q. [What] I suggest, in fact, is quite the reverse. That what it indicates is a pattern of mimicking and that children are quite capable of rote learning. You'd agree with that last part of my proposition, at least, wouldn't you?

A. I agree that they're quite capable of rote learning, but what the research generally suggests is that they're also not able to sustain that for extended periods of time. So ... it's suggestive of more than rote learning, in my view. ... It's about the capacity to sustain the no comment over time in the face of what can be quite considerable - I mean, it's obviously a stressful event. You're being interviewed by the police. You know, there's a degree of - um, ah, well, there's certainly a power imbalance, isn't there, in that interview arena. Um, and for someone of his age to be able to maintain the no comment, um, stance all the way through that interview, for me, suggested a more sophisticated style than, um, someone who was just rote learning.²⁸³

²⁸⁰ T281.17-19.

²⁸¹ T281.23-24.

²⁸² T281.21-282.28.

²⁸³ T357.13-358.7.

232 Dr Owen accepted that she was not aware of what emphasis of legal advice PM received from his lawyers once they were informed he had been arrested for murder, or the relationship he had with the lawyer. Dr Owen was not aware of the degree of repetition or coaching that PM's lawyer undertook with him to ensure that he was able to execute the interview in accordance with his rights. Dr Owen accepted that a child with impaired executive functioning could be coached to repeat a phrase and maintain it.²⁸⁴

Alternative moral code

233 Dr Owen further assessed PM as presenting 'with significant absence of remorse and concerning absence of respect for authority or others'.²⁸⁵ While Dr Owen acknowledged that 'his lack of remorse could be suggested to be due to lack or delay in moral development, it could equally be ascribed to a differing moral code'.²⁸⁶

234 Dr Owen explained that in her view, PM's moral code is not one that is 'necessarily rule abiding'.²⁸⁷

235 Dr Owen's evidence is that PM's family environment is one of the main factors influencing PM's alternate moral code. While Dr Owen accepted that his family environment has been traumatic, in her view, it 'nonetheless has very much an anti-authoritarian kind of code to it in and of itself'.²⁸⁸ Dr Owen stated:

[The] difficulties, I think, in this case are that he's so ingrained or has been so attached to that peer group and a family who - family members who have been involved in the criminal justice system that that very much has influenced where he stands in terms of if you want to call it moral development, but his moral - moral code.²⁸⁹

236 Dr Owen accepted in cross-examination that her thesis that PM's behaviour reflects adherence to an alternate moral code is informed by her conclusion that PM knows the rules of society but actively chooses to disregard those social norms and that he

²⁸⁴ T358.21-31.

²⁸⁵ Exhibit P90, [79].

²⁸⁶ Ibid.

²⁸⁷ T310.18-20.

²⁸⁸ T310.27-29.

²⁸⁹ T311.1-7.

has capacity to conform to gang culture and its associated moral code.²⁹⁰

237 It was put to Dr Owen in cross-examination that PM is said by Dr Singh to have a ‘fractured sense of self and a fractured sense of agency’, which impairs his moral development and his capacity to adhere to an alternate moral code. Dr Owen stated that ‘that’s Dr Singh’s opinion, I ... I have no basis to challenge it’.²⁹¹

Arunta calls

238 Dr Owen was asked a series of questions by counsel for the defence in relation to conclusions drawn by her, regarding Arunta calls while PM was held in custody on remand, about his adherence to an alternative moral code. Dr Owen agreed that she concluded that the Arunta calls show PM as being active in gang culture.²⁹² While Dr Owen accepted it is possible the Arunta calls involving PM and his brothers and other boys show him mimicking the language and the discourse of older boys, she stated that that was not that way she had heard the calls.²⁹³

239 Dr Owen disagreed that the Arunta calls are examples of PM exhibiting immature bravado as opposed to him adhering to an alternative moral code or gang culture.²⁹⁴

240 Dr Owen concluded in her report that PM’s ‘approach towards police, and of course his offending behaviour, suggests complete disregard for societal rules and personal obligations’ and that ‘he certainly has capacity to conform to the gang culture and moral code’.²⁹⁵ Dr Owen opined that PM is active within gang culture, including encouraging other associates to engage in violence against others.²⁹⁶

Affiliation with youth gang

241 Dr Owen was asked about the conclusions she drew regarding PM’s affiliation with a youth gang. Dr Owen emphasised that it is about the peer group PM affiliates

²⁹⁰ T360.27-361.1.

²⁹¹ T361.11-12.

²⁹² T361.16.

²⁹³ T361.17-21.

²⁹⁴ T361.28.

²⁹⁵ Exhibit P90, [79].

²⁹⁶ T361.16.

with, rather than the terminology of 'gang'. Dr Owen stated that 'the group of people that he's engaged with and socialising with and spending his time with' is what is significant in this case.²⁹⁷

242 Dr Owen's evidence is that PM is on the same level as his peer group. She explained this in the following way:

[Teenagers] can be quite discerning about who they hang out with, um, and if he were not able to keep up with the peer group, um, I would suggest that he wasn't, that the, in terms of age, if he's not able to keep up with the peer group, then he would generally be rejected by the peer group. He wouldn't continue to be hanging out with them. So in some ways he must be able to – um, you know, he's on their level, for want of a better term, in terms of sort of cognitive functioning and engagement in activities. Um, and I think as well, making the decision, there's some other evidence that making – some of the decisions that he made would suggest that whilst he's engaged with the peer group, he's not kind of subservient to them. He's not, um, the one that's being directed to follow rules and he just does it.²⁹⁸

243 In Dr Owen's view, PM's decision not to carry a knife on the night of the offence is 'important in terms of, um, kind of his own concept of ... his standing within the group, but also that he is able to make independent decisions'.²⁹⁹ Dr Owen elaborated on PM's decision not to carry a knife:

[Making] a decision to ... still be involved but, um, not arm himself in the way that others had, um, I think is important because if he were – you know, often in that gang kind of culture, if you do have younger members, the young members are often the ones that are, you know, sent to do the dirty work and they're doing the lookout and they're controlled or manipulated somewhat by older members of the group. And there [are] some subtle signs ... he's part of the group and making his own decisions ... that he's not, you know, the younger one who's [being] manipulated by others.³⁰⁰

244 However, Dr Owen agreed that one of the primary reasons that groups of young people labelled as gangs 'band together' is for protection against institutional racism, economic marginalisation and being the target of specific abuse.³⁰¹

²⁹⁷ T305.12–16.

²⁹⁸ T306.7–21.

²⁹⁹ T306.24–27.

³⁰⁰ T306.30–307.12.

³⁰¹ T378.1–5.

Offending – the conduct

245 In relation to PM's offending conduct, Dr Owen's evidence is that the seriousness of the offending is 'one of the building blocks' for PM's understanding that 'it's wrong'.³⁰² Dr Owen asserted that it would be very clear 'even [to] someone with somewhat delayed ... moral reasoning' that 'hitting someone, stabbing someone, hurting someone is in fact seriously wrong. Um, so I mean, I think it does contribute to the overall. ... To the overall judgement of, um, - of where someone's at in terms of their capability'.³⁰³

246 Dr Owen also gave evidence that inferences can be drawn from PM's conduct after the assault on the deceased. For example, Dr Owen asserted that PM flees the scene, continues to associate with the friends who are allegedly involved in the offending and admits to Ms Cidoni that he was present when the Mazda was set on fire. Dr Owen's evidence is that what can be drawn from that is that PM was 'obviously aware in the process of what was going on'.³⁰⁴ Dr Owen explained:

Um, he was obviously admitting that he was present at the time. Um, I think it contributes to the overall picture in terms of him being able to, you know, understand and sequence events. And they're all higher order cognitive function that parallel the capacity to, you know, take in information, interpret, make decisions.³⁰⁵

247 Dr Owen stated that while 'that probably doesn't seem like it means much ... it certainly suggests [overall] that ... he has the ability to plan and sequence and make decisions'.³⁰⁶

Opinion as to doli incapax

248 In her report, Dr Owen provided an opinion as to whether the presumption of doli incapax was capable of being rebutted by the prosecution. Dr Owen opined:

It would be, in [my] opinion, inconceivable that [PM] has not learned about the seriousness and consequences of his offending through past direct experience. All the experiences [discussed in my report] have, in my opinion,

³⁰² T301.17-21.

³⁰³ T301.21-30.

³⁰⁴ T302.11-13.

³⁰⁵ T302.13-19.

³⁰⁶ T302.20-24.

impacted on [PM]'s understanding of wrongness.

[PM] is reported to have had exposure from an early age to family violence. While this may seek to normalise the use of violence, it would also have exposed him to understanding about the impact of interpersonal assault and the possibility of severe injury and/or death.

[PM] has had sufficient exposure to understand the hierarchy of punishments for more serious violent behaviour. This provided adequate social experience to aid in the development of moral maturity.³⁰⁷

249 Dr Owen opined in her report that PM's experiences with the criminal justice system 'would have, without question, provided the basis for experiential learning and moral development. Thus, impacting his understanding that the act and consequences were greater than being merely naughty or mischievous'.³⁰⁸

250 Dr Owen agreed with counsel for the prosecution that PM would have known at the time that kicking and stomping on someone's head was morally wrong. Dr Owen also agreed that PM would have known that carrying knives and agreeing to conduct involving the use of knives to stab someone is morally wrong. Dr Owen further agreed that PM would have known that kicking and stomping on somebody while they are being stabbed is morally wrong, and that the act of murder is wrong.³⁰⁹

251 Dr Owen agreed with counsel for the prosecution that she would expect, even with the diagnoses of ADHD and the difficulties identified in his cognitive capacity that PM would still have the capacity to understand that his behaviour was seriously wrong.³¹⁰

252 Under cross-examination, Dr Owen accepted that despite acknowledging the significant limitations of her report, rather than presenting cautious findings, she presented specific opinions in her report in very firm language.³¹¹

³⁰⁷ Exhibit P90, [68]–[70].

³⁰⁸ Ibid [71].

³⁰⁹ T311.8–18.

³¹⁰ T378.22–25.

³¹¹ T318, 8–15.

253 However, Dr Owen asserted that despite not having direct contact with PM, this does not ‘mean that the other information ... didn’t provide enough information to be able to draw some conclusions’.³¹²

254 Dr Owen confirmed under cross-examination that her opinion is not affected by the professional opinions of the three other expert witnesses ‘because my opinion and my formulation was made at the time of my assessment ... My opinion is based on the material that was available to me at the time with significant limitations that were documented’.³¹³

255 Dr Owen accepted that there is a threshold to the reliability of an opinion formed without direct assessment and primary source materials.³¹⁴ However, Dr Owen resisted the proposition that she should question her original opinion on the basis of the opinions of the other three experts because that information ‘is second-hand’.³¹⁵

The following exchange occurred:

Q. You also base your opinion on a large body of documents that included documents that were written by other people?

A. Yes.

Q. Including police officers who’d drafted summaries?

A. Yes.

Q. And they provided observations or opinions about the offences that they ... intended to proceed to charge [PM] with and the basis for those?

A. Yes.

Q. And you accepted those to assist in the formation of your opinion and you referred to them, from time to time?

A. They were sources of information, yes.

Q. So you say, Dr Owen, that you are willing to allow that kind of information to inform your opinion but you are not willing to reconsider your ultimate formulation with the benefit of the opinion of three experts?

A. No, that’s not what I’m saying. What I’m saying is that my report that’s

³¹² T321.10–15.

³¹³ T322.29–323.6.

³¹⁴ T322.17–23.

³¹⁵ T323.20–21.

been tendered to the court was with an opinion based at the time on the sources of information that I had. Now, since then, there have been subsequent assessments but those assessments are also based on someone else's interpretation and observation of his behaviour which is summarised in their report. So it doesn't impact on the opinion that I drew when I conducted the report with the sources of information that I had.

Q. No, I understand you didn't have it then but you do now and what I'm asking you, now, with the benefit of all that information, is are you willing to allow that to affect your ultimate formulation?

A. ... frankly, I don't think it's my job to allow it. It's up to the Honourable Court to determine the weight that's placed on each assessment. I have said repeatedly there are significant limitations in my assessment based on the information that I had at the time.³¹⁶

256 Dr Owen further confirmed that her opinion that the presumption of doli incapax could be rebutted is 'on balance based on - as I've said repeatedly - significant limitations to the assessment methodology'.³¹⁷ Dr Owen confirmed that she is unable to put her opinion any higher than that.³¹⁸

257 Dr Owen accepted that it is possible that PM did not know that his conduct was seriously wrong in a moral sense.³¹⁹

Ms Cidoni

258 Ms Cidoni is an AHPRA registered consultant clinical psychologist. She has practiced for over 28 years as a forensic psychologist, primarily preparing reports for use by courts.

259 Ms Cidoni has conducted approximately 300 doli incapax assessments across her career, all of which have been requested by defence practitioners.³²⁰ Ms Cidoni estimated that of those 300 assessments, on balance, she has found a child doli capax in '30 to 40 per cent ...'.³²¹

260 The Court is in possession of three doli incapax assessment reports prepared by

³¹⁶ T323.29-324.31.

³¹⁷ T330.10-12.

³¹⁸ T330.13-15.

³¹⁹ T330.16-19.

³²⁰ T581.30-582.10.

³²¹ T581.30-582.10.

Ms Cidoni, dated 13 July 2021, and 23 September and 30 September 2022.

261 A unique feature of Ms Cidoni's evidence is that she had a pre-existing relationship with PM, dating back to 2021, when he was 12 years old. Ms Cidoni was asked to undertake a doli incapax assessment of him in respect of charges from the period February and May 2021. Ms Cidoni prepared a report, dated 13 July 2021; the charges relating to that assessment were withdrawn by Victoria Police on 16 December 2021.³²²

262 More significantly, Ms Cidoni was in the process of preparing a doli incapax assessment of PM regarding alleged offending during the period 14 January 2022 and 28 February 2022, when the index offence occurred. Consequently, Ms Cidoni finalised her doli incapax assessment report for the Children's Court, dated 23 September 2022, and prepared a separate report for the purposes of the index offence, dated 30 September 2022. The reports were prepared simultaneously, and while they were prepared for different courts and different alleged offences, they were based on the same assessment data derived from Ms Cidoni's clinical interviews with PM on:³²³

- (a) 7 March 2022;
- (b) 23 June 2022;
- (c) 13 July 2022; and
- (d) 17 September 2022.

Previous doli incapax assessments involving PM

263 Prior to the alleged offence, Ms Cidoni had interviewed PM 'about six times' regarding unrelated matters.³²⁴ Ms Cidoni stated that she found that at age 12, PM 'lacked grasp of a sufficient understanding between right and wrong, and knowing

³²² Exhibit D4.

³²³ Exhibit D6.

³²⁴ T502.21.

the acts he committed were seriously wrong'.³²⁵ It was Ms Cidoni's view that 'these acts were about acceptance and keeping in with certain peers, bravado, thrill seeking and acting out in response to internal conflict'.³²⁶

264 In preparing her report for the previous matters, Ms Cidoni observed that the relevant record of interview 'showed his considerable immaturity and superficial understanding of right and wrong'.³²⁷ She expressed the opinion that PM was 'doli incapax with regard to those charges'.³²⁸

265 Having considered Ms Cidoni's previous assessment of PM dated 13 July 2021 in relation to the previous matters, Victoria Police determined there was insufficient evidence to rebut the presumption of doli incapax regarding those charges and the charges were withdrawn.³²⁹ Ms Cidoni reported that:

[PM] told police he'd rather be in custody with his brother [AM] than at home. His answers to police *demonstrated immaturity where he laughed inappropriately and reported he was offending for fun*. It was accepted that *he learned no comment from his brother and noted his lack of attendance at school was a factor*. Police indicated that these factors add to the conclusion he is [doli incapax], including review opinion by another expert Dr Sue Mills who agreed with them.³³⁰

266 Ms Cidoni was subsequently asked to undertake a further assessment of PM in relation to further briefs of evidence from alleged offending in January and February 2022.³³¹ Ms Cidoni administered a series of tests on PM on 7 March 2022,³³² approximately six days before the offending in question.

267 It was put to Ms Cidoni in cross-examination that when a child has participated in numerous assessments for doli incapax, it can impact the outcome of the assessment. Ms Cidoni accepted the proposition in general terms but qualified her response by

325 T512.6-9.

326 T512.10-13.

327 T522.31-523.4.

328 T512.14-15.

329 Exhibit D6, [95].

330 Ibid.

331 T512.16-19.

332 T513.7-9.

noting that she had only written two doli incapax reports in respect of PM.³³³ Ms Cidoni further accepted that a child who has been assessed for doli incapax a number of times can become familiar with the potential outcomes. However, she opined that a child who is the subject of multiple doli incapax assessments is often impeded in the experiential learning ‘process’ suggested by counsel for the prosecution, by various other factors, such as, immaturity, traumatic histories and other mental health issues.³³⁴

268 Ms Cidoni disagreed that she explained the potential outcomes of a doli incapax assessment to PM. Ms Cidoni asserted that she ‘explained it within the context of the referral letters’.³³⁵

Psychological testing

269 Ms Cidoni administered the Weschler Intelligence Scale for Children – 5th edition (‘WISC-V’) on PM on 13 July 2021, a comprehensive intelligence test assessing the subject’s cognitive functions.³³⁶ According to Ms Cidoni, the WISC-V is commonly applied in practice,³³⁷ however there are more intensive tests that can be administered via a neuropsychologist.³³⁸

270 Ms Cidoni found that PM has a full-scale IQ of 82, placing him in the low average range compared to other children his age.³³⁹

271 A Processing Speed Index (‘PSI’) was also applied, which measured PM’s speed and accuracy of visual identification, decision-making, and decision implementation. Ms Cidoni explained that his testing scores indicate a weak processing speed index,³⁴⁰ with the effect that he ‘may currently experience some difficulty solving

³³³ T550.13–16.

³³⁴ T551.1–8.

³³⁵ T551.9–14.

³³⁶ T505.21–22; T506.1–4.

³³⁷ T506.8–12.

³³⁸ T506.5–7.

³³⁹ Exhibit D6, [170].

³⁴⁰ T505.31.

complex problems that require him to identify and apply rules'.³⁴¹

272 The Millon Adolescent Personality Inventory ('MAPI') was also applied on 13 July 2021, which is an exploratory tool, the purpose of which is to provide a snapshot of the subject's personality function.³⁴² Results of the MAPI indicated PM has conduct problems; he presents as 'very immature',³⁴³ impressionable, and impulsive,³⁴⁴ with anger and 'acting out behaviours'.³⁴⁵ In Ms Cidoni's view, the latter behaviours are likely in response to stressors and possibly a teenage adjustment disorder in response to his experiences of family violence and family breakdown. In this regard, Ms Cidoni agreed with Dr Singh's proposition that 'adverse childhood events slow down adolescent brain development and thus impair a child's cognitive development, as well as a child's capacity for self-regulation, both of which are related to moral development'.³⁴⁶ Ms Cidoni agreed with Dr Singh's conclusion that in addition to his comorbid diagnoses, and history of trauma, PM 'presents with a persistence of immature moral reasoning'.³⁴⁷

273 Ms Cidoni was asked about Ms Scott's neuropsychological results, and Ms Scott's conclusions about ADHD and findings that PM has a cognitive impairment.³⁴⁸ Ms Cidoni explained that Ms Scott's assessment of PM as having ADHD is based on 'specific testing that she applied', which is beyond the remit of Ms Cidoni's role.³⁴⁹ She stated that as a result, she did not 'define [PM] as having ADHD' in her own report. However, Ms Cidoni unreservedly accepted 'everything' that Ms Scott included in her report.³⁵⁰

274 Specifically, Ms Cidoni accepted the finding that PM's 'cognitive development is not

³⁴¹ Exhibit D6, [172].

³⁴² T509.22-23.

³⁴³ T510.11-13.

³⁴⁴ Exhibit D4, [5]; [7].

³⁴⁵ Ibid [5].

³⁴⁶ T533.13-19.

³⁴⁷ T534.20-26.

³⁴⁸ T531.17-18.

³⁴⁹ T532.7-10.

³⁵⁰ T531.8-14.

equivalent to same age peers’ which in her view is consistent with her 7 March 2022 assessment,³⁵¹ and that PM’s ‘level of impulse control would be considered unusually poor even for an eight year old’.³⁵² Ms Cidoni accepted Ms Scott’s finding that PM’s ‘level of functioning overall seems to be several years below that of an average 14 year old’.³⁵³

275 Ms Cidoni stated that despite the six month period between her assessment of PM and Ms Scott’s, Ms Scott’s testing ‘produced very consistent ... and non-surprising results’.³⁵⁴

276 Ms Cidoni applied the Sociomoral Reflection Measure – Short Form Objective (SRM-SF) on 7 March 2022. Ms Cidoni’s evidence is that this is a well-validated tool with demonstrated validity across different cultures.³⁵⁵ The tool assesses the reasoning and valuing components of moral judgement.³⁵⁶ According to Ms Cidoni, it ‘provides a measure of moral maturity and values in domains of contract (promise-keeping) and telling the truth, affiliation, life, property, law and justice’.³⁵⁷

277 Based on the testing applied, Ms Cidoni considered that PM’s ‘moral reasoning has developed in some areas yet in others remains quite reduced’.³⁵⁸ Ms Cidoni reported that PM’s responses demonstrate ‘a focus on status and approval and a lack of mature understanding of social systems’.³⁵⁹

278 Ms Cidoni provided examples of PM’s poor moral reasoning. He was asked how important it is for judges to send people who break the law to gaol, and his response was:

If you murder someone, you should go to jail. Because that’s wrong. If you have to save your life that’s different. It’s not if it’s self-defence. For other stuff, it depends.

351 T531.19–22.

352 T532.1–3.

353 T532.14–18.

354 T531.26–31.

355 Exhibit D6, [180].

356 Ibid.

357 Ibid [181].

358 Ibid [182].

359 Ibid [185].

*Robbing a bank or raping, that's really bad you should go to jail for that.*³⁶⁰

279 By way of contrast,³⁶¹ Ms Cidoni provided an example in her report of a mature response to the same question, demonstrating 'a high level of moral reasoning':

*Otherwise, life would be unhappy. Judges are supposed to give the sentence people deserve so that innocent people are protected. There is no excuse for wrongdoing, and hard criminals shouldn't get off easy – if what he did was wrong.*³⁶²

280 Ms Cidoni explained that she set out her report in this way because 'it's easier to understand the test ... particularly in these situations' whereas 'it's a little unclear ... when you don't have the comparison ... [but] when the comparison's stated, you can actually see the extremes or the differences'.³⁶³

281 Ms Cidoni did not explore on 7 March 2022 whether PM understood what murder was.³⁶⁴ However, she said that his responses indicate 'a basic understanding [which] puts him – still puts him at an early stage of moral development'.³⁶⁵ According to Ms Cidoni, her tests revealed that PM 'struggles to understand the underlying principles that determine why certain behaviours are right or wrong'.³⁶⁶ Ms Cidoni explained this in her report in the following way:

*It's suspected in his declarations of knowing what is right and wrong he lacks the appropriate level of awareness, insight and understanding to be able to apply this knowledge to his behaviour beyond a superficial acknowledgement, with respect to these particular offences that mainly involve joyriding in stolen cars with his peers.*³⁶⁷

282 Also on 7 March 2022, Ms Cidoni administered the Millon Adolescent Clinical Inventory (MACI II) on PM. This test is designed to identify early signs of disorders in adolescents as well as personality patterns and self-reported concerns and clinical symptoms.³⁶⁸ Ms Cidoni opined that this testing provided 'a very – very unique

³⁶⁰ Ibid [191] (emphasis in original).

³⁶¹ Ibid [192] (emphasis in original).

³⁶² T517.13–14.

³⁶³ T517.15–23.

³⁶⁴ T518.21–23.

³⁶⁵ T521.22–25.

³⁶⁶ T521.26–30.

³⁶⁷ T522.2–9.

³⁶⁸ Exhibit D6, [194].

snapshot at that point in time of where [PM]'s moral reasoning and mental health was sitting at ... six days before [the index offence]'.³⁶⁹ Ms Cidoni's evidence is that PM's moral reasoning as at the date of her testing on 7 March 2022, was 'still low and mainly immature'.³⁷⁰

283 Ms Cidoni's evidence is that PM endorsed items on the test 'that indicate that he wants to project a sense of autonomy and self-sufficiency'. However, the testing revealed that 'at the same time maturity and independence is undeveloped'.³⁷¹

284 Ms Cidoni explained that the results from the MACI II further indicated:

[A] more troubling personality pattern at higher base rate levels, reflecting that he has developed a self-protective [introversion] and aloofness. There is a general deficit in social initiative and stimulus-seeking behaviour. He is not very demonstrative or expressive regarding positive emotions and he seems emotionally detached or disconnected from others.

Scores on subjective depression scales were elevated. He is experiencing a level of sadness and despondency is exhibited that is consistent with a persistent depressive condition. His current state is notable for a diminished level of energy, interest and pleasure in activities that were enjoyed in the past. Now, much of the time, he is preoccupied with matters of personal adequacy, recurring self-doubts, and feeling disconnected from others. He reports feeling sad, empty, and lonely.

He also reported experiencing anxiety, which is a persistent and prominent part of an overall state of distress. He tends to be socially uncomfortable, and he is plagued by self-doubt. There is a strong inclination to harbour numerous worries and fears, and these may be expressed through various somatic complaints, including headaches, stomach-aches, and other vague pains.

He feels misunderstood and, at the same time, conflicted about what he wants or needs from others.

He internalises feelings about his family and other experiences. There is a self-perception of being a victim, and he acts out in response. He presents with a temper, which may periodically flare into contentious arguments or aggression.

It comes across as disdain [about] the rights of others but is also a battle with his internal pain where he is deficient in the capacity to share tender feelings, the ability to experience genuine affection and love, or the compassion to

³⁶⁹ T520.28–31.

³⁷⁰ T521.1–2.

³⁷¹ Exhibit D6, [195].

empathise with others' needs.³⁷²

285 According to Ms Cidoni, PM's scores indicated 'conduct problems with high elevations on the delinquency scales'.³⁷³ Ms Cidoni's evidence is that PM 'engages in fighting as a method of solving problems. He wants to be seen as assertive and self-assured and he presents as full of bravado. He is easily led by others in this context'.³⁷⁴

286 Ms Cidoni subsequently saw PM again in relation to the alleged offence, on 23 June, 13 July and 17 September 2022.³⁷⁵ Ms Cidoni acknowledged that some of the material obtained at those interviews with PM was referable to her second report (in respect of unrelated matters) and some referable to the alleged offence.³⁷⁶

287 Ms Cidoni stated that across the testing she undertook during the period July 2021 to 7 March 2022, she 'saw a lot of similarity'.³⁷⁷ Ms Cidoni explained that 'even though we know that adolescents can change, and... three months in an adolescent's life can be huge ... there was still a carry on of very similar themes ... from the first to the second presentation'.³⁷⁸

288 Ms Cidoni was asked questions in relation to the possibility of malingering by PM, or the possibility his responses may have been motivated by self-preservation. Ms Cidoni's evidence is that all of the tests she administered have embedded malingering sub-scales, which indicated no presence of malingering, other unusual characterological test-taking attitudes, or invalidity which may have distorted the testing results.³⁷⁹ However, in addition to those tests, on 17 September 2022, Ms Cidoni applied a specific malingering test, the Test of Memory Malingering ('TOMM').

³⁷² Ibid [196]–[201].

³⁷³ Ibid [204].

³⁷⁴ Ibid.

³⁷⁵ T526.23–30.

³⁷⁶ T526.31–527.3.

³⁷⁷ T529.23–25.

³⁷⁸ T529.25–29.

³⁷⁹ T527.7–17; Exhibit D6, [174]–[175].

289 PM obtained a score on the TOMM above the specified critical cut-off score in the manual and that overall, 'he presented clinically with appropriate test-taking behaviour'.³⁸⁰

290 Ms Cidoni also administered further tests in relation to attitudes towards gangs using the test, Measuring Violence-Related Attitudes, Behaviours and Influences Among Youths.

291 PM indicated to Ms Cidoni that he is a member of a gang and that he reported that he believed he is safer and has more protection if he is in a gang. PM also made contradictory statements to Ms Cidoni, that 'people think less of me in a gang' and that he believes 'it's dangerous if you are in a gang, you could end up getting hurt or killed'.³⁸¹

292 A further measure was used to assess PM's beliefs about conflict, self-reported risk-taking behaviours, and developmental level of interpersonal relationships. Ms Cidoni provided examples of PM's responses to the Knowledge Management and Personal Meaning (KMPM) Questionnaire, in relation to reasons young people fight, PM responded that:

[Young people fight if] *they were hit, to get revenge, to show who's in charge. He thought young people might avoid fights because they don't like it, they don't hang out with kids who fight. Young people might join gangs to protect themselves, and feel they belong. He said he gets into physical fights himself because people talk about me, I keep my self-respect, and you have to fight to survive, I don't let anyone mess with me. When he gets into fights, I don't want to get in trouble. He said if someone calls his mother a bad name, he will fight them because if you let them get away with it once, it will happen again.*³⁸²

293 According to Ms Cidoni, the results of this test further reveal PM's immature moral reasoning and his resort to physical force to resolve conflict. Ms Cidoni considered that PM lacks maturity and that he tends to consider problems that he faces simplistically, with the genuine belief that there are easy solutions. PM does not understand the impact of his actions or consider any potential consequences his

³⁸⁰ Exhibit D6, [209].

³⁸¹ Ibid [233].

³⁸² Ibid [236].

actions may carry. For example, Ms Cidoni stated that when she asked PM what he would say to a friend who called him a ‘wimp’ if he refused to steal things with them, PM remarked, ‘just leave, tell him to leave, punch him’. Ms Cidoni stated that PM ‘did not endorse explaining to his friend why it’s wrong or telling his friend he won’t have anything to do with him if he steals’.³⁸³

294 PM was also asked to evaluate a series of items relating to the wrongfulness of conduct. Ms Cidoni noted in her report that the items PM indicated were ‘very wrong’ included ‘stealing \$100, using a weapon to get money or things, attacking someone with a weapon with the idea of seriously hurting them, also hitting someone with the idea of hurting them (unless they were hurting you)’. By contrast, PM rated the following as being ‘a little bit wrong’: ‘taking a car for a ride without the owner’s permission, stealing something worth \$50 ... damaging someone else’s property on purpose and skipping classes’.³⁸⁴

Discussions with PM regarding the alleged offending

295 Ms Cidoni acknowledged that an inherent limitation of her assessment of PM is her inability to assess, with precision, PM’s understanding of the morality of his behaviour in relation to the alleged offence, due to his no-comment interview with police.³⁸⁵

296 Nevertheless, Ms Cidoni made a number of observations about the alleged offending from her clinical interview with PM. For example, when she asked PM about factors contributing to the alleged offending, PM disclosed that ‘he was very drunk after having consumed a lot of alcohol and... weed’ prior to the attack on the deceased.³⁸⁶

297 PM reported to Ms Cidoni that prior to the alleged offence, he had been suspended from school because his older brother, AM, ‘had a vape’.³⁸⁷ PM further stated that he had been released from custody, where he had been held on remand for

³⁸³ Ibid [237].

³⁸⁴ Ibid [240].

³⁸⁵ Ibid [60].

³⁸⁶ Ibid [61].

³⁸⁷ Ibid [62].

approximately 10 days, on Saturday 12 March 2022, the day before the alleged offending.³⁸⁸ PM reported that his substance use had increased during this period.³⁸⁹

298 PM reported that he does not spend time with anyone his own age and that his peers' range in age from their teens to early twenties.³⁹⁰ PM reported that he 'generally goes out with [AM]'.³⁹¹ He denied being a decision-maker within his group.³⁹²

299 In relation to the alleged offending, PM admitted to Ms Cidoni that he was aware that his brother, AM, and the older boys had 'armed themselves with knives'.³⁹³ PM reported that he did not take a knife, stating that he 'didn't want to'.³⁹⁴ Ms Cidoni understood this representation to imply that 'having a knife was a serious thing'.³⁹⁵ However, Ms Cidoni clarified that this was an inference she had drawn and not words that PM had actually said.³⁹⁶ Ms Cidoni rejected Dr Owen's assessment that this representation 'very strongly indicates that carrying a knife can be dangerous, either for himself or for others ... all aspects of, um, moral reasoning that are evident'.³⁹⁷ Ms Cidoni stated that while his understanding several months after the offence has enhanced as a result of therapy and exposure to the reactions of his own family, 'at that point in time - so taking us back to March, and basing it on the information I collected six days earlier, I don't agree [with Dr Owen's appraisal]'.³⁹⁸ Ms Cidoni expressed the view that PM was not able to 'think forward to what the consequences of carrying a knife may be'.³⁹⁹ Ms Cidoni's evidence is that PM had a basic understanding, at best, that 'carrying a knife could lead to negative

388 Ibid [62].

389 Ibid.

390 Ibid [70].

391 Ibid.

392 Ibid.

393 Ibid [63].

394 Ibid.

395 Ibid.

396 T542.10-14.

397 T542.23-543.13.

398 T543.1-9.

399 T543.10-13.

consequences' but that he could not 'foresee what those consequences were'.⁴⁰⁰

300 In Ms Cidoni's discussions with PM, he reported to her that he was a passenger in the stolen car and said that at some stage in the car he felt 'scared' but was unable to communicate why he felt scared, other than that he thought things 'were going bad'.⁴⁰¹ Ms Cidoni stated that PM was 'unable to actually go beyond that explanation', and that PM was 'unable to articulate' to her what he meant by that.⁴⁰² PM recalled thinking that he wanted to go home but did not because his brother, AM, did not want to.

301 PM said that the alleged offending 'happened fast'.⁴⁰³ He confirmed that he had never met the deceased.⁴⁰⁴ When asked about the stolen vehicle, Ms Cidoni's impression was that PM 'did not seem to give thought to the car's owner or that the driver was underage'.⁴⁰⁵

302 When asked why he kicked the deceased, PM said, 'I don't know' and that he 'thought they (the co-accused) were punching him'.⁴⁰⁶ Ms Cidoni provided the following exchange about the events in her report:

How did you feel when [AM] stabbed him? [PM] said *how did you know?* When I told him I watched the CCTV footage, he indicated he hadn't, that he didn't want to, but that he saw the pictures on the brief. I said did you see [AM] with a knife, [PM] closed his eyes, shook his head and said *I don't know, yes*. I discussed with [PM] that I saw him stop and watch as the others continued the attack and I asked whether he could recall what was he thinking. His speech was low, and he appeared sad, and remorseful. He indicated what happened was *bad* and *wrong*. He said *I can't remember* when he was prompted about his thoughts during the crime. It was apparent to me at that point that [PM] was deeply affected by the events and also by [AM]'s actions.⁴⁰⁷

303 Ms Cidoni assessed PM's understanding of right and wrong in the context of the

400 T543.20-24.

401 Exhibit D6, [266].

402 T544.5-10.

403 Exhibit D6, [268].

404 Ibid.

405 Ibid [267].

406 Ibid [64].

407 Ibid [65].

alleged offence. PM acknowledged that the offending was 'bad', 'not OK', and that 'it went too far'. He mentioned to Ms Cidoni that others, specifically his peers and his brother, had indicated to him that it was 'bad'.⁴⁰⁸

304 PM articulated that his actions did not cause the death of the deceased and repeatedly stated that he did not stab the deceased.⁴⁰⁹ It was Ms Cidoni's impression that PM genuinely believed his actions did not cause the deceased's death and that this was important to him.⁴¹⁰

305 PM was able to articulate that he did not think he was bad, or that his brother, AM, was bad, but that what they did was 'really bad'.⁴¹¹

306 PM reported that he was 'scared the whole time'.⁴¹² In Ms Cidoni's view, PM's various diagnoses and history of trauma provide an explanation for why PM felt scared. She said:

[Triggers] are - are - trauma triggers just happen. Um, so, you know, if there's some - some event that's parallel to a past event that he might've been exposed to he - he could react and be triggered by that event, and that could be a reason why he felt scared; that could be a logical reason.⁴¹³

307 PM also reported that he 'didn't sleep much' after the alleged offending and that while he could not remember much, he admitted he was present when the stolen vehicle was burnt.⁴¹⁴ He told Ms Cidoni that he was consuming alcohol and cannabis during the lead-up to his arrest for the alleged offence.⁴¹⁵

308 When asked about the consequences relating to the deceased, PM agreed it would be 'very bad for his family' and 'they would be angry'. He recognised that his peers in the community did not approve of what happened'.⁴¹⁶

408 Ibid [66], [271].

409 Ibid [67].

410 Ibid.

411 Ibid [68].

412 Ibid [69].

413 T545.7-17.

414 Exhibit D6, [69].

415 Ibid.

416 Ibid [71].

309 Ms Cidoni observed that PM seemed naïve to potential reprisals or threats to his future safety because of his involvement in the death of the deceased. In her view, he showed ‘no awareness that others may view him as bad or be scared of him or that he may not be able to attend the same school’.⁴¹⁷ Ms Cidoni expressed in her report:

He seemed genuinely surprised when I indicated some Youth Justice (YJ) staff feared him, and notes from his school indicated some teachers were scared of him. In this discussion, I relayed an incident where I was informed that staff members expressed concern when they were in the kitchen with him when he was eating/had possession of cutlery. When queried why people might feel this way, [PM] said *why?* And while he shook his head in disbelief, he said *I would never stab anyone*.⁴¹⁸

Psychosocial history

310 Ms Cidoni gleaned from the collateral materials provided to her that PM and his family presented with significant psychosocial disadvantage and there was a large care team involved with the family.⁴¹⁹

Summary and opinion

311 Ms Cidoni previously concluded ‘in agreement with Victoria Police’ that PM ‘is immature, owing to his psychological functioning, negative influences, schooling and family experiences’.⁴²⁰ On 16 December 2022, Victoria Police on 16 December 2022 determined that PM ‘viewed his offending at the time as *wrong*, but that he was limited in his capacity to understand these behaviours were *seriously wrong*’. Ms Cidoni asserted that this was consistent with her opinion at that date.⁴²¹

312 Ms Cidoni reiterated that while she previously assessed PM as having a basic understanding of right and wrong, ‘he has difficulty in appreciating the underlying principles that determine why certain behaviours are *right* or *wrong*’. Ms Cidoni explained that:

Past declarations [PM] made of knowing what is *right* and *wrong*, also indicated that he lacked the appropriate level of awareness, insight and understanding to be able to apply this knowledge to his behaviour beyond

⁴¹⁷ Ibid [72].

⁴¹⁸ Ibid [73].

⁴¹⁹ Ibid [86]–[89].

⁴²⁰ Ibid [245].

⁴²¹ Ibid.

superficial acknowledgement. This is with respect to offences that involved theft, and acts of joyriding in stolen cars with his brother and peers.⁴²²

313 Ms Cidoni's evidence is that PM was 'negatively influenced by his older brothers' and other older peers. She considered that 'his behaviour, his mental state and lowered moral reasoning' and factors such as his experiences of racism, bullying, family violence and transgenerational trauma are other facts that impact PM on an individual level.⁴²³

314 Ms Cidoni explained that PM's low processing speed is caused by neurological differences and has the effect that PM 'struggles with keeping up with the pace, is often last to finish tasks, and he [has] problems with becoming easily overwhelmed which leads to difficulty organising thoughts'.⁴²⁴ Ms Cidoni stated that this 'translates to [PM] taking longer to receive and understand messages from others and situations' and she explained that 'in conversations with others, he may invest energy in trying to remember what other people are saying, but often misses parts because he is trying to keep up'.⁴²⁵

315 Ms Cidoni assessed PM as meeting the diagnostic criteria for a Conduct Disorder under the DSM-V.

316 Ms Cidoni asserted that her testing on 7 March 2022 was 'nearest to the offending time', where she found that PM's moral reasoning levels were 'low and immature'.⁴²⁶ On that testing date, Ms Cidoni reported that PM 'demonstrated superficial understanding, compromised empathy and a failure to understand or see other perspectives'.⁴²⁷ Ms Cidoni asserted that 'the test results also showed limited progress/development of his moral understanding over the two test occasions'.⁴²⁸

317 Ms Cidoni was asked in cross-examination to explain the context of how PM's

422 Ibid [247].

423 Ibid [249].

424 Ibid, [253].

425 Ibid [253].

426 Ibid [260].

427 Ibid.

428 Ibid.

response, 'if you murder someone, you should go to gaol because that's wrong' arose in her testing. Ms Cidoni explained, that his statement was in response to a direct question she asked. Ms Cidoni further explained that PM's response, according to the evaluation manual, indicated 'a basic understanding' as opposed to 'a sophisticated answer'.⁴²⁹ Ms Cidoni agreed in cross-examination that PM's response indicates he recognises a hierarchy of offending, to an extent, but opined that 'he's showing some immaturity in relation to those' items in her tests.⁴³⁰ Ms Cidoni asserted that PM does not understand the process of why something is wrong and is unable to 'make the connection to potential harmful consequences of that behaviour'.⁴³¹

318 Ms Cidoni considers that PM's post-offending conduct—such as making no effort to change his clothing, his continued interactions with the co-accused, being present when the stolen vehicle was burnt—all demonstrate his immature naivete. Ms Cidoni said that she understood this conduct in the following way:

[He] was scared. He's a child. His moral functioning's so reduced that he, that he just didn't know what to do ... There's no changing clothes or disassociating himself from others. He just kept going along and, and carrying on and doing what his brother and the other boys were doing. So, I guess that to me ... indicates low moral reasoning ... He's focused on the fact that he didn't have a knife and although he kicked the deceased, he says he did not kill him. ... and that was important to him ... he knows murder is bad. 'Cause that was important to him to say that 'I'm not a murderer'.⁴³²

319 Ms Cidoni noted that in her report dated 13 July 2021, PM 'lacked the psychological ability ... to understand the impacts of earlier offending'. She explained that the 'record of his moral reasoning level ... in March 2022 was indicative of many basic responses that are consistent with these findings', with 'few higher level of mature responses [by PM regarding things] that were perceived [by him] as seriously wrong/or representing higher level moral understanding'.⁴³³

⁴²⁹ T517.4–8.

⁴³⁰ T554.22–30.

⁴³¹ T557.13–15.

⁴³² T541.8–22.

⁴³³ Exhibit D6, [288].

320 In her second report dated 23 September 2022, Ms Cidoni concluded that, PM 'lacked the psychological ability at the age of 12 and 13 to put himself in the place of another and understand the impacts'.⁴³⁴ Ms Cidoni's evidence is that this is 'an ability that develops over time' and that PM 'hasn't reached it at this stage'.⁴³⁵

321 Ms Cidoni rejected Dr Owen's hypothesis that PM's presentation reflects adherence to an alternative moral code. Her evidence is that 'to adhere to an alternative moral code requires a level of moral reasoning, and ... his level of moral reasoning isn't at that level ... to be able to adhere to an alternative moral code'.⁴³⁶ Ms Cidoni asserts that PM's level of moral reasoning is 'so immature' that 'he wouldn't be able to do that ... you'd have to have ... a higher level of moral reasoning to be able to switch over to an alternative moral code'.⁴³⁷

322 Counsel for the defence asked Ms Cidoni to provide an opinion as to whether PM, at the time of the alleged offence, 'understood the moral wrongness of his actions'. Ms Cidoni's evidence is that having conducted testing a few days prior to the alleged offence, 'I would say that he had a very compromised understanding of the seriousness of his actions'.⁴³⁸

323 Ms Cidoni disagreed in cross-examination that at the time of the alleged offence PM knew that it was seriously wrong in a moral sense to:

- (a) kick and stomp on a person's head while they are being stabbed;
- (b) to carry knives; or
- (c) to use knives to inflict injury or serious injury.⁴³⁹

324 Ms Cidoni rejected the proposition put in cross-examination that her report and opinion in relation to the applicability of *doli incapax* is restricted to 'joyriding in

⁴³⁴ Exhibit D5, [317]; T525.26-29.

⁴³⁵ T526.11-13.

⁴³⁶ T536.8-13.

⁴³⁷ T536.14-19.

⁴³⁸ T538.13-18.

⁴³⁹ T569.4-15.

stolen cars'.⁴⁴⁰ Ms Cidoni asserted that in her final report she is 'dealing with everything up to...[the] murder'.⁴⁴¹ Ms Cidoni opined that because she had assessed him on two occasions prior to the alleged offence, it gave her 'unique insight' and 'a clear picture ... to form that conclusion'.⁴⁴² Ms Cidoni stated, 'I feel quite definite in my opinion in that conclusion'.⁴⁴³ Ms Cidoni was challenged in cross-examination as to why she did not conclude in her final report that PM is doli incapax in relation to the alleged offence. Ms Cidoni provided the following response:

This is the best I can do at this point in time ... I feel I've got a lot of information four to six days before the matter that is telling me that he is extremely immature and has a very, very low social moral reasoning level. I have to consider that, while he can say murder's wrong, that he can't really explain why at that point ... [but] I didn't ask him. ... [so] I thought, well, I'll leave it at that and I'm sure some other experts will ... offer some other opinions and then, at some point, I'll write a supplementary report based on all the information... But I didn't do that. I didn't have that opportunity.⁴⁴⁴

325 Ms Cidoni agreed that at the time of writing her report in respect of the alleged offence, she was not able to 'draw the conclusion one way or another'.⁴⁴⁵ However, Ms Cidoni stated that had she had the opportunity to write an addendum report she would have drawn the conclusion that PM is doli incapax, based on the weight of the findings from the testing she conducted with PM 'six days before the matter' as well as the additional expert evidence she has now received.⁴⁴⁶

326 Ms Cidoni reflected that this is 'one of the most difficult' doli incapax reports she has ever written.⁴⁴⁷ She stated that while PM understands that murder is wrong, in her view, he was incapable of foreseeing the consequences of his specific conduct 'during the act'.⁴⁴⁸ Ms Cidoni elaborated that:

[Where] he can't make that connection, I believe the impairing factors are his, his, his developmental delays, his mental health conditions, his, you know,

⁴⁴⁰ T560.9-12.

⁴⁴¹ T560.12-14.

⁴⁴² T560.17-561.1.

⁴⁴³ T561.1.

⁴⁴⁴ T561.19-562.2.

⁴⁴⁵ T567.21-23.

⁴⁴⁶ T567.31-568.13.

⁴⁴⁷ T557.29-31.

⁴⁴⁸ T558.9-11.

cognitive condition, his PTSD and trauma exposure. These ... all serve as like a barrier and impairs him. So, it impairs his moral understanding therefore.⁴⁴⁹

Dr Singh

327 Dr Singh is a senior consultant forensic psychiatrist, registered as a medical practitioner with AHPRA. Dr Singh is an accredited member of the Royal Australia and New Zealand College of Psychiatrists and is Chair of the Child and Adolescent Forensic Psychiatry sub-committee.

328 Dr Singh prepared a report dated 10 April 2023, which was tendered into evidence.⁴⁵⁰

329 In preparing her report, Dr Singh conducted a psychiatric assessment of PM's psychiatric, medical and personal histories.⁴⁵¹ Dr Singh conducted clinical interviews with PM on 2 December 2022, via audio-visual link ('AVL'); and on 27 January 2023, at Parkville Youth Justice Centre; and on 25 February 2023, via AVL.

330 Dr Singh also interviewed PM's mother, MJ, on 27 January 2023 and interviewed Ms Lorraine McMahon, the Emerald Unit Supervisor, Parkville Youth Justice Centre of approximately 15 minutes duration, on 25 February 2023, via AVL.

331 Dr Singh was provided the report and addendum report of Dr Owen and was present in court for some of Dr Owen's evidence.

Dr Singh's evidence

332 Dr Singh has practiced for over a decade in forensic psychiatry, working with young people who have had contact with the criminal justice system, and who have been detained in detention centres in New South Wales.⁴⁵² Dr Singh's primary role is principal psychiatrist at Austinmer Adolescent Unit, which is the only forensic hospital for adolescents, based in Sydney, NSW.⁴⁵³ Most of the adolescents on the

⁴⁴⁹ T558.28-559.3.

⁴⁵⁰ Exhibit D2.

⁴⁵¹ Ibid [140].

⁴⁵² T404.2-8.

⁴⁵³ T403.6-10.

unit are children who have been involved in a homicide.⁴⁵⁴ Dr Singh's role at the hospital involves assessing and treating young people with comorbid mental illness who have committed serious offences or who are considered high risk of committing serious offences.⁴⁵⁵ Dr Singh has also practiced at both Malmsbury and Parkville Youth Justice Centres in Victoria.⁴⁵⁶

333 According to Dr Singh, the nature of her work routinely involves assessment of the moral development of children.⁴⁵⁷ Dr Singh has never given evidence in a murder trial prior to this matter,⁴⁵⁸ and she conceded that she has 'very limited doli incapax assessment experience'. Dr Singh has completed three doli incapax assessments in her career, including for the present trial.⁴⁵⁹

334 Dr Singh advised that the two other doli incapax assessments she has provided in her career were commissioned by the prosecution and that her assessment for the purposes of the present trial was the first commissioned by defence practitioners.⁴⁶⁰

335 Similarly to Dr Owen, Dr Singh's assessment of PM was informed by voluminous material and underpinned by several theoretical frameworks.

336 Dr Singh assessed PM as having:⁴⁶¹

- (a) a major depressive disorder of moderate severity (with symptom onset preceding the alleged offence);
- (b) suicidal ideation (including documented serious self-harm incidents whilst incarcerated);
- (c) complex post-traumatic stress disorder;

⁴⁵⁴ T403.20–22.

⁴⁵⁵ T403.15–18.

⁴⁵⁶ T404.1–2.

⁴⁵⁷ T404.24–27.

⁴⁵⁸ T405.11.

⁴⁵⁹ T450.27–31.

⁴⁶⁰ T451.1–3.

⁴⁶¹ Exhibit D2, [510]–[600].

- (d) childhood-onset conduct disorder;
- (e) deficits in cognitive function; and
- (f) attention deficit hyperactivity disorder (ADHD).

Family history

337 Dr Singh conducted a family of origin and developmental history of PM to contextualise PM's presentation and understand his attachment relationships.⁴⁶²

338 Dr Singh observed that PM's mother, MJ, grew up in poverty in Sudan in a traditional Muslim household. MJ commenced work at age 12, in order to help provide for her younger siblings. MJ married PM's father, DM, who was 10 years her senior, when she was 17 years old. Initially, their marriage was difficult; they had limited resources and were living through war. MJ gave birth to two sons in Sudan who both died, one at six months, and one two days after birth. MJ then gave birth to a daughter. Shortly thereafter, the family sought refuge in Egypt, where they resided for three years in a refugee camp, beset by poor living conditions and limited medical care. There, MJ suffered a stillbirth. The family then moved to Australia, arriving in 2004.⁴⁶³

339 MJ had three children under the age of three when PM was born. When PM was one year old, his parents separated for the first time. Following this separation, MJ and DM had an intermittent relationship between the years 2010 to 2015. The relationship produced seven children.

340 On 29 November 2015, DM strangled MJ in the presence of her children, including PM, who was age six. MJ reported that her children, including PM, saved her life.⁴⁶⁴ A family violence intervention order ('FVIO') was made in protection of MJ and her children. DM relocated interstate and ceased contact with his children.

⁴⁶² Ibid [630].

⁴⁶³ Ibid [640]–[657].

⁴⁶⁴ Exhibit P4.

341 In Dr Singh's opinion, MJ's history is likely to have resulted in an inability to cope with her children, including PM, or meet PM's early attachment needs.

342 After the FVIO was made, MJ was unable to service the mortgage repayments, resulting in the bank foreclosing on the property and MJ left with significant debt.

343 In 2019 and 2021 respectively, MJ had another two children. Records indicate that following the birth of her child in 2021, MJ struggled with her mental health.

344 Dr Singh stated that PM's self-report of his family history was consistent with that of his mother.⁴⁶⁵

Adverse childhood experiences

345 Dr Singh observed that PM had experienced significant trauma throughout his childhood, including extreme family violence, abuse, neglect, parental separation, sibling incarceration, transient accommodation, bullying, social exclusion, and experiences of racism. Dr Singh asserted that all these experiences were compounded by the family's circumstances of abject poverty.

Developmental history

346 Although PM was a wanted pregnancy, MJ reported to Dr Singh that PM was not planned and that he was conceived despite her contraceptive implant.⁴⁶⁶ MJ reported that she did not know she was pregnant with PM until four months gestation and thus did not receive any early antenatal care.

347 At seven months gestation, MJ was diagnosed with gestational diabetes, requiring regular insulin injections. MJ gave birth to PM at term and despite a caesarean section being medically indicated, she gave birth to PM vaginally before she was able to be prepared for surgery. MJ reported to Dr Singh that PM was a large baby, weighing 7.3 kilograms at birth.

348 MJ reported that when PM was a toddler, and she was pregnant with twins, she

⁴⁶⁵ Exhibit D2, [737].

⁴⁶⁶ Ibid [805].

witnessed DM attempt to strangle PM. MJ described intervening, which resulted in DM seriously assaulting her, causing the loss of the twin pregnancy she was carrying. MJ told Dr Singh that members of her diaspora community told her not to disclose the assault to doctors or to the police.

349 MJ reported to Dr Singh that she observed PM's behaviour change at around 10 years of age. She said PM became more oppositional, and that he would run away from home. MJ recalled times when she would drive out late at night to find PM with his older brothers at the local McDonald's, in the company of older boys.⁴⁶⁷

Educational history

350 Dr Singh noted that PM regularly attended school from grade one to grade three, when he was between the ages of six and eight.⁴⁶⁸ The family moved a number of times, and consequently, PM attended a number of primary schools. His early primary school records were not available to Dr Singh for review at the time of her assessment.⁴⁶⁹

351 PM was suspended in grade five for 'swearing at [his] teacher'. PM also reported to Dr Singh that he was involved in some fights at school.⁴⁷⁰

352 Available school reports from grade five state:

- (a) attendance of approximately 60 per cent; and
- (b) below average scores in the domains of 'critical and creative thinking' and 'ethical capability'.

353 PM's family then moved again, and PM attended a new school for grade six, when he was 11 years old. Due to circumstances of family violence, the family then had to move again, and they were accommodated in emergency housing. PM reported that the family 'stayed at two hotels', during which time PM was unable to attend school.

⁴⁶⁷ Ibid [830].

⁴⁶⁸ Ibid [840].

⁴⁶⁹ Ibid.

⁴⁷⁰ Ibid [845].

PM reported that his eldest brother was getting into trouble at this time and that police would often attend the house.⁴⁷¹

354 The family was then provided a house in another suburb, however it was in disrepair, so the family moved again to another suburb where they remained for one year.⁴⁷² PM completed grade six during this time.

355 PM then attended high school at age 12 until year eight, age 13, at which point he was remanded for the index offence.⁴⁷³ PM reported initially enjoying school but stated that when he attended the same school as his older brother, AM, he began truanting.⁴⁷⁴ He told Dr Singh that in 2021 he ‘stopped liking school’ but was unable to offer an explanation. He said that his attendance at school in year seven and the beginning of year eight was poor. This was confirmed by the school attendance records provided to Dr Singh.⁴⁷⁵

Substance use history

356 PM reported to Dr Singh that he first smoked cannabis in 2020, at age 11 or 12. PM reported that he smoked cannabis with his friends, approximately every fortnight, with use gradually increasing.⁴⁷⁶ PM also began vaping in 2021, at age 12.

357 PM commenced drinking alcohol in 2022, at age 13. Dr Singh understood from PM’s descriptions that he would drink between five and 11 standard drinks of alcohol with his friends.⁴⁷⁷

358 PM described consuming Xanax in 2022, obtained from his friends. He also described using a ‘cream charger’, colloquially referred to as ‘nangs’, although he could not explain to Dr Singh exactly what this was.⁴⁷⁸

471 Ibid [855].

472 Ibid.

473 Ibid [870].

474 Ibid.

475 Ibid [872].

476 Ibid [880].

477 Ibid [887].

478 Ibid [890].

359 Dr Singh observed that PM described his substance use with ‘some degree of bravado’. However, Dr Singh noted that in her second interview with PM, which was conducted in-person, PM disclosed experiences of loss, including the stabbing death of a friend in 2021, and the death of his cousin in a car accident, also in 2021. PM revealed that he ‘sometimes felt better’ when intoxicated.⁴⁷⁹ However, Dr Singh noted that PM was not able to connect his emotions to his actions, for example consuming substances to avoid his feelings of grief, until she specifically asked him.⁴⁸⁰

Forensic history

360 PM reported to Dr Singh that he first started getting into trouble in 2019, at about 10 years old. He began stealing food items from shops, ‘for myself and so my little sister could have food at home’. PM was reluctant to discuss the food insecurity in his home but agreed that there was not enough food for the family.⁴⁸¹

361 PM acknowledged being involved in fights at school but stated that he did not start the fights and that he ‘just retaliates’.⁴⁸²

362 PM reported being charged by police in relation to the theft of cars, although he understood that those charges were dropped because he ‘was just there’.⁴⁸³ PM could not explain why he was involved in stealing cars.

363 PM acknowledged that he was continuously getting into trouble until a period during September 2021 and February 2022. PM explained that during this time he was receiving substantial ‘support from community workers and I was having fun’.⁴⁸⁴ Dr Singh observed that the records indicate that his supervised bail program – and the support attached to it – ended on 15 December 2021. PM’s explanation for

⁴⁷⁹ Ibid [907].

⁴⁸⁰ Ibid [910].

⁴⁸¹ Ibid [920].

⁴⁸² Ibid [925].

⁴⁸³ Ibid [930].

⁴⁸⁴ Ibid [940].

why he began getting into trouble again was that he was ‘bored at home’.⁴⁸⁵

364 Dr Singh disagreed in cross-examination that PM’s forensic history indicates decision-making rather than a lack of moral understanding. Dr Singh’s evidence is that PM’s period of non-offending must be viewed in the context of the ‘significant support’ he was in receipt of during that period, which was then ultimately withdrawn.⁴⁸⁶

365 In relation to PM’s interactions with police, Dr Singh observed note-worthy changes in PM’s behaviour across the BWC footage. Dr Singh’s evidence is that:

[In] the initial [footage], he is less aroused. He’s less angry. He’s less defiant. He’s much more compliant. He also doesn’t seem to know the process. So, for example, he tries to take, um, his lollipop out of his pocket ... he seems calmer overall in the first video. In the second video, he is hostile. He is – he knows the process. So, he says, you can search me. Um, his posture is more defensive. So is his language. And so is his tone. Um, and he is at times disrespectful.⁴⁸⁷

366 In Dr Singh’s view, PM experienced those interactions with police ‘as being aversive ... certainly, there are experiences in which he is being denigrated. But also, he experiences that denigration’.⁴⁸⁸ According to Dr Singh, these interactions with police ‘cements ... his view that the world is hostile’.⁴⁸⁹ Dr Singh opined that this ‘hostile misattribution bias ‘may stem from his ‘insecure attachments’ but is also attributable to a pre-pubertal adolescent increase in defiance, risk-taking and impulsivity and his childhood-onset conduct disorder.⁴⁹⁰ Dr Singh asserted that PM ‘may also be responding to a level of aggression or what he perceives as disrespect from police officers’.⁴⁹¹

367 In relation to the footage in which PM reacts to being called the ‘n word’ by a police officer, Dr Singh asserted that such ‘experiences of racism ... may in some ways

485 Ibid.

486 T469.4–25.

487 T434.3–12.

488 T434.20–25.

489 T434.28–29.

490 T434.31–435.14.

491 T435.19–21.

reactivate the trauma response associated with that’. Dr Singh explained that PM’s behaviour in that footage can be characterised as ‘a fight response’ in the ‘very simplistic terms of the fight-flight-freeze response’.⁴⁹²

368 Ultimately, Dr Singh’s evidence is that ‘there are multiple explanations using a psychiatric lens for why there may be changes in how he’s responding’ in the BWC footage.⁴⁹³

Mental status examination

369 Dr Singh conducted a psychiatric assessment of PM on 27 January 2023. She described PM as appearing older than his chronological age.

370 Dr Singh observed that PM was able to attend to the majority of the interview, but lost concentration at times and that she had to repeat some questions. Dr Singh’s evidence is that PM struggled, despite his best attempts, to respond to hypothetical scenarios she presented to him.⁴⁹⁴

371 Dr Singh noted that PM found it difficult to talk about past trauma and that he ‘appeared to be disconnected from the experience of his emotions and could not ... explain what he felt when asked why he preferred not to talk about these negative experiences’.⁴⁹⁵ Dr Singh noted that PM reported to her that he uses self-talk as a means to self-soothe.⁴⁹⁶

Assessment of social and moral development

372 Like Dr Owen, Dr Singh relied on multiple theories of moral development to formulate her psychiatric opinion.⁴⁹⁷

373 Dr Singh’s evidence is that based on the cognitive development and social domain theories, ‘moral reasoning is considered as a gradually developing cognitive

⁴⁹² T435.24–30.

⁴⁹³ T435.30–436.1.

⁴⁹⁴ Exhibit D2, [1625].

⁴⁹⁵ Ibid [1650].

⁴⁹⁶ Ibid.

⁴⁹⁷ Ibid [1665].

process'.⁴⁹⁸

374 Dr Singh applied the following theoretical frameworks in assessing PM's moral development:

- (a) cognitive development theory;
- (b) social domain theory; and
- (c) meta-moral cognition theory.

Cognitive development theory

375 The first framework Dr Singh considered was the cognitive development theory, which applies Kohlberg's stages of moral development. Dr Singh stated that the transcripts and videos of PM with members of Victoria Police and other figures of authority, and the Arunta call recordings of PM with his brothers and other older boys while in custody are evidence of PM's 'level of developmental immaturity'.⁴⁹⁹ Dr Singh opined that illustrative of this fact is PM's denial in the face of clear evidence of wrongdoing.⁵⁰⁰ Dr Singh provided the example of PM stating that 'it is not him when presented with photographs of himself at a crime scene'.⁵⁰¹

376 Dr Singh considered that the Arunta call recordings demonstrate 'his sense of individualism and exchange consistent with an immature bravado'.⁵⁰² Dr Singh assessed his interactions in the Arunta calls and with figures of authority as 'being primarily egocentric' as a result of his cognitive deficits.⁵⁰³ Her evidence is that PM's egocentricity is 'particularly evident when more emotionally difficult topics were discussed'.⁵⁰⁴

377 Dr Singh asserted that this opinion was supported by collateral evidence, such as

⁴⁹⁸ Ibid [1675].

⁴⁹⁹ Ibid [1690].

⁵⁰⁰ Ibid.

⁵⁰¹ Ibid.

⁵⁰² Ibid [1700].

⁵⁰³ Ibid.

⁵⁰⁴ Ibid.

PM's school records, which indicated deficits in moral capacity.⁵⁰⁵ Dr Singh further noted that PM's cognitive difficulties are reflected in his poor adaptive functioning.⁵⁰⁶ Based on her clinical observations across three psychiatric interviews and a review of the available collateral material, Dr Singh concluded that PM's adaptive functioning is low.⁵⁰⁷

378 Dr Singh explained that adaptive functioning has three domains:

- (a) conceptual (academic);
- (b) social; and
- (c) practical.

379 Dr Singh observed that in the conceptual domain, PM has difficulty with problem-solving and judgement. Dr Singh asserted that this was evident at the clinical interview, in addition to the psychometric assessment of PM conducted by Ms Cidoni.⁵⁰⁸

380 In the social domain, Dr Singh found that PM demonstrates a limited awareness of others' thoughts, feelings and experiences, as well as deficits in empathy.⁵⁰⁹ In Dr Singh's opinion, PM's limited capacity for empathy is evident in his responses at police interviews, the structured clinical assessments of PM undertaken by Ms Cidoni, as well as during Dr Singh's assessment with PM.⁵¹⁰

381 In the practical domain, Dr Singh observed that PM has not acquired skills in the self-management of his behaviour and task organisation.⁵¹¹

382 According to Dr Singh, the 'consistent picture that emerges from both the psychometric assessment and the clinical evaluation is thus one of poor adaptive

505 Ibid [1705].
506 Ibid [1710].
507 Ibid.
508 Ibid [1720].
509 Ibid [1725].
510 Ibid.
511 Ibid [1730].

functioning, which supports the assessment of deficits in cognitive functioning'.⁵¹²

383 Dr Singh's evidence is that 'most significantly', on 7 March 2022, just five days before the commission of the alleged offence, Ms Cidoni assessed PM's moral reasoning 'using a well-validated tool'.⁵¹³ Dr Singh's evidence is that Ms Cidoni's 7 March 2022 assessment is consistent with her own clinical assessment of PM undertaken at interview on 27 January 2023.⁵¹⁴

384 In her 27 January 2023 clinical assessment, Dr Singh found that PM was not able to appraise the consequences of his actions.⁵¹⁵

385 Dr Singh assessed PM's responses as aligning with Kohlberg's pre-conventional stage of morality,⁵¹⁶ consistent with Ms Cidoni's assessment. According to Dr Singh, PM's moral development is 'primarily egocentric with decision-making based on self-interest', with an 'impaired capacity for empathy'.⁵¹⁷

386 Dr Singh disagreed with Dr Owen's criticism of the Kohlberg theory. Dr Singh further disagreed with Dr Owen's criticism of Ms Cidoni's assessment, which Dr Owen stated was based exclusively on Kohlberg's theory.⁵¹⁸ Dr Singh asserted that in addition to relying on Kohlberg's theory, Ms Cidoni also took into account PM's history, a neuropsychological assessment that she had previously conducted on PM, longitudinal assessments of his presentation, and his family environment.⁵¹⁹

Social domain theory

387 Dr Singh applied social domain theory in assessing PM's capacity to identify and prioritise universal moral principles above social conventions and personal domain elements.⁵²⁰

⁵¹² Ibid.

⁵¹³ Ibid [1735].

⁵¹⁴ Ibid [1740].

⁵¹⁵ Ibid [1760].

⁵¹⁶ Ibid [1770].

⁵¹⁷ Ibid.

⁵¹⁸ T446.30-447.2.

⁵¹⁹ T447.3-8.

⁵²⁰ Exhibit D2, [1780].

388 Dr Singh's evidence is that PM 'has an impaired capacity to be aware of the thoughts, feelings or mental states of others'.⁵²¹ Dr Singh explained that she considered this impairment as being 'linked to his mother's difficulty attuning and adequately responding to his emotional needs in infancy, in the context of her own psychological distress secondary to prolonged and persistent trauma, loss and multiple psychosocial stressors'.⁵²²

389 Dr Singh explained that PM's impaired and insecure attachment to his mother has resulted in 'a child with quite a fragmented sense of self'.⁵²³ Dr Singh stated that consequently, PM has developed a 'limited capacity to be aware of [his] own mental state', and 'difficulty understanding the mental states of other people'.⁵²⁴ Dr Singh continued that this 'has relevance ... in moral development' because to develop 'sophisticated moral capacity requires the child to be able to take the perspectives of others'.⁵²⁵ Dr Singh further stated that 'in the absence' of a secure attachment, 'there is difficulty for the child to be able to emotionally regulate'.⁵²⁶ According to Dr Singh, 'heightened emotions impact on reasoned thinking, or capacity to plan and make judgements' and therefore that has an impact on moral development.⁵²⁷

390 In relation to the impact of PM's history of early developmental trauma, including exposure to violence and other anti-social behaviours on his cognitive development, Dr Singh provided the following evidence:

It is hypothesised, based on this assessment, that these developmental insults impaired his developmental trajectory and his capacity to develop a sound understanding of universal moral standards. It is likely that he learnt that violence was an acceptable form of behaviour and has modelled some actions upon this. ... his immediate family, his older sister, three older brothers and his father have all had contact with the criminal justice system. His mother is also noted to have had difficulties trusting police and at times is reported to

521 Ibid [1780].

522 Ibid [1785].

523 T413.7-8.

524 T414.2-19.

525 T414.25-27.

526 T414.30-31.

527 T415.1-4.

be obstructive.⁵²⁸

391 In Dr Singh's view, PM's limited school attendance has further reduced his exposure
to and learning of pro-social norms and values.⁵²⁹ Dr Singh opined that PM's
experiences of racism, bullying, ostracisation and exclusion further impeded his
opportunities for pro-social learning.⁵³⁰

392 Ultimately, Dr Singh's evidence is that PM 'demonstrates a limited capacity for
autonomy ... [and is] vulnerable to influence by his older siblings and anti-social
peers'.⁵³¹

Meta-moral cognition theory

393 The final theoretical framework applied by Dr Singh considered the impact of his
emotions on his cognitive processes and how the interaction of these impact upon
his capacity for moral decision-making and actions.

394 Dr Singh diagnosed PM as having a major depressive disorder of moderate severity,
complex post-traumatic stress disorder, severe ADHD and a childhood-onset
conduct disorder.⁵³² Dr Singh considered these psychiatric disorders predated the
alleged offending. Dr Singh assessed PM as having a history of impulsivity and
emotional dysregulation consistent with and exacerbated by his diagnoses.⁵³³ In Dr
Singh's view, these conditions 'further impair his capacity for moral decision
making'.⁵³⁴

395 In relation to the diagnosis of a childhood-onset conduct disorder, Dr Singh
explained that there are different subtypes of the disorder and that 'some ... are
better conceptualised as a neurodevelopmental disorder'.⁵³⁵ Dr Singh also explained
that conduct disorders are also qualified by degree of severity. Dr Singh assessed PM

528 Exhibit D2, [1790].

529 Ibid [1800].

530 Ibid.

531 Ibid [1810].

532 Ibid [1820].

533 Ibid [1830].

534 Ibid.

535 T424.10-11.

as having a 'severe' conduct disorder.⁵³⁶ However, Dr Singh stated that PM does not have callous or unemotional traits attributable to other subtypes of conduct disorder.⁵³⁷

396 In discussing PM's profound emotional dysregulation attendant to his conduct disorder on the night of the alleged offence, Dr Singh 'came to the conclusion that his affective states are so heightened at times ... and his inability to regulate those states impaired his capacity for moral decision-making'.⁵³⁸

397 Dr Singh explained in her oral evidence that these psychiatric conditions that PM is diagnosed with 'impact quite directly on his capacity to develop moral sophistication and a capacity for mature moral reasoning'.⁵³⁹

Social learning theory

398 Dr Singh was asked about social learning theory, which Dr Owen said was most closely related to the approach she took in her assessment of PM. Dr Singh agreed with Dr Owen that there is 'clearly evidence of observational learning where [PM] sees things and then he models his behaviour based on that'.⁵⁴⁰ However, Dr Singh asserted that the experiential learning that Dr Owen referred to in her evidence, is 'not the core to the social learning theory' and is 'something a bit different'.⁵⁴¹ Dr Singh explained that social learning theory actually relates to the impact of environmental factors on PM, for example, the environment in which the police officers are dealing with him, and his capacity to foresee consequences.⁵⁴²

399 In contrast to Dr Owen's hypothesis about PM's experiences with police providing him with sufficient opportunities to learn normative social expectations, Dr Singh stated that she does not 'make the same link with [PM]'s experiences contributing to

⁵³⁶ T424.27-28.

⁵³⁷ T425.16-18.

⁵³⁸ T440.4-7.

⁵³⁹ T425.27-426.1.

⁵⁴⁰ T450.1-3.

⁵⁴¹ T450.17-18.

⁵⁴² T450.6-13.

... him developing a ... more mature moral understanding'.⁵⁴³ Dr Singh explained:

Because the experiences ... in and of themselves are not sufficient, um, in my view that he would learn that to engage in those behaviours [is] wrong. ... because ... he - he doesn't really integrate the consequences into subsequent actions. So if you look longitudinally at his offending history, what you see is that there's this repetitive pattern of very similar actions, which suggests... he has some deficits in executive functioning and he's very impulsive. And so those contribute to him learning, but ... I don't believe that he - that that learning equates to the development of a more mature moral capacity.⁵⁴⁴

PM's no comment interview

400 Dr Singh considered that PM's no comment interview with police in respect of the alleged offence 'can be interpreted in two ways'.⁵⁴⁵ On the one hand, PM can be regarded as 'demonstrating a sophistication in his responses and, therefore, a high level of moral understanding' insofar as seeking to avoid incrimination.⁵⁴⁶ However, on the other hand, Dr Singh considered that the more likely scenario, and 'one that is supported by the available evidence, is that [PM]'s 'no comment' responses are evidence of his developmental and moral immaturity'.⁵⁴⁷ Dr Singh reiterated this position in her oral evidence.⁵⁴⁸

401 Dr Singh considered that PM's no comment responses are likely 'a response learnt from his older brothers'.⁵⁴⁹ Dr Singh further considered that his no comment response may be 'evidence of a child's capacity to learn from experience, in this case through repeated contact with police and legal advice'.⁵⁵⁰

402 Further, Dr Singh considered that his ability to sustain a no comment interview 'is reflective of his developmental immaturity akin to the sustained repetitive responses observed in much younger children who mimic the behaviour of others for sustained periods of time'.⁵⁵¹

⁵⁴³ T436.12-15.

⁵⁴⁴ T436.15-28.

⁵⁴⁵ Exhibit D2, [2120].

⁵⁴⁶ Ibid [2130].

⁵⁴⁷ Ibid [2140].

⁵⁴⁸ T432.26-28.

⁵⁴⁹ Exhibit D2, [2145].

⁵⁵⁰ Ibid [2150].

⁵⁵¹ Ibid [2160].

403 Dr Singh disagreed with counsel for the prosecution that PM's no-comment interview 'suggests a high degree of internal control'.⁵⁵² Dr Singh also rejected the proposition that 'it's a reasonably mature response to police questioning'.⁵⁵³

PM's understanding that his actions were seriously wrong

404 In her assessment of PM, Dr Singh attempted to appraise PM's understanding of the serious wrongfulness of the alleged offence.⁵⁵⁴ Dr Singh conceded that her assessment was undertaken 'some 9-10 months after the alleged offending occurred and thus, any opinion offered is extrapolated from the available material, including detailed psychiatric interviews'.⁵⁵⁵

405 Based on her assessment, Dr Singh concluded that PM lacks moral sophistication.⁵⁵⁶ Dr Singh rejected Dr Owen's hypothesis that PM subscribes to an alternative moral code. In Dr Singh's view, 'because of his immature ... moral reasoning and his lack of moral sophistication ... he hadn't yet attained' or internalised and understood a pro-social moral code.⁵⁵⁷ Dr Singh explained that 'in order to choose something else, you first have to attain the capacity to be able to develop moral reasoning, and I don't think he'd done that'.⁵⁵⁸

406 Under cross-examination, Dr Singh elaborated that while she agrees that PM was 'subscribing to the antisocial behaviours of the group ... I've made a diagnosis of conduct disorder so ... that would accord with that diagnosis and what we know about [PM]'s history' rather than to an alternative moral code.⁵⁵⁹

407 Dr Singh was asked by counsel for the defence what the likely scenario was for PM on the night of the alleged offence, from a psychiatric perspective:

[If] you consider his age um, that he was - um, he was quite influenced by his

552 T482.20-21.

553 T482.22-23.

554 Exhibit D2, [1840].

555 Ibid [1845].

556 Ibid [1850].

557 T440.12-18.

558 T440.18-20.

559 T474.18-22.

peers ... The second thing that might have been going on for him was that he was intoxicated, or he had taken substances ... which would have caused further disinhibition and exacerbated pre-existing levels of impulsivity, which we've already established he has significant problems with inhibition of impulsivity. Um, the other thing that I think might have been going on for him is that, as I said, he has a conduct disorder, and so engaging in antisocial behaviours is something that is one of the characteristics of conduct disorder, so that also may have contributed to his actions. ... other things that I think are relevant from a psychiatric perspective are his ability ... for consequential thinking and planning which ... are significantly impaired ... all of those things in combination ... in addition to ... the context and environment in which he finds himself ... he doesn't necessarily think about the consequences of that, and so his actions demonstrate a lack of consequential thinking. ... he's behaviourally dysregulated [and while] I wasn't specifically referring to his brain development, although that is part of why he may have presented as being behaviourally dysregulated, what I mean by that term is that ... his behaviours were heightened, and there was a level of emotional dysregulation which contributed to those behaviours.⁵⁶⁰

408 When Dr Singh specifically asked PM why he had stomped on the deceased, PM 'struggled to respond and eventually said that he could not remember'.⁵⁶¹ Dr Singh noted in her report:⁵⁶²

After some time, he said that, though he thought there was a reason, he does not know what it was. When the potential consequences of hitting or kicking someone were explored, [PM] said that; 'never think that hitting or kicking will kill a person, just that [they] would be injured or hurt'...

When asked if the person had not died if it would be wrong to assault someone and how he would feel if he was the victim of an assault, [PM] responded, 'it would be a little bit wrong, it is not a big deal...'. When asked to explain this further he could not and simply repeated, 'it's not very wrong, I wouldn't make it a big deal'.

409 Dr Singh noted that PM was unable to consider the experience of being assaulted 'except from a self-referential frame'.⁵⁶³ In this way, PM is unable to consider that serious conduct may have a long-term impact on others.

410 In relation to his arrest, Dr Singh opined that PM's narrative 'cements a persistent picture of immature bravado and mimicry, which implies a limited and naïve awareness of another's perspective ... and potentially a limited appreciation of the

⁵⁶⁰ T440.27-442.5.

⁵⁶¹ Exhibit D2, [1900].

⁵⁶² Ibid [1900]-[1910].

⁵⁶³ Ibid [1910].

seriousness of the charge against him, despite being incarcerated for a period of over 10 months'.⁵⁶⁴

Psychiatric formulation – opinion as to whether doli incapax has been rebutted

411 Dr Singh stated that her diagnostic formulation as it relates to PM is supported by the neuropsychological report of Ms Scott.⁵⁶⁵

412 Dr Singh's evidence is that having regard to the assessments she conducted, PM 'has an impaired moral capacity ... and he has a persistence of immature moral reasoning, even when I saw him when he was 14 years old'. Dr Singh stated that it was not her opinion that doli incapax can be rebutted beyond reasonable doubt 'because there are multiple factors and multiple assessments, including my own, that demonstrate an impaired capacity for moral reasoning and an impaired ... sophistication'.⁵⁶⁶

413 Despite the caveats articulated in her report, principally that her assessments of PM were conducted nine to 10 months after the alleged offence occurred, Dr Singh stated, 'it's my opinion that he did not understand that what he was doing was seriously wrong in a moral sense'.⁵⁶⁷

414 Dr Singh agreed under cross-examination that she did not administer any measure of deception testing on PM. However, Dr Singh qualified her answer in the following way:

[That] would not accord ... necessarily with psychiatric practice ... for a deception scale, you need to be testing specific things that you feel may be lies or a person malingering. ... but in this case, there was – his narrative accorded with previous narratives. It was consistent with the information that I had in the collateral information. So not only was it not indicated from my perspective, it is also not, um generally part of standard practice unless you are anticipating that somebody is lying or malingering.⁵⁶⁸

415 Dr Singh was asked in cross-examination whether it was her opinion that PM would

⁵⁶⁴ Ibid [1950].

⁵⁶⁵ T417.24–31.

⁵⁶⁶ T429.11–22.

⁵⁶⁷ T431.6–7.

⁵⁶⁸ T453.3–16.

have thought at the time of kicking and stomping on the deceased's head 'was only naughty or mischievous'. Dr Singh's evidence is that she assessed PM as knowing at the time of the alleged offending that 'it was wrong'.⁵⁶⁹ However, Dr Singh elaborated that it is 'important not to equate knowing the difference between what is right and wrong' and 'knowing something is morally wrong, or having the moral capacity to be able to know that [something is morally wrong]'. Dr Singh explained:

[It] is not a question of simply knowing that something is right or wrong. ... [PM] is not [able to describe] why something is right or wrong. He is not able to, for example, take the perspective of, um, the [victim in a hypothetical scenario] ... so there is a deficiency in perspective-taking. So he knows that it's - he knows that it's wrong, but it is - moral development is assessed, um, in the nature of responses. So it's more complicated than being able to say this is wrong or that is right. It's the reasons why those things are right and wrong that ... show a person's maturity of moral development.⁵⁷⁰

416 In cross-examination it was put to Dr Singh that there are hypothetical examples where PM is able to articulate why something is wrong, for example, in the moral reasoning assessment conducted by Ms Cidoni, where PM was able to articulate that murder is wrong, or in the police interview, where PM was able to articulate that pushing someone is wrong. Dr Singh disagreed that PM's responses are demonstrative of mature moral reasoning. Dr Singh explained:

[What] he says is 'because you're touching someone'. He doesn't consider the consequence of that on a person. So beyond the concrete, he doesn't ... have any sophisticated rationale for why that might be wrong, and I think ... it's important not to make those sort of categorical errors ... when considering moral development.⁵⁷¹

417 In relation to PM's interview with police regarding the alleged offence, counsel for the prosecution asked the following question:

Q. Does he know it's seriously wrong, the conduct he's just engaged in 10 days earlier, in a moral sense?

A. ... I have no way of exactly saying that because it's difficult to extrapolate, given the amount of time, but my assessment suggests that he doesn't have

⁵⁶⁹ T461.21-23.

⁵⁷⁰ T463.12-24.

⁵⁷¹ T480.20-30.

the moral capacity to know that.⁵⁷²

418 Dr Singh was asked how confident she is in the conclusions she has drawn in relation to the presumption of doli incapax. Dr Singh stated, 'I'm confident in the conclusions I've drawn. I feel that they have been carefully considered', that they are 'robust' and 'comprehensive'.⁵⁷³

Ms Scott

419 Ms Scott is a clinical neuropsychologist. As a clinician she has been employed across a range of settings including forensic, hospital subacute and palliative care. She is experienced in the administration and interpretation of neuropsychological assessments.⁵⁷⁴

420 PM was referred to Ms Scott for an assessment of any neuropsychological condition and the nature of and effect of any cognitive impairments.⁵⁷⁵

421 Ms Scott completed neuropsychological assessments of PM at Parkville Youth Justice Centre over two sessions on 5 and 14 April 2023,⁵⁷⁶ lasting for one hour and two hours respectively.⁵⁷⁷ Ms Scott was asked to avoid discussing the offending with PM and so PM's state of mind during the offending did not form part of her opinion.⁵⁷⁸ In addition she conducted a corroborative interview with PM's mother, MJ, over telephone and also received:

- (a) the psychological reports of Ms Cidoni;
- (b) the first psychological report of Dr Owen;
- (c) eight Department of Justice and Regulation Youth Justice Bail Service Reports dated from 1 April 2021 to 21 July 2022;

⁵⁷² T482.6–11.
⁵⁷³ T499.20–24.
⁵⁷⁴ Exhibit D7, 13.
⁵⁷⁵ Ibid 1, 3.
⁵⁷⁶ T588.13–15.
⁵⁷⁷ Exhibit D7, 1.
⁵⁷⁸ T589.24–27.

(d) a Victoria Police Summary of Alleged Facts;

(e) school reports from 2019 and from 2021 and 2022.⁵⁷⁹

422 Following her assessment of PM, Ms Scott produced a report dated 24 April 2023 which was tendered into evidence.⁵⁸⁰

423 During her neuropsychological examination of PM, Ms Scott administered eight tests.⁵⁸¹ In the summary and assessment section of her report, Ms Scott sets out her overall findings from testing as follows:

On current testing, [PM] presents with severe impairments (i.e., scores in the extremely low range) in:

- information processing speed
- higher attentional abilities (including sustained attention and attentional switching)
- visual memory (particularly free recall of visual information)
- aspects of executive function (including mental flexibility and impulse control)

[PM] presents with moderate impairments (i.e., scores in the borderline range) in:

- aspects of visual processing (particularly visuoconstruction)
- aspects of memory function (including immediate recall of visual information and delayed recall of unstructured verbal information)

[PM] presents with mild impairments (i.e., scores in the low average range) in:

- working memory
- rate of new learning
- fund of general knowledge
- aspects of executive function (particularly planning and organisation)

[PM] presents with intact scores (i.e., scores in the average range and above) in:

- basic attention span
- basic verbal skills (including reading and verbal fluency)
- verbal intellectual abilities (including vocabulary and verbal abstract reasoning)
- mental arithmetic

⁵⁷⁹ Exhibit D7, 1, 3-5.

⁵⁸⁰ Ibid.

⁵⁸¹ Namely, the Wide Range Achievement Test-3 ('WRAT-3') Reading Subtest, the Wechsler Intelligence Scale for Children-Fourth Edition ('WISC-IV'), the Children's Memory Scale ('CMS'), the Rey Complex Figure Test, the Trail Making Test ('TMT'), the Delis-Kaplin Executive Functioning System ('DKEFS') colour-word inference test and verbal fluency, the Rey 15 Item Test, and the Depression Anxiety & Stress Scale ('DASS-21').

- visual abstract reasoning
- aspects of memory function (particularly learning and recall of contextualised verbal information, recognition of verbal information)
- aspects of executive function (including idea generation and abstract reasoning)⁵⁸²

424 She summarised that:

[PM] presents with prominent impairments in higher attentional abilities, visual memory and impulse control. He shows milder weaknesses in working memory, rate of new learning, planning and organisation. Information processing speed is highly variable and very sensitive to interference. Performance is generally stronger on verbal tasks including in the area of memory. [PM] presents with largely intact basic attention span, verbal skills, verbal intellectual abilities, verbal memory and aspects of executive function (particularly idea generation and abstract reasoning).

Behaviourally, [PM] presents with a severe disorder of impulse control and severe disinhibition (impacting physical behaviour and social communication). He shows prominent impairments in emotion regulation. However, he shows the ability to regulate his actions when motivated (e.g., participating in testing when he could avoid being locked down in his room). His level of insight into his own behaviour and function is very poor. He tends to overestimate his abilities. These scores are obtained in the context of extremely elevated psychological distress.⁵⁸³

425 Ms Scott found Ms Cidoni's reports particularly helpful given she had seen PM several times, and had interviewed members of his family.⁵⁸⁴ While in contrast, she expressed the view that she would consider Dr Owen's report as 'preliminary'. Ms Scott elaborated in the following way:

Dr Owen had access to some information that I didn't. Um, she had the really unfortunate disadvantage of not being able to directly interview [PM], um, or apparently anybody else that knows him. So I thought that, um, the conclusions would really need to be considered preliminary, because they're really only based on one sort of group of information. Um, so I would view them as preliminary findings.⁵⁸⁵

426 After conducting her assessments and preparing her report, Ms Scott also received Dr Singh's report.⁵⁸⁶ Before giving *viva voce* evidence she also had the opportunity to view, or read a transcript of, the evidence of Dr Owen, Dr Singh and Ms Cidoni. In

582 Exhibit D7, 9.

583 Ibid 10.

584 T601.27-602.6.

585 T602.10-17.

586 T590.13-18.

her evidence, Ms Scott stated that Dr Singh's report was comprehensive and logical and that 'from my perspective the methodology behind [it] is... something that I'm prepared to consider to be very sound and prepared to place more weight on her conclusions'.⁵⁸⁷

427 Ultimately, Ms Scott opined in her report – and maintained in her evidence – that PM's neuropsychological profile is consistent with a neurodevelopmental disorder, namely ADHD further exacerbated by childhood trauma and psychosocial disadvantage.⁵⁸⁸ She considers that historical reports confirm that this behaviour has been exhibited in multiple settings, prior to the age of 12, and that it has interfered with his social and academic function.⁵⁸⁹ She notes that this condition has never been previously identified or treated as far as she could ascertain.⁵⁹⁰

428 Ms Scott also notes that in addition to symptoms of ADHD and trauma, PM presents with an acute profile of psychological distress with a reported history of suicidal ideation, and that concerns have previously been raised about PTSD in response to the current matter.⁵⁹¹ Ms Scott states that PM's documented heightened behaviours before he was involved in the current offending, symptoms of hyperarousal and attentive dysfunction are likely long-standing and probably attributable to the combined impact of ADHD and trauma.⁵⁹²

429 In her report Ms Scott states:

[PM's] cognitive and behavioural impairments have had a significant effect on his life trajectory. Along with his psychosocial circumstances, his impairments have reduced his capacity to engage in education, select appropriate social relationships and avoid engaging in risky behaviours (such as substance use and crime). His life has taken on an increasingly negative trajectory.

[PM] presents with a reasonable capacity to understand abstract ideas and to reason when calm. However, he has extremely diminished capacity to

587 T601.21–23.

588 Exhibit D7, 10; T607.5–30.

589 Exhibit D7, 10.

590 Ibid.

591 Ibid.

592 Ibid.

prevent himself acting on impulse. He is also highly attentionally disordered which makes him very vulnerable to external influence. He is extremely emotionally dysregulated and very sensitive to external triggers. He has a very low frustration tolerance and very limited capacity to self-regulate once he becomes heightened.

[PM's] behavioural symptoms of restlessness, his distractibility and mental inflexibility would impair his ability to make calm, reasoned decisions at appropriate times. His reduced planning and organisational skills diminish his ability to consider the future consequences of his actions in the heat of the moment. His mental inflexibility reduces his capacity to understand others' perspectives. He experiences emotions intensely and rapidly and this can lower the threshold for maladaptive behaviours.

It is not possible to comment reliably about [PM's] specific experiences on the day of offending without discussing these events with him. However, at a broader level, [PM's] impairments likely cause the following difficulties day-to-day:

- he is highly distractible and struggles to maintain focus on a given thought or task without external guidance and support
- he is very easily overwhelmed with detailed or complex information
- he is likely to overlook pieces of information that are not immediately relevant to his current goal
- he has a very low frustration tolerance and is very likely to become irritable when overwhelmed
- his speed of processing is unreliable and very susceptible to external influence
- his thinking is very rigid and he struggles to understand a given situation from other perspectives
- he struggles to consider alternative options or solutions
- he is extremely impulsive
- he has difficulty processing and recalling visual and spatial information
- he struggles to learn new skills or information despite repetition
- his thinking is somewhat disorganised
- he is likely to be inefficient when planning his approach to a new or complex task⁵⁹³

430 In her oral evidence, Ms Scott explained how ADHD affects PM's capacity for calm and reasoned decision-making in the heat of the moment as follows:

It seriously diminishes his capacity for calm, reasoned decision making, absolutely, in the heat of the moment, because in that heat of the moment, when – where people say that what they're referring to is a state of autonomic arousal, where your heart is beating faster, all of your blood vessels are engorged, so there's blood going to all of your muscles, you're shaking, you're sweating, your capacity for breath increases, your brain is going haywire, your frontal lobes have shut down because they're not necessary in the heat of the moment. In the heat of the moment you need to get away, or squash the threat – you know, biologically and – and evolutionarily speaking.

⁵⁹³ Exhibit D7, 11.

And so in that state the capacity for nuanced higher order thinking and reasoning is severely diminished for anybody, and particularly so for someone whose brain is already primed to act in that way even at a resting state.⁵⁹⁴

431 She stated that such a response is from a perceived sense of threat which may not be something he could accurately identify,⁵⁹⁵ and that 'just having people yelling or behaving in an animated manner near [him] is enough to feel like a threat'.⁵⁹⁶

432 In her report, Ms Scott addresses a question of whether PM's cognitive development is comparable to that of his peers, stating that:

No. [PM's] cognitive development is not equivalent to same aged peers. While many of his skills are at expected levels, there are important areas of cognitive, behavioural, social and emotional function which are well behind his peers. Examining his test performance in comparison with normative data reveals that many of his impaired scores are closer to those seen in the average 9 year old (especially attention span, general knowledge, planning and constructional skills). His level of impulse control would be considered unusually poor even for an 8 year old. Taking into account his behavioural profile, test results and reports of function in the community his level of functioning overall seems to be several years below that of an average 14 year old.⁵⁹⁷

433 In cross-examination Ms Scott accepted that the process of testing is sampling skills and drawing inferences as to the cognitive profile of an individual.⁵⁹⁸ She agreed that the conclusions she has reached with respect to the average nine-year-old are confined to the results and the particular measures she has identified.⁵⁹⁹ She qualified this by saying, 'I don't think he's functioning at the level of a nine-year-old overall'.⁶⁰⁰ Furthermore, Ms Scott stated that she understood that at the time of her assessment PM was completing year 9 level work on remand – which is the level of schooling which would be relevant to his age – but that she had not received school reports from his time on remand and so she does not know whether he had any

⁵⁹⁴ T614.10-26.

⁵⁹⁵ T614.29-615.3.

⁵⁹⁶ T615.3-5.

⁵⁹⁷ Exhibit D7, 10.

⁵⁹⁸ T620.20-22.

⁵⁹⁹ T657.28-658.5.

⁶⁰⁰ T658.4.

difficulties completing that work.⁶⁰¹

434 As part of Ms Scott's assessments, PM returned a Full-Scale IQ score of 80 on the
Weschler Intelligence Scale for Children - 4th edition ('WISC-IV'),⁶⁰² which is in the
borderline range.⁶⁰³ However, she opined that this score should be interpreted with
caution since there were significant discrepancies between the comprising indices.⁶⁰⁴

435 Ms Scott stated that Ms Cidoni's earlier findings in the WISC-V assessment she
undertook with PM were not dramatically different from those she obtained about
two years later.⁶⁰⁵ She stated that the WISC generally is a useful tool but it is just one
tool, and from the perspective of a neuropsychological assessment it is 'just one slice
of a much bigger pie'.⁶⁰⁶

436 Asked about how PM's slower processing speed effects his capacity for drawing
inferences from things around him or imagining or picking up what might be in the
mind of other's, Ms Scott said:

[In] terms of picking up what's going on around you and drawing inferences,
you need to be able to pay attention to detail which - if you are attentionally
disordered because of ADHD - you're going to really struggle to pay
attention to even details that might seem obvious to other people. And then,
um, also because of the rigid thinking, you might just be focusing on one's
self and one's current focus and be less reactive and responsive to cues in the
environment and the changing nature of a dynamic scenario; so, absolutely, it
would really diminish the ability to - to flexibly stop what you're doing in
response to other things happening around you.⁶⁰⁷

437 Ms Scott expressed the opinion that there is a 'very high likelihood' that in the heat
of the moment, PM would follow along with others, explaining:

Very high likelihood either of following along or just being too overwhelmed
and distracted and disorganised in his own thinking to just go along with

⁶⁰¹ T642.20-28.

⁶⁰² See T646.9-648.27. Ms Scott opined in cross-examination that use of either the WISC-IV and WISC-V
is based on professional preference and both tests are sound and reliable measures.

⁶⁰³ Exhibit D7, 7; T651.24-29.

⁶⁰⁴ T652.20-28.

⁶⁰⁵ T593.18-24.

⁶⁰⁶ T594.9-11.

⁶⁰⁷ T621.30-622.11.

what everyone else is doing.⁶⁰⁸

438 However, in cross-examination, Ms Scott was asked about her acknowledgement in her report that the processing speed index in her WISC-IV assessment may have been affected by a correctional officer interrupting the testing.⁶⁰⁹ She acknowledged that there is a significant discrepancy between the two sub-tests for processing speed and that the slower result was obtained for the subtest which was interrupted whereas the other subtest fell in the low average range.⁶¹⁰ She also acknowledged that the processing speed index in the tests conducted by Ms Cidoni was 75 whereas her testing had a result of 68.⁶¹¹

439 Asked to comment on PM's capacity for moral reasoning during her examination in chief, Ms Scott stated:

[Moral] reasoning's not something that a neuropsychologist normally would assess, but I will say this, and I'll just use a little analogy. Um, if you think about say a computer, a neuropsychologist is assessing like the functional components of a computer – what is the processing power, what is the processor like, what is the RAM like, what is the graphics card like in this thing. A clinical and forensic psychologist, when they talk about moral development, they're like talking about the program that the computer can run, not the hardware of the computer. So I can't really talk much about the program, but I can tell you that if the hardware isn't great quality hardware we can't expect it to run very complex and demanding programs, like advanced social and moral development. So in the case of a brain, you know, there's only so much capacity the brain has, without external input, and I keep mentioning that because there is – there is scope to upgrade the computer, as it were, but without that input there – there's just a limited capacity, it becomes very, very effortful for that brain to do these very hard things like social, moral reasoning and high level, um, development.

... [PM] fundamentally lacks the basic building blocks to then go on and learn and develop and practice and utilise those skills. If you don't practice those skills in everyday life you have far less capacity or chance or likelihood of exercising them in a – in a particularly distressing moment.⁶¹²

440 When asked about Dr Owen's report she also stated:

I think with the benefit of the additional information I have access to, and

⁶⁰⁸ T632.14–17.

⁶⁰⁹ T653.17.

⁶¹⁰ T654.5–8.

⁶¹¹ T654.11–15.

⁶¹² T616.2–617.1.

particularly now, furthermore, with the information available from Dr Singh's report, that I would not necessarily draw the same conclusions that [Dr Owen] has. Um, but admittedly, I have not been asked to assess and I do not routinely assess social moral reasoning. As I've said earlier I think there are significant barriers for him in undertaking a - um, that routine trajectory of moral - social and moral development, because - as I've said because of the hardware difficulties he has.⁶¹³

441 As to PM's capacity to adhere to an alternate moral code, Ms Scott said she wondered if this is an example of ascribing a higher degree of intentionality and well-reasoned thinking to the actions of children with fundamentally disordered brain function.⁶¹⁴ She stated that regarding PM she would ascribe far less intentionality and control over behaviour and place more weight on the influence that his significant impairment, his other adverse experiences, and disadvantage have had in causing some of his behaviours. Ms Scott considered that those factors, as opposed to emphasising PM's internal moral reasoning, provide explanations for PM's behaviour. But again, Ms Scott conceded she had not assessed PM's moral reasoning.⁶¹⁵

442 Ms Scott stated that PM has a low average rate of learning but that this is modified by the extent to which he is concentrating and able to organise his learning.⁶¹⁶ She did not accept that there was nothing in her testing which indicates the PM is functioning at a level which precludes him from learning. She opined that 'what I am contending ... is that his impairments in other domains would come to bear and impact his real world performance in terms of learning'.⁶¹⁷ She said this would affect both his rate of learning and his ability to learn.

443 When asked whether there was anything from her testing that necessarily impacts PM's ability to understand that the nature of the acts were seriously wrong, Ms Scott said that that would require a more detailed assessment with him.⁶¹⁸ She accepted that a person with ADHD has the capacity to know that their actions are seriously

⁶¹³ T634.1-11.

⁶¹⁴ T634.13-18.

⁶¹⁵ T634.13-31.

⁶¹⁶ T654.31-655.2.

⁶¹⁷ T655.16-18.

⁶¹⁸ T655.25-30.

wrong in a moral sense, stating that ADHD would not preclude someone from understanding the wrongfulness of a given act at a very basic level.⁶¹⁹

444 Ms Scott agreed that the combination of PM's ADHD and his processing speed limitations mean that his decision making in the moment may be very poor. She also agreed that this combination does not necessarily mean that he lacks capacity to understand that acts are seriously wrong in a moral sense, stating that that alone is insufficient to make that conclusion and that it would require a far broader assessment than just looking at his cognitive skills alone.⁶²⁰

445 Ms Scott acknowledged that she is not an expert in the literature on moral development, however, asserted that she is an expert in relation to executive function and opined that:

[In] order to be able to develop ... really advanced psychological skills and capacities more broadly - inclusive of moral development, but more broadly - you do really need to be able to reason, think in the abstract, weigh alternatives, understand consequences of choices - these are really fundamental sort of building blocks to then go on and develop these higher level psychological skills. ... at a conceptual level, I cannot see how you could develop high-level thinking skills and high-level psychological skills without having at least - at least a foundational and functional level of executive function.⁶²¹

446 When asked if the level of skills required would depend on the moral question posed, she stated:

There are levels [of] moral reasoning that a person develops over time; and similarly, there are levels of executive function that develop over time. So, in order to develop high levels of moral reasoning, you need to - you'll presumably need high levels of exec - executive function; but this is really, you know, I can only speak very generally about this.⁶²²

447 Ms Scott also accepted that there are other factors beyond cognitive development which contribute to or impact on a person's moral development including life

⁶¹⁹ T656.5-12.

⁶²⁰ T658.18-21.

⁶²¹ T658.28-659.14.

⁶²² T659.20-27.

experiences, modelling, and personality traits.⁶²³

448 In cross-examination, Ms Scott was also asked whether PM presented with any understanding of the doli incapax assessment process. Ms Scott said that PM had asked her if she was assessing him for doli incapax like the ‘other ladies’ but that this was not further discussed.⁶²⁴

Conclusions as to the expert evidence

449 The main contest in the expert evidence appears to be between:

- (a) Dr Owen’s opinion that PM was capable of and made a rational choice to reject prosocial norms in favour of an alternate moral code; and
- (b) the conclusions drawn by Dr Singh, Ms Cidoni and Ms Scott that PM is significantly cognitively and behaviourally impaired with deficits in empathy and perspective-taking, which have the effect that he is unable to adjust his behaviour – in times of stress – to meet normative social demands. The conclusions drawn by the three defence experts indicate that PM is frequently in conflict with those around him, and often very rapidly escalates in behaviour, without understanding the precursors of the conflict, or as Ms Cidoni opined, being able to predict the consequences or outcomes of his actions.

450 The expert evidence adduced by the defence reveals that PM’s conduct is a product of a complex interplay of multiple compounding factors.

451 All three defence experts gave evidence that PM struggles to control himself because of profound emotional and behavioural dysregulation. The evidence of Dr Singh is that because of his severe ADHD and severe childhood-onset conduct disorder, PM struggles to understand the consequences of his actions and the impact that his actions may have on others. PM fails to generalise his behaviour from one situation

⁶²³ T660.11–17.

⁶²⁴ T643.27–644.6, T645.6.

to the next and to adjust his behaviour to avoid negative outcomes, despite his extensive opportunities for learning. Dr Singh's evidence is corroborated by TW's evidence in this regard, who indicated that PM's impulsivity, dysregulation, and lack of judgement were identified by the school. TW gave evidence that PM would 'quickly' go 'from zero to 100' in situations of stress.⁶²⁵

452 The evidence reveals that PM was unable to learn from his repeated experiences of consequences, such as suspensions from school, or his repeated interactions with the criminal justice system. The evidence supports the conclusion that PM was stuck in a cycle that he was unable to extricate himself from, despite the supports provided to him and the attempts made by various people to correct the course he was on.

453 While Dr Owen's evidence is that a conduct disorder supports her conclusion that PM presents as antisocial and that he subscribes to an alternate moral code, Dr Singh's evidence is that although PM has a severe childhood-onset conduct disorder, it is not the subtype attended by shallow affect or callous and unemotional traits. Dr Singh asserted that 'this is significant to the point that Dr Owen was making',⁶²⁶ that 'some people... just, have less empathy... are more antisocial'.⁶²⁷ Dr Singh's evidence is that PM does not present in that way, and that he instead acts impulsively, with poor planning. His cognitive, emotional and psychological development – including moral development – is delayed in comparison to his chronological age. He has difficulties appreciating the magnitude of serious events and has an unsophisticated problem-solving style, whereby he typically resorts to conflict to solve any problems he faces. All three defence experts gave evidence that PM's cognitive impairment and developmental delay impact his understanding of right and wrong and on what is seriously wrong in a moral sense. Ms Scott's evidence is that PM is so impaired and that 'his ADHD is so severe and has been exacerbated by very unfortunate circumstances' that in her view, significant 'NDIS support' is

⁶²⁵ T66.28–29.

⁶²⁶ T424.31–425.1.

⁶²⁷ T301.1–2.

clinically indicated.⁶²⁸

454 The evidence of Dr Singh and Ms Scott strongly supports a conclusion that PM is a severely compromised child with the moral reasoning capacity of a child several years below his chronological age.

455 Dr Singh and Ms Cidoni both agreed that PM would have understood the difference between right and wrong at the time of the alleged offence, and that PM understands, to a limited extent, the concept of moral wrongness. However, they each provided cogent evidence that at the time of the alleged offence, PM was unable to understand the impact of his actions on the deceased. The evidence is that his understanding is 'superficial' and not reinforced by any meaningful understanding. They both explained in oral evidence that to understand the morality of an action, you must understand the consequences of that action, to which they agreed that PM was, at the time of the alleged offence, unable to do.

456 I found Dr Singh to be an impressive witness. Dr Singh had the benefit of interviewing PM and his mother, MJ, who both provided rich sources of data informing her conclusion. It was suggested by the prosecution that Dr Singh came to the assessment of PM with significant preconceived ideas about the age of criminal responsibility. Dr Singh accepted in her evidence that the age of criminal responsibility should be raised, and that this belief is grounded in science. She stressed that her beliefs did not guide her assessment in this case and that undertaking a psychiatric assessment is done within the context of the evidence of the subject of the assessment. Dr Singh emphasised that she was cognisant of the potential for unconscious bias and guarded against it by employing the specific and comprehensive methodology that she used. I find that Dr Singh's evidence is not reliant upon any ideological view or bias.⁶²⁹

457 Further, I found Ms Scott provided valuable and clear insights into the

⁶²⁸ T617.27–618.8.

⁶²⁹ T490.12–491.23.

neuropsychological assessments she conducted on PM. Her oral evidence rendered comprehensible the highly technical diagnostic material contained in her reports.

458 In relation to Ms Cidoni, it is rare that the Court has access to psychological testing data of an accused collected so proximate to the alleged offending. Notwithstanding that the prosecution challenged Ms Cidoni on various aspects of her evidence, and accepting that her oral evidence was, at times, unwieldy, Ms Cidoni's opinion about PM's testing results is grounded in a rigorous evidence base. To that end, the testing she conducted was unchallenged by all the other expert witnesses, including Dr Owen. Ultimately her expert opinion and understanding of PM's moral capacity just days before the alleged offence is highly relevant and powerful, given the extraordinarily unique position she was in.

459 To the extent the prosecution suggests that the discrepancies between some of PM's responses in the clinical testing conducted by Ms Cidoni and Dr Singh are a result of deception, I reject it. I consider that any dissembling by PM or provision of self-serving responses on the tests seems fanciful, particularly having regard to Ms Cidoni and Dr Singh's evidence as to the absence of malingering. All three defence experts gave evidence to the effect that they believed PM was as honest with them as he could be.

460 I consider Dr Owen's inability to directly assess PM limits the strength and probity of her final conclusions. Significantly, Dr Owen fairly conceded that she cannot put her opinion any higher than that the presumption of *doli incapax* 'could' be rebutted on the 'balance of probabilities'. The expert evidence therefore gives rise to a significant question as to the extent of PM's moral reasoning capacity. However, as I have already addressed, the expert evidence is not the only consideration in this case. I must have regard to all the evidence.

Doli incapax

Prosecution submissions

461 The prosecution submits that PM's participation in the established agreement,

arrangement or understanding, namely by stomping on and kicking the deceased while he was being stabbed by the others, is 'self-evident' in this case from the CCTV footage. It says that the issue with the participation element is PM's understanding of the serious moral wrongness of his actions.

462 The prosecution pointed to the following categories of evidence to argue that the presumption of *doli incapax* should be rebutted:

- (a) the seriousness and circumstances of the alleged offending;
- (b) PM's education and school engagement;
- (c) PM's past behaviours including disciplinary actions at school;
- (d) PM's social development;
- (e) PM's exposure to and interactions with the criminal justice system;
- (f) PM's upbringing and family environment and social development; and
- (g) the expert opinion of Dr Owen.

463 The prosecution submits that it need not be proven that PM understood the law of complicity, nor the elements of murder to be found guilty in this case. The prosecution further submits that there is no requirement that this Court consider whether PM understood why an act is wrong in a moral sense, had any general sophisticated moral reasoning or knew what the difference between right and wrong was in the abstract.⁶³⁰

Seriousness and circumstances of offending

464 It was put that the seriousness of the alleged offending warrants greater consideration of the conduct itself, as 'what is required to rebut the presumption will vary according to the nature of the allegation and the child involved.'⁶³¹

⁶³⁰ Prosecution Closing Submissions, 28.

⁶³¹ *Ibid* 29; *RP*, [12].

465 The prosecution points to a number of specific matters which it says go to PM's moral understanding, including that: the deceased and his friends were running away and not engaging with those in the Mazda; the deceased was unarmed and alone when he was attacked; PM did not know the deceased; PM assaulted the deceased while he was on the ground and being stabbed by others; PM's participation is not confined to a single act, but is ongoing and repetitive; and PM chooses to continue his acts after it is clear the deceased has stopped moving.⁶³²

466 The prosecution made the submission that there is no 'moral grey area' with offending of this kind. It is 'vicious, unprovoked and sustained'.⁶³³ PM's knowledge that his co-offenders had knives is evinced by his admissions to Ms Cidoni and are consistent with his being in the Mazda for a significant period prior to the attack.⁶³⁴

467 The prosecution submits that PM's actions after the attack speak to his involvement as a 'willing participant', rather than a child believing his conduct is merely naughty. Those actions being, his retreat with the others and his involvement in the burning of the Mazda.⁶³⁵

PM's education and school engagement

468 The prosecution submits that PM's school results are of limited weight; PM's progress was never accurately assessed because of truancy.⁶³⁶ What is of greater relevance is PM's recorded behaviour at school, which included non-compliance with school rules and displays of interpersonal violence.⁶³⁷

469 The prosecution points to a number of incidents detailed in the Second Statement of Agreed Facts⁶³⁸ which it submits are significant. PM's regular suspensions for smoking, physical violence and threats to other students and staff were always met with corrective action designed to assist him to understand the impact of his

⁶³² Prosecution Closing Submissions, 29–30.

⁶³³ Ibid, 31.

⁶³⁴ Ibid.

⁶³⁵ Ibid.

⁶³⁶ Ibid 32.

⁶³⁷ Ibid.

⁶³⁸ Exhibit P3.

behaviour on others.⁶³⁹

PM's exposure to the criminal justice system

470 It was put by the prosecution that PM's interactions with police and PSOs over a three-year period prior to the alleged offending are significant because they provided opportunities for learning and exposure to rules and consequences.⁶⁴⁰

471 The prosecution submits that the recordings depict PM's moral understanding in situations where he was provided opportunities for learning. The recordings show an evolution of his behaviour towards authority and development of a strategy of giving 'no comment' interviews.⁶⁴¹ The video footage contextualises what the prosecution says is PM's development of and adherence to an 'alternative moral code'.⁶⁴² The prosecution submits that the footage clearly demonstrates PM's knowledge of the potential consequences of alleged behaviour through exposure to the criminal justice system.⁶⁴³

472 The prosecution submits that PM's behaviour during the interviews with police is far more subdued than in his interactions with police and PSOs in the community. This is reflective of what the prosecution says is PM's understanding of the severity of being arrested.⁶⁴⁴

473 The prosecution contends that PM learned to avoid consequences by providing false names and addresses and later, by learning to give 'no comment' responses when he is interviewed. The prosecution identifies a shift in PM's interview approach and selective answering of questions, which it says is 'demonstrative of a higher degree of moral reasoning and understanding. There is a method and consistency to the implementation of the answers which suggests a higher level of consequential

⁶³⁹ Prosecution Closing Submissions, 32-33.

⁶⁴⁰ Ibid 34.

⁶⁴¹ Ibid 35.

⁶⁴² Ibid.

⁶⁴³ Ibid 36.

⁶⁴⁴ Ibid 37.

thinking'.⁶⁴⁵

474 PM shows little concern for his behaviour when caught by PSOs, for example in February 2021 when he gives a false name, is caught out and then apologises.⁶⁴⁶ By contrast, when 'told he would be arrested on 6 March 2021 and 14 February 2022 for alleged burglary and outstanding whereabouts, [PM] becomes upset, hostile and aggressive'.⁶⁴⁷ The prosecution says this stark difference in behaviour is illustrative of PM's understanding of the difference between behaviour which is merely naughty and behaviour which is seriously wrong in a moral sense.⁶⁴⁸

475 The prosecution submits that behaviour and statements shown in the footage with PSOs goes beyond rote learning, parroting or mimicry and suggests a sufficient level of cognition, moral reasoning and learning. In this regard, the prosecution identifies – in addition to other matters discussed above – that:

In various interactions, [PM] asks if he was resisting, clarifies if he's being arrested, tells police they haven't given him enough information, asks if charges will remain on his record, understands the meaning of assault, asks police to obtain an independent third person, seeks clarification of particular charges, asks what type of warrant is in the system, meets allegations of offending by responding 'allegedly', asks if he is being detained and explains the cautions and rights in his own words. He refuses consent to provide his fingerprints and on one occasion volunteers that they can't take them because of his age.⁶⁴⁹

476 The prosecution submits that the question of PM subscribing to an alternative moral code is informed by the Arunta calls, for example that the 'calls are replete with gang talk and involvement ... [PM] speaks of stealing cars, doing 'burgs' ... [and] how to deal with a witness for snitching'.⁶⁵⁰

477 The prosecution submits that the calls are 'entirely consistent with [PM]'s admission to [Ms] Cidoni that he was a member of a gang. They reflect an adherence to an

⁶⁴⁵ Ibid 38.

⁶⁴⁶ Exhibit P12.

⁶⁴⁷ Prosecution Closing Submissions, 38 (footnotes omitted).

⁶⁴⁸ Ibid 38.

⁶⁴⁹ Ibid 39 (citations omitted).

⁶⁵⁰ Ibid 42.

alternative moral code rather than a lack of understanding of one.’⁶⁵¹

478 Finally, the prosecution refers to PM’s previous doli incapax assessments and submits that these provided PM with an opportunity for learning as well as an opportunity for PM to acquaint himself with the assessment process and its potential outcomes.

PM’s upbringing, family environment and social development

479 The prosecution accepts that PM presents with a significantly disadvantaged background. However, it submits that his firsthand experiences of family violence provided an opportunity for learning the consequence of interpersonal violence from an early age.

480 The prosecution refers to the evidence of LSC Williams and his conversation with PM about luxury cars as inviting the ‘irresistible inference ... that [PM] was referring to stealing cars’. It shows an awareness in PM that there were anti-social means to achieve his goals.⁶⁵²

481 The prosecution submits that the bail reports from 2021 pertaining to PM are of significance as they demonstrate that:

In the first half of 2021, [PM] repeatedly came to the attention of police and was charged with criminal offences. Between 1 April 2021 and 15 December 2021, he commenced on Youth Justice supervised bail. A number of support frameworks were put in place to address [PM]’s alleged offending behaviours.

Significantly, there is an absence of alleged offending between June and December 2021, beyond the alleged theft of his mother’s car in November 2021.

Following withdrawal of charges on 15 December 2021, the supervised bail came to an end. Thereafter, between 18 January and the alleged index offence, [PM] again came to the attention of police for alleged offending conduct on a number of occasions.

Rather than indicating a lack of understanding of right and wrong, this chain of events demonstrates [PM]’s capacity to conform to societal rules when significant supports are in place addressing his behaviours and a choice to go

⁶⁵¹ Ibid.

⁶⁵² Ibid 43.

against them.⁶⁵³

Expert opinion

482 In relation to the expert evidence called by the defence, the prosecution submits that:

- (a) where they are in conflict, the evidence of Dr Owen should be preferred to the evidence of Dr Singh;
- (b) the testing and clinical interviews of Ms Cidoni support the rebuttal of the presumption, while the opinions of Ms Cidoni are of limited utility and weight; and
- (c) the evidence of Ms Scott does not materially diminish Dr Owen's opinions nor preclude a finding that the presumption has been rebutted.

483 The prosecution identifies that each expert witness accepted that there were limitations to their opinions and that there is a level of subjectivity in each of their assessments.

484 The prosecution submits that Dr Owen has extensive qualifications and experience, including undertaking doli incapax assessments. It submits that Dr Owen repeatedly acknowledged that her inability to assess PM represented a significant limitation of her opinion, however, Dr Owen considered that she had a sufficient evidentiary foundation available to form an opinion.

485 The prosecution urged the Court to accept Dr Owen's opinions that at the time of the alleged offence PM would have known that kicking and stomping on someone's head was morally wrong; that carrying knives was morally wrong; that kicking someone while they were being stabbed was morally wrong; and that the act of murder was wrong. It submits that Dr Owen's opinions were consistent with the large volume of material before the Court and reflect an individual who would have clearly understood that his actions on 13 March 2022 were seriously wrong in a moral sense.

⁶⁵³ Ibid 45.

486 As to Ms Cidoni, the prosecution submits that the value of her evidence is in her testing and interviews rather than her professional opinions. The prosecution emphasises that a mere six days before the alleged offence PM responded to a question of Ms Cidoni's of how important it is for judges to send people who break the law to jail:

If you murder someone, you should go to jail. Because that's wrong. If you have to save your life that's different. It's not if it's self-defence. For other stuff, it depends. Robbing a bank or raping, that's really bad you should go to jail for that.⁶⁵⁴

487 The prosecution opines that PM's IQ level fell in the low *average* range of cognitive functioning, and submits that it is unfathomable that PM could understand murder was seriously wrong in a moral sense and deserving of jail but that an agreement six days later to cause really serious injury or death, or kicking and stomping on someone while they were being stabbed, did not reach that threshold.

488 The prosecution submits that Ms Cidoni's testing and clinical interviews reveal that: PM was aware on 13 March 2022 that AM and peers had armed themselves with knives;⁶⁵⁵ he did not want to arm himself; his comments to Ms Cidoni suggested that he witnessed AM stab the deceased; PM was a member of a gang⁶⁵⁶ and endorsed reasons why; and PM acknowledged he was present when the Mazda was burnt.⁶⁵⁷ The prosecution also emphasised that Ms Cidoni spent a considerable amount of time explaining to PM the nature and purpose of the doli incapax assessment, which she considered he understood.

489 The prosecution submits that Ms Cidoni's oral evidence was unsatisfactory and at times internally inconsistent. For example, her opinion of whether PM knew that kicking and stomping on someone's head was seriously wrong oscillated with her stating both that she could not draw a conclusion based on the information she has and that he did not understand that it was seriously wrong in a moral sense. The

⁶⁵⁴ Ibid 52; Exhibit D6, [260].

⁶⁵⁵ See Exhibit P89, [1].

⁶⁵⁶ Ibid [2].

⁶⁵⁷ Ibid [3].

prosecution addressed a number of further matters in relation to Ms Cidoni's evidence including that she stated that her opinion includes a deep consideration of all the material provided, yet she later admitted that she had not watched the record of interview from 23 March 2022.

490 The prosecution submits that ultimately Ms Cidoni sat on the fence, and that where her opinions in oral evidence differed to her third report, they should be rejected. It further submits that the reason she did not offer a solid statement regarding her opinion is because PM is not doli incapax.

491 As to Dr Singh, the prosecution identifies that there are consistencies in the evidence of Dr Owen and Dr Singh. For example, they both employ and support a multi-theory and individualised approach to the assessment and accept each assessment has an element of subjectivity. Furthermore, Dr Singh:

- (a) stopped short of suggesting that PM would have thought kicking or stomping on someone's head in the circumstances was only naughty or mischievous, instead assessing that PM knew it was wrong but only at a superficial level;
- (b) accepted that PM described a hierarchy of conduct in his answers to the sociomoral reasoning questionnaire administered by Ms Cidoni on 7 March 2022;
- (c) agreed that PM's post-offence conduct indicated a motivation not to get caught to avoid punishment;
- (d) agreed PM has had opportunities for learning;
- (e) agreed PM had the capacity to learn notwithstanding his impairments;
- (f) accepted that the stabbing of his friend was an important thing and that he had learned from it, although she did not think it had necessarily contributed to the development of a mature moral capacity;
- (g) accepted that in and of itself ADHD and the identified cognitive and

behavioural limitations were not sufficient to impinge an ability to understand conduct is seriously wrong and it would depend on the individual;

- (h) accepted it was possible that PM may not be able to articulate why, but still know that something is seriously wrong in a moral sense, although that was not her formulation; and
- (i) accepted that PM had expressed some empathy in relation to the alleged offending, stating that when the magnitude was higher such as in this case where there is a death, he is able to express some empathy.

492 The prosecution submits that, where Dr Owen and Dr Singh's opinions differ, the Court ought prefer Dr Owen's evidence. While no issue is taken with Dr Singh's qualifications the prosecution noted:

It emerged in evidence that this is only her third assessment. She comes to that task with significant preconceived ideas about the age of criminal responsibility. While we do not suggest that she has sought to mislead anyone or acted in bad faith, it is difficult to see at any level how someone might find [PM] to be *doli capax* in circumstances where they ideologically believe that the current minimum age of responsibility is unjust, unscientific, implicitly racist, inhumane, expensive, and downright ludicrous. Her words. Whatever the underlying reason for that belief.

Particularly in circumstances where the article espousing those views is published between assessments undertaken in this case.

Scientific evidence regarding brain development is an argument for another time and place, the age of criminal responsibility remains at 10 in this state with the presumption applying up to the age of 14. It is not a scientific question that the Court must determine it is a legal and factual question.

Ultimately, it is not necessary for the Court to find that [PM] had a sophisticated or even mature moral reasoning capacity for him to appreciate that his actions on 13 March 2022 were seriously wrong in a moral sense, as distinct from merely naughty or mischievous. For the reasons we've articulated, the test confirmed by the High Court draws attention to that distinction. And the evidence establishes that the presumption is rebutted.⁶⁵⁸

493 The prosecution submits that Ms Scott primarily relies upon testing of cognitive

⁶⁵⁸ Prosecution Closing Submissions, 62.

functions as opposed to a more nebulous subjective assessment of moral reasoning and her evidence is accepted by Dr Owen. The prosecution submits that while Ms Scott's evidence is a relevant piece in the puzzle it does not preclude a finding that PM knew that his conduct was seriously wrong in a moral sense. The prosecution emphasises that Ms Scott did not purport to provide an opinion about the alleged offending and has not been privy to the large body of evidence before the Court and the other expert witnesses, including the CCTV footage of the alleged offence.

494 In relation to Ms Scott's evidence the prosecution submits that:

Ms Scott explained that ultimately the process of testing is sampling skills, from which inferences are drawn to create a broader picture of a cognitive profile. Each of the tests administered are snapshots with respect to the time at which they are administered. And a child's score on the assessments can be influenced by motivation, attention, and opportunities for learning.

At the time of the first assessment, [PM] was age 14 years 1½ months. The assessments were conducted on 17 April 2023, over a year after the alleged offence. As noted with Dr Singh, [PM]'s presentation at that time can't be divorced from his experiences in custody since his remand. Further, the alleged offending was not discussed.

Both Dr Owen and Ms Scott agree that IQ score is correlated with access to schooling. And that if someone does not attend or engage with the education system their score would be likely to be lower. Ms Scott also agreed that the combination of ADHD and processing speed limitations would not preclude an understanding of the serious wrongfulness of an act in a moral sense. This is consistent with Dr Owen's opinion.

Ms Scott explained that her reference to normative data for a 9 year old child was in the context of the results for the particular skills identified: attention span, general knowledge, planning, construction skills, and impulse control. She would not want them to be necessarily generalised beyond that.

Dr Owen was invited to comment on the proposition if Ms Scott was to opine that [PM] did not have the capacity to understand his conduct at the alleged offence was seriously morally wrong. However, Ms Scott did not ultimately proffer such an opinion. Ultimately, she felt that she was unable to comment reliably about [PM]'s specific experiences on the day of the alleged offending without discussing the events with him. Even if she did so, it would have been through the lens of his cognitive and neurological functioning as opposed to an assessment of his moral reasoning. Which of course is essential to this case.

We suggest that there is nothing to be found in Ms Scott's testing and its

results that precludes either an adoption of Dr Owen's evidence or of the Crown case that the presumption is rebutted beyond reasonable doubt.⁶⁵⁹

Defence submissions

495 The defence maintains that PM did not enter into any agreement, arrangement or understanding to kill or cause really serious injury to the deceased, nor for the deceased to be stabbed. Nonetheless, the defence submits that, in any event, the prosecution has failed to prove, beyond reasonable doubt, that PM knew that his conduct during the fatal assault on the deceased was seriously wrong in a moral sense.

496 The defence emphasises that when considering whether the prosecution has rebutted the presumption of *doli incapax*, in relation to his conduct associated with the physical elements of the offence, care must be taken not to misstate the question as being whether PM knew in the abstract that 'murder' is seriously wrong in a moral sense. Instead, the question must focus upon whether PM knew that *his actions* were seriously morally wrong.

497 The defence also emphasises that this assessment must focus on whether PM had the capacity to know, and did in fact know, that his actions were seriously wrong in a moral sense *at the time he engaged in those actions*.

498 The defence submits that whether the prosecution can prove beyond reasonable doubt that PM knew that his actions were seriously morally wrong requires consideration of PM as an individual and unique child including his cognitive, intellectual and moral development, his disabilities, his education and environment.⁶⁶⁰

499 As noted above, the defence's arguments in relation to *doli incapax* focused on whether PM knew that his actions of kicking and stomping the deceased were seriously morally wrong. The defence adopted this course as:

⁶⁵⁹ Ibid 63–64.

⁶⁶⁰ Nicholas J Lennings and Chris J Lennings, 'Assessing Serious Harm Under the Doctrine of *Doli Incapax*: A Case Study' (2014) 21(5) *Psychiatry, Psychology and Law*, 791–800, 792.

- (a) it is not disputed that PM kicked and stomped on the deceased, whereas it is disputed that in doing so he was acting in furtherance of some agreement, arrangement or understanding with the other boys to kill or cause serious injury to the deceased; and
- (b) if the Court finds that the prosecution has not rebutted the presumption in respect of his actions of kicking and stomping this would dispose of both the charge of murder and the alternative charge of manslaughter. This is because both charges when alleged by way of complicity require proof beyond reasonable doubt that PM knew his kicking and stomping was seriously morally wrong.

500 The defence contends that an understanding of brain development in children provides the foundation upon which to assess when a child may develop moral reasoning. The defence relies on the evidence of Ms Scott and Dr Singh that events or interruptions during brain development may have profound consequences. In particular, reference was made to Ms Scott's evidence that 'just like if you were to build a tower with Jenga blocks unstable or wobbly blocks at the very bottom of the tower are going to have a significant impact all the way up for the rest of the tower'.⁶⁶¹ As such the defence emphasises that a child's own unique biological and neurological make-up, as well as their life experiences, are all matters integral to assessing their capacity for moral reasoning and their state of knowledge or understanding at a particular point in time in the context of a particular event.

501 Accordingly, the defence submits that central to the issues for deliberation is an assessment of PM's capacity for moral reasoning – and his actual knowledge, understanding and ability to draw inferences at the time – which itself necessitates the Court delving deeply into PM's psychiatric, neurological and psycho-social make-up.

502 The defence submits that the evidence reveals that PM has a number of

⁶⁶¹ T591-3.

developmental impairments which have impacted on the development of his moral reasoning, namely:

- (a) the intra-uterine insults flowing from PM's mother receiving a lack of antenatal care, her development of gestational diabetes and her experiences of family violence, poverty, social isolation and disconnection from her home;⁶⁶²
- (b) insecure attachment, which refers to where the parent is unable to provide safety and containment within the primary attachment relationship;⁶⁶³ and
- (c) the compounding effect of his experiences of childhood trauma, persistent adverse experiences and psycho-social disadvantage which further exacerbated the symptoms of his neurodevelopmental disorder, ADHD.

503 The defence identifies that:

Dr Singh diagnosed [PM] as having conduct disorder and, independently of Ms Scott, as having ADHD and noted the severity of his emotional dysregulation. [PM] is diagnosed as suffering from symptoms of post-traumatic stress disorder (PTSD) from multiple adverse events, the symptoms of which appeared from about age 8 or 9. Dr Singh also diagnosed [PM] with a Major Depressive Disorder with Anxious Distress of moderate severity. She traced the onset of symptoms back to about September 2019 (age 10), with exacerbation by virtue of his incarceration in March 2023.⁶⁶⁴

504 In relation to PM's insecure attachment, the defence submits that:

Dr Singh identifies [PM]'s lack of secure attachment as consistent with her finding in her interview that [PM] lacked the capacity for metacognition (the ability to be aware of his own mental state) and mentalization (the ability to understand the thoughts, feelings and mental state of others). Impairments of metacognition and mentalisation make it difficult to emotionally regulate one's own thoughts and feelings and to take the perspective of others both of which are required for developed moral reasoning.⁶⁶⁵

505 The defence emphasises the expert opinion of Dr Singh that PM presents with a persistence of immature moral reasoning and submit that this immaturity can be seen in the BWC footage, police interviews and Arunta calls where PM presents at

⁶⁶² Defence Closing Submissions, [42].

⁶⁶³ Ibid [43] – [45].

⁶⁶⁴ Ibid [51] (footnotes omitted).

⁶⁶⁵ Ibid [45] (footnotes omitted).

times with a brashness and sense of bravado. It submits that the language he uses when speaking to others is indicative of repetitive mimicking. It is further submitted that PM's behaviour is learnt from 'social scripts' from an early age and that in PM's home, and social milieu, violence and other social behaviours were not uncommon. In this regard the defence refer to Dr Singh's evidence that 'it is likely that he learnt that violence was an acceptable form of behaviour and has modelled some actions upon this'.⁶⁶⁶ The defence submits that the 'no comment' interview is evidence of PM's developmental and moral immaturity because he is simply doing what he has been told by a 'trusted adult', being Ms Conwell.⁶⁶⁷

506 Furthermore, it is submitted that other psychiatric factors have impacted his capacity for mature moral reasoning, including his diagnoses of severe childhood onset conduct disorder, PTSD, major depressive disorder and ADHD.⁶⁶⁸

507 The defence submits that it is significant that Dr Singh used three different theoretical frameworks and applied multiple lenses to the plethora of material available to her to assess PM's moral development and that as such her opinion, together with the opinions of Ms Cidoni and Ms Scott, ought to be preferred to the single 'alternative moral code' theory used by Dr Owen.

508 Furthermore, the defence submits that at every psychological or psychiatric assessment from the age of 12 years and four months to the age of 14 years and one week, PM has presented with features consistent with Dr Singh's psychiatric formulation and finding of persistent immature moral reasoning.

509 The defence submits that PM did not know that his participation in the assault was seriously morally wrong, stating in the written submissions:

Of particular importance is [PM]'s capacity for drawing inferences from things occurring around him, and his ability to imagine or pick up what might be in the minds of others. Ms Scott said:

⁶⁶⁶ Exhibit D2, [1795].

⁶⁶⁷ Defence Closing Submissions, [81].

⁶⁶⁸ Ibid [54].

[In] terms of picking up what's going on around you and drawing inferences, you need to be able to pay attention to detail which – if you are attentionally disordered because of ADHD – you're going to really struggle to pay attention to even details that might seem obvious to other people. And then, um, also because of the rigid thinking, you might just be focusing on one's self and one's current focus and be less reactive and response to accused [sic] in the environment and the changing nature of a dynamic scenario; so, absolutely, it would really diminish the ability to – to flexibly stop what you're doing in response to other things happening around you.

This means that in the moments of the assault upon the deceased, [PM]'s ability to pay attention to the details of what was occurring around him, and what was in the minds of the other boys, was impaired.

Dr Singh found that [PM]'s thinking was very rigid and fixed. He has particular difficulty with attentional switching and struggles to flexibly consider another's perspective. Applied to the circumstances on the night of the offence, [PM]'s ability to pay attention to the details of what the other boys were doing in the assault and draw inferences from their behaviour and make decisions in response is likely to have been significantly impaired.

In questioning, [PM] told Dr Singh that he knew the act of killing someone was wrong. He said what happened to [the deceased] was wrong, but he was unable to offer any reasons for this opinion beyond that someone had died and that his friends and family believed it was wrong. Dr Singh found that the responses of his mum and others appeared to contribute to his sense that what happened was wrong, she said that this '*demonstrated a reliance on others and an external locus of control for his moral reasoning*'. Dr Singh also noted the significance for [PM] that he did not use a knife and did not cause the death of the deceased. He interpreted himself as separate from those that had stabbed [the deceased].

In the opinion of Dr Singh and Ms Cidoni, it is likely that [PM] did not understand, at the time of the offence, that his actions were seriously morally wrong. These opinions are consistent with the opinion of Ms Scott, that [PM]'s brain was not sufficiently developed – it lacked the 'basic building blocks' or 'hardware' – for moral reasoning, particularly in the heat of a dynamic moment.⁶⁶⁹

510 The defence submits that PM's conduct after the event does not indicate a higher-level awareness that his actions were seriously morally wrong, with Dr Singh agreeing with Ms Cidoni that PM's conduct after the event demonstrates his naivete.

511 The defence submits that the hypothesis of the prosecution's expert witness, Dr Owen, that PM's behaviour reflected an adherence to an alternate moral code, influenced by his involvement in gangs, as opposed to a lack of understanding of the

⁶⁶⁹ Ibid [61]–[65] (footnotes omitted).

wrongfulness of his behaviour is fundamentally flawed. The defence submits that Dr Owen's hypothesis:

- (a) incorrectly assumes that PM is cognitively intact;
- (b) improperly holds PM responsible for his life trajectory;
- (c) incorrectly assumes that contact with the criminal justice system induces pro-social moral learning; and
- (d) incorrectly interprets PM's responses in police interviews as indicative of moral reasoning capacity.

512 The defence states that Dr Owen's hypothesis implicitly assumes that PM chose the way his life unfolded, such that he chose an alternate moral code inspired by gang culture. The defence submits that Dr Owen grounded her theory in studies based on older teens in a different cultural background and some of her sources were less than academic. On this point the defence submits that Dr Owen does not address how PM's life path has been affected by his impairments, in relation to which Ms Scott gave evidence that:

[PM]'s cognitive and behavioural impairments have had a significant effect on his life trajectory. Along with his psychosocial circumstances, his impairments have reduced his capacity to engage in education, select appropriate social relationships and avoid engaging in risky behaviours (such as substance use and crime). His life has taken on an increasingly negative trajectory.⁶⁷⁰

513 As to the evidence relating to PM's earlier interactions with police the defence submits that:

The police interactions do provide opportunities for learning, but they do not contribute to him developing a more mature moral understanding. It is apparent that [PM] repeats the same pattern of behaviour over and over, for example giving [a] false name or address or maintaining it is not him in a clear CCTV still image. He repeats this behaviour despite the same negative outcome resulting. His behaviour only ceases for a time when he is given intensive supports from Youth Justice. This is indicative of his deficits in executive functioning and impulsiveness. It shows that he is not learning so

⁶⁷⁰ Exhibit D7, 11.

as to develop a more mature moral capacity. In addition, the acts of violence [PM]’s father perpetrated upon [MJ] and the children did not contribute to [PM]’s moral development. His father faced no penal consequences for his actions, all that resulted was that he left the family in dire financial need.⁶⁷¹

514 While Dr Owen placed reliance on PM’s no-comment interview to police when he was arrested for murder, the defence submits that this was not indicative of some higher level executive functioning but is instead the product of coaching by his brother over a period time and the proximate and firm advice he received from his solicitor immediately prior to his interview.

515 The defence submits that the presumption of *doli incapax* cannot and has not been rebutted, stating that:

In Dr Singh’s opinion [PM] ‘did not understand that what he was doing was seriously wrong in a moral sense’. She said that it was not her opinion that the presumption of *doli incapax* can be rebutted beyond reasonable doubt ‘because there are multiple factors and multiple assessments, including my own, that demonstrate an impaired capacity for moral reasoning and an impaired sophistication.’

When Ms Cidoni was pressed on the ultimate question she said:

Is it the case that you cannot say one way or another whether, back in March 2022, he understood that the conduct in kicking and stomping on someone’s head was seriously wrong in a moral sense?---I would say that he did not understand that it was seriously – seriously wrong in a moral sense.

In her report, Dr Owen concluded that: ‘*I am of the opinion that the presumption of doli incapax should be rebutted.*’ In evidence, she tempered her opinion to conclude that ‘*on balance*’, the presumption ‘*could*’ be rebutted, and conceded that she could not put her opinion any higher than that.

Dr Owen’s evidence on the ultimate question, along with her acknowledgement of the ‘*significant limitations*’ of her assessment, is a long way short of supporting the prosecution case that the presumption of *doli incapax* has been rebutted beyond reasonable doubt. Rather, it is an opinion necessarily containing significant doubt. Ultimately, Dr Owen conceded: ‘*It’s possible that he didn’t know that his conduct was seriously morally wrong*’.

The weight of evidence, including the evidence of four expert witnesses, firmly resists the prosecution’s efforts to rebut the presumption of *doli incapax*. Rather, despite it not being his burden to prove, in his defence [PM] has overwhelmingly established that he lacked the necessary capacity for

⁶⁷¹ Defence Closing Submissions, [75] (footnotes omitted).

Consideration

516 With respect to the charge of murder – PM is alleged to have engaged in the following conduct that is relevant for the purpose of an assessment regarding *doli incapax*:

- that PM entered into an agreement, arrangement or understanding to kill or cause really serious injury; and
- participated or acted to support that agreement, arrangement or understanding by stomping on and kicking the deceased.

517 The prosecution points to PM’s participation by stomping and kicking the deceased as powerful evidence that PM must have known the seriousness of his conduct at the time. The prosecution does not stop at the conduct but points to a breadth of evidence which it says demonstrates PM’s capacity to learn from his life experiences and that he is sufficiently developed despite his cognitive limitations to understand the difference between right and wrong and necessarily that what he was doing when he attacked the deceased was seriously wrong in a moral sense. The prosecution submits that the inferences it asks me to make about the evidence are supported by Dr Owen.

518 The prosecution submits, that when I consider the breadth of evidence relating to PM’s life, Dr Owen’s opinion and the circumstances of the conduct, I should be satisfied beyond reasonable doubt that PM understood that his conduct, when he attacked the deceased, was seriously wrong in a moral sense.

519 I must consider all the evidence to determine whether the circumstances of the case enable me to infer that PM knew that his conduct was seriously wrong in a moral sense and whether such an inference is the only reasonable inference that the evidence would enable me to draw. Putting to one side the conduct and the expert opinions, in reaching any inferences regarding pieces of evidence, I have carefully

⁶⁷² Defence Closing Submissions, [82]–[86] (footnotes omitted).

reviewed the entirety of the evidence before this Court. In doing so, I do not necessarily reach the same inferences sought by the prosecution or, for that matter, the defence.

520 In addition to my own conclusions about the evidence in the particular and overall, I have been greatly assisted by the psychological and psychiatric frameworks explaining PM's behaviours as seen in the evidence and his conduct on 13 March 2022.

521 I will firstly consider an assessment regarding *doli incapax* in relation to PM's conduct in participating in the attack on the deceased.

522 PM's conduct in participating in the attack on the deceased is obviously seriously wrong by ordinary adult standards. He can be seen repeatedly kicking and stomping on the deceased. This conduct is done during an horrendous and frenzied attack, as others surround the deceased kicking, hitting and stabbing him. What can be seen is chilling. It is nothing less than an incomprehensible and senseless attack on a defenceless teenager who was entitled to feel safe going home from a party.

523 It was suggested by the defence that PM did not know that the deceased was being stabbed during the attack and he merely thought that the others were hitting him. The CCTV footage does not provide an accurate representation of the scene in that the lighting and the angle of the CCTV footage does not fully capture the entire scene. Considering the evidence, including other footage taken close to the time⁶⁷³ and the position of streetlights, I cannot be certain of how dark it was or how well PM could see what was occurring.

524 Nonetheless, on his own account to Ms Cidoni, PM knew that his brother and his peers had armed themselves with knives on the night of the incident.⁶⁷⁴ When asked by Ms Cidoni about how he felt that his brother stabbed the deceased, PM asked, 'how did you know?' and when asked whether he saw his brother with a knife he

⁶⁷³ Exhibit P67.

⁶⁷⁴ Exhibit P89, [1].

closed his eyes, shook his head and said 'I don't know, yes'.⁶⁷⁵

525 PM can also be seen in the footage stopping his attack numerous times and observing what is going on. Given his proximity to the others during the attack and the sheer number of knife wounds sustained by the deceased, I consider that PM must have known that the deceased was being stabbed at the time he participated in the attack.

526 There is a discrepancy in the history PM provides to Ms Cidoni and Dr Singh and his accounts may have been subject to some exaggeration or immature bravado, but there is at least consistency that he had been drinking. Having reviewed the compilation recording,⁶⁷⁶ I consider it is likely that he had consumed some substance, most likely alcohol. The evidence including the CCTV footage is equivocal as to PM's level of intoxication. Regardless of what substances PM consumed, I do not accept that PM was not aware that some of the boys were stabbing the deceased during the attack.

527 Given the nature of the attack, it is difficult for an ordinary adult observer of the CCTV footage to imagine that PM could not have known that his conduct was seriously wrong in a moral sense. However, it has long been held that a child's knowledge cannot be presumed by the mere commission of the act or acts alleged. It is impermissible to conflate proof of acts such as PM's kicking and stomping during a frenzied attack as proof of the requisite knowledge. The danger with this approach is that it shifts to generalised assumptions about what PM should understand rather than focusing on what PM knew or understood and the factors that may affect his ability in the circumstances of the offending.

528 The High Court in *BDO*, unequivocally confirmed what was said in *RP*, that:

No matter how obviously wrong the act or acts constituting the offence may be, the presumption of *doli incapax* cannot be rebutted merely as an inference from the doing of that act or acts. There needs to be evidence from which an

⁶⁷⁵ Exhibit D6, [65]

⁶⁷⁶ Exhibit P69.

inference can be drawn, beyond reasonable doubt, that the child's development is such that they knew that it was morally wrong, in a serious respect, to engage in that conduct. The development in question is the intellectual and moral development of the child.⁶⁷⁷

529 Similarly, while PM was 13 years and three weeks old at the time of the offending, the High Court has stressed that the only presumption which the law makes in the case of child defendants is that those aged under 14 years are *doli incapax*. It is acknowledged that children do not mature at uniform rates and that rebutting the presumption directs attention to the intellectual and moral development of the child and not an assumption of what a child of that age should or would be expected to know.

530 Thus, while knowledge of the serious wrongness of PM's acts cannot be simply inferred from his conduct and age, what will suffice to rebut the presumption does vary according to the nature of his acts. Here, PM's acts are undoubtedly serious and given their nature it can be accepted that a child of his age is more likely to have knowledge of their serious wrongness than they may have of more nuanced or conceptually difficult offending such as fraud or forgery or less serious offending such as vandalism.

531 The prosecution points to PM's conduct after the attack as evidence from which I can infer that PM was a willing and 'understanding participant in the group, not just a child believing his conduct is merely naughty'.⁶⁷⁸ In particular, PM fled the scene with the other co-accused and was present when the Mazda was burnt some days later.

532 In addition to evidence concerning PM's conduct in the attack and his pre and post offence conduct, the prosecution led further evidence to rebut the presumption of *doli incapax*, relating to PM's education, his social development, upbringing and family environment, his prior interactions with the criminal justice system and the expert evidence of Dr Owen.

⁶⁷⁷ BDO, [14].

⁶⁷⁸ Prosecution Closing Submission, 31.

533 The prosecution submits that PM's conduct seen in the record of interview for the alleged offence demonstrates a level of appreciation for the circumstances he finds himself in and the fact that, on advice, he was able to maintain a no comment record of interview – as someone prone to impulsivity and dysregulation – is indicative of a sufficiently developed moral reasoning to have the capacity to understand what is seriously wrong.

534 The prosecution acknowledges that PM's school results are of limited probative value because PM's progress was never accurately assessed due to truancy. However, there was extensive evidence of PM's recorded behaviour at school including non-compliance with school rules and displays of interpersonal violence. PM regularly faced consequences for his misbehaviour, including suspensions. The evidence shows that he was counselled for his behaviour by school staff including TW, providing him opportunities for learning and reflection.

535 As to his social development, upbringing and family environment, the prosecution rightly acknowledges that PM presents with a significantly disadvantaged background. However, it submits that his firsthand experiences of family violence provided a further opportunity for learning the consequences of interpersonal violence from an early age. The prosecution also refers to LSC Williams' evidence of PM insinuating that there were 'other' ways he could get a luxury car and submits that the irresistible inference is that PM was referring to stealing cars, demonstrating an awareness that there was other – antisocial – means to achieve his goals.

536 The prosecution led an extremely large body of evidence relating to PM's prior interactions with the criminal justice system. As outlined above, this included almost four hours of BWC footage and 11 records of interviews with police.

537 The BWC footage and the records of interviews provide a snapshot of PM's interactions with authorities and his behaviour in those moments over an almost three-year window. PM's extensive interactions with police and PSOs undoubtedly provided opportunities for learning about the rules of society and the consequences

for breaking them. The evidence demonstrates that PM acquired some knowledge of police practices and the justice system. However, other consistent features in the BWC footage are of PM displaying dysregulated and out of control behaviour. He is often verbally aggressive and uncooperative.

538 PM demonstrates the ability to repeat the cautions and rights to police during his interviews. As discussed above, he also makes some statements which could be viewed as suggesting that he has some understanding of right and wrong when questioned by police. The independent person present at each interview consistently confirmed that they thought PM understood the caution given and his rights.

539 It can also be accepted that PM's previous doli incapax assessments may have provided him with further opportunities for learning as well as to acquaint himself with the assessment process and its potential outcomes. The bail reports from 2021 pertaining to PM appear to indicate that with appropriate support PM can avoid participating in offending behaviour.

540 As set out above, the Court was also played recordings of several Arunta calls in which PM speaks of stealing cars and doing 'burgs' as well as discussion of gangs. The prosecution submits that in these calls PM does not demonstrate an incapacity or inability to hold his own within his friendship group.

541 Dr Owen provides a hypothesis that PM's behaviour generally and the offending behaviour reflected an adherence to an alternate moral code (influenced by his involvement with antisocial peers), as opposed to a lack of understanding of the wrongfulness of his behaviour. Dr Owen opined that PM had gained significant experiences which would have provided him with opportunities for learning, including about basic principles of right and wrong and the legal consequences for violent behaviour. Dr Owen considered that PM's no comment police interviews were demonstrative of some degree of consequential thinking, an important aspect of moral reasoning, and the ability to sustain and maintain that position is quite a sophisticated skill. Likewise, she considered that his differing accounts to the experts

who interviewed him spoke to his capacity to consider and understand potential consequences.

542 In reaching her conclusions, Dr Owen relied upon PM's interactions with police and his involvement with the criminal justice system, including his experience having a friend who was stabbed. In summary, Dr Owen's hypothesis is that PM made a rational choice to reject prosocial values and instead chose delinquency.

543 Dr Owen confirmed that her opinion that the presumption of *doli incapax* could be rebutted is 'on balance based on – as I've said repeatedly – significant limitations to the assessment methodology'.⁶⁷⁹ Dr Owen said that she is unable to put her opinion any higher than that.⁶⁸⁰ Ultimately, Dr Owen accepted that it is possible that PM did not know that his conduct was seriously wrong in a moral sense.⁶⁸¹

544 I consider that all the evidence adduced by the prosecution, when considered together, could *potentially* be capable of supporting an inference that PM knew that his conduct is seriously wrong in a moral sense. This is particularly evident when regard is had to the seriousness of the conduct under consideration.

545 As Dr Owen's opinion suggests, one may expect that a 13-year-old who had significant exposure to police would have learnt from his experiences. This learning may have given rise to an understanding that kicking and stomping on an unarmed individual, who was being attacked by a group, was seriously wrong. Dr Owen's explanation for PM's conduct, notwithstanding knowledge of its wrongness, was because he had actively chosen to ascribe to an 'alternative moral code'. However, I consider the framework presented by Dr Owen is somewhat simplistic in this case and does not fully drill down into the complex matrix of PM's life experiences, neurological deficits and the overlay of his disorders. It is enticing to accept Dr Owen's hypothesis given the horrendous nature of the offending, which places the criminal responsibility at PM's feet.

⁶⁷⁹ T330.10–12.

⁶⁸⁰ T330.13–15.

⁶⁸¹ T330.16–19.

546 However, the High Court has emphasised that what is important is the consideration of the knowledge of the unique child in question. While the prosecution has led evidence which suggests that PM had numerous opportunities for learning and moral development, it cannot be assumed he has done so. The evidence of PM's home life, schooling and interactions with the justice system are not themselves necessarily suggestive that he is morally developed. Accordingly, care must be taken to consider his capacity for learning from his previous experiences. Even in the absence of the evidence adduced by the defence, there is evidence before the Court of earlier doli incapax assessments and importantly Ms Cidoni's testing performed on 7 March 2022, six days before the alleged offending, which raises doubt as to PM's moral development as at that point in time. Dr Singh considered Ms Cidoni's test results from 7 March 2022, revealed PM's moral reasoning levels were low and immature and demonstrated superficial understanding, compromised empathy and a failure to understand or see other's perspectives.

547 At the time she prepared her report, Dr Owen's opinion relied on a number of assumptions, in particular that PM was cognitively intact, that he was capable of experiential learning, and that his moral development was such that he had an understanding and knowledge of conventional morality and the capacity to choose to reject this in favour of ascribing to an 'alternative moral code'. Dr Owen accepted that PM's ADHD and slower processing speeds may mean his decision-making will be poor, however noted that even with the ADHD and identified cognitive difficulties, PM still had the capacity to understand conduct that is seriously wrong.

548 Despite the burden being on the prosecution to rebut the presumption of doli incapax beyond reasonable doubt, the defence called evidence from three expert witnesses, Dr Singh, Ms Cidoni and Ms Scott, as well as from PM's solicitor, Ms Conwell.

549 Dr Singh, Ms Scott and Ms Cidoni, each of whom assessed PM, in person, on multiple occasions, found PM to be significantly cognitively impaired. As set out in

detail above, each of the defence expert witnesses were of the view that PM has impaired social and cognitive development which has impacted his developmental trajectory and thus his capacity to develop a sound understanding of moral principles. Furthermore, PM has been diagnosed with a childhood-onset conduct disorder, severe ADHD and PTSD as well as a major depressive disorder and anxiety disorder of moderate severity. Each of these conditions were present at the time of PM's alleged offending. Dr Singh's evidence, supported by Ms Scott, is that these psychiatric conditions impact directly on PM's capacity to develop moral sophistication and a capacity for mature reasoning.⁶⁸²

550 As I have stated Dr Singh was an impressive witness. She concluded that PM presents with a persistence of immature moral reasoning and is of the opinion that:

[PM]'s limited capacity for abstract thinking, evidenced at assessment, is consistent with previous assessments of his cognitive ability, as noted in the psychometric assessment conducted by Ms Cidoni in 2021 when he was aged 12 years and 4 months. Based on my clinical observations and semi-structured assessments over the course of three psychiatric assessments, coupled with the results of a structured assessment of his moral reasoning [six] days prior to the alleged index offence, which indicated that he had low and immature moral reasoning, I formed the opinion that [PM] presents with a persistence of immature moral reasoning over the course of these assessments.⁶⁸³

551 Similarly, Ms Cidoni concluded that PM's complete responses to the SRM-SF administered on 7 March 2022 demonstrated that his moral reasoning levels were low and immature. Indeed, in every psychological or psychiatric assessment from the age of 12 years and 4 months to the age of 14 years and 1 week, PM has presented with features consistent with Dr Singh's psychiatric formulation and finding of persistent immature moral reasoning.

552 I consider that there is cogent evidence based on psychological testing and psychiatric assessment that PM's cognitive and moral development is limited and that he is further incapacitated by his psychiatric disorders, particularly severe

⁶⁸² T425.24-426.4.

⁶⁸³ Exhibit D2, [2105]-[2112].

ADHD.

553 While the evidence of PM's immature intellectual and moral development does not necessarily preclude a finding that the presumption has been rebutted, the evidence called by the defence is extremely important to understanding what inferences can be drawn about PM's moral capacity and knowledge at the time of the offending.

554 Viewing the evidence through this lens leaves open the real possibility that PM did not in fact have the ability to learn from his experiences in the manner suggested by Dr Owen.

555 For example, PM's behaviour in his interactions with the criminal justice system is consistent with the opinions of the defence experts. His dysregulated behaviour in the BWC footage can be seen as demonstrating his incapacity to understand the cues around him and make sense of how to deal with a given situation. He shows little concern for consequences and, in line with the expert opinions of Dr Singh and Ms Scott, they can be seen as reflecting an immature and reactive young boy with poor impulse control and little understanding that his behaviours are only worsening the situation for him. TW's evidence, including his observations of PM at school, is also consistent with Ms Scott and Dr Singh's opinions in relation to PM's behaviour in the BWC footage. TW observed PM rapidly becoming more heightened in aversive interactions with others and that PM had no real understanding of the impact of his behaviours on others or the consequences of his behaviour.

556 While not fully explored in the evidence, there are suggestions that PM had earlier experiences and interactions with police before the first BWC footage in June 2019 when he was 10 years old. For example, it appears that police attended his home on 29 November 2015 after he and his siblings witnessed his father perpetrating violence against their mother.⁶⁸⁴ PM's mother also told Dr Singh that her older children had started getting in trouble with police in 2016.⁶⁸⁵ LSC Williams' evidence

⁶⁸⁴ Exhibit P4.

⁶⁸⁵ Exhibit D2, [706].

is that PM and his family had interactions with police in different capacities. The evidence confirms that PM experienced racism from police. These facts, along with his earlier interactions with police, may well have normalised interactions with police as an ordinary occurrence and potentially limited his ability to understand the gravity of his interactions with the police and respect for the authorities.

557 Similarly, it is difficult to accept the prosecution's submission that PM's firsthand experiences of family violence provided an opportunity for learning the consequences of interpersonal violence. PM told Dr Singh that he had first witnessed his father beat his mother at the age of four.⁶⁸⁶ His mother also told Dr Singh of PM witnessing family violence from when he was a toddler.⁶⁸⁷ I prefer Dr Singh's evidence that these experiences are likely to have impressed social scripts on PM, normalising violent and antisocial behaviours from an early age.⁶⁸⁸

558 As already addressed, the fighting ground in the expert evidence is that, on the one hand, Dr Owen considers that PM's behaviours as observed in the BWC footage and the interviews with the police equates to his capacity to learn from his experiences and demonstrates his adherence to an alternate moral code rather than impaired moral development. On the other hand, Dr Singh opines that PM is the product of his childhood trauma, persistent adverse experience and psychosocial disadvantage in his life which has hindered his ability to learn from his behaviour and actively make pro-social choices. Dr Singh explained that PM has experienced many losses in his life, feels isolated, different to others and discriminated against and in turn has fuelled connection-seeking with others, particularly his older brother, AM, and his friends.⁶⁸⁹

559 Similarly, while, at face value, a number of PM's responses to police interview questions may suggest that he understood right and wrong, as Dr Singh explained:

⁶⁸⁶ Ibid [747].

⁶⁸⁷ Ibid [817].

⁶⁸⁸ Ibid [1960]–[2012]; T420.10–27.

⁶⁸⁹ T422.15–18.

The fragility of the leap to asserting that his responses demonstrate an understanding of the seriousness of his actions is exposed when one considers the categorical error inherent in the assertion. Simply stating that something is right or wrong and being able to give examples of actions that might be right or wrong, as [PM] has done, does not demonstrate that he had a moral understanding of why a specific action is right or wrong. Acquiring a moral understanding is a skill that improves incrementally over an extended period.⁶⁹⁰

560 I consider PM's responses in records of interview demonstrate at best a superficial understanding of right and wrong. There is little exploration by the police of why he considers something to be right or wrong. In the records of interview viewed by the Court, PM does not show any capacity to explain his responses beyond a basic level of right and wrong, which is not necessarily reflective of his level of moral understanding.

561 For example, in a record of interview with police on 6 March 2021, when PM was aged 12, the following exchange occurred:

Q ... so I want to know what you think right and wrong is.

A. I already know. I know all that.

Q. You tell me what you think right and wrong is. You tell me. Let's - let's - let's speed up the process then. You tell me what right or wrong is.

A. Continue, fuck.

Q. So at home does mum have rules?

A. Obviously.

Q. Yep. What's the rules at home?

A. Don't worry.

Q. ... If you steal something is that good or bad?

A. Obviously bad.

Q. ... If you hurt someone is that good or bad.

A. You already know the answer. Why are you asking me this?⁶⁹¹

562 On 31 March 2021, PM gives the following answers when asked whether he knows

⁶⁹⁰ Exhibit D2, [2275]–[2280] (footnotes omitted).

⁶⁹¹ Exhibit P17, Q51–Q58.

right from wrong:

Q. ... Are you able to sort of explain ... if something's right and something's wrong, what that sort of means to you? ... if you get in trouble at home, would you say that's right or wrong, or can you explain to me what the difference is?

A. ... Obviously no.

Q. Obviously no?

A. I dunno what you're asking.

Q. You don't know the difference between right and wrong?

A. I do, but I dunno why you're asking me that, also, yeah.

563 I consider PM's responses when asked whether he understands right or wrong in the records of interview with police, are akin to saying, "I've heard this before, move on to the next question". They do not reflect that PM has moral sophistication as suggested by the prosecution.

564 In relation to PM's post offence conduct in fleeing the scene and being present when the stolen vehicle was burnt some days later provides little basis for inferring what PM understood when he participated in the attack. It is at least equally explainable as demonstrating naivete and immaturity. Regard must be had to the facts that he made no attempt to hide or destroy the clothing and footwear he wore at the time of the alleged offence, he placed himself in another stolen vehicle, continued to interact with his co-accused and lacked consideration of CCTV cameras.

565 The prosecution relies significantly on Dr Owen's opinion in relation to the interview with police on 23 March 2022. Dr Owen opined that on 23 March 2022, PM for the first time when arrested contacted his lawyer on two occasions, suggesting learning regarding seriousness of his conduct and consequences following his exposure to previous doli incapax assessment.⁶⁹² Dr Owen also notes in relation to the 23 March 2022 interview, that PM provided his correct name and address, that he understood the reason for interview, repeated his rights in his own words, stated he

⁶⁹² Exhibit P90, [78].

understood his rights, that he understood what a legal representative was and that he had spoken to a lawyer. PM made a 'no comment' interview throughout. He denied recognising himself in video and in photographs. He stated that he understood the seriousness of the death of a person and that he understood the opportunity to provide his side of the story.

566 The 23 March 2022 interview lasted 23 minutes. Dr Owen was not aware of the legal advice, or the emphasis of the legal advice given to PM before the interview by his lawyer, Ms Conwell. Dr Owen was not aware of the longstanding relationship between PM and Ms Conwell prior to this time and the depth of PM's trust in Ms Conwell. Dr Owen was not aware of the coaching or repetition of instructions provided by Ms Conwell to PM and her instructions in relation to giving a 'no comment' interview and the point in time when he should commence providing no comment. Dr Owen was not aware of the dramatic nature of PM's arrest by the Special Operations Group and that he had been at a fingerprint hearing in the evening around 9:30pm prior to the interview. The hearing went for approximately one hour and he then had a telephone consultation, pre-interview, with Ms Conwell. Dr Owen was not aware of how PM came to speak to Ms Conwell on the night of 23 March 2022.

567 Dr Owen agreed that based on the additional information about Ms Conwell's involvement and the instructions she gave him, a cognitively impaired child with reduced executive functioning could maintain a 'no comment' interview.⁶⁹³

568 Dr Singh rejected the proposition that PM's subdued behaviour in the 23 March 2022 interview suggested a high degree of internal control or a reasonably mature response to police questioning.⁶⁹⁴ In her oral evidence, Dr Singh maintained that she considered that PM's responses in interviews are more likely evidence of his profound developmental and moral immaturity. This may be contrasted with Dr Owen's view that PM 'no comment' responses reflect a high level of moral

⁶⁹³ T359.16-18.

⁶⁹⁴ T482.17-21.

understanding and therefore he knew what he was accused of was seriously wrong in a moral sense.

569 Further, based on the information about PM's pre-interview circumstances and what Ms Conwell told him to do and the emphasis in the discussions for PM to sustain the 'no comment' interview, Dr Singh considered that this would have contributed to his ability to sustain the response.⁶⁹⁵

570 Given the circumstances of PM's arrest, the fingerprint hearing and his telephone conversations with Ms Conwell, Dr Owen's concessions and Dr Singh's opinion, I do not consider PM's subdued behaviour, and his ability to sustain a 'no comment' interview for approximately 23 minutes, is necessarily indicative of learning or an understanding of the seriousness of his conduct on 13 March 2022. He was given truly clear and strong advice on how to respond, by Ms Conwell, a person he knew and trusted.

571 As to the Arunta calls, Dr Singh considers PM's conduct to be more likely mimicking demeanour.⁶⁹⁶ Dr Singh disagreed that the calls were evidence of PM being a leader rather than a follower or that he was directing others. I consider the Arunta calls are consistent with PM behaving in an immature manner mimicking language and discourse of older boys. PM's conversations are equally consistent with a young boy seeking approval and trying to big note himself.

572 The prosecution bears a heavy burden when prosecuting children. It must be emphasised that the starting point is that a child is presumed in law incapable of bearing criminal responsibility for their acts. The High Court's decisions in *RP* and *BDO* confirm that the State's exercise of power over children through prosecution cannot be approached lightly and can only be appropriate where criminal responsibility has been properly established.

573 On the totality of the evidence I do not consider that the prosecution has rebutted the

⁶⁹⁵ T432.31-433.3.

⁶⁹⁶ T423.5-9.

presumption of *doli incapax* in respect of PM's conduct for the purposes of the participation element. The presumption must be rebutted beyond reasonable doubt.

574 I have had regard to the most serious nature of the allegation of murder and the nature of the alleged conduct. However, it is important to avoid the application of adult value judgements on PM's conduct or undue regard to the obviously abhorrent nature of the alleged crime itself.

575 A review of the evidence in its entirety leaves open, at the least, a reasonable possibility that PM had limited knowledge at the time of right and wrong. While the evidence suggests that he had a wide range of opportunities for learning, the evidence in particular, of his moral capacity and cognitive development mean that he had not necessarily gained the requisite knowledge to understand that what he was doing at the time he attacked the deceased was seriously wrong.

576 The evidence leaves open the reasonable inference that PM, given the complex nature of his multiple diagnoses, had no real understanding of the extent of his impact on others. Notwithstanding some of PM's statements to police and the experts – such as saying he knew murder was wrong on 7 March 2022 – PM's severe emotional dysregulation, his lack of impulse control, impacted by his severe ADHD, his psychiatric disorders, including severe child-onset conduct disorder and PTSD and the circumstances leading up to the offence, must be considered alongside his diminished cognition, emotional and moral development by comparison to his chronological age. At the very least, Dr Singh's opinion leaves open the reasonable possibility that PM's understanding of the wrongfulness of his conduct at the time was superficial and not reflective of any meaningful understanding of it being seriously wrong in a moral sense. Indeed, even on Dr Owen's view, such absence of knowledge is a reasonable possibility given she felt she could only express her opinion on the balance of probabilities.

577 In all the circumstances, I find the prosecution has not rebutted the presumption of *doli incapax* beyond reasonable doubt in relation to PM's conduct, namely the

kicking and stomping on the deceased while he was being stabbed. Consequently, the inevitable conclusion must be that PM cannot be found guilty of murder or the alternative charge of manslaughter. This is because both charges, when alleged by way of complicity, require proof beyond reasonable doubt that PM knew his conduct making up the participation element of either offence was seriously wrong in a moral sense.

578 Accordingly, it is unnecessary for me to conclude whether the evidence establishes beyond reasonable doubt that PM entered into an agreement, arrangement or understanding with another to cause really serious injury or death to the deceased. Nonetheless, had I found that PM had in fact entered into an agreement, arrangement or understanding to kill, or cause really serious injury to, the deceased I would still be satisfied that the evidence leaves open the reasonable possibility that he did not know that his conduct of participation, done in furtherance of that agreement, was seriously wrong in a moral sense.

579 For much of the same reasons as those discussed above – I would not have been satisfied that PM knew that his conduct, in entering into such an agreement, arrangement or understanding, was seriously wrong in a moral sense. In her report, Dr Singh identified that PM had ‘a limited capacity for autonomy, he is noted to be vulnerable to influence by his older siblings and his anti-social peers’. The evidence of his cognitive and moral development suggests that PM lacked agency and may not have had the capacity to understand that he could be viewed as morally (as well as legally) responsible for the actions of others, which would necessarily require a degree of consequential and abstract thinking. This is reflected in his statements to Ms Cidoni where he did not describe or consider himself as being part of what ‘they’ did and placing emphasis on the fact that he did not use a knife.⁶⁹⁷ Thus, having regard to the evidence, including his age in comparison to the other older boys, there remains the reasonable possibility that PM would regard such conduct as wrong but not seriously wrong in a moral sense.

⁶⁹⁷ Exhibit D6, [67].

Conclusion and verdict

580 I therefore find PM not guilty of murder and not guilty of the alternative crime of manslaughter.

581 I direct that an entry of not guilty be made on the record in respect of the charge of murder, and the statutory alternative of manslaughter, in the indictment numbered N10577110.