

AUSTRALIA / JUDGMENT

R v Green [2024] NSWDC 638

COURT

District Court

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District Court**New South Wales****Medium Neutral Citation:** R v Green [2024] NSWDC 638**Hearing dates:** 9 – 11 October 2024**Date of orders:** 18 October 2024**Decision date:** 18 October 2024**Jurisdiction:** Criminal**Before:** D Barrow SC DCJ**Decision:** Accused is found not guilty on counts 1-4.**Catchwords:** CRIME – Judge alone trial – reasons of trial judge – assault occasioning actual bodily harm – intentional strangulation – where accused and complainant in a domestic relationship – accused found not guilty on all counts**Legislation Cited:** Criminal Procedure Act 1986**Cases Cited:** Fleming v The Queen [1998] HCA 68**Barwick v R [2023] NSWCCA 139****GS v R [2022] NSWCCA 65****Category:** Principal judgment**Parties:** The Crown**Accused (Wayne Green)****Representation: Crown:****Ms Fleeton, of Counsel****Defence:**

Ms Hooper, of Counsel

File Number(s): 2023/00215590

2023/00084497

JUDGMENT

1. Wayne Green appeared for trial on 9 October 2024, charged with the following offences:

1. Count one: on or about 14 March 2023 at Surry Hills in the State of New South Wales he assaulted JM, thereby occasioning to her actual bodily harm.
2. Count two: on or about 14 March 2023, at Surry Hills in the State of New South Wales, he intentionally strangled JM without her consent.
3. Count three: on or about 5 July 2023, at Redfern in the State of New South Wales, he assaulted JM.
4. Count four: on or about 6 July 2023 at Surry Hills, in the State of New South Wales, he assaulted JM.

1. The accused pleaded not guilty to each count and the trial proceeded before me without a jury. Both the Crown and the accused agreed to this course.

2. The Crown opened and identified the following alleged conduct on the part of the accused:

Count 1: after being allowed to enter the complainant's unit, the accused punched her to the head four or five times, resulting in her losing consciousness, falling and hitting her head on the floor. The accused also stomped on her head, causing pain.

Count 2: upon the complainant regaining consciousness, she tried to stand, however the accused got on top of her and held her down, kneeling on her torso and then choked or strangled her.

1. Couns 1 and 2 were alleged to have occurred in the complainant's unit in the early hours of 14 March 2023. The Crown continued:

Count 3: on 5 July 2023 the complainant and the accused, in breach of an Apprehended Violence Order, were staying in a unit on the corner of Cooper and Walker Streets in Redfern. The complainant was asleep on a couch when the accused and an unknown male returned. She let them in and continued to try and sleep on the lounge room floor. The accused and the male were talking loudly. She told them to shut up. The accused walked to the complainant and stomped her left shoulder, which put the complainant's right shoulder into the floor causing her pain.

Count 4: on 6 July 2023 the accused and the complainant had attended the Molly Malone Tavern in Surry Hills and spent time in the gaming room. Afterwards, and when on the way to a Belvoir St unit complex (Northcott), the accused punched the complainant in the left jaw with his right hand using a closed fist. The complainant felt immediate pain and dizziness and felt like she was going to lose consciousness.

Judge Alone trial

1. In reaching my verdicts, I must take into account any warning, direction or comment which by law would be required to be given or made to a jury, s 133 Criminal Procedure Act 1986. My reasons must link the principles of law being applied and articulate how these directions and warnings were applied in reaching my conclusions as to findings of fact and my ultimate conclusions regarding verdicts. See *Fleming v The Queen* [1998] HCA 68 at [28], [30]-[33]; *Barwick v R* [2023] NSWCCA 139 at [56]

The trial evidence

1. In about November 2022 the complainant and the accused began a relationship. At that time, the complainant was renting a unit at 10/310 Riley Street Surrey Hills. The accused commenced to live in the unit with her very soon after the relationship began.
2. At 3:57 AM on 14 March 2023, a 000 call was made by a resident of the same apartment block, advising the police that a violent domestic incident was occurring in unit 10. This call was recorded and played in the trial. The caller stated he was calling from 310 Riley St and that in unit 10:

"I heard screaming A violent domestic. She's screaming, she's screaming. There's a fight there. Thank you so much."

1. The caller then hung up. Attempts to contact the caller again that evening were not successful. [1]
2. Police promptly attended 310 Riley St and by 4:10 AM were inside Unit 10. The door to the unit was opened by Bailey Hammond, a relative of the accused. He lied to the police and claimed no-one else was home. Nothing turns on this lie.
3. Both the complainant and the accused were apparently asleep in a double bed in the unit's only bedroom. Police entered the bedroom and asked the complainant if there were any problems. The complainant said that there were no problems. She gave police the following account:

C Hayden: Has there been any arguments?

JM: Oh not bad, that it's like, yeah.

C Hayden: How long ago was that?

JM: I don't know. Maybe an hour or so. [2]

C Hayden: And who was arguing?

JM: Oh him and his nephew did for a bit and then I yelled and yeah, I told them to shut up.

JM explained she had a migraine "so I've been in bed".

Later C Clarke stated: "I just want to make sure no-one's injured or anything."

JM replied: "Yeah, no, you're right.... The only thing I've got is a migraine."

JM: "It's all good. And him and his nephew are over it. He's been asleep for a bit anyways."

1. These were references to the accused, who at the time of this dialogue was in the same bed as the complainant.
2. The police took the accused's details. The complainant provided some further information and the police then left.
3. Later that day, at about 8:47 AM, the complainant telephoned the police and said she had lied to police who had attended her unit earlier that night. She reported that she had been punched and choked by her ex-partner, the accused. The complainant told the telephone operator she had lost consciousness during the assault and had bruises around her neck. (Ex C, page 1)
4. Police returned to the unit and spoke with the complainant at 9:43AM. That conversation was electronically recorded by body worn camera and played during the trial (Ex D, E and G). The complainant told the Officers the accused had assaulted her:

"So the fight started like a couple of days ago, he hit me..... I said, if you lay hands on me again, we're finished And yesterday we went to the pub and he carried on like a two year old child and he spat in my face at the pub..... I quickly walked back here and barricaded the door..... I didn't let him in and I stayed home all day and just watched movies and then went to sleep..." (EX E, MFI 6 at 00:03:42)

1. The complainant said she had then gone to her aunt's home for 45 minutes and upon her return she noticed someone had broken in. She went to the Crown Hotel and the accused was there. She challenged him about breaking into her unit. Later that evening she told him: "we're done, like, I don't want nothing else to do with you." (EX E, MFI 6 at 00:05:02)
2. Later, the accused had come to her unit and begged to be let in. She refused. His nephew (Bailey) was with him and "he was getting a bit scared" so she let them in. The complainant stated that she told Bailey: "he's gonna end up hitting me and hurting me." She told the accused: "I shouldn't even let you in with you spitting in my face at the pub, you know?" The accused responded: "yeah well I'll bash you again." (EX E, MFI 6 at 00:05:25-06)
3. The complainant, in reference to Count 1, then said: "then he got up and he punched me four or five times and knocked me out and I hit my head on the ... sliding door I've got a massive lump on my head. And then I woke up and he was like choking me and I can remember just looking into his eyes like, I just want to breathe..." This part of the complainant's account underpinned Count 2. The complainant continued: "Then I woke up from when he was choking me, I woke up cause he was stomping on my head like he had his shoes on but he was stomping on my head and his nephew was pulling him off going 'don't unc, leave her alone like don't touch her!'"

4. The complainant observed that police had arrived at her unit soon after the accused had stopped his assaults. "He jumped in bed with me and he goes 'cuddle me' and I said 'no way, I should be dobbing your ass in right now'.... And I bullshitted and said everything was fine." (EX E, MFI 6 at 00:06:45)
5. The complainant explained she had called the police in the morning because she couldn't let him get away with this: "look at me", she explained she had said nothing earlier because: "I don't wanna be the reason for him to get locked up." (EX E, MFI 6 at 00:07:33)
6. The accused returned whilst the police were in the unit. He was arrested by reason of the complainant's allegations and, it would seem, because of a breach of bail. He appeared surprised to be told that he had assaulted the complainant, saying "are you serious" (EX G, MFI 7 at 00:01:21) and denied having done so "I didn't even fucking do anything..." (EX G, MFI 7 at 00:02:14).
7. In the accused's presence, and with the police there, the complainant said to him: "They come back, babe. They come back." "I can't do shit about it." "They know, they fucking, they know." (EX G, MFI 7 at 00:001:24-32) The complainant did not reveal to the accused that the police had attended because she had called them.
8. The complainant continued, pointing to her neck: "How do I say what this come from? Like, babe. They're not stupid." "You choked me out and stomped on my head." The accused replied: "You're kidding me baby. You're kidding me." She told him: "babe you've gotta accept the fact that you fucked me up." (EX G, MFI 7 at 00:02:28-45)
9. At no point in this dialogue did the accused make admissions.
10. The complainant told police that the accused had been "really sick" (EX G, MFI 7 at 00:03:25) for 4-5 days (EX G, MFI 7 at 00:04:48) and "he's got carbuncles and boils. He's been sick for like 14-15 days." (EX G, MFI 7 at 00:09:31) The accused was provided with a container and vomited into it. In the ensuing minutes, the complainant provided the accused with a glass of milk to help his nausea and displayed affection towards him, hugging and kissing him and saying: "You're alright baby. I love you." (EX G, MFI 7 at 00:08:41)
11. As the accused was removed, the complainant told police, "I love the guy so much but I hate what he does to me, you know what I mean?" (EX G, MFI 7 at 00:10:46)
12. The complainant participated in a DVEC interview at 10.15AM at her unit that was played during her evidence in chief at the trial. She repeated her earlier account to the police. (EX H)
13. Regarding Count 1, the complainant said:

"I said nephew I'm telling you he will, and I could tell he was stressed so I let him inside and then I said to Wayne, I shouldn't even let him near at the end of the day because like the way you treat me and, um. And he didn't like what I said, so he punched me, I don't know, four or five times in the head. And I remember, like, when I was starry and fainty, I tried to get onto the lounge, but I just fell. I hit my head on where the sliding door thing is." (EX H, MFI 8 at 00:01:42)

1. Regarding Count 2:

"and then, I remember I come to, and I got half backup and then he grabbed me around the throat and held me down and I blacked out again. And I woke up to him jumping on me head with his shoes on, and he's jumping on my head and his nephew was going on like just get off her and don't touch, like stop hitting her. And then took him a little bit and he got off me." (EX H, MFI 8 00:01:42)

1. The complainant expanded on the answer above at 00:05:20:

"I can remember trying to get up. And then, um, he, I don't know something happened, I can't remember what happened, something happened, and he grabbed me around the throat and pinned me down against the ground. Like he was kneeling on me holding me down, and I can remember just looking in his eyes and like, just let me breathe...." (EX H, MFI 8 00:05:20)

1. The complainant was asked: "when he grabbed you around the throat, did you feel that you lost consciousness at any point?" She replied: "I don't remember, but I I did blackout because I woke up because he was jumping on me. And, and I woke up because he was jumping on my head like, so obviously I was passed out. And I couldn't hear nothing. But yeah, his nephew like when I woke up, he was going like stop. You know, he just wanted him to stop. He was grabbing him and trying to get him off me." (EX H, MFI 8 00:05:47)
2. The complainant continued and told the police: "I've got his fingerprints all on my neck from when he choked me. I got a lump on my head from hitting it when he knocked me out when he punched me. I got a mark on my cheek. Fat lip from jump, that was from jumping, I can remember that one on my lip because it was the last jump on my head. Yeah, I can remember that one." (EX H, MFI 8 at 00:06:16)
3. Photographs were taken of the complainant's injuries (Ex F). Photograph 1 depicts redness to the right hand part of her bottom lip, together with a small possible contusion in the same area. Photograph 2 depicts a reddish, small mark to her left cheek and brown discolouration to the left side of her neck. Photographs 3 & 4 depict the same part of the complainant's neck, however the brown marks are not visible. Instead, the photographs depict a number of reddish linear marks with the appearance of scratch marks. They do not resemble finger marks. Photograph 5 depicts the right side of the complainant's neck. The photo is of poor quality. No obvious injury or marks are visible.
4. The accused was charged that morning with the offences that became Counts one and two on the indictment.

5. The complainant was taken to Royal Prince Alfred Hospital that morning. Agreed facts were tendered as Exhibit Q regarding the complainant's attendance and, regarding Counts 1 and 2, read as follows:

Medical evidence as to Counts one and two on the indictment

4. That, the complainant attended Royal Prince Alfred Hospital on 14 March 2023, at 12:36 PM, presenting with a number of complaints, including:
 - a. Ongoing headache with mild nausea; and
 - b. Complaining of anterior neck pain.
5. That, the trainee specialist - Dr Sean Kelly from the Emergency Department, Royal Prince Alfred Hospital, noted the following observations:
 - a. Obs normal
 - b. Looks systemically well.
 - c. Pulse regular.
 - d. Glasgow coma score scale 15.
 - e. Pupils equal and reactive to light.
 - f. Upper and lower limb neurological exam normal.
 - g. C-sine non-tender.
 - h. Mild bruising under right orbit with some orbital bone tenderness.
 - i. Bruising noted to anterior neck.
 - j. Chest clear, mild chest wall tenderness.
 - k. Abdomen soft not tender.
 - l. Calves soft not tender.
 - m. Mild right sided hip/pelvic pain, however patient has mobilised post event so unlikely that there is a fracture; and
 - n. Nil long bone injury.
6. That, the trainee specialist- Dr Sean Kelly from the Emergency Department, Royal Prince Alfred Hospital, noted the following impression:
 - a. Blunt head trauma with loss of consciousness; and
 - b. Strangulation - need to ensure nil vascular injury.

7. That, the expert Dr Timothy Royle - from Royal Prince Alfred Hospital, noted on examination that there was bruising and tenderness around the right eye and bruising to the anterior neck. Routine blood tests, chest x-ray, and CT angiogram of the brain, facial bones and neck vessels were normal.
1. There was no evidence adduced in the prosecution case regarding the interactions between the accused and the complainant in the period after 14 March 2023 until both were located by the police on 6 July 2023. What is apparent from the evidence is that at some point during that period their relationship resumed. At some point during that period, the complainant no longer had access to Unit 10/310 Riley Street Surrey Hills.
2. By July 2023 police held concerns for the well-being of the complainant, as she had been reported as a missing person. A warrant was also extant for the accused, apparently because his ongoing association with the complainant was in breach of the terms of an apprehended violence order.
3. On 5 July 2023 information was received by the police from a member of the public that a person matching the accused's appearance was at the Molly Malone's Irish Tavern in Surry Hills. During the trial, CCTV footage depicting the accused and the complainant in the poker machine area of that establishment was played (EX L). That footage depicted the accused throw an item in the direction of the complainant. The complainant's evidence was that the accused threw a cigarette lighter at her. (T54.21) The accused's evidence was that he had thrown his last \$20 note in the complainant's direction, but not at her and had done so out of frustration ('pissed off') because the complainant had gambled away their remaining money. (T117, T134)
4. I have watched this footage repeatedly. The object thrown was a lighter. At the time of throwing it, the accused was standing very close to the complainant and threw it with significant force in her direction. I cannot be confident that he threw it at her and it clearly did not strike her. I will return to this when considering the evidence.
5. Police then became aware of the presence of the accused and the complainant in the nearby Northcott apartment complex. In the early hours of 6 July 2023 police entered Unit 121. The accused was located under a bed and the complainant subsequently emerged from behind a rack of clothes.
6. The complainant's presentation in the moments after she emerged was captured on BWC footage and played in the trial (Ex N and P). She appeared highly anxious and distressed. She told the officers "I've been trying to go every day". "Every time I try to get away, no joke, its like he's got a tracker up my arse." (EX N, MFI 10 at 00:03:17) She also told the police she had been charged with criminal offences, been granted bail and was required to reside and report in the Hunter Valley. She had not been doing so.

7. I was left unsure about the source of the complainant's distress; whether it was because of the accused's behaviour towards her or because of her own imminent problems with breaching her bail conditions. When cross-examined, the complainant said she was not sure if she was under the influence of drugs at that time. (T65)
8. During the conversation with police and after Sergeant Hextell told her: "We need to talk to you because I've been told you've been towelled up again since this" (EX N, MFI 10 at 00:02:21) the complainant stated:

"Oh from this morning when I was asleep, he jumped all over me and kicked me or something. I don't even know because I was asleep and I don't know I can't breathe properly. He stabbed something all here I can't get dressed like undress myself anything." (EX N, MFI 10 00:04:03)

1. Later in this dialogue, (EX N, MFI 10 at 00:14:28) the complainant returned to this subject and said:

"I was asleep and he yelled at the door like, yeah, I sort of remember opening the door. I got up and opened the door, and I just wish that I could lay back down and then I don't know he started talking to me. And I said, 'can you just shut the fuck up? Like, I'm tired. I'm exhausted. Like I'm mentally and physically exhausted.'

And then he just said, like I don't know he said something like 'what the fuck slut? What did you say?' Or something. And then I don't know if, well he he jumped on me. I'm sure he jumped on me....

And then he reckons that he kicked me." (EX N, MFI 10 00:14:50- 00:15:13)

1. This account is the basis for Count 3. It was repeated by the complainant to police in the DVEC later that day at Surry Hills Police Station (EX O, MFI 11), with an addition, "he full like just stomped on me and then I didn't know but he said he kicked me as well... he stomped on my left shoulder which put my right shoulder into the floor (EX O, MFI 11 at 00:02:51- 03:12)
2. In the BWC recordings on 6 July 2023 the complainant told police about the charges that she faced and at EX N, MFI 10 at 00:06:31 said:

"because we have come up from the pub there and I've been asleep, he's just punched me like right here in the chin and I just started dropping because I was just dizzy I was just seeing stars and then he's like grabbing me and dragging me like I can't fucking see I'm that dizzy I can't walk."

1. Similarly, in the DVEC (EX O, MFI 11 at P 3) the complainant said:

"We left the pub and we got just past the set of lights and he punched me in my jaw and I nearly lost consciousness. And he's like "hurry the fuck up and walk you little slut"".

1. This alleged conduct constituted the basis for Count 4.

2. The complainant told police that she and the accused had then made their way to Unit 121 in a Housing Commission complex (Northcott) in Surry Hills. The occupants of that unit were Sarah Addy and George Haskill.
3. As noted, the accused was subsequently arrested in that unit and the complainant was hiding behind a clothes rack.
4. The accused was not spoken to by police at the time of his arrest on 6 July 2023. Photographs of the complainant were not in evidence.
5. The complainant was taken to St Vincent's Hospital. The Agreed Facts (Exhibit Q) are as follows:

Medical evidence as to counts three and four on the Indictment

8. That, a staff member Chandramoha - from St Vincent's Hospital, noted the following observations:
 - a. Mild tenderness of her left angle of mandible.
 - b. C spine tenderness.
 - c. Reasonably tender over her sternum and right anterior chest.
 - d. Chest clear.
 - e. Abdomen soft not tender.
 - f. Mobilising upper limbs/lower limbs.
9. That, the staff specialist Dr Duy Nguyen from St Vincent's Hospital, noted the following impression:
 - a. No acute injury is identified in the head, facial bones, cervical spine or thorax.
1. During cross-examination, the complainant accepted (T92) she had written a Statutory Declaration in April 2023 for use by the accused in a bail application:

"Dear Magistrate of the Courts, I JM of 10/310 Riley Street Surrey Hills New South Wales 2010, write this letter to please find within you to release my partner Wayne Thomas Greene from prison and back on his parole as this incident did not occur. When police arrived on the 14 March 2023 for a domestic they were told by both Wayne and I nothing happened. They came back some time later and questioned me and I felt intimidated and agreed with what they said. The marks on me were not from Wayne. Please take into account Wayne needs to be home with me and see a counsellor to help him deal with the loss of his mother being murdered and the loss of his brother. Wayne has done so well since he was released from prison five months ago. Wayne has accomplished getting his own residence, seeking a counsellor and also doing everything right with parole.

I would like our AVO dropped altogether please so Wayne and I can move on and live our lives together. We have plans in the near future to move to Newcastle to be with our children and become a family again. I need Wayne back at home with me as I am suffering from anxiety and depression with Wayne being in custody. Thank you for your time."

1. The complainant gave evidence, with the protection of a s128 Certificate, that the contents of the Statutory Declaration were not true. She wrote it after she had received threatening phone calls and texts (T93) from the accused and from "the other boys" saying that if she did not get the accused out of prison "I'd wanna watch myself, I'm gonna get hurt." She was offered money to write the Statutory Declaration. She could no longer recall the names of the "boys" who threatened her on the accused's behalf. She did not go to the police because she was too scared. "I was petrified of (the accused). I didn't want him to get out." (T94)
2. The complainant was also asked about letters she had written to the accused after 6 July 2023 when she and the accused were both in custody. The complainant stated that she had spent the second half of 2023 in custody. (T63) As of July 2023, the complainant did not really want a future with the accused. (T65) The complainant stated that the accused had written her a letter from custody and that she had written back "I did say I loved him at the end of it because I know what was coming if I didn't." (T66) As far as she was aware, she wrote only the one letter. Letters written by the complainant became Exhibit 1 in the trial.
3. Without reviewing the contents of the letters, there appear to be four letters, not one, although it is possible that two of the letters went to the accused together. The letters are expressed in very affectionate terms, with the complainant repeatedly stating how much she was missing the accused and how she was looking forward to a future with him. An example of this, capitalised: "WILL YOU MARRY ME? I WANT YOU TO BE MY MAN UNTIL I TAKE MY LAST BREATH."
4. Not each of the letters is dated, although the first in the bundle is dated Monday 25 September 2023. The last letter in the bundle, from its contents, appears to have been written a few days earlier.
5. The complainant insisted that she wrote these letters not because she continued to love the accused but "because I was at Dillwynia, and I got pulled into an office by the screws, because there'd been ... (not transcribable) .. written to Wayne from one of the girls inside with me saying: 'J is in here. Do you want me to kick the fucking cunt out of her?'" (T78) The complainant said that she understood the letter had been intercepted but because she knew about it, it was for her protection to write to the accused in an apparently loving way.
6. During re-examination, the complainant's attention was taken to one of the letters where she wrote: "MY BABY, CAN YOU PLEASE PROMISE NOT TO HURT ME AGAIN." The complainant said this was a request that he not keep bashing her. (T80)

7. The accused gave evidence and denied ever assaulting or choking the complainant. His mother was murdered in a domestic violence incident in 2017. (T119) He hated 'women bashers' and had never bashed a woman. (T120) His evidence was that the complainant had repeatedly lied to the police about him.
8. When it was put to him, regarding the 14 March 2023 incident, that he had punched the complainant 4-5 times to the head, the accused replied: "Did you see how fat I was – how big I was?, ... if she was 40 kilo, and I was 100 and something kilo and I hit her so many times wouldn't the police have seen it when they came there?" [3]
9. The accused denied ever writing to the complainant when they were both in custody. (T129) No letters from the accused became part of the evidence. The accused denied that he had called the complainant from custody in the period before the preparation of the April 2023 Statutory Declaration. (T131) There was no evidence in the prosecution case of any calls from the accused to the complainant in that period.

Directions

Onus / Standard of proof / Presumption of innocence

1. The Crown bears the onus of proving the charges beyond reasonable doubt. The Accused is presumed to be innocent unless the Crown satisfies me beyond reasonable doubt of his guilt of one or more of the offences. Beyond reasonable doubt is of course the highest standard of proof known to our law.

Assessing the evidence / Applying common sense

1. In assessing the evidence, and in determining whether the Crown has satisfied me of the guilt of the accused, I must approach the task with an open and unbiased mind, act logically, rationally, and not capriciously. Although in carrying out that task, I should apply common sense, my verdict must be based only on the evidence called in the trial.

Separate consideration

1. The four charges against the accused are being tried together as a matter of convenience. However, there are strictly four trials being conducted and I must give separate consideration to the question of whether the Crown has proven its case in respect of each charge. In that regard, I must not compromise but must attend to the elements of each alleged offence and whether the Crown has satisfied me of its elements beyond reasonable doubt.

Elements of the alleged offences

1. The elements for each offence are as follows:

Count 1:

1. The accused assaulted the complainant.

1. Assault is any act by an accused which recklessly or intentionally causes another person to apprehend or expect immediate unlawful violence;

* Such conduct is without the consent of the complainant;

* The conduct was intentional or reckless in the sense that the complainant believed that she would, then and there, be the subject of immediate and unlawful violence and the accused none the less went and took that risk, and;

* The conduct is without lawful excuse.

1. The accused caused actual bodily harm to the complainant.

1. Actual bodily harm is given its ordinary meaning. It includes any injury or hurt that interferes with the health or comfort of a person and it needs not be permanent but needs to be more than transient or trifling.

Count 2:

1. The accused intentionally strangled the complainant.

1. To strangle is to intentionally apply pressure to the neck so as to be capable of affecting the breath or the flow of blood to or from the head. See discussion in *GS v R* [2022] NSWCCA 65 at [58]-[64]

2. Such conduct is without the consent of the complainant.

Count 3:

1. The accused assaulted the complainant.

1. Assault is any act by an accused which recklessly or intentionally causes another person to apprehend or expect immediate unlawful violence;

* Such conduct is without the consent of the complainant;

* The conduct was intentional or reckless in the sense that the complainant believed that she would, then and there, be the subject of immediate and unlawful violence and the accused none the less went and took that risk, and;

* The conduct is without lawful excuse.

1. The accused caused actual bodily harm to the complainant.

1. Actual bodily harm is given its ordinary meaning. It includes any injury or hurt that interferes with the health or comfort of a person and it needs not be permanent but needs to be more than transient or trifling.

Count 4:

1. The accused assaulted the complainant.

1. Assault is any act by an accused which recklessly or intentionally causes another person to apprehend or expect immediate unlawful violence;

* Such conduct is without the consent of the complainant;

* The conduct was intentional or reckless in the sense that the complainant believed that she would, then and there, be the subject of immediate and unlawful violence and the accused none the less went and took that risk, and;

* The conduct is without lawful excuse.

1. The accused caused actual bodily harm to the complainant.

1. Actual bodily harm is given its ordinary meaning. It includes any injury or hurt that interferes with the health or comfort of a person and it needs not be permanent but needs to be more than transient or trifling.

Evidence by remote means and in the presence of a support person

1. The complainant gave evidence by audio visual means and in the presence of a support person. Much of her evidence in chief was given by way of earlier recordings, by DVEC. I direct myself that these features are standard in cases of this sort. I must not treat this evidence in any different manner by reason of it being given in that form, and in the presence of a support person. I must approach my assessment of the complainant's evidence in the same manner as evidence given in person in the court room.

Essential Crown witness

1. The Crown case depends substantially on the evidence of a single witness, JM.
2. This being so, unless I am satisfied beyond reasonable doubt that JM is both an honest and accurate witness in the account she has given, I cannot find the accused guilty.
3. I am entitled to convict the accused upon the evidence of JM, but only after I have carefully examined the evidence and satisfied myself that it is reliable beyond reasonable doubt.
4. In considering JM's evidence and whether it does satisfy me of the accused's guilt, I must look to see if it is supported by other evidence.

Context evidence

1. In addition to the evidence led by the Crown specifically on the counts in the indictment, the Crown has led evidence of other acts of alleged misconduct by the accused towards the complainant.
2. The evidence of other acts is as follows:

1. That the accused had hit the complainant a couple of days before Counts 1 and 2 occurred and on the day before the offences he had spat in her face at a hotel. (EX E, MFI 6 at 00:03:42)
2. On the occasion of Counts 1 and 2 the accused had tried to kick the complainant's door in. (EX E, MFI 6 at 00:04:13)
3. That the accused had repeatedly hit her during the relationship. (EX H, MFI 8 00:03:58)
4. The accused had punched her, thrown things at her and bitten her legs on another occasion. (EX H, MFI 8 00:11:37 – 00:11:40)
5. The accused had hit her 'a few times'. (EX H, MFI 8 00:12:06 – 00:12:12)
6. By July 2023 the accused was pretty much punching her and knocking her out almost every day. (EX O, MFI 11 00:08:02 – 00:08:45), (T44)
7. The accused would hit her like a man. (EX O, MFI 11 00:08:02 – 00:08:45)
8. The accused had bashed her probably four times in The Columbian Hotel in public. (EX O, MFI 11 00:08:02 – 00:08:45)
9. The accused "was beating the fuck out of me. He went to stab me and everything, that's when George stepped in". (EX O, MFI 11 00:10:45- 00:11:04)
10. The accused had thrown a lighter at her at Molly Malone's Tavern. (T53)
1. It is important I recognise the relevance of this evidence. It was admitted firstly for the purpose of placing the complainant's evidence towards proof of the charges into what the Crown says is a realistic and intelligible context. By context I mean the history of the conduct by the accused toward the complainant as she alleges it took place.
2. Without the evidence of these other acts, the Crown says I may wonder, for example, about the likelihood of apparently isolated acts occurring suddenly without any reason or any circumstance to link them in anyway. If I had not heard about the evidence of other acts, I may have thought the complainant's evidence was less credible because it was less understandable. I accept that the evidence was placed before me to answer questions that might otherwise arise in my mind about the particular allegations in the charges on the indictment.
3. I must not substitute the evidence of the other acts for the evidence of the specific charges on the indictment. The Crown is not charging a course of misconduct by the accused but has charged particular allegations arising in what the complainant says, was a course of domestic violence assault. I am concerned with the particular and precise occasions alleged in each count.

4. I must not reason that, just because the accused may have done something wrong to the complainant on some or other occasion, he must have done so on the occasions alleged in the Indictment. I cannot punish the accused for other acts attributed to him by finding him guilty of the charge/s in the Indictment. Such a line of reasoning would amount to a misuse of the evidence and not be in accordance with the law.

Markuleski direction / Consequences of not guilty verdict on one count

1. As the complainant is an essential witness whose evidence about each of the four allegations must be proved beyond reasonable doubt, I need to consider the effect upon my assessment of her credibility if I conclude that I cannot be satisfied beyond reasonable doubt of her evidence with respect to one of the counts. In other words, as the Crown case relies essentially upon the evidence of the complainant for each count – if I have a reasonable doubt about the complainant's evidence concerning (say) Count 1, then I must consider how this impacts on my assessment of her evidence in relation to the remaining counts. If I cannot believe the complainant's evidence beyond reasonable doubt on one count, then it may be difficult for me to accept her evidence concerning the other counts.

Inferences

1. I am entitled to draw inferences of fact from other facts that I find proved. However, I must be very careful in drawing inferences adverse to the accused and must not do so unless the inference is reasonable and rational in the circumstances.
2. Furthermore, and because of the onus of proof on the Crown, and the very high standard of proof, I must be extremely careful before drawing any inference of guilt. Before doing so, I must carefully examine any such inference, and satisfy myself that it is the only rational inference available in the circumstances.

Witnesses not called

1. In the evidence at trial, it became apparent that a number of relevant witnesses were not called in the prosecution case:

* The maker of the 000 call, despite that person's particulars apparently being available; see Exhibit B.

* Bailey Hammond, who was present during the evening of 13-14 March 2023 and who on the complainant's account secured the accused's entry to the complainant's unit, witnessed the accused's assaults upon her and was responsible for pulling the accused away from making further assaults.

* Sarah Addy, an occupant of Unit 121 Northcott Towers, who the complainant allegedly complained to about the accused's conduct towards her (see EX P, MFI 13 at 00:15:57) and who was present in the period immediately before the arrival of the police.

* George Haskill, a second occupant of Unit 121 Northcott Towers, who was present in the period immediately before the arrival of the police.

1. I can take the fact that there was no evidence from these individuals into account when deciding whether the Crown has proved the guilt of the accused.
2. I am not to guess what any of these four people would have said if they had been called. But in a criminal trial, where the Crown must prove that the accused is guilty beyond reasonable doubt, the tribunal of fact is entitled to take into account that there was no evidence from a particular person in deciding whether or not there is a reasonable doubt about the accused's guilt.

Evidence by the Accused

1. The Accused chose to give evidence in the trial. There was no obligation on him to do so. The fact that he gave evidence does not shift the burden of proof which remains with the Crown.
2. In his evidence the accused denied the offences. If I accept his evidence in that regard with respect to any or all of the allegations, then I must find him not guilty.
3. If I think that his evidence is probably true, or that there is a reasonable possibility that it is true, or might be true, then I must also find him not guilty of the particular count that I am considering.
4. However, even if I reject his evidence entirely, then I must simply put it aside and return to the question of whether the Crown has satisfied me of the elements of each of the offences.

No onus on Accused

1. Although the Accused put forward a case in his defence, he bears no onus of proof, and the onus remains on the Crown. Suspicion, even the greatest suspicion, is no substitute for such proof.
2. As I have said, even if I do not accept any of the accused's evidence, I must simply put it aside and return to the question of whether the Crown has proven any of the charges beyond reasonable doubt.

Motive to lie

1. It was suggested on behalf of the accused that the allegations were deliberate lies, made to advance the complainant's material interests. While I have taken into account this suggested motive to lie, the fact that it has been raised does not shift the onus of proof from the Crown. Nor does it mean that the Accused takes on any onus to prove the suggested motive.

2. Therefore, while it is a matter that I must take into account, if ultimately, I am not satisfied that any of the allegations do arise out of a motive to lie, I must put aside the suggested motive and return to the question of whether the Crown has satisfied me beyond reasonable doubt of the elements of the charges.
3. In considering whether the Crown has proven any of the offences against the accused, I must be careful not to reason, even if I am not satisfied that the complainant had any reason to make up the allegations, that the absence of any such reason supports the Crown case in any way. In other words, I must not ask myself the question "why would the Complainant lie?". There might be all sorts of reasons for a complainant to give false or inaccurate evidence, and the absence of any reason, or apparent or possible reason, cannot be used to support her evidence or the Crown case in any way.

Anti-bad character direction

1. As the allegations involve a person who is now in custody, and the evidence referred to him being on parole at the time of the alleged offences, it is obvious that he has committed offences in the past. I must not use the fact that the Accused is in custody or has previously committed criminal offences against him in any way, such as, for instance, to conclude that for that reason he is generally a person of bad character, or of no or reduced credibility.
2. Similarly, although there are four counts on the indictment, the Crown does not rely on tendency evidence. Therefore, I must consider the evidence relevant to each count separately. If I were to conclude that one count has been proved beyond reasonable doubt, I must not reason that because of that conclusion the accused is guilty on other counts on the indictment.

Determination

1. Consistent with the above directions, I must proceed with the presumption of innocence of the accused firmly in place. I must have regard to the onus and the standard of proof. I recognise that the prosecution case in relation to each count relies very substantially upon an acceptance of the reliability and truthfulness of the complainant's evidence.
2. Consistent with the direction I have given myself, I must acquit the accused if I accept his evidence or if I consider that it might reasonably be true. If I were to reject his evidence, I must put it to one side and still consider whether the Crown has established its case regarding any one of the counts on the indictment.

Counts 1 and 2

1. The first observation I make is regarding the deficiencies in the police investigation. No effort appears to have been made to take a statement from the individual who contacted the police by way of 000 call. The information in the 000 call itself was very limited.

2. The complainant's account is that she was subjected to a violent assault by the accused after letting him in to her unit that night. The person who contacted 000 may well have been able to provide an account as to what they heard that prompted their 000 call. The Court is left to speculate about that because of this deficiency. I must not speculate.
3. Second, a young man named Bailey Hammond was inside the unit when the police attended in response to the 000 call. On the complainant's account, Bailey Hammond was the accused's nephew and was much younger than the accused. The complainant's account was that Bailey Hammond and the accused had come to the unit late that night. It had been Bailey who had persuaded her, against her better judgment, to let both the accused and him in. Her account was that the accused had then assaulted her immediately and it had been Bailey Hammond who had pulled the accused away from her during the assault. Also, the complainant's initial account to the police when they first attended the unit was that any argument that had been heard by a neighbour had been an argument largely between the accused and Bailey Hammond, with her only intervening at the end. The complainant's account was that the accused had asked her to get into bed with him upon becoming aware of the impending police arrival. Bailey Hammond was present at this point as well.
4. No statement was obtained from Mr Hammond. The Officer in Charge gave evidence of having made very limited efforts to locate him. Again, I must not speculate, however Mr Hammond is a witness I would have expected the prosecution to have called.
5. The account of the complainant relevant to Counts 1 and 2 involved very substantial physical violence allegedly inflicted upon her by a much bigger man.
6. Physically, the complainant appears to be very slight of build. In one of her letters to the accused in September 2023, she wrote that upon entering the custodial system, she weighed 44 kgs.
7. Given the complainant's small size, particularly contrasted with the accused, her documented injuries are surprisingly limited, given her account of the accused's behaviour, particularly the allegation that whilst wearing shoes he had stomped on her head. The clear evidence of some form of injury to the complainant's neck is difficult to interpret. There is no expert evidence as to whether those injuries are consistent with choking, as described by the complainant. I must not speculate.
8. On my assessment, the complainant's injuries, as depicted in the photographs and the Agreed Facts, provide very little support for the prosecution case. The medical evidence does not allay the doubt I have about the complainant's honesty and reliability, about which I will shortly set out. The medical evidence establishes that to some extent the complainant had relatively minor injuries. How those injuries were occasioned and whether they were caused by another individual or by the accused is not clear to me.

Counts 3 and 4

1. Regarding the July 2023 allegations, the complainant's account to police was that upon arriving at Unit 121 of the Northcott apartments she spoke to Sarah, one of the occupants, now identified as Sarah Addy. The complainant's account was that she spoke to Ms Addy because she was fearful she would be further assaulted by the accused:

"Yeah and I come and seen her and told her what happened and I said like I've had enough I'm going to hand myself in tomorrow." (EX P, MFI 13 at 00:15:57)

1. George Haskill was also present in the unit when the police arrived.
2. When the complainant emerged from her hiding place she was visibly upset. This is apparent from the body worn camera footage. The submission made by the prosecution was that her distress was a result of her fear of the accused.
3. Neither Ms Addy nor Mr Haskill provided a statement. Neither was called in the prosecution case. The Officer in Charge gave evidence that she was not on duty at the time of the police attendance on 6 July 2023. She presumed that the Officers who were in attendance on that occasion took the particulars of both Ms Addy and Mr Haskill and resolved that they had nothing to contribute to the investigation. The Officer in Charge conceded she did not know what either prospective witness may have said.
4. Again, I would have expected both these people to have been called in the prosecution case. Did the complainant speak to Ms Addy about the brutality of the accused? Was the complainant distressed by being in the unit with the accused before the police attended? Was her distress only apparent when the police arrived? I must not speculate about these matters and the evidence is deficient in this respect.
5. Following the events on 6 July 2023, the complainant was again taken to hospital. As set out above in the agreed facts, this evidence is of very limited probative value in the circumstances. There were no photographs of the complainant as at 6 July 2023 in evidence.
6. Turning to the evidence of the complainant. The Court received into evidence her two recorded conversations with police on 14 March 2023 and her two recorded conversations with police on 6 July 2023. On each occasion the complainant was emotional. On each occasion she made clear allegations of serious acts of violence committed against her by the accused. When the complainant gave evidence, she was also plainly upset.
7. The evidence supports the conclusion that the complainant's life was in disarray in the relevant period. She had relinquished the care of her teenage daughter to her mother and had been using ice. She had been prosecuted earlier for criminal offences and as at 6 July 2023 she was on bail for other matters. She was, by July 2023, effectively homeless. On 6 July 2023 she knew (and seemed pre-occupied by) that she was in breach of her bail. Given her evidence was that she spent the second half of 2023 in custody, this appears to have been a well-founded concern.

8. The complainant's personal circumstances meant that she was very vulnerable to abuse. In the Crown's closing address, the point was made that the complainant's apparently inconsistent behaviour was 'classic behaviour of a victim of domestic violence trying to smooth things over. Trying to placate a person who there was a complex relationship of love and violence'. (T 144 P28) Conversely, those aspects of her life at that time also contribute to her manifest unreliability. That her life was chaotic, or because she may have been a domestic violence victim, does not change the standard of proof. I must not allow sympathy or emotion to influence my decisions in this case.
9. Before I could convict the accused on any count on the Indictment, I must be satisfied beyond reasonable doubt that the evidence that the complainant gave regarding any particular count is honest and reliable. On the evidence before me, there are real difficulties in reaching such a conclusion.
10. When the police first attended the premises on 14 March 2023 in response to the 000 call, the complainant and the accused were together in bed. On the complainant's account, this occurred in response to the police coming to the unit door. The presence of them both in bed was a deception, she stated, initiated by the accused, and one she participated in. [4]
11. The police made enquiry directly to the complainant whilst she was in bed as to whether there was anything arising that was of concern. The complainant replied that there was not. She made some obviously false statements, if her subsequent evidence was true, about the prevailing circumstances.
12. Of itself, this deception can be explained away, because of the complainant's feelings for the accused, her reluctance to get him into trouble and because he was physically present when her conversation with the police took place. Even so, there was no suggestion from the tone or manner in which the complainant spoke to the police that she was upset or traumatised. I have listened carefully to the exchange, recorded on EX D. Her evidence at trial was that the violence inflicted on her had occurred very shortly before the police arrived. In this regard I note that the 000 call was made at 3:57 AM. By 4:07 AM police were banging on the door of Unit 10 and at 4:10 AM police were inside the unit. (Exhibit B)
13. The complainant also injected into their initial conversation deliberate untruths, if her subsequent allegations are true, that seemed to go beyond what was called for, to satisfy the clear police concern for her welfare. For example: saying the earlier disturbance was between the accused and his nephew, that she was in bed with a migraine, that the accused had been asleep "for a bit", that "they've sorted their shit out now".

14. Later that morning, after the complainant had contacted the police and made the complaint about being assaulted by the accused and when the police were speaking with her, the accused returned to the unit and was arrested. He was unwell at that point, looked feverish in the recorded footage that also recorded him vomiting into a bowl provided to him by the police. He told the police he had boils and carbuncles all over his body. The complainant told the police he had been sick for several weeks.
15. As detailed above, at that point the complainant expressly raised with the accused her allegations about his behaviour earlier in the night. At no point did the accused adopt any of the allegations made by the complainant and instead denied them and appeared very surprised when police informed him that he was under arrest for assaulting the complainant earlier that day.
16. Strangely, given the content of the complainant's evidence of the violence of the accused towards her earlier, the body worn footage shows her being very affectionate and solicitous towards him in the period before he was removed from the unit by the police. As noted, at no time did she tell the accused that the police were in attendance because she had called them.
17. Only during the complainant's cross-examination did it become apparent she had signed a Statutory Declaration on 27 April 2023. As detailed earlier, the Statutory Declaration was made in support of an application for Supreme Court bail made by the accused.
18. During the complainant's evidence, she accepted she had written the Statutory Declaration (it was in handwriting) and explained she had done so because of direct threats made to her by the accused and by some of his friends in the community.
19. Despite the availability of intelligence from the Department of Corrective Services as to the content of telephone communications within the Correctional system, no record of any calls between the accused and the complainant are in evidence. The accused's evidence was that he had no telephone calls with the complainant whilst he was in custody. No evidence of threats by others was produced. The complainant was unable to even nominate names.
20. I consider that the complainant's making of the Statutory Declaration, together with her unconvincing vague evidence about why she did so, undermine to a significant degree her credibility.
21. On the evidence, the accused was released to bail. Precisely when this occurred was not particularised, however it was plainly before 6 July 2023. Thereafter, the accused and the complainant resumed their relationship.
22. In considering the evidence and arriving at findings of fact, I am required to exercise my common sense and experience of the world and of people. I am aware that it is not uncommon for people who are the subject of domestic violence to persist in a violent relationship, in the hope that things will turn around. It may be that that was complainant's motivation in returning to the relationship after the accused was released from custody

prior to July 2023. Nevertheless, the making of and contents of the Statutory Declaration and the resumption of the relationship, are at odds with the complainant's account of the events on 14 March 2023 that constitutes counts 1 and 2.

23. Turning to the events in July 2023, again the situation is that I need to be satisfied beyond a reasonable doubt of the honesty and reliability of the complainant's account before I can reach guilty verdicts on either count. During her cross-examination, the complainant was asked about the letters she had written to the accused whilst they were both in custody after 6 July 2023. Those letters (Exhibit 1) were often expressed in very affectionate terms. The complainant's evidence was that she wrote those letters for self-protection, having become aware that another female inmate had tried to contact the accused and offer to violently assault her. There was no evidence in the prosecution case that provided any support for this having happened. Having read the complainant's letters, I found the complainant's evidence on this topic very difficult to accept. There is so much that is intimate and apparently sincere in the letters that I, on balance, consider the complainant meant what she said in them. Her explanations in re-examination were not at all convincing. Examples of the complainant's statements in those letters include:

Extracts from a letter sent by complainant to the accused on Monday 25 September 2025:

"I hope you are well my baby I put the request in for our call but I have to get my Solicitor to put a thing in to get the charges dropped so we can write and call each other, I miss you so much my baby you are my whole world + more. I can't wait to get the fuck out of here my baby"

"Can't wait to see you and cuddle n kiss you make love to you fuck it's been so long, I miss your smell your touch I just miss all of you. Now I have so much to tell you when we get out babe. I hope you still love me like you used to"

"I think of you 24/7 baby I really hope you are ok + I hope you know how much you mean to me Wayne Thomas Green their aint no word in this world that can tell you how much I fucken love you.

Well I've going to love you and leave you for now.

Love and miss you my hubby...

Love J"

Extracts from a letter sent by complainant to the accused, undated:

..."you know what my baby I swear to fucken god that you and I this is our last fucken time it's both of our second time in this year enough is enough I want us to go through IVF and have our baby well I'm clean and I know you are doing ok. I miss your voice, your laugh, your smell your skin on my skin I just miss my hubby and kids straight out fuck. Just want to squeeze you so tight..."

"I will love you and leave you for now my baby.

You are my world, my life the reason I wake up everyday, you are the reason I breathe and walk everyday you are what makes me make my day to day life"...

"I just went and spoke to miss and I seen your pic I almost cried I told her to print a pic of you off for me but she said she can't LOL, and she just gave me a form that she will give to the govonor so we can make a phone call it's only one call but better then nothing."

"I'm doin it easy as in here my babe. Want to see if I can get moved to clarence be mad if you and I both could hey my baby?"

"Look my baby this is true as I sit here I want to ask you WILL YOU MARRY ME I WANT YOU TO BE MY MAN UNTIL I TAKE MY LAST BREATHE"...

..."have you constantly on my mind, I love you so much and I'm so lucky to have you and call you all mine."

..."you have no idea what I would do just to hear your sexy voice one more time. But it's ok my baby we will be free soon then it's back to just me and you. I [love heart] you Wayne Thomas Green."

"Babe miss gave me a form so I can fill out so we can have a phone call I can't wait I love you, I hope you love me just as much I hope you want to marry me."

Extracts from a letter sent by complainant to the accused, undated:

"Love and miss you so much my baby I don't know if you got your first letter off me, Im going to ask Mon to send us both pics ok my sexy man, babe you know you are my king, I want to know when we both get out of jail can we move away from the city and start all over again because we both know we aint going to last together in that dead whole, and I aint losing you for nothing you are my world my love my life my whole reason I wake up and breathe everyday you are the man I want to wake up beside you until the day I die..."

1. The accused gave evidence in the trial. I have regard to my earlier direction in this respect. He has taken on no onus and even if I was to reject his evidence I must put it to one side and consider the prosecution case. He denied ever behaving in a violent way towards the complainant. He denied pressuring the complainant from custody, or speaking to her by phone or arranging for someone else to do so. (T 133) He was not shaken in cross-examination. The only anomalous evidence he gave was that when in the Molly Malone Tavern's poker machine room he had thrown his last \$20 in the direction of the complainant and had done so because he was irritated that she had spent all of their remaining money on the poker machines. The footage clearly shows that the object thrown was a cigarette lighter and not a \$20 note. The complainant had said it was a cigarette lighter and she was correct. This inconsistency in the accused's evidence does not impact on his credibility more generally. As he observed, "But it ain't make me a woman-basher." (T 135.02)

Conclusion

1. There is nothing qualitatively different about the evidence that the complainant gave in support of each count on the indictment. The complainant's evidence may be entirely accurate, however, for the reasons set out above, I have substantial reservations about her honesty and her reliability with regard to each count on the Indictment. Additionally, having regard to the Liberato direction, there is a reasonable possibility that the accused's evidence is true.
2. Applying the onus and the standard of proof, I am not satisfied that any count on the indictment has been established beyond reasonable doubt.
3. I do not know where the truth lies in this case and because of that uncertainty I must return verdicts of not guilty on each count.

Verdict

1. Regarding Count 1, I return a verdict of not guilty.
2. Regarding Count 2, I return a verdict of not guilty.
3. Regarding Count 3, I return a verdict of not guilty.
4. Regarding Count 4, I return a verdict of not guilty.

Endnotes

1. Ex B records the informant as Juliana Leggeri and records a mobile phone number. As the caller was a male it is not clear why this person is identified as the informant. No evidence was adduced in the trial to explain this.
2. The 000 call was made at 3:57AM. By 4:10AM police were in the unit speaking to the complainant. Ex B
3. The accused's appearance was captured by the body worn camera footage. He was obviously a large, well built man.
4. I note that despite the accused giving evidence, this aspect of the complainant's evidence was not raised with him by the Crown Prosecutor.

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Decision last updated: 07 February 2025

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Prepared on 26 October 2026 · Esheria