HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 11 Nov 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	A40/2021
File Title:	Bromley v. The King
Registry:	Adelaide
Document filed:	Form 27A - Applicant's submissions
Filing party:	Applicant
Date filed:	11 Nov 2022

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN: DEREK JOHN BROMLEY
Applicant

and

THE KING
Respondent

APPLICANT'S SUBMISSIONS

Part I: Suitable for Publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The issues raised by this appeal are whether:
   (a) The Court of Criminal Appeal erred in finding that the new psychiatric and psychological evidence was not "compelling" because it was not "highly probative in the context of issues in dispute at the trial of the offence."
   (b) The Court of Criminal Appeal erred in finding that it was not in the "interests of justice" to consider the appellant's evidence on the basis that such evidence was not "compelling" when viewed in light of the respondent's additional evidence.

Part III: Section 78B Notices

3. The appellant has considered whether notices should be given in compliance with s 78B of the *Judiciary Act* 1903 (Cth) and is satisfied that such a notice is not necessary.

Part IV: Reasons for the Judgement below

4. The medium neutral citation for the judgement, below, is *R v Bromley* [2018] SASCFC 41.

Part V: Statement of relevant facts

5. This statement of relevant facts has been limited to allow a general understanding of the circumstances in which the legal issues arise. This is because many of the key factual issues and the evidence concerning them are discussed in some detail as part of advancing the legal argument.

6. The appellant sought permission to appeal a second time, pursuant to s. 353A of the *Criminal Law Consolidation Act 1935* (SA) ("the Act"), against his conviction for murder.

7. In the early hours of 9 April 1984, the body of Stephen Docoza was found floating in the River Torrens, directly under the Morphett Street Bridge.[1]

8. In the first trial of this matter against the appellant and his co-accused, John Karpany, the prosecution's central witness was Gary Carter, who had "serious mental health problems."[2] Carter was suffering from schizoaffective disorder at the time of the alleged offending.[3] This led to his being taken to Hillcrest Hospital on the day following that alleged offending. Carter remained at Hillcrest for about three months although he escaped a number of times to visit members of his family.[4]

9. Carter gave evidence that, on the evening of 3 April 1984, at around midnight, Karpany and he travelled by taxi to Hindley Street. Carter said that, outside of Jules Bar in Hindley Street, he saw the appellant and Mr Docoza both of whom entered the taxi with Carter and Karpany. Carter said that the four men left the taxi at the western end of Hindley Street and walked from there to the banks of the River Torrens, near the Morphett Street Bridge.[5]

10. Carter said that, on the bank of the River Torrens, he saw the appellant demand sex from Docoza, who refused.[6] Carter said that, after this, the appellant and Karpany kicked and punched Docoza and that Docoza rolled into the river.[7] Carter said that he saw the appellant ducking Docoza's head under the water. Carter said that the appellant struck Docoza with a barbell which Carter had been carrying in his bag. Carter said that the appellant and Karpany stripped Docoza naked.[8]

11. Carter claimed to have tried to assist Docoza and was frightened. He departed the scene leaving the other three men at which time he said that Docoza was still conscious. Carter said that he obtained a drink of water at a pie cart and went up on the Morphett Street Bridge.[9]

---

[1] *R v Bromley* [2018] SASCFC 41 at [1]
[2] *R v Bromley* [2018] SASCFC 41 at [3]
[3] *R v Bromley* [2018] SASCFC 41 at [18 b.]
[4] *R v Bromley* [2018] SASCFC 41 at [76]: the timing of one of these escapes is relevant to one of the factual matters in dispute.
[5] *R v Bromley* [2018] SASCFC 41 at [9]: the Court of Appeal takes its summary of the facts from the judgment of King CJ in the Court of Appeal on the first appeal to that Court. The original judgment is reported at (1985) 122 LSLS 454.
[6] *R v Bromley* [2018] SASCFC 41 at [9]
[7] *R v Bromley* [2018] SASCFC 41 at [9]
[8] *R v Bromley* [2018] SASCFC 41 at [9]
[9] *R v Bromley* [2018] SASCFC 41 at [9]

12. The appellant was seen on the Morphett Street Bridge by police. He was later sighted by police in the area below the bridge. He ran away and hid (in a cactus bush) before being located again and questioned. He was allowed to leave. While this interaction was going on, Carter approached a police officer and spoke to him.

13. The appellant was identified by the taxi driver, from photographs, on the second attempt, as being one of the people who got into the taxi outside of Jules Bar. But the taxi driver described the clothes worn by the person he identified in a way that was very different to the clothes that the appellant was wearing that evening and early morning.[10]

14. The appellant's position has always been that he was not present with the other three men at any time, that evening or morning. He has maintained his innocence, throughout.

Part VI: Outline of argument

Introduction and Background

15. This Part identifies and outlines the argument of the appellant in this appeal. This Part deals with the following issues:

(a) the procedural history and status of this application for special leave;

(b) the relevant legal principles concerning s 353A;

(c) identification and analysis of the flaws in the Court of Appeal's approach;

(d) a response to the argument Advanced by the Respondent in the Special Leave hearing; and

(e) a discussion of the new pathological evidence and other evidence.

Procedural History and Status of the Application for Special Leave

16. The decision the subject of this appeal was the refusal by the Court of Appeal to grant permission to bring a further appeal pursuant to s. 353A of the Act.

17. Under the Act, the Court of Appeal may grant permission if it is satisfied that there is fresh and compelling evidence that should, in the interests of justice, be considered on an appeal.[11] The Court may grant the appeal if it thinks there was a substantial miscarriage of justice.[12]

---

[10] The evening of 3 April 1984 going into the morning pf 4 April 1984.
[11] The Act, s 353A(1)
[12] The Act, s 353A(3)

18. The application for special leave[13] raised seven special leave questions[14] focussed upon the finding by the Court of Appeal that two bodies of evidence, referred to as the new psychiatric and psychological evidence and the new pathological evidence.

19. The Court of Appeal had found that neither body of evidence was compelling because it was not highly probative in the context of the issues in dispute in the trial. The Court of Appeal also, if necessary, would have found that it was not in the interests of justice to consider the applicant's evidence because it was not compelling in the light of similar facts evidence (which the Crown did not call at the trial but sought to rely upon on the application for permission to bring a second appeal).

10 20. On the hearing of the application for special leave, this Court referred the application for special leave to appeal to the Full Court of this Court for argument, as on an appeal, limited to the ground whether the fresh psychiatric evidence is compelling and whether it was in the interests of justice that it be considered on the appeal.

21. The effect of the Court's referring order is that, for the purpose of considering whether special leave should be granted, only the new psychiatric and psychological evidence may be relied upon by the appellant as evidence meeting the three essential conditions to be established before the Court of Appeal has jurisdiction to hear a second appeal, namely, that the evidence is fresh within the meaning of s 353A(6)(a); compelling within the meaning of s 353A(6)(b); and should, in the interests of

20 justice, be considered on an appeal.[15] In Keogh (no 2), the Court of Appeal referred to the three requirements as constituting one essential condition which it referred to as "the jurisdictional fact".[16]

22. It may observed, however, that, once the jurisdictional fact is satisfied, on the hearing of any subsequent appeal, it will be open to the Court, consistent with the practice in

---

[13] **Amended Core Appeal Book ("CAB"), page 276**

[14] The seven special leave questions were:

(a) Whether the Court of Appeal erred in finding that the new psychiatric and psychological and new pathological evidence (whether looked at together or separately) was not compelling because it was not highly probative in the context of issues in dispute at the trial of the offence?

(b) Whether the Court erred in finding that it was not in the interests of justice to consider the appellant's evidence because it was not compelling when viewed in light of the Respondent's additional evidence which was said to have established that there was no significant possibility that a jury in the trail would have acquitted the applicant, if the jury were acting reasonably?

(c) Whether the Court erred in receiving and assessing further evidence from the Crown (that is, evidence which was not tendered at the trial despite being known by, and available, to the Crown) which further evidence was, in any event, neither fresh nor compelling?

(d) Whether the Court erred in finding that, if permission to appeal were granted, the applicant had not demonstrated that there was a substantial miscarriage of justice?

(e) Whether the Court's decision resulted in a miscarriage of justice?

[15] *R v Keogh (no 2)* ("Keogh (no 2)") (2014) 121 SASR 307, 330 [80]

[16] Keogh (no 2) at 330 [80]

all other criminal appeals, to receive further new evidence from the appellant on the more flexible basis articulated in *Ratten v The Queen* ("Ratten").[17] [18]

23. In Ratten, Barwick CJ, with whom McTiernan, Stephens and Jacobs JJ agreed, said that great latitude must be given to an accused in determining whether the accused could have, by reasonable diligence, have had the evidence at his trial and that, if new evidence, though it may not be fresh evidence, causes the court to entertain a doubt that the guilty verdict cannot stand, the court may proceed to set aside the verdict.[19] The Chief Justice went on to say that if new material, whether or not it is fresh evidence, convinces the appellate court that there has been a miscarriage of justice, the verdict will be quashed without more.[20]

24. The Court of Appeal in Keogh (no 2) also pointed out that the drawing of a distinction between fresh evidence according to the strict statutory definition and fresh or otherwise admissible evidence new evidence according to the Ratten approach will be seen as artificial and not workable in practical terms.[21]

25. The matter before the Court is an application for special leave limited to consideration of whether the fresh psychiatric evidence meets the criteria of s 353A.

26. And, as stated, the decision which is the subject of the application for special leave is a refusal to grant permission to bring a further appeal pursuant to s. 353A of the Act.

27. Notwithstanding, these submissions address for the Court the content and relevance of the new pathology evidence (and certain other evidence) which, although not the subject of the special leave application, as referred, in the strict sense, would, it is submitted, be relevant on any second appeal to the Court of Appeal and, depending on the terms of any grant of special leave, may be relevant on an appeal in this Court. The evidence, capable of being received according to Ratten principles on any subsequent appeal, is also relevant on the question of whether this application is a suitable vehicle for a grant of leave. The proposition that the new pathological evidence is incapable of being the subject for an application for permission for a second appeal having been embraced by the respondent, a question of general importance concerning that issue also arises.

---

[17] (1974) 131 CLR 510
[18] Keogh (no 2) at 348 [143]
[19] *Ratten v The Queen* (1974) 131 CLR 510 ("***Ratten***") at 517-518 per Barwick CJ cited in Keogh (No 2) at 335 [99] per the Court.
[20] *Ratten* at 517-518 per Barwick CJ cited in Keogh (No 2) at 335 [99] per the Court.
[21] Keogh (No 2) at 347 [139] per the Court

Principles arising from s 353A

28. Evidence is compelling if it is reliable, substantial and highly probative in the context of the issues in dispute at the trial.[22]

29. Section 353A manifests an intention that finality yield in the face of fresh and compelling evidence which, when taken with the evidence at the trial, satisfies the Court of Appeal that there has been a substantial miscarriage of justice.[23]

30. "Reliable", "substantial" and "highly probative" are to be given their ordinary meanings.[24] The concepts have their own work to do but there will commonly be overlap in the satisfaction of each.[25]

31. Reliability requires the evidence to be credible and provide a trustworthy basis for fact finding.[26]

32. Substantiality requires that the evidence be of real significance or importance with regard to the matter it is tendered to prove.[27] The focus of 'highly probative', in the context of the issues in dispute at the trial, is upon the conduct of the trial. In addition, fresh evidence that discloses a line of defence that was not apparent at the trial may be 'highly probative' because it bears on proof of guilt.[28]

33. Commonly, where fresh evidence is compelling, the interests of justice will, *ipso facto*, favour the consideration of the evidence on an appeal. Circumstances, such as an intervening public confession of guilt, may favour a different result. The long-standing nature of a conviction does not provide a reason why, in the interests of justice, fresh and compelling evidence should not be considered on a second or subsequent appeal.[29] It is important not to conflate the interests of justice with the determinative issue in the appeal[30] which is the question whether the appellant has established, on the balance of probability, that the additional evidence, taken with the evidence adduced at the trial, gives rise to a significant possibility that a jury, acting reasonably, would have acquitted.[31]

---

[22] The Act, s 353A(6)
[23] *Van Beelen v The Queen* (2017) 262 CLR 565 ("***Van Beelen***") at 574 [19] and 576 [27]; [2017] HCA 48, [19] and [27]
[24] *Van Beelen* at 576 [28]
[25] *Van Beelen* at 574 [28]
[26] *Van Beelen* at 574 [28]
[27] *Van Beelen* at 574 [28]
[28] *Van Beelen* at 577 [28]
[29] *Van Beelen* at 578 [30]
[30] *Van Beelen* at 578 [31]
[31] *Van Beelen* at 578 [32]

Compelling: The Court of Appeal's flawed analysis of the new psychiatric and psychological evidence

The Court of Appeal's Approach

34. Five independent experts provided the new psychiatric and psychological evidence.[32]

35. The new psychiatric and psychological evidence is to the effect that it has become known, since 1984, that the evidence of people like Carter, suffering from schizoaffective disorder is much less reliable than was known in 1984. Persons suffering from schizoaffective disorder are likely to suffer from memory defects and be vulnerable to suggestion. Though such persons can give accurate evidence on occasion, whether their evidence on a particular point is true or not can only be established by independent corroboration.[33]

36. In this regard, the summary of Dr Brereton's[34] evidence states the issue, clearly. There was an extremely high likelihood that Mr Carter's account of events was inaccurate in some detail and that there is no way of telling an accurate recollection from an inaccurate one.[35] Almost the entirety of Mr Carter's evidence would have to be corroborated before his account of events could be considered reliable.[36] By way of example, a pathologist's evidence could corroborate the nature of an assault but Mr Carter's evidence as to who inflicted the assault could not be, on that basis, considered reliable.[37] Dr Brereton also stated that the higher the emotion involved in the event, the lower the likelihood of accurate recall.[38] Dr Sugarman emphasised Mr Carter's vulnerability to suggestion and his anxiety about being interviewed by police[39] which interviews occurred when the Clerk of the Court was being told that Mr Carter was not fit to attend court.[40] Dr Sugarman, who had reviewed the hospital file,[41] also emphasised that the statements by Carter to hospital staff about events on

---

[32] Two psychologists, Professor Ian Coyle and Dr Roy Sugarman, and three psychiatrists, Dr Richard Furst, Dr Stephen Hook and Dr William Brereton: *R v Bromley* [2018] SASCFC 41 at [37] (**CAB page 137**)
[33] A summary of this evidence is set out in the reasons at *R v Bromley* [2018] SASCFC 41 at [38] (**CAB page 137**). Appendix A to the reasons sets out the evidence in greater detail, starting at [511] at (**CAB page 265**).
[34] Dr Brereton was engaged by the Crown to provide a report but called by the appellant before the Court of Appeal. The summary of his evidence commences at *R v Bromley* [2018] SASCFC 41 at [543] (**CAB page 272**).
[35] *R v Bromley* [2018] SASCFC 41 at [550] (**CAB page 273**). See, also, Professor Coyle at [513]-[515] (**CAB pages 270-1**); Dr Furst at [529]-[532] (**CAB pages 269-270**).
[36] See Dr Brereton's written report at paragraph 24.23 vol6/2401 for a clearly articulated statement of this evidence.
[37] *R v Bromley* [2018] SASCFC 41 at [551] (**CAB page 273**)
[38] *R v Bromley* [2018] SASCFC 41 at [554] (**CAB page 274**)
[39] *R v Bromley* [2018] SASCFC 41 at [520] (**CAB page 267**): Mr Carter said to police that he wanted to join them because he couldn't cheat them. Dr Brereton considered this to be a strong indicator that Carter was a person susceptible to giving an incorrect record of events: *R v Bromley* [2018] SASCFC 41 at [558] (**CAB page 274**).
[40] *R v Bromley* [2018] SASCFC 41 at [521] (**CAB pages 267-8**)
[41] *R v Bromley* [2018] SASCFC 41 at [519] (**CAB page 267**)

the river bank bore little in common with his evidence.[42] Dr Brereton says of such accounts of the incident which were clearly wrong that they demonstrate that Carter's understanding and recall of the incident was directly affected by psychotic symptoms.[43] Dr Hook emphasises, in terms of suggestibility, that the structured nature of Carter's police statements is unlikely to match what Mr Carter was saying spontaneously at the time.[44] Dr Hook also notes that Mr Carter was likely to want to minimise his involvement as far as possible.[45]

37. The response of the Court of Appeal to the new psychiatric and psychological evidence was to set out Carter's evidence in detail.[46] The Court of Appeal then set out that part of the evidence in the trial that was said to support Carter's evidence.[47] The Court of Appeal concluded that, because the experts did not consider all of the supporting evidence for Carter, the weight of their evidence was diminished.[48]

38. On the subject of suggestibility, the Court of Appeal set out evidence of statements by Carter at various times to various people[49] without considering the many ways in which Carter's version of events changed. The Court of Appeal, again, criticised the failure of the experts to consider all such out of court statements by Bromley and concluded that the phenomenon of suggestibility did not happen.[50]

39. The Court of Appeal found that the new psychiatric and psychological evidence reliable and substantial[51] but not highly probative in the in the context of the issues in dispute in the case. For that reason, it was not compelling.[52]

The Flaws in the Court of Appeal's Approach

Support Relates to Non-incriminatory Evidence

40. In the present case, the Court of Appeal conducted a flawed analysis of the evidentiary impact of the additional expert psychiatric and psychological evidence adduced by the appellant in the context of the evidence and the issues at the trial.

---

[42] *R v Bromley* [2018] SASCFC 41 at [522] (**CAB page 268**). The Court of Appeal sets out these statements (via hospital notes) at [176]-[185] (**CAB pages 173-177**). The statements before the body of Mr Docoza was found and reported cast Carter in an heroic light "saving a drug addict". After the newspaper reports of the body being found, the story changed to him being an innocent witness to murder and actual rape.
[43] Transcript of appeal "disputed facts hearing", page 229, lines 3-24 (**Book of Further Materials** ("**BFM**") **v3 p960**)
[44] *R v Bromley* [2018] SASCFC 41 at [537] (**CAB pages 270-1**): see, also, evidence of Dr Coyle (Transcript of appeal "disputed facts hearing", pages 40-44 (**BFM v4 pp.771-775**)
[45] *R v Bromley* [2018] SASCFC 41 at [537] (**CAB pages 270-1**)
[46] *R v Bromley* [2018] SASCFC 41 at [48]-[76] (**CAB pages 146-152**)
[47] *R v Bromley* [2018] SASCFC 41 at [77]-[135] (**CAB pages 147-161**)
[48] *R v Bromley* [2018] SASCFC 41 at [136]-[140] (**CAB pages 161-162**)
[49] *R v Bromley* [2018] SASCFC 41 at [152]-[191] (**CAB pages 164-180**)
[50] *R v Bromley* [2018] SASCFC 41 at [192]-[196] (**CAB pages 180-181**)
[51] *R v Bromley* [2018] SASCFC 41 at [376] (**CAB page 222**)
[52] *R v Bromley* [2018] SASCFC 41 at [377]-[378] (**CAB page 222**)

41. The new psychiatric and psychological evidence possessed the requisite high probative value given that the issue of the reliability of the witness Carter's evidence was in dispute at the trial and was crucial to the Crown case.[53] The importance of his evidence to the Crown case is evident from the fact that he was the only witness to put the appellant at the scene of the offending in this case.

42. As has been observed, the result of the analysis was to assert that the new psychiatric and psychological evidence was of diminished evidentiary effect because Carter's evidence was corroborated in significant respects by other evidence.[54]

43. The problem with this reasoning is that the supporting evidence on which the Court of Appeal relied was not evidence which was incriminatory of the appellant.[55] It cannot be said, in any way, to put the appellant at the scene of the offending. Nor can it be said even to put the appellant together with witness Carter.[56] Relevant examples include:

(a) the evidence of Edith Carter (said to corroborate Carter's evidence) that:

(i) Carter had been in Hillcrest Hospital in 1983, had mental health problems, had been on medication and used to carry around a bag with a sheepskin rug in it;[57]

(ii) Karpany was sleeping in her grandson's room that evening;[58]

(iii) about 2.00am or 3.00am, she heard Carter and Karpany leave her home.[59]

(b) the evidence of Beverley Carter that Karpany arrived back at her home on the evening of 3 April 1984 and was very intoxicated and he slept in her niece's bed. Then she thought she heard people leaving at between 1.00am and 2.00am the next morning;[60]

---

[53] As the learned trial judge said, in summing up, "… as the Crown, Mr Martin, put to you, that his evidence is so crucial to the Cown case". (**CAB pages 6-7**). King CJ, in the first appeal to the Court of Appealsaid: "The case against Bromley depended to a considerable extent upon the evidence of Gary Carter.": cited at *R v Bromley* [2018] SASCFC 41, [10] (**CAB page 125**)

[54] The heading in the Court of Appeal's reasons is: "The Trial Evidence Supporting Carter's Evidence". (**CAB page 147**, immediately before [77])

[55] This is of crucial significance in the light of the new psychiatric and psychological evidence a key thrust of which is that, while Carter's evidence could be accurate on occasion, it was not reliable. That is, even if the evidence had been corroborated in all but one respect, Carter's mental status was such that it could not be regarded as reliable on that remaining matter. See paragraphs [36] and [44], for example.

[56] The one exception to this is Mr George, the taxi driver's, identification, after the fact, of the appellant from photographs on the second occasion. The problem with Mr George's evidence is that it also tended to contradict Carter and exculpate the appellant because it described the person in the taxi relied on by the Crown as being the appellant as dressed in a dapper manner which clearly contradicted the way in which the appellant was dressed on that evening. The Crown case depended on Carter's uncorroborated evidence contradicting Mr George on this point. See below at paragraphs [51]-[53]

[57] *R v Bromley* [2018] SASCFC 41 at [77] (**CAB page 147**)

[58] *R v Bromley* [2018] SASCFC 41 at [78] (**CAB pages 147-8**)

[59] *R v Bromley* [2018] SASCFC 41 at [79] (**CAB page 148**)

[60] *R v Bromley* [2018] SASCFC 41 at [80] (**CAB page 148**)

(c) the evidence supporting a conclusion that Karpany, although not identified by George, was in George's taxi with Carter traveling to Hindley Street in the city;[61]

(d) the evidence supporting a conclusion that the deceased, Docoza, was in Hindley Street and entered the taxi with another person;[62]

(e) the questionable identification evidence of the taxi driver (Mr George) as to the presence of the appellant in his taxi from Hindley Street;[63]

(f) the evidence of Detecetive Zeuner as to a wall of the nature and in the position described by Carter, that could be climbed over;[64]

(g) the evidence said to corroborate Carter giving the deceased tablets;[65]

10 (h) evidence of the desert boots and barbell being found near to where Carter described the attack occurring;[66]

(i) the evidence, including the evidence of Mr George (the taxi driver), said to corroborate the time of death of the deceased;[67]

(j) the evidence of the deceased wearing desert boots and being stripped of his clothing;[68]

(k) the 3 skeins of evidence said to corroborate Carter's evidence of a violent attack having occurred (which will be discussed in more detail below), in particular, the evidence of Margaret Bromley concerning the state of the appellant's clothing and shoes;[69]

---

[61] *R v Bromley* [2018] SASCFC 41 at [92]-[96] (**CAB pages 150-1**)
[62] *R v Bromley* [2018] SASCFC 41 at [97]-[101] (**CAB pages 151-3**)
[63] *R v Bromley* [2018] SASCFC 41 at [102]-[107] (**CAB pages 153-5**). Note that this evidence is an exception to the observation, above, that none of the supporting evidence was capable of tending to incriminate the appellant. However, as already noted, George's evidence contradicts Carter's evidence more than it supports it. The Court of Appeal documents George's photo identification on a second set of (coloured) photos ([103]) and also refers to discussions in the taxi about an occupant having got out of jail ([104]-[106]). However, the Court of Appeal notes but leaves to another part of the reasons wrestling with George's descriptions of the person said to be Bromley as "dapper" and "very smartly dressed" and the details of that clothing.
[64] *R v Bromley* [2018] SASCFC 41 at [108] (**CAB page 155**)
[65] *R v Bromley* [2018] SASCFC 41 at [109]-[111] (**CAB pages 155-6**)
[66] *R v Bromley* [2018] SASCFC 41 at [112]-[114] (**CAB page 156**)
[67] *R v Bromley* [2018] SASCFC 41 at [115]-[121] (**CAB pages 156-8**)
[68] *R v Bromley* [2018] SASCFC 41 at [122]-[125] (**CAB pages 158-9**): the Court of Appeal notes ([125]) that Carter's description of a fully naked body of the deceased is contradicted by the body being found with a shirt and windcheater on the top half. The Court of Appeal passes this off by saying that it corroborates Carter's evidence of a violent attack involving the removal of clothing and shoes. The discovery of the partially naked body shows that Carter's evidence was wrong on a key point of detail. It may be observed, also, that much of what corroborates Carter's evidence places Carter and Karpany, not the appellant, at the scene of the violence. This takes on some extra significance in the light of an early statement by Carter to investigating police that, since he couldn't cheat them, he should join them. See *R v Bromley* [2018] SASCFC 41 at [520] (**CAB page 267**).
[69] *R v Bromley* [2018] SASCFC 41 at [127]-[131] (**CAB pages 159-160**): it may be noted that there are alternative explanations both for the police officers' observation of what they thought was blood and Ms Bromley's observations of mud on the appellant's clothing. Importantly, Dr Manock's evidence relied on by the Court of Appeal is questioned strongly by the new pathological evidence. The new evidence contradicts,

(l) the evidence corroborating Carter's evidence that he obtained a glass of water from the pie cart;[70]

(m) the evidence said to support Carter having seen the police approaching the appellant and speaking to him;[71] and

(n) the evidence supporting the fact that Carter went to Victoria Square with Father Pearson, the following day, and was subsequently taken to Hillcrest.[72]

44. None of the above evidence, in any way, puts the appellant at the scene of the offending. While it might demonstrate that Carter's evidence on some matters is corroborated, it does not corroborate his evidence on the only issue that matters in this case – the guilt of the appellant. As discussed below, the preponderance of the new psychiatric and psychological evidence is such that Carter cannot be considered reliable on anything without independent evidence corroborating the relevant fact sought to be proved. It follows that evidence corroborating Karpany and Carter's travel to Hindley Street, together, in a taxi or placing both Carter and Karpany, together, at the scene of a violent attack, is irrelevant in the light of the new medical evidence concerning Carter's lack of reliability. By taking the approach that it did, the Court of Appeal overstated the probative effect of what it said was evidence corroborating Carter. This is particularly the case in those areas where the evidence said to corroborate also reveals inaccuracies in and contradictions of the Carter evidence.

Evidence Contradicts Carter More than it Supports

45. The Court of Appeal's analysis appears to ignore or overlook those aspects of the so-called corroborating evidence which indicated inaccuracies in Carter's attempts at recollection.[73] The Court of Appeal finds corroboration of Carter in the contents of

---

more strongly, Carter's evidence about an attack by the barbell than Dr Manock and Dr Manock's evidence as to bruising, especially, as to timing, is challenged more strongly than the Court of Appeal observed (131].

[70] *R v Bromley* [2018] SASCFC 41 at [132] (**CAB page 160**): note that Mr George, the pie cart operator, gives times and dates different to Carter's evidence.

[71] *R v Bromley* [2018] SASCFC 41 at [133] (**CAB page 160**): note that Carter's description of the interaction with police is markedly different to the police evidence.

[72] *R v Bromley* [2018] SASCFC 41 at [134]-[135] (**CAB page 161**): Carter's evidence about his reasons for speaking to Carter is also contradicted by the evidence of the police officers who observed Carter with his bag when they spoke to him in the early morning near Morphett Bridge.

[73] For example, Carter had himself on the bridge before Karpany and the appellant came out from the Torrens and walked towards him (trial transcript, page 167 (**BFM v1 p212**)). On Carter's account, the police stopped the police car and asked Carter whether he had seen two Aboriginals with jackets on (**BFM v1 p213**). This is when the appellant is said to have run away (**BFM v1 p213**). Then he saw other police officers come up the road and saw the appellant who was hiding get in the car (trial transcript, page 168 (**BFM v1 p213**). The police did not speak to the appellant (trial transcript, page 169 (**BFM v1 p214**)). The police asked me my name and I said I am going home (trial transcript, page 169 (**BFM v1 p214**)). Karpany had my bag on his shoulder and he kept it (trial transcript, page 170 (**BFM v1 p215**)). The evidence of the police officers is very different. The police officers drove past the appellant walking towards the city on two occasions before, on

Carter's bag when it was found by council gardener, Hrybyk, on the morning of Friday, 6 April 1984.[74] However, since Carter was seen by police on the morning of 4 April in possession of his bag,[75] and he had absconded from hospital immediately before the bag was found,[76] a strong possibility arises from the objective evidence that Carter had left his bag in the gardens at some point not long before it was found.

46. The Court of Criminal Appeal, in discounting the probative value of the new psychiatric and psychological evidence, relied on what it called support of Carter's evidence from pie cart operator, Arthur George.[77] Mr George did describe an incident of a young person getting a drink of water in the manner described by Carter. Although this was potentially corroborative of this aspect of Carter's evidence, the Court failed to note that Mr George had this on a different morning, Thursday, 5 April or Friday, 6 April, as opposed to Wednesday, 4 April 1984,[78] and at the wrong time of the morning, between 2 and 2.30 am,[79] when the evidence of the taxi driver, Mr George, had him dropping off his passengers, including Carter, much later at 3.30 am.[80] Constable Burden recorded her time of interacting with the

---

the third occasion, he had disappeared. On no occasion, did they see three people as would have been the case if Carter's version were correct (trial transcript, pages 334-336 (Burden) ((**BFM v1 p379-381**)). The Appellant was allowed to leave by police officers. At no time did he get into the police car (trial transcript, page 345 (Burden) (**BFM v1 p390**)). Significantly, when Carter spoke to police, he still had his bag with him (trial transcript, page 459 (Griggs) (**BFM v2 p509**)). Carter claimed to have asked Karpany where his bag was the next day in Victoria Square in the city (trial transcript, pages 171-172 (Carter) ((**BFM v1 p216-217**)) which is inconsistent with his evidence that he went straight home after talking to police (trial transcript, page 170 (**BFM v1 p215**)) and the police observations that he had his airways bag with him when they spoke to him. Carter's evidence is also rendered unlikely by the contrast between his claim that he had met the appellant, just once before, in Victoria Square, years earlier (trial transcript, pages 152 (**BFM v1 p197**) and 245 (**BFM v1 p290**)) and Mr George, the taxi driver's evidence that Carter went across the street from the taxi to outside the nightclub, Jules, and embraced the dapper person who, on the Crown case, was the appellant (trial transcript, page 376 (**BFM v1 p421**) and Court of Criminal Appeal's reasons at [83] (**CAB pages 148-9**)). Another example is the state of undress of Mr Docoza's body. In the Court of Criminal Appeal's reasons at [122]-[126] (**CAB pages 158-9**) the Court treats Carter as vindicated by the presence of desert boots and a body naked from the waist down but appears to disregard the contradiction of Carter's evidence which was that Mr Docoza had been totally naked.

[74] *R v Bromley* [2018] SASCFC 41, at [109]-[111] (**CAB pages 155-6**): Note that Mr Hrybyk's evidence is at trial transcript, page 493 (**BFM v2 p542**). The prosecutor asks the question as Friday, 7 April 1984 but Friday was 6 April. 6 April, as discussed, below, was the same day that Carter absconded from hospital and turned up at his sister's place.

[75] Trial transcript, page 459 (Officer Griggs) (**BFM v2 p509**)

[76] See trial transcript at page 129 (Ms JR Carter) (**BFM v1 p174**), 188 (Carter) (**BFM v1 p233**) and pages 493-496 (Hrybyk) (**BFM v2 p542-545**). Hrybyk stated that he had worked in that area of the gardens on the preceding two days. Mr Pyman's evidence refers to a note of an escape at 9 am on Friday, 6 April 1984: trial transcript: page 512 (**BFM v2 p561**).

[77] *R v Bromley* [2018] SASCFC 41, at [132] (**CAB page 160**)

[78] Trial transcript, pages 330-331 (**BFM v1 p375-376**)

[79] Trial transcript, page 331 (**BFM v1 p376**)

[80] Trial transcript, page 415 (**BFM v1 p460**). On Carter's account, he had walked to the river, witnessed a murder and walked to the pie cart which puts the time a long time after 2.30 am.

appellant as 4.25 am.[81] In addition, Officer Moyle was parked in the vicinity of the pie cart shortly before 4 am but appears not to have observed Carter.[82]

Three Skeins of Evidence

47. The Court of Appeal described three skeins of evidence which supported Carter's evidence of a violent assault.[83] First, the reasons rely on observations by Officers Burden and Griggs that the appellant appeared to have fresh blood on his shirt, hand and lip.[84] It was the railway police officer, Moyle, who observed blood on the back of the appellant's hand and some beneath his lip.[85] But, immediately before that observation, the appellant was stuck in a cactus bush and had to be assisted to get out.[86] While no forensic evidence was adduced to prove the presence of blood,[87] any blood on the appellant was likely a result of scratches from the cactus bush. The Court of Criminal Appeal describes the appellant as having "blood from the deceased on his clothing"[88] when seen by Police Officers Griggs and Burden. There was no forensic or other evidence to that effect.

48. The second skein of evidence relied on in the reasons[89] is that Margaret Bromley observed the appellant washing his clothes[90] and observed red clay on the jacket[91] and mud on the trousers.[92] Getting mud or clay on trousers and a jacket can clearly happen from hiding in bushes. And washing clothes which have mud or clay on them is not evidence of consciousness of guilt.

49. The third skein of evidence is said to be Dr Manock's evidence of bruises which, the Court of Appeal says, is not wholly disputed by the new pathological evidence.[93] (Questioning Dr Manock's timing of the bruising is an important thrust of the new pathological evidence.) However, the reasoning of the Court of Appeal, in its three skeins discussion, mixes up two areas of evidence (suspected blood and clothes washing) directed to inculpating the appellant (which are not probative in that

---

[81] Trial transcript, page 345 (**BFM v1 p390**)
[82] Trial transcript, pages 474 (**BFM v2 p474**) and 482-483 (**BFM v2 pp531-532**)
[83] *R v Bromley* [2018] SASCFC 41, at [127]-[131] (**CAB pages 159-160**)
[84] At trial transcript, at page 343 (**BFM v1 p388**), Burden said that the appellant had a fresh red splash on his shirt that appeared to her to be blood. At page 463 (**BFM v2 p513**), Griggs made a similar observation. The appellant said he had been in a fight and had been robbed.
[85] Trial transcript, page 477 (**BFM v2 p526**)
[86] Trial transcript, page 476 per Moyle (**BFM v2 p525**)
[87] As discussed, immediately below, Margaret Bromley observed marks on the clothing as suggestive of clay, not blood.
[88] *R v Bromley* [2018] SASCFC 41 at [348] (**CAB page 216**): the Court of Appeal is quoting submissions of the respondent Crown at the time.
[89] *R v Bromley* [2018] SASCFC 41, at [129] (**CAB page 160**)
[90] Trial transcript, pages 422-424 (**BFM v1 p467-469**)
[91] Trial transcript, page 424 (**BFM v1 p469**)
[92] Trial transcript, page 421 (**BFM v1 p466**)
[93] *R v Bromley* [2018] SASCFC 41, at [130] (**CAB page 160**)

regard) and a third piece of evidence (that Mr Docoza had bruising) which, as is conceded in the next paragraph of the reasons, contradicted Carter's evidence as much as it confirmed it.[94] The three skeins of evidence do not inculpate the appellant and they take nothing away from the cogency and relevance of the new evidence as to the degree of Carter's unreliability as a witness.

50. As has been discussed, a major flaw in the Court of Appeal's approach was to regard corroboration of Mr. Carter's evidence on aspects that were non-inculpatory of the appellant as tending to make those parts of the evidence which were inculpatory of the appellant reliable.[95] The line of reasoning is analogous to that which was criticised in *OKS v Western Australia*[96] where a Facebook message "Spontanious [sic] Combustion" acknowledged an occasion when the appellant told a story while lying on a bed with the complainant could not be used by the prosecution as corroboration of an allegation of indecent dealing alleged to have occurred at the time of that story. This reasoning was illogical and contrary to the content of the new psychiatric and psychological evidence.[97]

The Effect of Changing the Evidentiary Landscape

51. The flawed analysis of the evidentiary impact of the additional expert psychological and pathological evidence also included a failure to appreciate the relationship between different pieces of evidence. For example, the verdict of the jury was based on the reliability of Carter's evidence to contradict an important part of the evidence of the taxi-driver witness, George, who gave evidence that the passenger who, on the Crown case, was the appellant was dressed very differently to the way in which the appellant was dressed that night.[98] Indeed, the Court of Appeal accepted that the

---

[94] *R v Bromley* [2018] SASCFC 41, at [130] (**CAB page 160**): the new pathological evidence was even stronger in contradicting Carter's description of an attack by barbells.

[95] Carter's evidence may be considered as an unreliable account of an assault at which Carter was present with Karpany and the dapper person from Mr George's taxi. It would not be surprising if Carter knew of the appellant from conversations with Karpany. If he observed the appellant being accosted by police, his troubled mind may have determined to involve the appellant in the assault, perhaps, in place of another or, even, himself. Carter's failure to mention a deadly assault that had happened a short while earlier is quite incomprehensible unless Carter, himself, was suffused with guilt concerning that assault. His explanation at trial transcript, page 173 (**BFM v1 p218**) is hardly convincing: "I was frightened; I was sick … I was sick and my mum worries about me a lot."

[96] [2019] HCA 10 at [30]

[97] *R v Bromley* [2018] SASCFC 41 at [30(2)(e)] (**CAB page 133**), [38(1) and (3)] (**CAB pages 137-138**), [42] (**CAB pages 139-140**) and [512]-[516] (**CAB pages 265-266**) (Professor Coyle), [42] (**CAB pages 139-140**) and [518]-[523] (**CAB pages 267-268**) (Dr Sugarman), [524]-[535] (**CAB pages 268-270**) (Dr Furst), [536]-[542] (**CAB pages 270-271**) (Dr Hook) and [42] (**CAB pages 139-140**) and [543]- [559] (**CAB pages 272-274**) (Dr Brereton)

[98] *R v Bromley* [2018] SASCFC 41 at [25] (**CAB page 131**), [107] (**CAB page 155**) and [339]-[344] (**CAB page 213-215**). George identified the Appellant from a set of colour photographs. He had previously been unable to make an identification from a set of black and white photographs. This evidence is recounted at [103] (**CAB page 153**).

jury's verdict depended on its having rejected, as mistaken, Mr George's clear description of his passenger's mode of dress.[99]

52. The Court of Appeal, in its analysis, failed to appreciate and take into account that, in the light of the new psychiatric and psychological evidence, George's evidence must be considered in a new evidentiary landscape[100] by a jury such that George's evidence (of a dapper man who could not have been the appellant) was likely to be seen as reliable evidence contradicting a key aspect of Carter's evidence (the appellant's presence in the taxi with Carter, Karpany and Docoza) inculpating the appellant and that the capacity of Carter's evidence, in the mind of the jury, to contradict George's evidence (of the dapper manner of dress) was similarly reduced.

53. This is shown by the Court of Appeal's continuing to place weight on the jury's rejection of Mr George's evidence in circumstances where the new psychological and psychiatric evidence indicated that Mr Carter's evidence was, no longer, a proper basis to reject the evidence of Mr George.

Court of Appeal's Reliance on Additional Crown Evidence

54. The Court of Appeal received and analysed additional Crown evidence[101] proffered by the Crown for the first time on the application for permission. The evidence purported to be propensity evidence. Although the Court of Appeal stated that it did not base its decision on this evidence, it regarded the evidence as supporting its decision not to treat the new psychiatric and psychological evidence as compelling.[102]

55. The decision of the Court of Appeal to receive additional Crown evidence on the question whether it was in the interests of justice to grant permission for a second appeal is contrary to the principles applicable to the determination of appeals in criminal matters. It is settled law that a miscarriage of justice will be established where fresh evidence, when viewed in combination with the evidence given at trial, shows that there is a significant possibility that the jury, acting reasonably, would have acquitted the appellant had that evidence been available to it.[103] The Crown is not permitted, on an appeal where fresh evidence has been received, to rework its trial strategy to adduce evidence that was known to it but which it chose not to lead in the trial.

---

[99] *R v Bromley* [2018] SASCFC 41 at [344] (**CAB page 215**)
[100] R v Keogh (no 2) at 347 [141], per the Court: "[certain possibilities] … in the light of the fresh evidence available, assume a much greater potential significance than might have been thought to be the case at trial. … the evidentiary landscape has changed and, as a result, these possibilities assume a greater importance …"
[101] *R v Bromley* [2018] SASCFC 41 at [36] and [433]-[506] (**CAB page 137 and pages 242-263**)
[102] *R v Bromley* [2018] SASCFC 41 at [507]-[508] (**CAB page 263**)
[103] *Rodi v Western Australia* (2018) 265 CLR 254 ("***Rodi***"), 263 [28]

56. Even where the Crown is permitted to adduce evidence to explain the effect of the new evidence, it is not permissible for the appellate court to rely on that evidence to form its own view as the effect of the new evidence. The appellate court is to act upon that view of the new evidence which is most favourable to the appellant that a reasonable jury may take.[104] Forming its own view of the fresh evidence based on other evidence adduced by the Crown amounts to the appellate court usurping the role of the jury.[105]

57. The Court of Appeal's reasoning that the Crown could adduce evidence that was not adduced at trial either to show that certain fresh evidence was not compelling or that it was not in the interests of justice to grant permission is not in accord with authority. Normally, if fresh evidence is compelling, it will follow that it is in the interests of justice to consider the fresh evidence on appeal.[106] The example given in Van Beelen of it not being in the interests of justice to grant permission where an applicant for permission has made a public admission of guilt[107] illustrates the exceptional nature of finding that it is not in the interests of justice not to grant permission in the case of fresh and compelling evidence. It does not follow by analogy that the Crown can dredge through its files and adduce evidence that was known but not utilised at the time of trial. Allowing the Crown so to do would be in contradiction of the intention of s 353A that finality yield in the face of fresh and compelling evidence which, when taken with the evidence at trial, satisfies the Full Court that there has been a substantial miscarriage of justice.[108]

58. A view (by the appellate court that the fresh evidence does not undermine the conclusion of guilt) is not a basis to find that the interests of justice do not favour permission. This is to conflate the interests of justice with the determinative issue in the appeal.[109]

59. The actions of the Court of Appeal to receive new evidence proffered by the Crown was against long accepted principles for determining appeals on the basis of fresh evidence. It was not permitted by s 353A pf the Act. It was in error.

Argument Advanced by the Respondent in the Special Leave Hearing

60. In the oral hearing of the special leave application on 16 September 2022, the respondent advanced an argument that the appellant was precluded from relying on

---

[104] *Rodi* at 265-6 [37]-[38], citing *Gallagher v The Queen* (1986) 160 CLR 392, 401
[105] *Rodi* at 266 [38]
[106] *Van Beelen* at 578 [30]
[107] *Van Beelen* at 578 [30]
[108] *Van Beelen* at 576 [27]
[109] *Van Beelen* at 578 [31]

the new pathological evidence on the basis that the appellant relied on the (now challenged) evidence of Dr Manock in the trial.[110] The respondent relied on the component of the definition of "compelling" that evidence is compelling if it highly probative in the context of the issues in dispute at the trial of the offence.[111]

61. This proposition is not in accord with authority going to the construction of that element of the definition.

62. While the focus of the third criterion is on the conduct of the trial, the meaning of the issues in dispute at the trial will depend on the circumstances of the case. Fresh evidence as to identity is unlikely to meet the criterion if the sole issue in the trial was whether the accused's act was done in self-defence. On the other hand, fresh evidence disclosing a line of defence that was not apparent at the time of trial may meet the criterion because it bears on the ultimate issue in dispute.[112]

63. The circumstance that the new pathological evidence was fresh has the effect that the appellant, at trial, was forced to conduct his defence, the best way he could, in the light of Dr Manock's evidence. The appellant could hardly challenge Dr Manock's expert evidence with lay evidence of his own in circumstances where his case was that he was not present when any attack was made on the victim. Accordingly, the appellant had no choice but to accept that Dr Manock's evidence proved drowning or to rely on Dr Manock's evidence where, in a very qualified manner, it contradicted Carter's evidence of attack by barbell.[113]

64. The new pathological evidence classically goes to the ultimate issue of whether the appellant's guilt had been proven beyond reasonable doubt. Equally, it conforms with the principles stated in Van Beelen (as to whether fresh evidence is highly probative) by opening up lines of defence that were not apparent at the trial. They were not apparent because they were closed off by the content of Dr Manock's evidence now shown to be errant by the new pathological evidence.

65. Contrary to the respondent's submission, the new pathological evidence satisfied the element of the definition of compelling in s 353A(6)(b)(iii).

---

[110] *Bromley v The King* [2022] HCATrans 158, PDF page 12

[111] Act, s 353A(6)(b)(iii)

[112] *Van Beelen* at 577 [112]-[113]; [2017] HCA 48, [28]: also, see Keogh No 2 at 338-9 [112]-[113] where it was held, inter alia, that identification of the issues in dispute at trial will turn on the facts and circumstances of the particular case as prosecuted and defended. The Court observed that para (iii) does not require that the evidence be highly probative of the issues in dispute at the trial but be highly probative in the context of the issues in dispute at the trial. This allows for a more expansive understanding of the qualification to be applied in the circumstances of the particular dispute. The second reading speech indicated that the qualifications in para (iii) were not intended to be overly restrictive.

[113] *Bromley v The King* [2022] HCATrans 158, PDF page 12

66. While the application for special leave has not been referred to the Court in respect of the new pathological evidence, the ability of that evidence to meet the definition of compelling may be relevant when considering its admissibility in any subsequent appeal on Ratten principles.

Aspects of the New Pathological Evidence

67. The Court of Appeal summarised three propositions arising from the new pathological evidence. Proposition 1 challenged Dr Manock's evidence related to diatom studies and haemolytic staining of the heart which were said to support drowning as a cause of death.[114] Proposition 3 challenged Dr Manock's evidence of an indication that the deceased was unconscious at the time of death based on the absence of water in Mr Docoza's stomach.[115] And proposition 2 challenged Manock's evidence that various observed injuries were close to death and definitely within 24 hours of death.[116] (The Court of Appeal's summary expressed in these

---

[114] *R v Bromley* [2018] SASCFC 41 at [274] (**CAB page 197**). See report of Professor Thomas dated 8 July 2014 (**BFM v5 p1708**) pages 23-24, paragraphs 7-8 (rejecting Dr Manock's indicators of drowning) (**BFM v5 p1730-1731**), page 26, paragraph 1 (natural causes not excluded) (**BFM v5 p1733**); page 4 of report of Professor Thomas dated 3 December 2014 (**BFM v5 p1827**) at page 4 (diatoms in stomach are not evidence of drowning) (**BFM v5 p1830**), pages 6-7, paragraphs [2]-[4] (drowning diagnosis of exclusion, Dr Manock's examination insufficient) (**BFM v5 p1832-3**); see report of Dr Byron Collins dated 18 December 2015, pages 3-4 of report, paragraphs [1]-[5] (drowning not established, diatom and haemolytic staining of the heart not probative, drowning established by exclusion) (**BFM v5 p1914-1915**); see report of Dr Plueckhahn dated 5 March 1993, pages 2-3, paragraphs [3]-[6] (no scientific basis for diagnosis of death by drowning) (**BFM v5 p1695-1696**).

[115] *R v Bromley* [2018] SASCFC 41 at [276] (**CAB page 198**). See report of Professor Thomas dated 8 July 2014, page 1 (**BFM v5 p1708**), page 25 paragraph 10 (**BFM v5 p1732**), page 27, paragraph 2 (**BFM v5 p1734**), page 32, paragraph 12 (**BFM v5 p1739**); page 8, paragraph 9 of report of Professor Thomas dated 3 December 2014 (no substantive evidence to show deceased was unconscious when he entered the water) (**BFM v5 p1834**); see Dr Michael Lynch report dated 8 November 2016 at pages 2-3 (water in the stomach and staining of the aortic root are neutral) (**BFM v5 p2009-2010**); see evidence of Dr Michael Lynch in Transcript of appeal "disputed facts hearing, page 470 (**BFM v4 p1206**) (two or three days earlier is possible (lines 1-6); some or all of the injuries could have occurred post-mortem (lines 8-24)). Professor Thomas said in oral evidence that there was no evidence that Mr Docoza was alive or alive but unconscious (Transcript of appeal "disputed facts hearing", page 298, line 28-33, line 1 (**BFM v3 p1029**)). Professor Thomas also states that there was insufficient evidence to exclude death by natural causes so as to diagnose death by drowning (Transcript of appeal "disputed facts hearing" page 310, lines 13-26 (**BFM v3 p1041**) and, in cross-examination, T page 321, lines 10 -page 322, line 17 (**BFM v3 p1052-1053**). Professor Thomas indicates the unhelpful nature of haemolytic staining as a method to diagnose drowning in cross-examination (Transcript of appeal "disputed facts hearing" page 329, lines 1-23 (**BFM v3 p1060**)). Dr Byron Collins debunks both haemolytic staining and the presence of diatoms as indicators of drowning in his oral testimony and states that the cause of death should have been unascertained (Transcript of appeal "disputed facts hearing" page 407, lines 20-34 (**BFM v3 p1138**); page 412, lines 11-25 (**BFM v3 p1143**); and page 419, lines 8-32 (**BFM v4 p1155**)). Dr Collins stated, in cross-examination, that the cause of death should have been unascertained and natural causes had not been properly excluded (Transcript of appeal "disputed facts hearing" page 432, lines 19-28 (**BFM v4 p1168**); page 436, lines 4-9 (**BFM v4 p1172**); page 441, lines 28-31 (**BFM v4 p1177**); and 442, lines 7-15 (**BFM v4 p1178**). Dr Lynch also said in oral testimony that the cause of death was unascertained (Transcript of appeal "disputed facts hearing" page 481, lines 32-35 (**BFM v4 p1217**); 488, lines 3-22 (**BFM v4 p1224**); and 489, lines 34-37 (**BFM v4 p1225**).

[116] *R v Bromley* [2018] SASCFC 41 at [275] (**CAB page 198**). See the Court of Appeal's acceptance of these propositions at [278] (**CAB page 198**). Importantly, the Perl's Prussian test showing the presence of haemosiderin pigment indicates that a possible subarachnoid haemorrhage on which Dr Manock relied to show loss of consciousness peri-mortem, if it had occurred, must have occurred at least 3-5 days prior to

three propositions does not exhaust the thrust of the new pathological evidence.[117] Many of the injuries recorded by Dr Manock were challenged as being either artefacts of the post-mortem process, blows suffered by the body while in the water or the results of putrefaction.[118] Yet, in cross-examination, Dr Manock said that all injuries occurred before death.[119])

Implications of the New Pathological Evidence

68. The rhetorical response of the Court of Appeal to this new evidence is that the propositions do not prove their positive opposites.[120] That is, for example, absence of proof of drowning does not prove that a person did not drown. This misses the point, completely, in a criminal appeal where the crucial test is significant possibility of an acquittal.[121]

69. However, in a new evidentiary landscape, where the evidence of Dr Manock, so far as it supported Mr. Carter's description of events, is seen to be unreliable, the defence case has open to it a much broader range of hypotheses consistent with the appellant's innocence. That is, this fresh evidence discloses lines of defence that were not apparent at the time of trial.

---

death. See report of Professor Thomas dated 8 July 2014 at page 22, paragraphs (b)-(c) (**BFM v5 1729**); pages 27-28, paragraph 5 (**BFM v5 pp1734-1735**); Paragraphs [5]-[7] pages 7-8 of Report of Professor Thomas dated 3 December 2014 (injuries may be attributed to post-mortem putrefaction or autopsy procedure) (**BFM v5 pp1833-1834**); page 8, paragraph [8] of report of Professor Thomas dated 3 December 2014 (Haemosiderin in the dura indicates injury of at least two-three days duration) (**BFM v5 p1834**); see oral testimony of Dr Thomas (Transcript of appeal "disputed facts hearing" page 292, line 23-293, line 13 (**BFM v3 p1023-1024**) (in presence of putrefaction, difficult if not impossible to distinguish decomposition from pre-mortem bruising); see report of Dr Byron Collins dated 18 December 2015, page 6 of report, paragraph (a) (haemosiderin indicates blunt trauma occurring at least two days prior to death) (**BFM v5 p1917**); and see report of Dr Plueckhahn dated 5 March 1993, page 3, paragraph (e) (in a putrefied body, aging of bruises is impossible) (**BFM v5 p1696**). Dr Thomas states in cross-examination that he cannot be sure whether haemorrhage seen on the tissues of the scalp and bone are ante-mortem, peri-mortem or post mortem (Transcript of appeal "disputed facts hearing" page 352, lines 15-23 (**BFM v3 p1083**)). Dr Collins stated in oral testimony that one could not tell whether what were identified as injuries occurred ante-mortem, peri-mortem or were artefactual (Transcript of appeal "disputed facts hearing" page 423, line 5-426, line 2 (**BFM v4 pp1159-1162**)). Dr Lynch stated that it was not possible to distinguish between injuries that occurred in life and the effects of coming into contact with hard objects in the water after death (Transcript of appeal "disputed facts hearing" page 500, lines 26-35 (**BFM v4 p1236**); 501, lines 1-9 (**BFM v4 p1237**); 508, lines 11-17 (**BFM v4 p1244**); and 513, lines 7-9 (**BFM v4 p1249**). This included the injuries in the area of the scalp.

[117] A summary of Professor Thomas's concerns is in his report dated 8 July 2014 at pages 35-36 (**BFM v5 pp1741-1742**)

[118] For example, see report of Professor Thomas dated 8 July 2014 at pages 31-32, paragraph 11 (**BFM v5 pp1737-1738**) and page 7, paragraph [5] of report of Professor Thomas dated 3 December 2014 (**BFM v5 p1833**).

[119] Trial transcript, page 314, (last four lines on page) (**BFM v1 p359**)

[120] *R v Bromley* [2018] SASCFC 41 at [279] (**CAB page 198**)

[121] *Van Beelen* at 591 [75] per Bell, Gageler, Keane, Nettle and Edelman. See, also, *Rodi* at [28]; *Gallagher v The Queen* (1986) 160 CLR 392, 399, 402, 414, 421; [1986] HCA 26; and *Mickelberg v The Queen* (1989) 160 CLR 259, 273, 301; [1989] HCA 35. The point against the Court of Appeal's reasoning may equally be made by reference to a criminal trial where the proof of all elements is on the Crown and the standard of proof is beyond reasonable doubt.

70. The new pathological evidence confirms (and strengthens), that part of Dr Manock's evidence which threw doubt on Mr. Carter's evidence that the deceased's injuries were inconsistent with Mr. Carter's evidence that the deceased had been attacked with barbells.[122]

71. Dr Manock's evidence as to bruising to the carotid artery on the right side of the neck was significant in supporting Carter's evidence in the minds of the jury in its suggestion of multiple gripping of the neck redolent of a murderous attack.[123]

72. Further, the new pathological evidence also casts doubt on the timing of certain injuries, which is relevant (in particular) to the allegation that the deceased was attacked with a barbell (which is, in turn, relied upon to suggest that Carter's evidence concerning the use of a barbell in the attack is more reliable). In particular, it is noted by Professor Thomas that, because haemosiderin pigment cannot be detected with the Perl's Prussian test until 3 to 5 days after the haemorrhage, it is the case that any ante-mortem bruising to the scalp "must have occurred some 3 to 5 days before death."[124] This is, clearly, inconsistent with the use of a barbell to strike the victim on the head and contradicts both the evidence of Carter and Dr Manock.

73. The Court of Appeal's characterisation of the new pathological evidence concerning that and other bruising as "criticism[125] at a lack of documentary support[126] and a level of agnosticism but no actual challenge to these findings",[127] as has been seen,

---

[122] In his report dated 8 July 2014 Professor Thomas at pages 28-29, paragraph 7 (**BFM v5 p1735-1736**), notes Dr Manock's equivocal evidence that Mr Docoza's injuries might or might not have been caused by strikes with a dumbbell and states that, even with a glancing blow, a dumbbell would have caused much greater injuries than were able to be observed. See also page 8 of report of Professor Thomas dated 3 December 2014, at paragraphs [10]-[11] (**BFM v5 p1834**): (I would have expected more autopsy evidence of violence if deceased was bashed, kicked, punched or bashed with dumbbell; no substantive evidence to support the hypothesis of a grip); see report of Dr Byron Collins dated 18 December 2015, page 7 paragraph (d) (**BFM v5 p1918**): (if assault took place as described by Carter, injuries documented less than could reasonably be expected); and see report of Dr Plueckhahn dated 5 March 1993 at page 3, paragraph (d) (**BFM v5 p1696**): (surprising that Dr Manock did not report more bruises if Carter's evidence was true). Professor Thomas gives specifics of the likelihood of marking of the skin and probable skull fracture from a blow with the barbell in his oral testimony (Transcript of appeal "disputed facts hearing" page 308, lines 7-28 (**BFM v3 p1039**)).

[123] *R v Bromley* [2018] SASCFC 41 at [235]-[236] (**CAB page 190**). As is recorded at [68] (**CAB page 145-146**) of the reasons, Carter's evidence was to the effect that the appellant on two occasions forcibly pushed the deceased's head under the water. See, also, trial transcript at pages 163 and 164 (**BFM v1 pp208-209**).

[124] See report of Professor Thomas dated 8 July 2014 at page 22, paragraphs (b)-(c) (**BFM v5 1729**); pages 27-28, paragraph 5 (**BFM v5 pp1734-1735**)

[125] For an example of criticism, generally, of the autopsy, see page 18 of report of Professor Thomas dated 8 July 2014 (**BFM v5 p1725**), pages 18-19 (list of 11 inadequacies of the autopsy) (**BFM v5 p1725-1726**).

[126] See page 19, paragraph (e) of report of Professor Thomas dated 8 July 2014 (**BFM v5 p1726**): "The photograph of the presumed right neck dissection does not show the carotid artery and there is no histological section such that the bruising described by Dr Manock cannot be confirmed.")

[127] *R v Bromley* [2018] SASCFC 41 at [310] (**CAB page 204**): "No actual challenge" is hardly a correct description of the evidence. In terms of the alleged evidence of gripping, see report of Professor Thomas, dated 8 July 2014 at page 30, paragraph 8 (**BFM v5 p1737**), where both the existence of bruising, as opposed to putrefactive change, and evidence of gripping are rejected.

misdescribes the effect of the evidence. It also misses the point. Pathology opinion evidence should be supported and documented. Where the opinions are not so supported, the limited value of the opinions should be fully articulated. The evidence of expert pathologists weighs heavily on the minds of jurors and it should be given with appropriate caution.

Other New Evidence

74. Two further pieces of new evidence are capable of being received on any appeal if the applicant obtained permission to appeal, the further evidence of the taxi driver, Mr George, and the evidence of several members of the Prisoners Action Group who spent time with the appellant, earlier in the evening.

75. The subsequent witness statement of Mr George[128] rejected the premise of the trial judge's suggestion to the jury[129] that, in the lights of Hindley Street, that night, Mr George was mistaken.[130]

76. The evidence of members of the Prisoners Action Group described the appellant's dress and appearance up until he was dropped off by them at 11.30-11.45pm, that evening.[131] The Court of Appeal rejected receipt of this evidence.[132] This evidence showed consistency in the appellant's appearance from when he left the home where he was staying until he was seen by the police officers – no hat, no tie, no coat.

Part VII: Orders sought by the appellant

(1A) That the appellant have special leave to appeal;

(1) That the appeal be granted;

(2) That the order of the Court of Criminal Appeal is set aside;

That, in substitution therefor:

(3) That leave is granted to appeal;

(4) That the appeal to the Court of Criminal Appeal is upheld;

(5) That the conviction is quashed;

(6) An order as to whether or not a new trial is to be held.

---

[128] See exhibit DJN1 to the affidavit of David John Nuske sworn 4 July 2014 (**BFM v5 p1560**).

[129] Reproduced in *R v Bromley* [2018] SASCFC 41 at [341] (**CAB page 214-215**): "… But, if you look at the jacket, Exhibit P5, members of the jury, you may agree that it is a very light colour and it may well be that, in the lights of Hindley Street, that night, the witness George was reasonably mistaken in thinking it was not light blue but white."

[130] After describing the clothes, George said they were distinctive, particularly, for an Aboriginal. He said that the dapper person stood out like a neon sign (page 3) (**BFM v5 p1563**). After re-emphasising the accuracy of the white suit description, George said that the lighting in Hindley Street made no difference; that he had plenty of time to observe as the person was standing in the light in front of the Jules nightclub; that it was good lighting; that the individuals were standing there for two or three minutes; and car light also lit their clothing (page 6) (**BFM v5 p1566**).

[131] See paragraphs 13 to 19 of and exhibits DJN4-DJN7 to the affidavit of David John Nuske sworn 4 July 2014 (**BFM v5 p1557**); (**BFM v5 p1608-1633**).

[132] *R v Bromley* [2018] SASCFC 41, [353] (**CAB page 216**)

Part VIII: Four hours

Dated: 11 November 2022

Stephen Keim SC

Name: Stephen Keim SC, counsel for the applicant

Telephone: 0433 846 518

Email: s.keim@higginschambers.com.au

Annexure in accordance with Practice Direction 1 of 2019

353A of the *Criminal Law Consolidation Act 1936 (SA)*