



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN:

Derek John BROMLEY

Applicant

and

The King

Respondent

APPLICANT'S REPLY

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Part I: CERTIFICATION

1. The applicant certifies that this reply is in a form suitable for publication on the internet.

Part II: CONCISE REPLY TO ARGUMENT OF THE RESPONDENT

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2. As a starting point, the applicant observes that the respondent's submissions filed 9 December 2022 do not engage with the detail of the applicant's submissions filed 11 November 2022. In only very limited respects does the respondent even refer to the submissions of the applicant or challenge what is said, therein. And this is done without any serious consideration of, or argument in respect of, those matters which the respondent contends are not correct.¹
3. An obvious omission in the respondent's submissions is the failure to consider the evidence that contradicts witness Carter's evidence² and how, in light of the new evidentiary landscape created by the new psychiatric and psychological evidence,³ such contradictory evidence must be viewed as having more compelling impact against the reliability of witness Carter's evidence.

¹ For example, at [38] of the Respondent's Submissions, it is said that the applicant's characterisation of the new pathological evidence "does not properly characterise the effect of the fresh evidence." However, the respondent's submissions do not elaborate on that contention to explain how that is the case. Nor does the Respondent give any serious consideration to the content of the new psychiatric or psychological evidence. Further, at [39], the respondent submits that the applicant's contention concerning the treatment of Carter's evidence "fails to appreciate the task required under s 353A." Yet, again, the respondent does not identify how it is said that this is the case. Nor does the respondent actually engage with (and respond to) the applicant's contention.

² The evidence contradicting Carter's account is summarised at [45]-[46] of the applicant's submissions.

³ The principles applicable to the need to factor in the impact of a new evidentiary landscape are discussed in applicant's submissions, [51]-[53]. See, particularly, footnote 100, thereof.

4. In paragraphs [27] to [34] of its submissions, the respondent contends that Carter's evidence is "supported on all material respects".⁴ Such a contention can plainly not be accepted. This is because:
- a. the areas where Carter may be supported are not inculpatory of the Applicant⁵ at all;⁶
 - b. the respondent is seeking, impermissibly,⁷ to rely on propensity evidence;
 - c. the alleged supporting material seeks to rely on the highly questionable identification evidence of the taxi driver, Mr George,⁸ without acknowledging, at all, the very clear problems with such evidence;⁹
 - 10 d. none of the suggested corroborating evidence puts the applicant at the scene of the offending. Indeed, the respondent seeks to elevate the weak circumstantial evidence of the applicant being seen and spoken to by police in the vicinity of the River Torrens as supportive of Carter's evidence;¹⁰
 - e. the fact that the applicant may have had blood and/or mud on him is not evidence of his having committed a crime but is entirely consistent with his being stuck in a cactus bush and having to be helped out of the said bush.¹¹ The respondent has not addressed this proposition.

⁴ Respondent's submissions, [27]

⁵ See applicant's submissions, [42]-[44] and [47]-[50].

⁶ The areas where Carter is supported are limited and also subject to inconsistencies and contradictions, a matter that is ignored by the Respondent in its Submissions. As mentioned above, see Applicant's Submissions, [45]-[46].

The respondent also impermissibly seeks to rely on the "esoteric knowledge of Karpany" as to what happened to Docoza. Such evidence is not admissible against Mr Bromley, nor does it inculcate Mr Bromley in any case.

⁷ The evidence relied upon as propensity evidence was available to the Crown but not called at the applicant's trial. That evidence has not been considered by a jury as to its probative effect. As this Court said in *R v Van Beelen* [2017] HCA 48; (2017) 262 CLR 565 at 578 [32], the issue on an appeal is whether the new evidence taken with the evidence adduced at the trial, gives rise to a significant possibility that a jury, acting reasonably, would have acquitted (emphasis added). To supplement the evidence adduced at the trial with evidence available to the Crown, at the time of trial, but not used in the trial is not permitted on an appeal. The Court of Appeal, in seeking to do so, on the question of the interests of justice, has aggravated the error in *Van Beelen* by not only conflating the appeal question with the interests of justice question but asking it in a way not permitted in an appeal. As is pointed out in the applicant's submissions at [57], determining the applicant's rights in this manner usurps the role of the jury. See the principles as discussed in the applicant's submissions at [56].

⁸ Respondent's submissions, 15]-[17]

⁹ Appellant's submissions, [51]-[53]. Mr George's evidence that the applicant was the dapper man in the taxi was identification made of an Indigenous man from photographs at the second attempt: see footnote 100. But, of course, George's description of the dapper man as the person accompanying Carter and Karpany in the taxi was directly contradictory of Carter's evidence in that the applicant's clothing and appearance on the night was far removed from that of the dapper man.

¹⁰ Respondent's submissions, [19]-[20]: indeed, the evidence of the police officers shows clearly how inaccurate and unreliable Carter's evidence was. See applicant's submissions, [45], especially, footnote 73.

¹¹ Applicant's submissions, [47]

5. The respondent also submits¹² that the applicant had been on the River Torrens that night. In this respect, the respondent relies upon the evidence of Margaret Bromley as to the state of the applicant's clothes (i.e. that they had mud on them – not blood) and that he was washing those clothes.¹³ Such evidence does not support Carter's evidence any more than it is evidence of the applicant being on the River Torrens, that night. One might get mud on their clothes in many ways, including by hiding in prickly bushes and getting stuck there.
6. The respondent summarises the fresh psychiatric and psychological evidence¹⁴ but fails to address the applicant's contentions concerning the flawed analysis of that evidence by the Court of Appeal.¹⁵ Nor does the respondent respond in any real sense to the applicant's contentions concerning the effect such evidence has on the evidentiary landscape.¹⁶
7. The respondent sought to uphold the Court of Appeal's reliance on a finding that granting permission to appeal was not in the interests of justice because the applicant had a disposition or proclivity to rape (or attempt to rape) young males in public places and to use the intoxicated state of the victim, and the infliction of a violent assault, and the assistance of another male offender, to carry out the intended crime.¹⁷
8. The Court of Appeal regarded it as permissible to receive this evidence on the interests of justice issue notwithstanding that the evidence was available to the Crown at the time of the Applicant's trial and not adduced.¹⁸
9. The Court of Appeal held that the disposition or proclivity evidence was admissible in a trial against the applicant whether the issue was determined by common law principles or s 34P of the *Evidence Act 1929* (SA).^{19,20}
10. Both the common law and s 34P place strong emphasis on the probative value of the disposition or proclivity evidence in the context of the issues of the trial.²¹

¹² Respondent's submissions, [29m.]

¹³ Respondent's submissions, [21]

¹⁴ Respondent's submissions, [35]-[36]

¹⁵ Applicant's submissions, [34]-[53]

¹⁶ Applicant's submissions, [51]-[53]

¹⁷ Respondent's submissions, [79] citing *R v Bromley* [2018] SASFC 41, at [486]

¹⁸ See footnote 7, above, as to why this is in error.

¹⁹ Section 34P came into force on 1 June 2012.

²⁰ *R v Bromley* [2018] SASFC 41, at [483]

²¹ Section 34P(2) provides:

Discreditable conduct evidence may only be admitted for a use (the **permissible** use) other than the impermissible use if, and only if-

- (a) The judge is satisfied that the probative value of the evidence admitted for a permissible use outweighs any prejudicial effect it may have on the defendant; and

11. The Court of Appeal's substantive assessment of the probative value of the discreditable conduct evidence in this case is flawed because it relies on the Court of Appeal's errant conclusions concerning Carter's evidence having been corroborated by other evidence in the trial and its failure to give effect to the gravamen of the new psychiatric and psychological evidence as it relates to the inherent unreliability of Carter's evidence (in the absence of confirmatory third party evidence). Once the lack of value of Carter's evidence is recognised, the changed evidentiary landscape is such that there is effectively no evidence incriminating the applicant apart from the weak circumstance that he was somewhere in the central part of Adelaide at the time the offence was committed. In this context, the probative value of the discreditable conduct evidence is diminished.
12. Second, there was no room for the discreditable conduct evidence for the purpose which gives it probative value and permits its admission. In *HML v The Queen*,²² it was pointed out by reference to *Pfennig v The Queen*²³ that the probative value of propensity evidence was to exclude coincidence and to exclude the possibility that another person happened to be present and committed the crime.²⁴
13. There is no room for discreditable conduct evidence to play that role in the present appeal. The Crown case (and Carter's evidence) placed another person, Karpany, at the scene of the crime with one or more other males (Carter, himself, and the dapper man who was not the applicant). There is no coincidence to exclude. On the Crown case, it is not at all unlikely that someone other than the applicant was present and committed the crime. That is because Carter's evidence places Karpany at the scene of the alleged crime. As a result, the discreditable conduct evidence relied on by the Crown²⁵ was not probative having regard to the issues arising at the trial.
14. The Court of Appeal's finding that the discreditable conduct evidence was admissible was wrong on substantive grounds as well as for the reason that it was not permissible to consider such evidence on the interests of justice issue.

(b) In the case of evidence admitted for a permissible use that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue -the evidence has strong probative value having regard to the particular issue or issues arising at the trial.

²² [2008] HCA 16; (2008) 235 CLR 334 cited in *R v Bromley* [2018] SASFC 41, at [483]

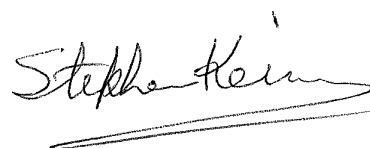
²³ [1995] HCA 7; (1995) 182 CLR 461

²⁴ This significance and function of propensity evidence is developed by reference to a series of leading authorities in *R v Bromley* [2018] SASFC 41, at [482]-[501].

²⁵ *R v Bromley* [2018] SASFC 41, at [448]-[451]. Arguably, Karpany was the person most likely to engage in actual physical rape or attempted rape on the basis of the evidence sought to be relied upon. See [451].

15. The respondent's recounting the ways in which Carter's psychiatric condition was discussed at the trial²⁶ and even the resulting proposition that Carter's reliability was contested at the trial does not meet the gravamen of the new psychiatric and psychological evidence, namely, that, while some of Carter's evidence might be reliable, in the absence of third party proof, one cannot know whether any particular part of it is reliable or not.²⁷ In the same way, the assertion that the new psychiatric and psychological evidence was not to the effect that "people who are suffering from schizo-affective disorder are incapable of being reliable ..."²⁸ does not meet that gravamen. That Carter's reliability was canvassed at the trial is a factor that strengthens the importance of the new psychiatric evidence on the subject of that reliability.
16. Equally, the respondent's restatement of the flawed analysis of the Court of Appeal of the new psychiatric and psychological evidence²⁹ fails to grapple with the thrust of that evidence, particularly, its impact in changing the evidentiary landscape as it existed at the trial.³⁰
17. There is no independent corroboration of the only key piece of evidence. That is, there is no independent corroboration of Carter's evidence that the applicant was involved in a violent altercation with the deceased, Mr Docoza. And that is the critical issue on this application.
18. The Crown fails to grapple with this fact. In the circumstances, special leave ought to be granted to appeal, and the appeal allowed.

Dated: 23 December 2022



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²⁶ Respondent's submissions, [51]-[59]

²⁷ Applicant's submissions, [35]-[36]; Dr Brereton's evidence (footnotes 33-36) states the proposition clearly. The assertion that the fresh evidence rose no higher than giving greater detail to an issue that was well covered (respondent's submissions, [71]) is rejected.

²⁸ Respondent's submissions at [68]

²⁹ Respondent's submissions, [62]-[72]

³⁰ Applicant's submissions, [51]-[53]