HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 09 Dec 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 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	09 Dec 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

10

RESPONDENT'S SUBMISSIONS

Part I: CERTIFICATION

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

Part II: CONCISE STATEMENT OF THE ISSUES

2. This application for special leave was referred to a Full Bench on 16 September 2022. The referral was limited to the question of whether the fresh psychiatric and psychological evidence (**the fresh evidence**) is compelling within the meaning of s 353A(1) of the *Criminal Law Consolidation Act 1935* (SA) (**CLCA**). The limited referral has the effect of
20 leaving the findings and conclusions of the Full Court in relation to the fresh pathological evidence, and hence the cause of death, undisturbed.[1] Notwithstanding the limited referral, the applicant, including at [22], [27] and [60]-[73] of his submissions, addresses the effect of the fresh pathological evidence. In this regard the applicant's submissions go beyond the scope of the referral. The referral is to be determined on the basis of the pathological evidence given *at trial* and the use made of that evidence by the prosecution and the defence *at trial*.

3. The outcome of this application will turn on this Court's assessment of the fresh evidence tendered on the application, taken with the evidence adduced at trial, considered in the
30 context of the issues in dispute at trial.

4. The referral has two aspects. The first focusses on the Full Court's primary conclusion that the fresh evidence was not compelling. The second aspect concerns the alternative finding

---

1 Announcing the orders referring the matter on 16 September 2022, Keane J noted that "... the pathological evidence relating to the cause of death will not need to be entertained as a separate ground": [2022] HCATrans 158 at lines 656-657.

of the Full Court to the effect that, despite the fresh evidence being "compelling", having regard to new evidence tendered by the respondent on the hearing of the application demonstrating esoteric knowledge and a relevant propensity, it was not "in the interests of justice" to consider the fresh evidence as on an appeal.

5. The respondent contends that the following questions arise for determination:

   a. where in a trial a witness suffering from a mental illness gives evidence, and the jury is aware that the witness suffers from that mental illness and was acutely impacted by it at the time of the events witnessed, and the jury is also aware of the relevance of the illness and its impact upon the witness's reliability, is expert evidence about the contemporary understanding of the impact of that illness on the witness's reliability, which did not establish that the witness was incapable of providing a reliable account or render the evidence of the witness inadmissible, "compelling" within the meaning of s 353A CLCA?

   b. in considering whether the fresh evidence was "compelling", was the Full Court entitled to take into account the evidence at trial which conflicted with the impugned witness's evidence and which supported his evidence?

   c. lastly, if the Full Court was wrong in concluding that the fresh evidence was not "compelling", was it nonetheless permissible for the Court to receive evidence said to demonstrate that it was not in the "interests of justice" that the fresh evidence be considered as on appeal, and, was the Court right to conclude that that evidence did so demonstrate?

Part III: 78B NOTICE

6. No such notice is required.

Part IV: FACTS

7. What follows is, first, an overview of the case at trial, then an overview of the litigation from 1985 to present. Next, a summary of the circumstantial evidence at trial inculpating the applicant, independent of the witness Gary Carter (**Carter**) is provided; followed by an overview of the evidence capable of supporting Carter's account. There is then an overview of the fresh evidence in the Court below.

8. The prosecution case at trial was that the applicant, in company with his co-accused Karpany, murdered Stephen Docoza in the early hours of the morning of 4 April 1984 on the banks of the River Torrens, immediately adjacent to the Morphett Street Bridge in Adelaide.

9. The applicant had been released from gaol on 3 April 1984 for separate offending involving an assault and attempted rape in the Adelaide CBD.

Procedural overview and appeals

10. Carter suffered from schizo-affective disorder. At the applicant's trial Carter gave evidence to the effect that, whilst in company with the deceased, the applicant, and Karpany, he witnessed the applicant and Karpany violently assault the deceased on the banks of the Torrens in the early hours of 4 April 1984.

11. Neither the prosecution nor the defence called evidence about schizo-affective disorder. Whilst the defence arranged for Dr Kenneth O'Brien, a forensic psychiatrist, to observe Carter during his evidence with a view to the possibility of him giving evidence, Dr O'Brien was not ultimately called.[2] Plainly a forensic decision not to call Dr O'Brien was made.

12. In his summing up the trial Judge told the jury that Carter's evidence was to be "scrutinized with special care" and drew the jury's attention to aspects of Carter's evidence that were contradicted by other evidence, or otherwise could not be correct on the prosecution case. The adequacy of those directions was upheld on appeal to the Court of Criminal Appeal[3] and on further appeal to this Court.[4]

13. The applicant applied for permission to appeal against his conviction a second time pursuant to the then operative[5] s 353A CLCA.[6] The application relied primarily on pathological, psychological, and psychiatric evidence which the applicant submitted was "fresh", "compelling", and established that there had been a substantial miscarriage of justice. The application was refused by the Full Court on the basis that the evidence was not "compelling" because it was not "highly probative in the context of the issues at the trial of the offence".[7] In the alternative, the Court held that, to the extent that the evidence may be considered "compelling", evidence adduced by the respondent established that it was not "in the interests of justice" that the applicant be granted permission to appeal. In doing so the Court concluded that the evidence adduced by the respondent established that there was no significant possibility that a jury in the trial of the applicant, acting reasonably, would have acquitted the applicant had the totality of the evidence on the application been before it.[8] In the further alternative, the Full Court indicated that it had considered the

---

2 Dr O'Brien's involvement, and observation of Carter's evidence (subject to a portion of evidence that O'Brien was unable to attend for), are discussed in the judgment below: [2018] SASCFC 41 at [204]-[211] Amended Core Appeal Book (**ACAB**) 182-184.

3 *The Queen v Bromley* (1985) 122 LSJS 454.

4 *Bromley v The Queen* (1986) 161 CLR 315.

5 The provision has since been repealed and enacted, with the same terms and effect, in s 159 CLCA.

6 *R v Bromley* [2018] SASCFC 41; ACAB 118.

7 *R v Bromley* [2018] SASCFC 41 at [377]-[378]; ACAB 222.

8 *R v Bromley* [2018] SASCFC 41 at [388], [508]; ACAB 224, 263.

applicant's evidence, applying the test in *Mickelberg v The Queen,*[9] and, doing so, was not satisfied that there had been a substantial miscarriage of justice.[10]

14. By his application for special leave to appeal, the applicant challenges the Full Court's primary and alternative conclusions. As noted above, the application is confined to a consideration of the effect of the fresh psychiatric and psychological evidence adduced in the Full Court.

The evidence at the applicant's trial

10 ***The evidence independent of Carter capable of inculpating the applicant***

15. Karpany and Carter were picked up by a taxi driven by Michael George (**George**) from the Parks Community Centre in Angle Park at approximately 3:00am on 4 April 1984.[11] George drove them to the city,[12] briefly stopping at an address in Hawker Street, Brompton, before travelling on to Hindley Street in Adelaide, stopping somewhere near Jules bar.[13]

16. George gave evidence that the two passengers got out of the taxi, and greeted another Aboriginal man outside Jules, who he described as "dapper".[14] George gave evidence identifying that man as the applicant,[15] and said the applicant and another white man, whom he identified as Docoza, were together, and that eventually all four men got into his taxi.[16]
20 George's evidence was that the applicant was "very smartly dressed".[17] In cross-examination this was explored as including a tailored suit and a hat.[18]

17. George gave evidence identifying the applicant as one of the people in the taxi;[19] he also gave evidence that there was a conversation to the effect that the person George identified as the applicant said "'I've just been in gaol.' Or 'I've just got out of gaol.' Something about gaol anyway."[20] In cross-examination, the effect of his evidence was that it was Carter who said that the applicant had just gotten out of gaol.[21]

---

9 (1989) 167 CLR 259.
10 *R v Bromley* [2018] SASCFC 41 at [509]; ACAB 264.
11 Trial transcript 371; Applicant's Book of Further Material (**ABFM**) 416.
12 Trial transcript 374; ABFM 419.
13 Trial transcript 374-375; ABFM 419-420.
14 Trial transcript 376; ABFM 421.
15 Trial transcript 377; ABFM 422.
16 Trial transcript 376-377; ABFM 421-422.
17 Trial transcript 379; ABFM 424.
18 Trial transcript 405-406; 450-451.
19 Trial transcript 387; ABFM 432. This was by way of participation in an identification process that involved George selecting the applicant's photograph from an array as the person who had been in the taxi.
20 Trial transcript 381; ABFM 426.
21 Trial transcript 410-412; ABFM 455-457.

18. After driving down Hindley Street further, and after a stop where George gave evidence that one of the passengers went into a premises on Hindley Street and returned with a brown paper bag which he assumed was covering a flagon,[22] the men alighted from the taxi on Hindley Street in the vicinity of the Suburban Taxi office which was located between West Terrace and Morphett Street.[23] George gave evidence that the applicant paid the fare.[24] George also gave evidence that, give or take approximately five minutes, the taxi trip ended at 3:30am on 4 April.[25]

19. At a time approximately between 3:55am[26] and 4:25am[27] on 4 April, the applicant was spoken to by police officers on Festival Drive, in the vicinity of the Morphett Street Bridge which spanned the River Torrens. After the police first saw him on the bridge, he ran from them and was eventually discovered in bushes nearby.[28]

20. The applicant gave police his name, volunteered that he had just been released from gaol, and added that he had been in a fight at a pub, and that he had been bashed and robbed of $60. The account relating to the fight at a pub was elicited from the applicant in response to questions from the police about observations made by them about a stain on his shirt that they believed was fresh blood, and blood on his hands and lip.[29]

21. Evidence was given by Margaret Bromley, the wife of the applicant's foster-brother, that in the morning of 4 April 1984, after the applicant had returned to her and her husband's house where the applicant was staying, she noticed dry mud on the front of his trousers.[30] She also gave evidence that the applicant put his trousers and the other clothes he had been wearing the night before, along with his shoes, in the washing machine and washed them. She saw mud on his shoes.[31] She also gave evidence that the applicant had a brown woollen hat.[32]

---

22 Trial transcript 382-383; ABFM 427-428.
23 Trial transcript 384-385; ABFM 429-430.
24 Trial transcript 384; ABFM 429.
25 Trial transcript 416; ABFM 461.
26 Trial transcript 474; ABFM 523.
27 Trial transcript 334, 345; ABFM 379, 390.
28 Trial transcript 340-341; ABFM 385-386.
29 Trial transcript 343, 463, 477; ABFM 388, 513, 526.
30 Trial transcript 421; ABFM 466.
31 Trial transcript 422-423; ABFM 467-468.
32 Trial transcript 426; ABFM 471.

22. On Friday 13 April, police divers located a dumbbell[33] and two desert boots[34] in the area of a landing on the banks of the river, adjacent to the bridge. The laces on the boots were still tied.

23. A friend of the deceased gave evidence that the deceased had been wearing desert boots on the evening of 3 April 1984.[35] She identified the boots found by police as those belonging to the deceased, by reference to their laces.[36]

24. The above establishes that George identified the applicant and Docoza as two of the
10 passengers who got out of his taxi at approximately 3:30am on 4 April on Hindley Street, between Morphett Street and West Terrace, south of the River Torrens. Further, on the most generous reading of the evidence,[37] that just under one hour later, at approximately 4:25am on 4 April, the applicant was spoken to by police on Festival Drive near the Morphett Street bridge, a short distance from the murder scene on the banks of the River Torrens just west of the bridge. When he was speaking to police he was dishevelled and admitted to having been in a fight.

25. Margaret Bromley's evidence supported an inference that the mud on the applicant's trousers and shoes was as a result of the applicant's involvement in an assault on the
20 deceased on the banks of, or whilst the deceased was in, the river.

26. As a result, independently of Carter's evidence, the evidence at trial established:

a. that the death of Docoza was caused by another in the early hours of 4 April 1984 in the river next to the Morphett Street Bridge;

b. the applicant was identified as being in the company of the deceased at approximately 3:30am within walking distance of the Morphett Street Bridge;

30

c. the applicant was seen on the bridge and spoke with police and was observed to have blood on his hands and lip consistent with his involvement in an assault, as well as a possibly blood-stained shirt, at a time between approximately 3:55am and 4:25am;

d. the deceased's shoes, and a dumbbell capable of inflicting some of the injuries the deceased suffered, were found in the river a short distance from where the applicant spoke with police, and

e. in the hours after the assault, the applicant's clothes and shoes were dirty, consistent with the applicant having been in the river, and he washed them.

40

---

33 Trial transcript 484; ABFM 533.
34 Trial transcript 486; ABFM 535.
35 Trial transcript 141; ABFM 186.
36 Trial transcript 142; ABFM 187.
37 The earlier time, in line with the evidence of Officer Griggs, would make it only around half an hour after alighting from the taxi.

Other evidence capable of confirming Carter's account

27. At trial there was a body of evidence that in some aspects conflicted with, and in other aspects supported, Carter's account. The respondent submits that the resulting effect of a reading of the whole of the evidence at trial is that Carter's account is supported on all material aspects. While there are conflicts in the evidence, none sufficiently undermine the prosecution case or a global assessment of Carter's evidence.

28. This is significant given the consensus in the fresh evidence (examined below) that when assessing an account given by a person suffering from schizo-affective disorder, looking for support for the account given is useful. Contrary to the applicant's submissions,[38] the respondent contends that the effect of the expert evidence requires an analysis of all of Carter's evidence to evaluate his reliability.

29. As general topics, the areas in which Carter's account was supported include:

   a. the death occurring in the early hours of 4 April 1984;[39]

   b. Carter was with the applicant and Karpany in the taxi in the early hours of 4 April 1984;[40]

   c. Carter was identified with the deceased and the applicant in the taxi;[41]

   d. Carter was with the applicant and Karpany on the banks of the River Torrens;[42]

   e. Carter was with the deceased at the time the deceased entered the river;[43]

   f. the location at which the deceased entered the river;[44]

   g. that there was an assault on the deceased;[45]

   h. that the death was as a result of third parties assaulting the deceased;[46]

---

38 See, e.g., Applicant's Written Submissions at [42]-[44].

39 See e.g. [35] of the respondent's annexure. The deceased is not seen after the night of 3 April 1984 and his motorcycle is seen the next day abandoned. Carter has esoteric knowledge of the murder by 6am on 4 April 1984.

40 See e.g. [1]-[3], [19] of the respondent's annexure. Karpany was seen going to sleep at Carter's mother's house on the evening of 3 April 1984, neither Karpany nor Carter were present when Carter's mother woke at 7am the next day, the taxi driver Michael George confirms he collected two people after the call at around 2:30am and they proceeded into town, via Brompton, where they collected two others that George identified as the applicant and Docoza. There is also Karpany's esoteric knowledge of what happened to Docoza.

41 See e.g. [9]-[13] of the respondent's annexure. There was no challenge to George's identification of Docoza as being one of the men he collected on Hindley Street.

42 See e.g. [9], [17], [28]-[29] of the respondent's annexure. The applicant is identified by George, the applicant is seen and spoken to by police on Festival Drive near the Morphett Street Bridge and the applicant is observed to have, variously, blood on his clothes, lip and hands.

43 See e.g. [17], [20]-[22] of the respondent's annexure. In particular, Carter's esoteric knowledge of where the dumbbell and the deceased's shoes are subsequently found in the river, his knowledge of Docoza's clothes being removed.

44 See e.g. [17], [20]-[22] of the respondent's annexure, again relating to Carter's esoteric knowledge.

45 See e.g. [19]-[24] of the respondent's annexure. In particular, the evidence of the bruising to the deceased's forearm, forehead and scalp, all consistent with being beaten by another.

46 See e.g. [19] of the respondent's annexure. Karpany's esoteric knowledge of the assault, along with the applicant's propensity for committing assaults of this nature.

i. that the assault was connected with a sexual advance;[47]

j. that Karpany was involved in the assault;[48]

k. that the applicant was in the vicinity of the location where the assault occurred and the body was subsequently located;[49]

l. that the applicant was involved in a violent altercation that night,[50] and

m. that the applicant had been at the River Torrens that night.[51]

30. As noted above, on Friday 13 April, police divers located a dumbbell[52] and two desert boots[53] in the area of the landing on the banks of the river. The laces on the boots were still tied. This search was undertaken as a result of a conversation that detectives had with Carter as to the location of the attack.[54] The dumbbell belonged to Carter who had it in his backpack with him on the night of the murder.

31. Detective Peglar gave evidence that on 15 April 1984 he found another dumbbell which matched the one found in the river at Mrs Edith Carter's address.[55]

32. Arthur George, who worked at the Pie Cart (located under the Morphett Street Bridge), gave evidence that in the early hours of the morning, a young Aboriginal man was given a cup of water from the Pie Cart.[56] Mr George's evidence was that this was on either the Thursday or Friday morning.[57]

33. It was accepted that Carter was admitted at Hillcrest Hospital from 4 to 6 April 1984.[58]

34. What the above establishes is that there was a substantial body of evidence adduced at trial, independent of Carter, that supported his reliability.

---

[47] See e.g. [19] of the respondent's annexure, again relating to Karpany's esoteric knowledge and the applicant's propensity, as well as the fact that the deceased's trousers had been removed.

[48] See e.g. [19] of the respondent's annexure, again relating to Karpany's esoteric knowledge of the assault.

[49] See e.g. [20]-[22], [26]-[29] of the respondent's annexure. The location that Carter identified to police was where the dumbbell was located and deceased's shoes were found, and the applicant is seen by police at the relevant time on Festival Drive.

[50] See e.g. [9], [17], [19], [28]-[29] of the respondent's annexure. The observations of the police as to the applicant's appearance and blood on his clothing, lip and hands, along with the applicant's statements to the effect that he had been in a fight that night.

[51] See e.g. [24] of the respondent's annexure. Margaret Bromley's evidence about the state of the applicant's clothes and shoes, along with the applicant's act of washing his clothes and shoes.

[52] Trial transcript 484; ABFM 533.

[53] Trial transcript 486; ABFM 535.

[54] Trial transcript 529-530; ABFM 578-579.

[55] Trial transcript 530-531; ABFM 579-580.

[56] Trial transcript 331-333; ABFM 376-378.

[57] Trial transcript 330; ABFM 375.

[58] Trial transcript 501; ABFM 550.

The fresh psychiatric and psychological evidence

35. The Court below received evidence from three psychiatrists, Drs Furst, Hook, and Brereton, and two psychologists, Dr Sugarman and Professor Coyle. Each witness prepared a written report and supplemented their report with oral evidence. The annexure to the Full Court's judgment contains an accurate summary of that evidence.[59]

36. The Full Court concluded that the fresh evidence established four propositions of particular importance:[60]

10

a. Since 1984 there has been an expansion of knowledge and understanding in relation to schizo-affective disorder, including that it is now generally accepted that most persons suffering from the disorder are unreliable historians. The reasons for this include the impairment in memory function and the difficulty experienced in distinguishing between real events and delusions while psychotic. Consequently, accounts given by people suffering schizo-affective disorder may not be reliable absent corroboration.

b. A core feature of schizo-affective disorder is that people suffering from it may be susceptible to "suggestibility".

20

c. The broad distinction that Dr Barrett postulated in his report of 6 August 1984 (which was not before the jury) between grandiose delusional beliefs and memory of objective factual events can no longer be accepted.

d. Notwithstanding the above, it is generally accepted that a person suffering from schizo-affective disorder is capable of giving reliable evidence and accurately recalling events they witnessed.

Part V: RESPONDENT'S ARGUMENT

30 37. The respondent contends that the fresh evidence is not relevantly "compelling" because it establishes no more than that Carter was in a class of witness whose reliability must be carefully considered, and, in relation to which, independent support will be important.

38. The applicant appears to contend that the effect of the expert evidence was that corroboration was required for all aspects of the evidence of a person suffering from schizo-affective disorder.[61] Respectfully, this contention does not properly characterise the effect of the fresh evidence.

39. The applicant also appears to contend that any assessment of the surrounding evidence

40 supporting Carter in determining whether his evidence is reliable is irrelevant unless it put

---

59 *R v Bromley* [2018] SASCFC 41 at [511]-[559]; ACAB 265-274.
60 *R v Bromley* [2018] SASCFC 41 at [38]; ACAB 137-138.
61 Applicant's Written Submissions at [35]-[39], [44].

the applicant at the scene of the assault, whereas all evidence conflicting with Carter is relevant.[62] Respectfully, this contention fails to appreciate the task required under s 353A.

40. Even if compelling, it was not in the interests of justice that the fresh evidence be considered because the respondent's evidence established, amongst other things, that the applicant had a relevant propensity which was cogent evidence of the applicant's guilt of the offence. In the circumstances of this case, especially considering the general nature of the effect of the fresh evidence, the evidence put forward by the respondent was sufficient to support the determination of the Full Court[63] that it was not in the interests of justice that
10 the fresh evidence be considered as on an appeal.

Second or subsequent appeals: s 353A CLCA

41. This Court considered the construction and application of s 353A CLCA in *Van Beelen v The Queen (**Van Beelen**)*.[64] The provision creates a novel right of appeal limited to where there is fresh and compelling evidence that should, in the interests of justice, be considered on an appeal. The limitation derived from the definitions of the words "fresh" and "compelling" contained in s 353A(6)(b)(iii), and the requirement that there be a "substantial miscarriage of justice", make plain that the appellate court's task requires an
20 analysis of the way in which the fresh and compelling evidence impacts on the evidentiary landscape of the trial itself in the context of the forensic contest at trial. It follows that the general proposition that an appellant is bound by the conduct of his counsel at trial[65] remains applicable.

42. In *Van Beelen*, this Court said that the three requirements contained in s 353A(6)(b) which fresh evidence must satisfy before it may be considered compelling - that it be reliable, substantial and highly probative in the context of the issues in dispute at the trial - attract their ordinary meaning, each having work to do, albeit with a degree of overlap:[66]

> … The criterion of reliability requires the evidence to be credible and provide a trustworthy basis for fact
> 30 finding. The criterion of substantiality requires that the evidence is of real significance or importance with respect to the matter it is tendered to prove. Plainly enough, evidence may be reliable but it may not be relevantly "substantial". Evidence that meets the criteria of reliability and substantiality will often meet the third criterion of being highly probative in the context of the issues in dispute at the trial, but this will not always be so. The focus of the third criterion is on the conduct of the trial. What is encompassed by the expression "the issues in dispute at the trial" will depend upon the circumstances of the case. Fresh evidence relating to identity is unlikely to meet the third criterion in a case in which the sole issue at the trial was whether the prosecution had excluded that 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

---

62 Applicant's Written Submissions, including at [44].
63 *R v Bromley* [2018] SASCFC 41 at [388], [508]; ACAB 224, 263.
64 (2017) 262 CLR 565.
65 See e.g. *Orreal v The Queen* (2021) 96 ALJR 78 at [16] and the authorities cited therein.
66 *Van Beelen v The Queen* (2017) 262 CLR 565 at [28].

> the third criterion because it bears on the ultimate issue in dispute, which is proof of guilt. [Citations omitted]

43. The requirement that it must also be "in the interests of justice" that fresh evidence which is compelling be considered on an appeal is a further pre-condition to the enlivenment of the jurisdiction to hear a second or subsequent appeal.[67]

44. The respondent contends that the interests of justice condition in s 353A(1) empowers a court to refuse permission to appeal notwithstanding that the evidence is "fresh" and "compelling". While those circumstances may be rare,[68] Parliament expressly included the further condition. To that extent, it was contemplated that an applicant may be able to marshal "fresh" and "compelling" evidence, but, on the facts and in the circumstances of the application, it may not be in the interests of justice that the evidence be considered on an appeal.

45. Accepting this, the Full Court is able to receive evidence in relation to the question of whether it is in the interests of justice that fresh and compelling evidence be considered on appeal in order to contextualise or otherwise assess the "fresh" and "compelling" evidence adduced by an applicant. The example referred to by this Court in *Van Beelen* was evidence of a public confession of guilt by an applicant.[69] That evidence would necessarily be tendered by a respondent and be relevant to whether it is in the interests of justice that fresh and compelling evidence be considered on appeal

46. It is not possible nor desirable to define precisely what is meant by the phrase, "interests of justice", but it has been acknowledged that it involves the judicial evaluation of a broad range of factors.[70] Further, in *R v Lambeth Metropolitan Stipendiary Magistrate; Ex Parte McComb,* Lord Donaldson MR observed in relation to the phrase the "purposes of justice" that the "...The purposes of justice are to ensure that the accused is convicted if guilty and acquitted if innocent."[71] To similar effect, in *Mickelberg (No 3)*,[72] Malcolm CJ formulated the following considerations that apply to the "interests of justice" in a criminal matter:[73]

> The interests of justice in a particular criminal case are to ensure that a person who is accused of a crime is convicted if guilty and acquitted if innocent after he has received a fair trial. The interests of justice also extend to the public interest in the due administration of justice.

---

[67] *Van Beelen v The Queen* (2017) 262 CLR 565 at [30].
[68] *Van Beelen v The Queen* (2017) 262 CLR 565 at [30].
[69] *Van Beelen v The Queen* (2017) 262 CLR 565 at [30].
[70] *BHP Billiton Ltd v Schulz* (2004) 221 CLR 400 at [172].
[71] *R v Lambeth Metropolitan Stipendiary Magistrate; Ex Parte McComb* [1983] QB 551 at 564.
[72] *Mickelberg v The Queen (No 3)* (1992) 8 WAR 236.
[73] *Mickelberg v The Queen (No 3)* (1992) 8 WAR 236 at 251.

47. Further, the interests of justice condition could, in the circumstances of a particular case involving a stale conviction, encompass considerations of the potential fairness or unfairness of calling evidence in response to the preconditions in respect of all parties.[74]

48. The imposition of the additional requirement that it must also be "in the interests of justice" that fresh evidence which is compelling be considered on an appeal militates in favour of that requirement encompassing factors that exist beyond the fresh and compelling evidence. In this regard, the further condition is a mandatory consideration that the Court of Appeal must take into account before the principles applicable on a substantive appeal
10 are engaged. As a result, the consideration of a respondent's evidence at the permission stage is in accordance with the statutory framework as provided by Parliament.[75]

49. The purpose of s 353A, namely the creation of a limited exception to the principle of finality, informs the breadth and impact of the "interests of justice" condition. While the provision displaces the principle of finality, the public interest that inheres in that principle also forms part of a court's legitimate consideration of the "interests of justice".

50. As the example provided by the respondent and referenced by this Court in *Van Beelen* illustrates, there may be some matters where notwithstanding "fresh and compelling"
20 evidence, a Court entertaining an application may be faced with other evidence or material proffered by a respondent that demonstrates the applicant's guilt in such a way that it can be satisfied an applicant's conviction has, in line with the interests of justice, resulted in the "conviction of a guilty person" such that the interests of justice do not demand consideration of the "fresh" and "compelling" evidence on an appeal.

Carter's evidence "in the context of the issues in dispute at trial"

51. As early as in the prosecutor's opening address, the jury were made aware that Carter had "difficulties in recalling details consistently"[76] and that, from the day after the murder, he spent three months in Hillcrest Hospital, having been admitted there before.[77] The
30 prosecutor outlined that, notwithstanding the difficulties with Carter's evidence, the jury would be presented with evidence that supported it in various ways.

---

[74] cf *Kentwell v The Queen* (2014) 252 CLR 601 at [29], albeit in the context of comments made about appeals brought against convictions on the basis of misconceptions about the law that may have existed at the time of the conviction. However, the respondent contends a scenario where witnesses are no longer available to give evidence in response to particular propositions put forward on an application under s 353A is a matter that could still inform the interests of justice condition.

[75] Cf Applicant's Written Submissions at [55].

[76] Trial transcript 9; ABFM 39.

[77] Trial transcript 9; ABFM 39.

52. Carter gave evidence that he was admitted to Hillcrest Hospital the day following the murder, where he stayed for "two to three months".[78] His evidence included his various "escapes" from Hillcrest during the course of his admission, and evidence about the changes in his medications, including the various injections and tablets he was prescribed.[79] In cross-examination he accepted that his mother had thought he was sick on the day following the murder, even though he thought he was "still alright".[80] He also accepted that it was difficult for him to remember back to March and April, and when he was "tight and tense" - adopting his description of how he felt when he was sick.[81]

10 53. Carter accepted that he was feeling sick when he witnessed the murder.[82] He said that when he was feeling sick he thought he had seen "the Devil", and thought that he (Carter) was a footballer for Port Adelaide.[83]

54. Carter said that he thought he first learned that he was schizophrenic in 1982[84] and that, since then, he had been under the care of Dr Barrett, his psychiatrist.[85]

55. Carter gave evidence that if he regularly took his medication, he was "not too bad" but that for three to four weeks prior to the murder he did not take his tablets.[86]

20 56. In the prosecution closing address the jury was invited to "scrutinise Gary Carter's evidence with great care" and was told that it was "obvious he was ill at the time" of the murder and "obvious that he has made some errors."[87] The prosecutor then stepped through different aspects of Carter's evidence for which support could be found in other evidence.

57. In his address defence counsel alerted the jury to the fact that when giving his evidence Carter was no longer acutely afflicted by his illness, instead presenting as "...a different man" to the one "...with the devil talking to him."[88] It was put that Carter was "...a totally unreliable witness" who was not just in conflict with the expert evidence of Dr Manock but "...in conflict with common sense".[89] Counsel drew the jury's attention to Carter's

30 evidence about his seeing the Devil, his evidence about his condition when he was feeling

---

78 Trial transcript 152; ABFM 197.
79 Trial transcript 175-176; ABFM 220-221.
80 Trial transcript 177; ABFM 222.
81 Trial transcript 178; ABFM 223.
82 Trial transcript 182; ABFM 227.
83 Trial transcript 194; ABFM 239, 288.
84 Trial transcript 242; ABFM 287.
85 Trial transcript 244; ABFM 289.
86 Trial transcript 250; ABFM 295.
87 Trial transcript 576; ABFM 635.
88 Trial transcript 645; ABFM 704.
89 Trial transcript 648; ABFM 707.

particularly unwell, and his evidence that, looking back, the events of the murder seemed "unreal".[90]

58. In the light of the caution sounded by the prosecutor, and the attacks mounted by defence counsel, the Judge gave specific directions as to how the jury were to approach Carter's evidence. These included that Carter suffered from a mental illness and that he "undoubtedly…was more affected by that illness on the night in question than when he gave evidence before you".[91] The jury was directed to approach Carter's evidence "with considerable caution", particularly given its significance to the prosecution case and the fact that Carter was mistaken "…in some important respects."[92] It was only if after heeding that warning, and analysing Carter's evidence against the balance of the evidence, that, the jury were directed, they could proceed to accept "some or a great deal" of his evidence.[93] As noted above, these directions were upheld on the applicant's first appeal and application to this Court.

59. In the context of the issues in dispute at trial, Carter's evidence was of crucial importance. So much was accepted by the prosecution and repeated in each address and in the summing up. Carter's illness and potential unreliability, expressly linked to his illness, was a keenly contested issue at trial.

60. For the purposes of this application, it should be noted that defence counsel embraced the evidence given by Dr Manock (the pathologist who gave evidence as to the cause of death) at trial as, on his case, being consistent with a reasonable hypothesis consistent with accidental death. Defence counsel urged the jury to accept Dr Manock's evidence as reliable and as impugning, on the defence case, the evidence of Carter.[94]

61. The following propositions may be accepted regarding Carter's evidence at trial:

   a. all parties, and the Judge, made clear to the jury that Carter suffered from a serious psychiatric illness;

   b. the jury knew that Carter's illness had required him to be treated as an inpatient at hospital on more than one occasion, including for two to three months immediately after the murder;

   c. that as a result of his illness, Carter's memory and perception of reality were impacted (including because things seemed "unreal", because he saw the Devil and because he believed he was a league footballer);

---

[90] Trial transcript 652-653; ABFM 711-712.
[91] Summing up 3; ACAB 6.
[92] Summing up 3-4; ACAB 6-7.
[93] Summing up 5; ACAB 8.
[94] Trial transcript 646-647, 654-655, 658; ABFM 705-706, 713-714, 717.

d. Carter conceded that his demeanour and mental state at the time of the trial were significantly different to what they were on the night of the murder, at which time he had not been taking his medication for some weeks and was acutely unwell; and

e. that aspects of Carter's evidence were in conflict with the evidence of other witnesses on the prosecution case.

The fresh psychiatric and psychological evidence - was it "compelling" for the purposes of s 353A?

10

62. Each expert conceded in their evidence that Carter was capable of accurately recalling events.[95] None of the experts were asked to undertake a review of the evidence given at trial that was independent of Carter and said to support or conflict with his account (and hence bearing on the issue of reliability). Respectfully, the Full Court was right to observe that, "…this significantly diminishes the weight to be given to their opinions as to the reliability of Carter's trial evidence."[96] As a result, the effect of the expert evidence is at best a foundation for a more diffuse claim: that, as a general proposition, people with schizo-affective disorders, in the acute symptomatic grip of their disorder, are generally unreliable historians.

20

63. Further, the impact of the evidence as to the difference in specialist knowledge between the time of trial and when the evidence was given was that, while it was a view already held in the 1980s, the scientific understanding as to why and how those suffering from schizo-affective disorders are such unreliable historians had deepened.

64. Not dissimilarly, on the issue of suggestibility, the effect of the expert evidence was that, as a class of witness, people suffering from schizo-affective disorder would be more likely to be suggestible than the average person.

30 65. What falls from the above is that the effect of the fresh evidence could be said to speak to the level of intensification, or emphasis, required in any direction to a jury as to the care required in scrutinising the evidence of a witness suffering from schizo-affective disorder before relying upon that evidence. However, the experts did not themselves undertake the exercise of scrutinizing Carter's evidence in the light of the evidence as a whole, for the purpose of pointing to any particular shortcoming or shortcomings fatal to his reliability, nor was there any cross-examination as to a particular risk of "recent invention" or infection of his account.

---

95 Fresh evidence transcript 49 (Coyle), 79 (Sugarman), 148, 179 (Furst), 199 (Hook), 240-241 (Brereton); ABFM 780, 810, 879, 910, 930, 971-972.

96 *R v Bromley* [2018] SASCFC 41 at [140]; ACAB 162.

66. On this point, it is of note that at trial objection was taken to a question asked by the prosecutor as to who was the first person Carter told about the events he had witnessed. In the result, the question was withdrawn "subject to any cross-examination that might open the topic up."[97]

67. As a result, the respondent contends that the high point of the fresh evidence was that the consensus of the experts was that Carter was a member of a class of witness that is, as a general proposition, likely to be unreliable. Potentially, given the advancements in knowledge in the field, "very" or "extremely" unreliable. Further, in order to evaluate any account of a witness who is a member of that class, it would be objectively useful to look to other sources to assess the potential reliability of the account given.

68. It was not the evidence of the experts that Carter was incapable of giving reliable evidence. Each expert acknowledged they had not considered all of the evidence at trial that could support Carter's account; each conceded aspects of support for his account would be relevant to whether his recall was accurate and each conceded that Carter was, at base, capable of recalling the event. The effect of their evidence was not that people who are suffering from a schizo-affective disorder are incapable of being reliable, nor that they can never give reliable accounts. Though trite, it is worth noting that the evidence of witnesses who are *incapable* of being reliable is inadmissible as their evidence could not rationally affect the probability of facts in issue.[98]

69. What the Full Court did in assessing the evidence was to distil the core propositions that emerged from it, and then consider, by reference to the criteria in s 353A, whether or not the evidence was "fresh" and "compelling". In coming to their primary conclusion that the fresh evidence was not "compelling", the Court sought to evaluate the propositions that had emerged from the expert evidence against the evidence and directions given to the jury at trial.[99] This task can be distinguished from undertaking an independent assessment of evidence adduced at trial in the application of the "proviso", with its attendant circumspection in relation to matters arising from an assessment of a complainant's credibility, such as occurred in *OKS v Western Australia*.[100]

---

97 Trial transcript 173; ABFM 218.

98 *HML v The Queen* (2008) 235 CLR 334 at [5].

99 Further, as regards suggestibility, the Court examined the chronology of Carter's statements displaying esoteric knowledge of the assault on the deceased: *R v Bromley* [2018] SASCFC 41 at [152]-[196]; ACAB 164-181.

100 (2019) 265 CLR 268 at [29]-[31]; cf Applicant's Written Submissions [50].

70. The Full Court's analysis and conclusion were not contrary to the expert evidence; they were in accordance with the provisions governing the application. In order to evaluate whether or not the statutory criteria were met, the Court had to consider whether and how the fresh psychiatric evidence impacted Carter's reliability.[101] That task necessitated a consideration of Carter's evidence, in the light of all other evidence capable of having some bearing on that issue, including the fresh evidence.[102]

71. The respondent contends that "in the context of the issues in dispute at the trial of the offence", the fresh evidence rose no higher than giving greater detail to an issue that was
10 well-covered: that the impact of Carter's mental illness was central to his reliability, and that careful regard had to be had to the balance of the evidentiary landscape before his account could be acted upon. As the jury were directed at trial, looking to other aspects of the evidence at trial was (and remains) important when assessing reliability.

72. When this Court has regard to the evidence supporting and conflicting with Carter's account, the way in which the issue was approached at trial, and the effect of the fresh evidence, the respondent contends it will be satisfied that the Full Court did not err in its primary conclusion.

20 **Interests of justice**

73. The respondent contends that the Full Court correctly held that, to the extent the fresh evidence *was* "compelling", the further "interests of justice" criterion was not met. It is important to note that this criterion is a separate condition on a grant of permission to appeal for a second or subsequent time - no similar condition exists in the common-form appeal provision where fresh evidence is adduced.[103] Contrary to the reasoning of the majority of the Full Court in *Van Beelen*, in this matter, there was no conflation of that separate criterion with the determinative issue in the appeal.[104]

30 74. Here, the separate consideration in relation to the "interests of justice" criterion was that, assuming the fresh evidence was "compelling", such that it was reliable, substantial and highly probative in the context of the issues in dispute at the trial, there was a body of evidence put forward by the respondent that established that despite that "compelling" evidence, it was not in the interests of justice that it be considered on an appeal – to contrast

---

101 The situation can immediately be contrasted with a scenario where at the time of trial, it was not known to the parties that the witness suffered from schizo-affective disorder.

102 Cf applicant's written submissions [43]ff, [50]-[53].

103 Cf *Rodi v Western Australia* (2018) 265 CLR 254 at [28]; Applicant's Written Submissions at [55]-[56].

104 *Van Beelen v The Queen* (2017) 262 CLR 565 at [31].

with the error in *Van Beelen*, despite the fresh evidence undermining Carter's unreliability, the respondent's evidence could be brought to bear as to the *weight* to be given to the fresh evidence.

75. The Full Court made findings[105] that the respondent's evidence on the application broadly established two matters:

a. that Carter and Karpany had esoteric knowledge relevant to the offending consistent with the prosecution case inculpating the applicant; and

10 b. that the applicant had a disposition or proclivity to demand sex from males in public places, to become frustrated or angry if rebuffed, to act on that frustration or anger by physically assaulting the person sex was demanded from, notwithstanding the demand was made in a public place with the attendant risk of detection, and that he had a willingness to act on that disposition or proclivity, particularly after consuming alcohol and when in, or notwithstanding that he was in, the company of Karpany.

76. The Full Court did not posit its consideration of the interests of justice condition on the assumption that the fresh evidence did not undermine the conclusion of guilt. Instead, despite its primary conclusion, it went on to consider whether, on the assumption the fresh

20 evidence was capable of being "compelling", whether the evidence tendered by the respondent on the application demonstrated that the interests of justice condition was not satisfied. So much is set out in the Court's construction of s 353A at [388], where it notes that permission to appeal a second or subsequent time may still be refused notwithstanding the fresh evidence may appear to meet the definition of "compelling".

77. The Court's findings in relation to esoteric knowledge and the applicant's propensity both independently undermined the capacity of the fresh evidence to the extent that the interests of justice condition was not met.

30 78. Regarding the applicable law, the Full Court adopted the approach that the evidence of esoteric knowledge and that relating to the applicant's propensity had to be admissible as if it were being led at a trial. In respect of the esoteric knowledge evidence,[106] admissibility was determined in line with the principles outlined in *Kamleh v The Queen*.[107] In respect

---

105 [2018] SASCFC 41 at [431]; ACAB 241 (regarding Carter and Karpany's esoteric knowledge); [502], [506]; ACAB 262, 263 (regarding the alleged propensity of the applicant). Given the nature of the question before this Court, and given the fact this question was decided in the alternative to the Court of Appeal's primary conclusion as to the fact the psychiatric evidence was not "compelling", the respondent has not included the material upon which those findings were based in its further materials. As described in the judgment below at [403]-[416], [431]; ACAB 228-236, 241 (regarding esoteric knowledge); [458]-[465], [506]; ACAB 248-251, 263 (regarding the propensity evidence).

106 Which, the respondent notes, was primarily relied upon to demonstrate consistency with Carter's evidence of there having been an assault on the deceased in which Karpany participated, and in opposing the effect of the pathology evidence put forward by the applicant on the topic of accidental death. The latter goes beyond the scope of this application as referred given that the scope was confined to the psychiatric and psychological evidence from the Court below.

107 (2005) 79 ALJR 541.

of the propensity evidence, admissibility was governed by s 34P of the *Evidence Act 1929* (SA). Arguably this approach to the "interests of justice" criterion goes beyond the terms of the condition itself, and was, as such, favourable to the applicant.

79. The Court described the propensity as "a propensity to rape (or attempt to rape) young males in public places and to use the intoxicated state of the victim, and the infliction of violent assault, and the assistance of another male offender, to carry out the intended crime."[108] The propensity not only was specific, it also, in the respondent's submission, had "close similarity" to the alleged offence, in the sense contemplated by the
10 authorities.[109] Given the specific nature of the propensity, and the "close similarity" between the 1981 conduct and the murder, the strength of the inferential mode of reasoning able to be deployed was significant.[110]

80. The evidence independent of Carter, surveyed above, established that the applicant had been identified as in the company of the deceased in the early hours of 4 April 1984, was seen by police in the immediate vicinity of where the body was later discovered, was dishevelled, with blood on his shirt, hand and lip, and admitted having been in a fight. Further, there was mud on his trousers and shoes, consistent with having been in the river. The deceased's body was found without trousers, and with injuries consistent with having
20 been assaulted, and having drowned. In these circumstances, evidence of the applicant's propensity was capable of being used as weighty evidence consistent with his guilt (as well as in considering the criteria under s 353A); the Full Court was entitled to consider the improbability of there being another person in the same location at the same time, with the same propensity as the applicant, in explaining the absence of the deceased's trousers, the deceased's injuries and the cause of his death.[111]

81. The Full Court articulated the way in which the propensity evidence was used, in line with the applicable principles as to admissibility, at [487], where it adapted a statement of Cox J in *Pfennig*:[112]

30

> It would, in our opinion, be an affront to common sense to postulate two persons in the deceased's vicinity at Adelaide, and both certainly near the Morphett Street bridge over the River Torrens, about the same time that morning, each with a propensity to rape young men in public places and to use the intoxicated

---

108 *R v Bromley* [2018] SASCFC 41 at [486]; ACAB 257.
109 *Hughes v The Queen* (2017) 263 CLR 388 at 356; *TL v The King* [2022] HCA 35 at [28].
110 cf *TL v The King* [2022] HCA 35 at [29].
111 See e.g. the Court of Appeal's construction of s 353A at [388]-[391]; ACAB 224-225.
112 *R v Bromley* [2018] SASCFC 41 at [487]; ACAB 257, with the strikethrough terms removed, citing *R v Pfennig [No 2]* (1992) 57 SASR 518 at 524, adapting the statement of Cox J to the facts and circumstances of the applicant's case.

state of the victim and the infliction of violent assault and the assistance of another male offender to carry out the intended crime.

82. In line with the construction of s 353A outlined above, admission and consideration of the respondent's evidence was consistent with the content of the interests of justice condition conferred by Parliament. This matter was one where, as a result of the evidence adduced by the respondent before the Full Court, the "interests of justice", properly considered, did not demand consideration of the fresh evidence as on an appeal under s 353A.

Conclusion

83. The respondent contends that when the fresh evidence is considered as a whole, it fails to satisfy the criterion in s 353A(6)(b)(iii) CLCA. It only establishes that as a class of witness, people suffering from schizo-affective disorder are not generally reliable historians and regard ought be had to independent evidence in assessing their accounts. The respondent submits this conclusion is sufficient to dispose of the application.

84. Further, to the extent that the evidence is "compelling", the evidence about the esoteric knowledge of Carter and Karpany, and the evidence that establishes the propensity of the applicant, mean that the Full Court was correct to conclude that it was not in the interests of justice that the evidence be considered as on an appeal.

85. The Full Court's judgment is not attended by sufficient doubt to warrant a grant of special leave to appeal. The application for special leave to appeal should be dismissed.

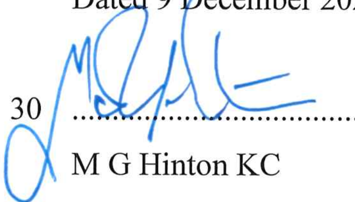
Part VI: NOTICE OF CONTENTION OR CROSS APPEAL

86. Not applicable.

Part VII: TIME ESTIMATE

87. The respondent estimates that no more than one and a half hours will be required for the presentation of its oral argument.

Dated 9 December 2022



M G Hinton KC
Telephone: (08) 7322 7055
Email: dpp@sa.gov.au

W M Scobie
Telephone: (08) 7322 7950
Email: william.scobie@sa.gov.au

ANNEXURE: LIST OF RELEVANT STATUTORY PROVISIONS

Section 353A of the Criminal Law Consolidation Act 1935 (SA) *(as in force on 7 March 2016)*

Section 34P of the ***Evidence Act 1929*** **(SA)** *(as in force on 7 March 2016)*