



IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No: A14 of 2016

BETWEEN:

NH
Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS
Respondent

APPELLANT'S SUBMISSIONS

20 **Part I: CERTIFICATION**

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

Part II: CONCISE STATEMENT OF ISSUES

- 1.1 In what circumstances can an Appeal Court quash a verdict of not guilty and set aside a judgment of acquittal?
- 30 1.2 In the event that an Appeal Court has an inherent jurisdiction to set aside a verdict of acquittal did the Court err in doing so?

Part III: CERTIFICATION WITH RESPECT TO SECTION 78B

The appellant certifies that it has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* (Cth) . The appellant does not consider that any notice under that section is required to be given.

40 **Part IV: CITATION FOR THE REASONS OF THE COURT BELOW**

The reasons for judgment of the Court below are not reported. The internet citation is [2015] SASFC 109.

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Part V: NARRATIVE STATEMENT OF RELEVANT FACTS

5. The relevant facts are set out below:-
- 5.1 David Zefi, Rrok Jakaj, Dario Stakaj and the appellant H,N, (the defendants) were each jointly charged on Information with the murder of Christopher Trifon Hatzis at Adelaide on 4 August 2012.
- 10 5.2 The defendants each pleaded not guilty. Their trial, before a judge and a jury, commenced on 7 August 2014.
- 5.3 On 17 September 2014 at about 11.11am the jury retired to consider its verdicts.
- 5.4 On 22 September 2014 at about 2.27pm the jury returned to deliver its verdicts. When they did so, the following exchange occurred:
- 20 Trial Judge: Mr Foreman, I understand you have verdicts?
 Foreperson: Yes, I do.
 Trial Judge: Are they unanimous or at least any conviction for murder must be unanimous? You do know that, don't you?
 Foreperson: Yes, but --
 Trial Judge: But others are majority?
 Foreperson: Can you please start that again?
 Trial Judge: Take your time. My associate will take them from you. I Take it all the verdicts are not unanimous? Is there a majority verdict among the verdicts?
- 30 Foreperson: Yes, that is correct.
 Trial Judge: My associate will need to know as you go through which are unanimous and which are majority.
 Foreperson: Yes.
 Trial Judge: Just listen carefully.
 Foreperson: Sure.
- 40 Associate:[verdicts in relation to the other three defendants taken]
 As to the accused [REDACTED], are you unanimously agreed upon your verdict as to the charge of murder?
 Foreperson: No.
 Associate: As to the charge of murder, and the accused [REDACTED], are ten or more of you agreed upon your verdict for a majority verdict of 'not guilty'?
 Foreperson: Yes.
 Associate: As to the charge of murder, do you find the accused [REDACTED] [REDACTED] 'not guilty'?
 Foreperson: Yes.
 Associate: And that is the verdict of ten or more of you?
 Foreperson: Yes.

Associate: Members of the jury, as to the alternative charge of manslaughter and the accused [REDACTED], are you unanimously agreed upon your verdict?

Foreperson: No.

Associate: Are ten or more of you agreed upon your verdict for a majority verdict?

Foreperson: Yes.

Associate: As to the alternative charge of manslaughter, do you find the accused [REDACTED] 'guilty' or 'not guilty'?

10 Foreperson: Guilty.

Associate: And that is the verdict of ten or more of you?

Foreperson: Yes.

5.5 Whilst the verdicts were being taken no member of the jury made known to the Court any dissatisfaction with the verdicts as given by the foreperson nor with any of the answers he gave to the questions put to him by either the trial judge or her Honour's Associate as set out at [5.4] above.

20 5.6 On 22 September 2014 at about 2.34pm the jury was discharged and the allocatus was administered in respect of each defendant on the charge of manslaughter.

30 5.7 At about 4.50pm on 22 September 2014 the jury foreperson met with the Acting Jury manager and stated that in relation to each of the defendants the jury had not reached a majority verdict on the charge of murder. That is, in the course of delivering the verdicts as set out above at [5.4]. On both occasions the jury foreperson stated "yes" to indicate that ten or more of the jurors were agreed on a verdict of "not guilty" in relation to the charge of murder as against [REDACTED]. That answer was incorrect. The correct answer on both occasions was "no", as the jury had not reached any verdict on murder.

5.8 The jury foreperson was not expecting the Associate's question as to whether the 'not guilty' verdicts on murder were the verdicts of ten or more of them. The foreperson had thought that if the jury was not unanimous on "guilty" for murder, then that was the end of the matter regarding murder and they were simply to turn to consider manslaughter.

40 5.9 On 1 October 2014 between about 10.30am and 11.00am, the prosecution were notified of the defect in the verdicts. Counsel for the defendants had also been notified by this time.

5.10 On 2 October 2014 the matter was listed before the Trial Judge for sentencing submissions. At that hearing, before sentencing submissions proceeded, the parties were heard in relation to the defects in the verdicts. Submissions as to sentence were then made by each of the parties.

50 5.11 Sentence was imposed on 7 October 2014, and no further submissions were made or invited in relation to the issue raised by the foreperson and confirmed by the other jurors.

- 5.12 After the sentencing of the defendants on 7 October 2014, a Report of Prisoner Tried was created and printed for each of them using the information entered into the Supreme Court of South Australia's computer records. Those four reports of Prisoner Tried were certified and signed as correct by a Clerk of Arraignment and the Trial Judge.
- 10 5.13 The respondent subsequently filed an application seeking orders from the Supreme Court to expunge the verdict of not guilty of murder, and the guilty verdict on the alternative charge of manslaughter and to order a new trial on the charge of murder.
- 20 5.14 The appellant filed a notice of appeal seeking to have the verdict of guilty of manslaughter quashed on the ground that the jury had failed to first deliberate and return a true verdict of not guilty of murder before considering the alternative charge of manslaughter. In the alternative the appellant also complained that the verdict of manslaughter was unsafe and unsatisfactory as it was a verdict against the weight of the evidence. The appellant further complained that the Learned Trial Judge had erred in finding that there was a case to answer on either charge.
- 5.15 The Full Court of the Supreme Court of South Australia (by a majority) granted the respondent's application and in the circumstances, did not consider further the appellant's appeal.

Part VI: APPELLANT'S ARGUMENTS

6.1 Introduction

- 30 6.1.1 The decision of the Full Court and the arguments put forward by the respondent were on the basis that the Court had inherent jurisdiction to quash not guilty verdicts returned by a jury. It was not suggested that the rights of appeal contained in Part 11 of the *Criminal Law Consolidation Act 1935 (SA)* could be invoked. Neither was it suggested that any form of judicial review could be invoked.
- 40 6.1.2 The issues which arise in this matter involve a consideration of the extent of the inherent jurisdiction of a superior court of record, and in particular the circumstances, if any, in which any such jurisdiction can be invoked to quash not guilty verdicts returned by a jury.
- 6.1.3 In the event that the court does have jurisdiction to do so, the further question arises as to whether it should have exercised the discretion to quash the verdicts returned in this case.

6.2 Jurisdiction of a Superior Court of Record

6.2.1 The jurisdiction of a superior court of record, in this case the Supreme Court of South Australia, is based in the legislation establishing the court as amended by Parliament from time to time.

6.2.2 Section 17 of the *Supreme Court Act 1935 (SA)* provides:—

(1) *The court shall be a court of law and equity.*

(2) *There shall be vested in the court—*

- 10 (a) *the like jurisdiction, in and for the State, as was formerly vested in, or capable of being exercised by, all or any of the courts in England, following:*
- (i) *The High Court of Chancery, both as a common law court and as a court of equity:*
 - (ii) *The Court of Queen's Bench:*
 - (iii) *The Court of Common Pleas at Westminster:*
 - (iv) *The Court of Exchequer both as a court of revenue and as a court of common law:*
 - (v) *The courts created by commissions of assize:*
- 20 (b) *such other jurisdiction, whether original or appellate, as is vested in, or capable of being exercised by the court:*
- (c) *such other jurisdiction as is in this Act conferred upon the court.*

6.2.3 It follows that the jurisdiction of those English courts provides the setting in which the conduct of trials by jury of criminal charges is found.

6.3 Inviolability of Jury Verdicts

30 6.3.1 It has long been recognized that judgments of acquittal entered after a verdict of not guilty entered by a jury are not susceptible to challenge.¹

6.3.2 This was stated in the clearest of terms in the *King v Snow*² which discussed in detail the position at common law.

6.4 Correction of Jury Verdicts

40 6.4.1 That position is subject to some exceptions and in certain limited circumstances there is scope for a mistake in a jury's verdict to be corrected.

¹ *Kourakis CJ* set out in his judgment in the reasons the history behind this at [23] – [40]

² (1915) 20 CLR 315, 321 and 322 per Griffith CJ, 364 per Gavan Duffy and Rich JJ

6.4.2 This is confined to where the mistake or error is identified and rectified before the jury has dispersed³ and certainly not later than after the signing of the report of prisoner tried by the Trial Judge.

6.5 Appellate Jurisdiction in Criminal Matters

6.5.1 In relation to the powers on appeal from jury trials this has been modified by statute and is found in Part 11 of the *Criminal Law Consolidation Act 1935 (SA)*

6.5.2 In relation to appeals against acquittal the rights of appeal from judgments of acquittal have been modified by statute to permit appeals in the case of directed verdicts⁴ and trials by judge alone⁵.

6.6 Applications for Retrials to the Full Court following Acquittal

6.6.1 Part 10 of the Criminal law Consolidation Act 1935 (SA) now makes provision for retrial of certain offences⁶ in cases of tainted acquittals⁷ or fresh or compelling evidence⁸.

6.7 Inherent Jurisdiction of a Superior Court of Record

6.7.1 It is not disputed that a superior court of record possesses an inherent jurisdiction which supplements that provided for by statute.

6.7.2 The extent of the inherent jurisdiction of a superior court of record is not closed or limited to defined categories⁹. New circumstances will arise in which a court will have to consider how to exercise its powers to ensure that its processes and procedures are properly used.

6.7.3 Nevertheless, the inherent jurisdiction cannot conflict with the express terms of its statutory jurisdiction or go beyond the limits otherwise provided by statute as to the extent of its jurisdiction.

6.7.4 It is noteworthy that no previous cases have been identified in which a court has relied on its inherent jurisdiction to set aside jury verdicts in circumstances analogous to those which have arisen here. It is submitted that this is because to do so would be to go beyond the express statutory powers provided by statute and to breach the long held principles in relation to the inviolability of jury verdicts.

³ *R v Cefia* (1979) 21 SASR 171

⁴ *Criminal Law Consolidation Act 1935 (SA)* s352(1)(ab)(i)

⁵ *Criminal Law Consolidation Act 1935 (SA)* s352(1)(ab)(ii)

⁶ s331(1)

⁷ s336

⁸ s337

⁹ *Walton v Gardiner* (1993) 177 CLR 378, 393 - 395

- 6.7.5 The majority judgment bases the exercise of its powers on the need to protect an abuse of process from undermining the confidence in courts generally¹⁰.
- 6.7.6 At the same time the majority have also recognized that what had occurred was as a result of a “*mistake*”, firstly by the foreperson in the answers which he gave and secondly by the whole jury in their acquiescence to those responses¹¹.
- 10 6.7.7 Once it is recognized that what occurred was due to a *mistake* rather than some other act or behavior it is apparent that this is the type of problem which, once identified, would ordinarily be dealt with by way of appeal where a right of appeal is available. It cannot be described as an *abuse* that could give rise to any lack of public confidence. It is certainly not an abuse that stemmed from any action of the appellant or the other defendants and does not come within the categories that have been recognized as amounting to an abuse of process¹².
- 20 6.7.8 In circumstances where the legislature has expressly limited rights of appeal¹³ it is not appropriate to circumvent those limits by seeking to rely on the exercise of the court’s inherent jurisdiction.
- 30 6.7.9 This is further confirmed by the legislature having expressly enacted provisions to allow for applications to be made to the Full Court to order re-trials in the case of verdicts of acquittal obtained in tainted circumstances. A tainted acquittal exemplifies an abuse of the court’s processes by a party, which if there was such an inherent jurisdiction in the court, would mean that there would have been no need for the enactment of Part 10. The fact that Part 10 was enacted points strongly to the absence of any such inherent jurisdiction.
- 6.7.9 As *Kourakis CJ* identified, if a remedy is required, it is up to Parliament to provide.¹⁴ It might be added that this is exactly what Parliament has seen fit to do in the case of tainted acquittals.

6.8 Exercise of the jurisdiction

- 40 6.8.1 If contrary to the above arguments, the court does possess an inherent jurisdiction to quash a verdict of acquittal from a jury it is submitted that in the circumstances of this case it is not appropriate to do so.
- 6.8.2 It is the case that the jury were not able to unanimously agree that the appellant was guilty of the charge of murder. To submit the appellant to a

¹⁰ *Case Stated on Acquittal No 1 of 2015* [2015] SASCF139 (Reasons) at [164]

¹¹ Reasons at [140]

¹² *Jeffery & Katauskas v SST Consulting* (2009) 239 CLR 75, 93 [27]

¹³ *Criminal Law Consolidation Act 1935 (SA)* s 352, s353

¹⁴ Reasons at [45]

second trial on such a serious charge would be to expose him to an unacceptable risk¹⁵.

- 6.8.3 In a case such as this where what has occurred is not of the appellant's making, the consequences of what has happened should not fall on him. There is no reason to depart from centuries of jurisprudence to create an exception where none is required.

10 **6.9 Conclusion**

6.9.1 For the reasons set out above the appellant submits that the judgment of acquittal of murder should not have been set aside and a new trial on that charge ordered.

6.9.2 If this is accepted, the appeal brought against the conviction for manslaughter remains to be determined and should be remitted for further hearing.

20 **Part VII: APPLICABLE STATUTORY PROVISIONS**

The applicable provisions, which are still in force, are contained in an annexure marked "A"

Part VIII: ORDERS SOUGHT

The appellant seeks orders as follows:-

- 30 (a) the appeal be allowed;
- (b) the orders numbered 1, 2 and 4 of the Full Court made on the 25th day of September 2015 be set aside
- (c) the matter be remitted to the Full Court for further hearing and determination of the appellant's appeal in action number 277 of 2014 in the Criminal Appeals Jurisdiction of the Supreme Court of South Australia.

Part IX: ESTIMATE OF LENGTH OF ORAL ARGUMENT

40 1.5 to 2 hours for the appellant.

Dated: 14/4/16


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¹⁵ *Davern v Messel* (1984) 155 CLR 21, 30 -31

Annexure A – Applicable Statutory Provisions

Criminal Law Consolidation Act 1935 (SA)

Part 10—Limitations on rules relating to double jeopardy

Division 1—Preliminary

331—Interpretation

(1) In this Part—

10 *acquittal* of an offence includes—

- (a) acquittal in appellate proceedings relating to the offence; and
- (b) acquittal at the direction or discretion of the court,

(whether in this State or in another jurisdiction);

administration of justice offence means any of the following offences:

- (a) an offence of perjury or subornation of perjury;
- (b) an offence against section 243, 244, 245 or 248;
- (c) an offence against section 249 or 250 where the public officer is a judicial officer;
- (d) an offence against section 256;

20 (e) a substantially similar offence against a previous enactment or the law of another jurisdiction corresponding to an offence referred to in a preceding paragraph;

Category A offence means any of the following offences:

- (a) an offence of murder;
- (b) manslaughter or attempted manslaughter;
- (c) an aggravated offence of rape;
- (d) an aggravated offence of robbery;
- (e) an offence of trafficking in a commercial quantity, or large commercial quantity, of a controlled drug contrary to section 32(1) or (2) of the *Controlled Substances Act 1984*;
- (f) an offence of manufacturing a commercial quantity, or large commercial quantity, of a controlled drug contrary to section 33(1) or (2) of the *Controlled Substances Act 1984*;
- (g) an offence of selling a commercial quantity, or large commercial quantity, of a controlled precursor contrary to section 33A(1) or (2) of the *Controlled Substances Act 1984*;

30

- (h) a substantially similar offence against a previous enactment or the law of another jurisdiction corresponding to an offence referred to in a preceding paragraph;

judicial body means a court or tribunal, body or person invested by law with judicial or quasi-judicial powers, or with authority to make an inquiry or to receive evidence;

judicial officer means a person who alone or with others constitutes a judicial body;

relevant offence means—

- (a) a Category A offence; and
 - (b) any other offence for which the offender is liable to be imprisoned for life or for at least 15 years.
- 10
- (2) For the purposes of this Part, a reference to an *offence of murder* includes—
 - (a) an offence of conspiracy to murder; and
 - (b) an offence of aiding, abetting, counselling or procuring the commission of murder.

332—Meaning of fresh and compelling evidence

- (1) For the purposes of this Part, evidence relating to an offence of which a person is acquitted is—
 - (a) *fresh* if—
 - (i) it was not adduced at the trial of the offence; and
 - (ii) it could not, even with the exercise of reasonable diligence, have been adduced at the trial; and
 - (b) *compelling* if—
 - (i) it is reliable; and
 - (ii) it is substantial; and
 - (iii) it is highly probative in the context of the issues in dispute at the trial of the offence.
 - (2) Evidence that would be admissible on a retrial under this Part is not precluded from being fresh or compelling just because it would not have been admissible in the earlier trial of the offence resulting in the relevant acquittal.
- 20

30 333—Meaning of tainted acquittal

For the purposes of this Part, if at the trial of an offence a person is acquitted of the offence, the acquittal will be *tainted* if—

- (a) the person or another person has been convicted (whether in this State or in another jurisdiction) of an administration of justice offence in connection with the trial resulting in the acquittal; and
 - (b) it is more likely than not that, had it not been for the commission of the administration of justice offence, the person would have been convicted of the offence at the trial.
- 40

334—Application of Part

- (1) This Part applies whether the offence of which a person is acquitted is alleged to have occurred before or after the commencement of this Part.
- (2) This Part does not apply if a person is acquitted of the offence with which the person is charged but is convicted of a lesser offence arising out of the same set of circumstances that gave rise to the charge.
- (3) However, this Part does apply in the circumstances set out in subsection (2) if the acquittal was tainted.

10 **Division 2—Circumstances in which police may investigate conduct relating to offence of which person previously acquitted**

335—Circumstances in which police may investigate conduct relating to offence of which person previously acquitted

- (1) A police officer may not carry out an investigation to which this section applies, or authorise the carrying out of an investigation to which this section applies, without the written authorisation of the Director of Public Prosecutions.
- (2) However, a police officer may carry out, or authorise the carrying out of, such an investigation without the written authority of the Director of Public Prosecutions if the police officer reasonably believes that—
 - 20 (a) urgent action is required in order to prevent the investigation being substantially and irrevocably prejudiced; and
 - (b) it is not reasonably practicable in the circumstances to obtain the consent of the Director of Public Prosecutions before taking the action.
- (3) The Director of Public Prosecutions must be informed, as soon as practicable, of any action taken under subsection (2) and the investigation must not proceed further without the written authorisation of the Director of Public Prosecutions.
- (4) The Director of Public Prosecutions must not authorise an investigation to which this section applies unless—
 - (a) the Director of Public Prosecutions is satisfied that—
 - 30 (i) as a result of the investigation, the person under investigation is, or is likely, to be charged with—
 - (A) an offence of which the person has previously been acquitted; or
 - (B) an administration of justice offence that is related to the offence of which the person has previously been acquitted; and
 - (ii) it is in the public interest for the investigation to proceed; and
 - (b) in the opinion of the Director of Public Prosecutions, the previous acquittal
 - 40 charged as a result of the investigation.

- (5) This section applies to an investigation in respect of a person's conduct in relation to an offence of which the person has previously been acquitted and includes—
- (a) the questioning, search or arrest of the person;
 - (b) the issue of a warrant for the arrest of the person;
 - (c) a forensic procedure (within the meaning of the *Criminal Law (Forensic Procedures) Act 2007*) carried out on the person;
 - (d) the search or seizure of property or premises owned or occupied by the person.
- 10 (6) In subsection (5), a reference to *an offence of which the person has previously been acquitted* includes a reference—
- (a) to any other offence with which the person was charged that was joined in the same information as that in which the offence of which the person was acquitted was charged; and
 - (b) to any other offence of which the person could have been convicted at the trial of the offence of which the person was acquitted.

Division 3—Circumstances in which trial or retrial of offence will not offend against rules of double jeopardy

336—Retrial of relevant offence of which person previously acquitted where acquittal tainted

- 20 (1) The Full Court may, on application by the Director of Public Prosecutions, order a person who has been acquitted of a relevant offence to be retried for the offence if the Court is satisfied that—
- (a) the acquittal was tainted; and
 - (b) in the circumstances, it is likely that the new trial would be fair having regard to—
 - (i) the length of time since the relevant offence is alleged to have occurred; and
 - (ii) whether there has been any failure on the part of the police or prosecution to act with reasonable diligence or expedition with respect to the making of the application; and
 - (iii) any other matter that the Court considers relevant.
- 30 (2) An application under subsection (1) must be made within 28 days after—
- (a) the person is charged with the relevant offence following the acquittal; or
 - (b) a warrant is issued for the person's arrest for the relevant offence following the acquittal.
- (3) If the Full Court orders a person to be retried for an offence of which the person has been acquitted, the Court—
- (a) must—
 - (i) quash the acquittal; or

- (ii) remove the acquittal as a bar to the person being retried for the offence,

(as the case requires); and

- (b) must make a suppression order under Part 8 of the *Evidence Act 1929* forbidding the publication of specified material or material of a specified class if satisfied that the order is necessary to prevent prejudice to the administration of justice; and

- (c) may make any other order that the Court thinks fit in the circumstances.

10 (4) The Director of Public Prosecutions may not, without the permission of the Full Court, present an information for the retrial of a person in respect of whom the Court has made an order under this section more than 2 months after the Court made the order.

(5) The Full Court should not give permission for the late presentation of an information for a retrial unless the Court is satisfied that, despite the period of time that has passed since the Court made the order for the retrial—

- (a) the Director of Public Prosecutions has acted with reasonable expedition; and
- (b) there is good and sufficient reason why the late presentation of the information should be allowed.

20 (6) If, more than 2 months after an order for the retrial of a person for a relevant offence was made under this section, an information for the retrial of the person for the offence has not been presented or has been withdrawn or quashed, the person may apply to the Full Court to set aside the order for the retrial and—

- (a) to restore the acquittal that was quashed; or
- (b) to restore the acquittal as a bar to the person being retried for the offence,

(as the case requires).

(7) In this section—

acquitted person means a person who has been acquitted of a relevant offence (whether in this State or in another jurisdiction).

337—Retrial of Category A offence of which person previously acquitted where there is fresh and compelling evidence

30 (1) The Full Court may, on application by the Director of Public Prosecutions, order a person who has been acquitted of a Category A offence to be retried for the offence if the Court is satisfied that—

- (a) there is fresh and compelling evidence against the acquitted person in relation to the offence; and
- (b) in the circumstances, it is likely that the new trial would be fair having regard to—

- (i) the length of time since the offence is alleged to have occurred; and

40 (ii) whether there has been any failure on the part of the police or prosecution to act with reasonable diligence or expedition with respect to the making of the application.

(2) An application under subsection (1)—

- (a) must be made within 28 days after—

- (i) the person is charged with the Category A offence following the acquittal; or
 - (ii) a warrant is issued for the person's arrest for the Category A offence following the acquittal; and
- (b) may only be made once in respect of the person's acquittal of the Category A offence.

Note—

An application cannot be made under this section for a further retrial if the person is acquitted of the Category A offence on being retried for the offence (but an application may be made under section 336 if the acquittal resulting from the retrial is tainted).

10

- (3) If the Full Court orders a person to be retried for an offence of which the person has been acquitted, the Court—

(a) must—

- (i) quash the acquittal; or
- (ii) remove the acquittal as a bar to the person being retried for the offence,

(as the case requires); and

20

(b) must make a suppression order under Part 8 of the *Evidence Act 1929* forbidding the publication of specified material or material of a specified class if satisfied that the order is necessary to prevent prejudice to the administration of justice; and

(c) may make any other order that the Court thinks fit in the circumstances.

- (4) The Director of Public Prosecutions may not, without the permission of the Full Court, present an information for the retrial of a person in respect of whom the Court has made an order under this section more than 2 months after the Court made the order.

- (5) The Full Court should not give permission for the late presentation of an information for a retrial unless the Court is satisfied that, despite the period of time that has passed since the Court made the order for the retrial—

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- (a) the Director of Public Prosecutions has acted with reasonable expedition; and
- (b) there is good and sufficient reason why the late presentation of the information should be allowed.

- (6) If, more than 2 months after an order for the retrial of a person for a Category A offence was made under this section, an information for the retrial of the person for the offence has not been presented or has been withdrawn or quashed, the person may apply to the Full Court to set aside the order for the retrial and—

- (a) to restore the acquittal that was quashed; or
- (b) to restore the acquittal as a bar to the person being retried for the offence,

(as the case requires).

40

- (7) In this section—

acquitted person means a person who has been acquitted of a Category A offence (whether in this State or in another jurisdiction).

338—Circumstances in which person may be charged with administration of justice offence relating to previous acquittal

- (1) The Full Court may, on application by the Director of Public Prosecutions, order a person who has been acquitted of an indictable offence to be tried for an administration of justice offence that is related to the offence of which the person has been acquitted if the Court is satisfied that—
- (a) there is fresh evidence against the acquitted person in relation to the administration of justice offence; and
 - (b) in the circumstances, it is likely that a trial would be fair having regard to—
 - (i) the length of time since the administration of justice offence is alleged to have occurred; and
 - (ii) whether there has been any failure on the part of the police or prosecution to act with reasonable diligence or expedition with respect to the making of the application; and
 - (iii) any other matter that the Court considers relevant.
- (2) An application under subsection (1) must be made within 28 days after—
- (a) the person is charged with the administration of justice offence; or
 - (b) a warrant is issued for the person's arrest for the administration of justice offence.
- (3) If the Full Court orders a person to be tried for an administration of justice offence that is related to an indictable offence of which the person has been acquitted, the Court—
- (a) must remove the acquittal as a bar to the person being tried for the administration of justice offence; and
 - (b) may make any other order that the Court thinks fit in the circumstances.
- (4) The Director of Public Prosecutions may not, without the permission of the Full Court, present an information for the trial of a person in respect of whom the Court has made an order under this section more than 2 months after the Court made the order.
- (5) The Full Court should not give permission for the late presentation of an information for any such trial unless the Court is satisfied that, despite the period of time that has passed since the Court made the order for the trial—
- (a) the Director of Public Prosecutions has acted with reasonable expedition; and
 - (b) there is good and sufficient reason why the late presentation of the information should be allowed.
- (6) If, more than 2 months after an order for the trial of a person for an administration of justice offence was made under this section, an information for the trial of the person for the offence has not been presented or has been withdrawn or quashed, the person may apply to the Full Court to set aside the order for the trial and to restore the acquittal as a bar to the person being tried for the offence.
- (7) In this section—

acquitted person means a person who has been acquitted of an indictable offence (whether in this State or in another jurisdiction)

Division 4—Prohibition on making certain references in retrial

339—Prohibition on making certain references in retrial

At the retrial of a person for an offence of which the person had previously been acquitted by order of the Full Court under Division 3, the prosecution must not refer to the fact that, before making the order for the retrial of the offence, the Court had to be satisfied that—

- (a) the acquittal was tainted; or
- (b) there is fresh and compelling evidence against the acquitted person in relation to the offence,

(as the case requires).

10 Part 11—Appellate proceedings**352—Right of appeal in criminal cases**

(1) Appeals lie to the Full Court as follows:

- (a) if a person is convicted on information—
 - (i) the convicted person may appeal against the conviction as of right on any ground that involves a question of law alone;
 - (ii) the convicted person may appeal against the conviction on any other ground with the permission of the Full Court or on the certificate of the court of trial that it is a fit case for appeal;
 - (iii) subject to subsection (2), the convicted person or the Director of Public Prosecutions may appeal against sentence passed on the conviction (other than a sentence fixed by law), or a decision of the court to defer sentencing the convicted person, on any ground with the permission of the Full Court;
- (ab) if a person is tried on information and acquitted, the Director of Public Prosecutions may, with the permission of the Full Court, appeal against the acquittal on any ground—
 - (i) if the trial was by judge alone; or
 - (ii) if the trial was by jury and the judge directed the jury to acquit the person;
- (b) if a court makes a decision on an issue antecedent to trial that is adverse to the prosecution, the Director of Public Prosecutions may appeal against the decision—
 - (i) as of right, on any ground that involves a question of law alone; or
 - (ii) on any other ground with the permission of the Full Court;
- (c) if a court makes a decision on an issue antecedent to trial that is adverse to the defendant—
 - (i) the defendant may appeal against the decision before the commencement or completion of the trial with the permission of the court of trial (but permission will only be granted if it appears to the court that there are special reasons why it would be in the interests of the administration of justice to have the appeal determined before commencement or completion of the trial);

- (ii) the defendant may, if convicted, appeal against the conviction under paragraph (a) asserting as a ground of appeal that the decision was wrong.
- (2) If a convicted person is granted permission to appeal under subsection (1)(a)(iii), the Director of Public Prosecutions may appeal under that subparagraph without the need to obtain the permission of the Full Court.

Juries Act 1927 (SA)

57—Majority and alternative verdicts

- 10 (1) Subject to subsection (2), where a jury, having retired to consider its verdict, has remained in deliberation for at least 4 hours and the jurors have not then reached a unanimous verdict—
- (a) if a sufficient number agrees to enable the jury to return a majority verdict—a majority verdict will be returned; but
 - (b) otherwise—the jury may be discharged from giving a verdict.
- (2) No verdict that an accused person is guilty of murder or treason can be returned by majority.
- 20 (3) Where an accused person is charged with a particular offence (the *major offence*) and it is possible for a jury to return a verdict of not guilty of the offence charged but guilty of some other offence for which the person has not been charged (the *alternative offence*)—
- (a) the jury must consider whether the accused is guilty of the major offence before considering whether he or she is guilty of the alternative offence; and
 - (b) if the jury reaches a verdict (either unanimously or by majority) that the accused is not guilty of the major offence but then, having been in deliberation for at least 4 hours, is unable to reach a verdict on the question of whether the accused is guilty of the alternative offence—
 - (i) the accused must be acquitted of the major offence; and
 - (ii) the jury may be discharged from giving a verdict in respect of the alternative offence; and
 - (iii) fresh proceedings may be taken against the accused on a charge of the alternative offence.
- 30 (4) In this section—
- majority verdict* means—
- (a) where the jury, at the time of returning its verdict, consists of 12 jurors—a verdict in which 10 or 11 jurors concur;
 - (b) where the jury, at the time of returning its verdict, consists of 11 jurors—a verdict in which 10 jurors concur;
 - (c) where the jury, at the time of returning its verdict, consists of 10 jurors—a verdict in which 9 jurors concur,
- 40 and *by majority* has a corresponding meaning.

Supreme Court Act 1935

Part 2—Jurisdiction and powers of the court

Division 1—Jurisdiction

17—General jurisdiction

- (1) The court shall be a court of law and equity.
- (2) There shall be vested in the court—
 - (a) the like jurisdiction, in and for the State, as was formerly vested in, or capable of being exercised by, all or any of the courts in England, following:
 - (i) The High Court of Chancery, both as a common law court and as a court of equity:
 - (ii) The Court of Queen's Bench:
 - (iii) The Court of Common Pleas at Westminster:
 - (iv) The Court of Exchequer both as a court of revenue and as a court of common law:
 - (v) The courts created by commissions of assize:
 - (b) such other jurisdiction, whether original or appellate, as is vested in, or capable of being exercised by the court:
 - (c) such other jurisdiction as is in this Act conferred upon the court.