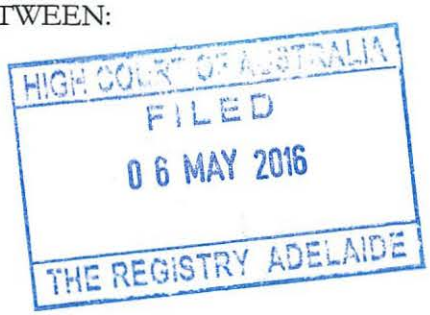
IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

A14 of 2016

BETWEEN:



N,H
Appellant

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS
Respondent

A15 of 2016

BETWEEN:

RROK JAKAJ
Appellant

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS
Respondent

A16 of 2017

BETWEEN:

DAVID ZEFI
Appellant

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS
Respondent

A19 of 2016

BETWEEN:

DARIO STAKAJ
Appellant

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS
Respondent

RESPONDENT'S SUBMISSIONS
REDACTED IN ACCORDANCE WITH ORDERS OF GORDON J OF 27 APRIL 2016

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Part I: INTERNET PUBLICATION

1. The redacted version of this submission is in a form suitable for publication on the internet.

Part II: ISSUES ON APPEAL

2. The appeal raises the following issues:
   (i) Did the portions of the affidavits admitted in the Supreme Court disclose error in the nature of a miscommunication of the jury's verdicts, such that "false" verdicts were delivered, or in the nature of a misapprehension on the part of the jury as to the requirements applicable for their verdicts to be in accordance with law?
   (ii) Was that evidence admissible having regard to the exclusionary rule articulated in *Smith v Western Australia*[1] (***Smith***)?
   (iii) Did the return of "false" verdicts upon which judgments of acquittal were entered on the Court's record, masking non-compliance with s 57 of the *Juries Act 1927* (SA) (**JA**), enliven the inherent powers of the Supreme Court to protect the integrity of its processes by setting aside those perfected judgments?
   (iv) Did the Court retain a discretion to refuse to set aside the affected judgments, despite finding that the resultant state of affairs constituted an abuse of the Court's processes?

Part III: SECTION 78B NOTICE

3. Notice pursuant to s78B of the *Judiciary Act 1903* (Cth) need not be given.

Part IV: STATEMENT OF CONTESTED FACTS

4. The respondent accepts each appellant's statement of facts with the exception of the factual assertion made at [71] of Stakaj's submissions, and at [74] of Zefi's submissions to the extent that it claims that the second example given in that paragraph was admitted into evidence. As regards question 5 of the statements exhibited to the affidavits of eleven of the jurors, only the questions and answers in question 5 which pertained to the four murder verdicts were tendered and admitted, not those relating to the manslaughter verdicts.

Part V: APPLICABLE LEGISLATIVE PROVISIONS

5. In addition to those set out by the appellants, the provisions set out in Annexure A.

Part VI: RESPONDENT'S ARGUMENT

A. ADMISSIBILITY

The two matters the respondent seeks to establish

6. Two questions arise with respect to the evidence admitted by the Court below. First, what was the nature of the error in the verdicts established by that evidence? Second, was that evidence admissible?

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[1] *Smith v Western Australia* (2014) 250 CLR 473.

7. The characterisation of the error in the verdicts disclosed by the evidence frames the question as to admissibility. That characterisation must distinguish between evidence which discloses that the foreperson misspoke or miscommunicated a verdict (or non-verdict[2]) of the jury, and evidence which discloses that the foreperson of the jury accurately communicated a verdict, albeit a verdict which may have been reached by a misapplication of the law.

8. Here, the evidence admitted discloses a miscommunication by the foreperson of the jury's verdicts on each of the charges of murder. Further, properly understood, it discloses nothing as regards any understanding, or misunderstanding, by the jurors as to the legal requirements applicable to their verdicts. Further again, that evidence so characterised does not fall within
10 the scope of the exclusionary rule discussed in *Smith*[3] and is admissible.

Characterisation of the error disclosed

9. The evidence unanimously[4] admitted into evidence was as follows:
   (i) the affidavit of the foreperson (Juror No 2527/14) excluding the final paragraph of the statement of the foreperson exhibited to that affidavit; and,
   (ii) each of the remaining eleven jurors' affidavits excluding their respective juror statements exhibited to those affidavits, but admitting those parts (and only those parts) of question 5 in those statements, and the answers to those parts in question 5, which pertained to the four verdicts on the charge of murder.[5]

10. That evidence discloses an error in the communication of the verdicts by the foreperson to
20 the Court. That is, that on the charge of murder for each appellant the foreperson did not accurately convey the verdicts (or non-verdicts, as the case may be) of the jury. This was the view unanimously taken by the Court below.[6]

Ambiguity

11. Whilst the terms of question 5 – [redacted] – might in isolation admit of some ambiguity, a reading of that question in the context of the whole of each affidavit dispels any relevant ambiguity.[7] Read in isolation, the reference [redacted] could arguably admit of the following alternative interpretations:

    (i) [redacted]

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[2] That is, where the jury did not resolve to return any verdict at all.
[3] *Smith v Western Australia* (2014) 250 CLR 473.
[4] *Case stated on acquittal; R v Stakaj* (2015) 123 SASR 523 at [20] (Kourakis CJ), [121] (Gray and Sulan JJ).
[5] See *Case stated on acquittal; R v Stakaj* (2015) 123 SASR 523 at [71], [73] (Gray and Sulan JJ).
[6] See *Case stated on acquittal; R v Stakaj* (2015) 123 SASR 523 at [11]-[13], [15], [17], [20] (Kourakis CJ), [116]-[117] (Gray and Sulan JJ).
[7] Cf Zefi's submissions (**ZS**) at [72].

(ii) [redacted]

(iii) [redacted][8]

12. Zefi submits that the third interpretation is "the most obvious"[9] and "it is unlikely that any juror"[10] would have adopted the first or second interpretations. That should be rejected.

13. Once each affidavit is read in its entirety[11] and the nature of the deponents borne in mind, the third interpretation can be discarded. Each affidavit [redacted]

10 [redacted].[12]

14. The interpretation postulated by Zefi assumes that the asking of question 5 [redacted]. Such an assumption is unsupported. The foreperson's affidavit[13] was the first in time and does not suggest so. There is nothing in the other affidavits [redacted]. The Court would be unassisted by [redacted]. To suggest that that is the import of question 5, is so implausible that it can safely be excluded as a

20 reasonable possibility. The obtaining of evidence from each juror [redacted].

15. Similarly, [redacted][14]. To suggest that [redacted], is fanciful.

16. The only interpretations reasonably open on the evidence are those at (i) and (ii) of [11] above. That is, [redacted]

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[8] Specifically, the requirements of s 57 of the *Juries Act 1927* (SA).
[9] ZS at [72].
[10] ZS at [73].
[11] No party contends that the affidavits should not be read in their entirety for the purposes of ascertaining the meaning and effect of those portions tendered.
[12] That is, as to whether or not their verdicts complied with s 57 of the *Juries Act 1927* (SA) or, indeed, with any other legal requirements.
[13] Juror 2520/14.
[14] Statement exhibited to the affidavit of Juror 2520/14 at [5] (emphasis added).

[redacted].[16] However, any ambiguity as between these two interpretations need not be resolved. In either event, the error disclosed remains an error in the communication of the verdicts of the jury.

A miscommunication in any event

17. Whether the miscommunication was [redacted], there remains established an "error in the transmission of [the jury's] act from the juryroom to the courtroom".[18] In either case, the evidence establishes that the foreperson misspoke and "false" verdicts on each charge of murder were delivered.

18. The characterisation of the latter of these two circumstances as a "miscommunication" in the relevant sense is not in conflict with the dicta of the majority in *Biggs v Director of Public Prosecutions (WA)*[19] (***Biggs***). That dicta recognises the possibility of a jury converting something less than a unanimous verdict to a unanimous verdict, by all jurors agreeing upon the verdict to be delivered (despite the outcome of any vote that might be taken, and despite any misapprehension on their part about a need for unanimity).[20]

19. Such possibility does not exist here. The jury reported that they were not unanimous. Thus, they were neither "unanimous" in the sense that some final vote produced unanimity, nor in the sense that, despite a vote not producing unanimity (or a majority), there was nevertheless agreement by all upon the verdict to be delivered (that is, "unanimous" in the *Biggs* sense). It cannot be supposed that the jury determined (be it under some misapprehension as to the law or not) that despite no poll producing a result of 10 or more (but less than 12) jurors favouring a verdict of not guilty, the jury nevertheless determined to return a *majority* verdict of not guilty. Either they all joined in the notion of returning a "not guilty" verdict (on whatever basis), in which case their verdict was unanimous in the *Biggs* sense, or they did not.

20. It is one thing to reason, as Franklyn J did, that a verdict of not guilty agreed upon by, for example, a bare majority, may be converted into a verdict of the *whole* of the jury such that it

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[15] The respondent notes that Jakaj and Stakaj concede that this is the nature of the error disclosed; see Jakaj's submissions (**JS**) at [23]; Stakaj's submissions (**SS**) at [37.4], [37.5], [66], [68], [100]. This was also the view of the evidence taken by Kourakis CJ; *Case stated on acquittal; R v Stakaj* (2015) 123 SASR 523 at [12], [17], [20], [48].
[16] This appears to be the view taken by Gray and Sulan JJ, although their reasons are perhaps not exclusive of the first interpretation either; see *Case stated on acquittal; R v Stakaj* (2015) 123 SASR 523 at [83], [100], [116]-[117].
[17] Whether under a misapprehension as to the law or not.
[18] *Wigmore on Evidence* (1961) McNaughten Revision, Vol VIII, §2355 at [717-719].
[19] *Biggs v Director of Public Prosecutions (WA)* (1997) 17 WAR 534.
[20] *Biggs v Director of Public Prosecutions (WA)* (1997) 17 WAR 534 at 555 (Franklyn J, Walsh J agreeing).

is relevantly unanimous. It is quite another to say that a verdict of not guilty, even where agreed upon by, say, a bare majority, may be nevertheless *accurately communicated as a verdict of 10 or more of the jury.* In *Biggs*, Franklyn J could not exclude the possibility that the initial communication by the jury that their verdict was "unanimous" was accurate because the jury had all joined in the decision to deliver that verdict. Here, such a circumstance not being a possibility, the evidence necessarily (on either interpretation) discloses a miscommunication.

21. In the alternative,[21] if Franklyn J's remarks in *Biggs* were to be considered at odds with the characterisation advanced, then the respondent submits that *Biggs* is, to that extent, erroneous and the relevant dicta should not be followed.

10 22. Justice Franklyn concluded that the foreperson's report that the jury had reached a unanimous verdict – when it did not possess even a statutory majority – did not amount to a miscommunication of the jury's verdict, but rather revealed "a misapprehension on the part of at least some of the jurors as to the basis on which they might agree upon a verdict".[22]

23. This approach may be broken down into two steps. First, the jury votes. Second, the jury unanimously agrees its verdict having regard to the outcome of the vote. Thus a vote 10:2 or 7:5 in favour of conviction becomes a "unanimous" verdict of guilty.

24. However, Franklyn J's approach further presupposes that in each example postulated, the votes cast at the first step by the minority somehow remain preserved, despite a subsequent decision *by all* (at the second step) to agree to delivery of the verdict favoured by the *majority.*
20 However, it then ceases to be meaningful to speak of the jury's original vote. Where a jury determines to join unanimously in a particular vote (even if it is because they erroneously believe that to be the necessary effect which flows from a bare majority first vote), then the result of that first vote is superseded. The vote becomes 12:0. It is not meaningful to speak of the minority's "first" vote as somehow remaining their "true" vote. Either the jury determines to return a verdict directly reflective of the result of a vote (e.g., 10:2 or 7:5), or all determine (for whatever reason) to join in the outcome favoured by some, in which case it is only meaningful to refer to the ultimate verdict reached by the jury, namely one of unanimity.

25. With the advent of majority verdicts, and the fundamental change their introduction brought about, the general expectation[23] is that the verdicts delivered in Court will reflect the outcome
30 of Franklyn J's first step – the jury's ("first") vote. This is so because the very concept of majority verdicts is a concept which seeks to engage with the outcome of what this Court

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[21] To the submission put at [18]-[20] above.
[22] *Biggs v Director of Public Prosecutions (WA)* (1997) 17 WAR 534 at 558 (Franklyn J, Walsh J agreeing).
[23] Albeit one with which the Court may not be certain there has been compliance.

referred to in *Cheatle v The Queen*[24] as the analogously electoral process. This Court explained:

> ... there is a significant difference in nature between a deliberative process in which a verdict can be returned only if consensus or agreement is reached by all jurors and a process in which a specified number of jurors can override any dissent and return a majority verdict. The requirement of a unanimous verdict ensures that the representative character and the collective nature of the jury are carried forward into any ultimate verdict. A majority verdict, on the other hand, is analogous to an electoral process in that jurors cast their votes relying on their individual convictions.[25] (*Footnotes omitted*)

26. Such observations do not exclude the practical possibility that a jury whose vote produces a 7:5 result may nevertheless determine all to agree to deliver the verdict favoured by the bare majority. However, if such a jury then reported that their verdict was unanimously reached, there remains no ongoing sense in which their votes remain 7:5.

27. A jury either faithfully reports the result of their analogously electoral process (e.g. 7:5) or determines to deliver a particular verdict unanimously in light of, or despite, their original vote. They cannot retain their "true" division of 7:5 *and* be relevantly unanimous; they are one or the other. If the jury foreperson reports, as in *Biggs*, unanimity, but later all jurors report that they were not unanimous, then at least one of those reports (be it the first or the later in time) cannot properly be characterised as an accurate statement of the verdict of the jury.

Was the evidence admissible?

28. Once the error disclosed by the portions of evidence admitted is properly characterised as revealing an error in communication and, equally, as not disclosing anything of the reasons, understanding or beliefs underpinning the jury's verdicts – the conclusion that such evidence does not fall within, or offend, the exclusionary rule is relatively uncontroversial.[26]

The scope of the exclusionary rule

29. In *Smith*, this Court unanimously articulated the exclusionary rule in the following terms:

> It is a general rule of the administration of criminal justice under the common law that once a trial has been determined by an acquittal or conviction upon the verdict of a jury, and the jury discharged, evidence of a juror or jurors as to the deliberations of the jury is not admissible to impugn the verdict.[27] (*Footnote omitted*)

30. That rule has never denied the admissibility of evidence extrinsic to a jury's deliberations.[28]

31. Historically, the distinction between matters extrinsic and intrinsic to jury deliberations has led to unsatisfactory consequences. Courts presented with complaints regarding jury conduct

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[24] (1993) 177 CLR 541.
[25] *Cheatle v The Queen* (1993) 177 CLR 541 at 552-553 (the Court).
[26] No appellant appears to dispute that if the evidence is properly characterised as disclosing only an error in transmission, which all jurors agree upon, such evidence would be admissible.
[27] *Smith v Western Australia* (2014) 250 CLR 473 at [1] (the Court).
[28] *Smith v Western Australia* (2014) 250 CLR 473 at [27] (the Court).

or verdicts have attempted to characterise matters as extrinsic or intrinsic by reference to the physical location in which particular events took place, or to events extraneous to the deliberative process, or by identifying whether the source of the evidence was a juror or non-juror.[29] More recently, this Court has stated that "[w]hat is 'extrinsic', and therefore outside the exclusionary rule, is not a question which can always be answered by a mechanical application of rules about the source of evidence or the location of an event".[30] Rather, the task is to consider how the rationale for the exclusionary rule informs the limits of its operation in the circumstances of the particular case.[31] It requires an evaluative approach.

32. The rule is underpinned by two fundamental public policy considerations: the preservation of the secrecy of a jury's deliberations so they are free and frank and the verdict a true verdict; and the importance of finality.[32] A third policy consideration, or an aspect of the first, may be added: the need to protect jurors from harassment, censure and reprisals, such that the proper functioning of jurors and the willingness of jurors to discharge their functions is secured.[33]

33. This Court considered that preservation of secrecy would not operate "to throw a protective cloak of secrecy over criminal conduct".[34] A blanket rule based on finality could work against the interests of justice.[35] The preservation of finality as justification for the exclusionary rule lost its force where the evidence did not go to the substance of the jury's deliberations.[36] The application of the exclusionary rule to preserve finality must yield to the first duty of the courts to preserve the integrity of the criminal justice system which they administer.[37]

34. Thus, in *Smith* a bright line approach such as applied by the House of Lords in *R v Mirza; R v Connor and Rollock*[38] and in the English and Scottish authorities that precede it was rejected.[39]

Unanimous correction of a miscommunication

35. It is not the case that a verdict pronounced in court in the presence of all members of the jury

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[29] *Smith v Western Australia* (2014) 250 CLR 473 at [27] (the Court).
[30] *Smith v Western Australia* (2014) 250 CLR 473 at [28] (the Court).
[31] *Smith v Western Australia* (2014) 250 CLR 473 at [29], [32] (the Court).
[32] *Smith v Western Australia* (2014) 250 CLR 473 at [30] (the Court).
[33] *R v Pan* [2001] 2 SCR 344 at 375 (Arbour J).
[34] *Smith v Western Australia* (2014) 250 CLR 473 at [39] (the Court).
[35] *Smith v Western Australia* (2014) 250 CLR 473 at [40]-[41] (the Court). Indeed, this Court quoted with approval the words of Lord Atkin in *Ras Behari Lal v King-Emperor* (1933) 60 LR Ind App 354: where His Lordship said, "[f]inality is a good thing, but justice is a better".
[36] *Smith v Western Australia* (2014) 250 CLR 473 at [43] (the Court).
[37] *Smith v Western Australia* (2014) 250 CLR 473 at [45] (the Court); see also *R v Pan* [2001] 2 SCR 344 at 374 (Arbour J).
[38] [2004] 1 AC 1118.
[39] Accordingly, cases such as *R v Wooller* (1817) 2 Stark 112; 171 ER 589; *Pirie v The Caledonian Railway Company* (1890) 27 SLR 973; 17 R 1157; *Ellis v Deheer* [1922] 2 KB 113, *Boston v W S Bagshaw & Sons* (1966) 1 WLR 1135, *R v Roads* [1967] 2 QB 108, *Nanan v The State* [1986] 1 AC 860 and *R v Millward* [1999] 1 Cr App R 61 must now all be approached with caution, bearing in mind the High Court's approach in *Smith*.

and purportedly acquiesced in by all cannot be called into question by evidence adduced from all members of the jury asserting, not that they disagree with the verdict, but that the verdict as pronounced was not the verdict of the jury. In this, the respondent embraces, as the Court below did,[40] the second circumstance of correcting a mistakenly delivered verdict considered by *Wigmore* at §2355 "Mistake in Announcement". The critical passage of *Wigmore* for present purposes is that extracted in the majority judgment of the Court below at [114].[41]

36. In this case, the foreperson answered a series of questions put by the Associate in open court as to the jury's verdict.[42] Those answers included affirmations by the foreperson that, as to the charge of murder for each accused, ten or more of the jury were agreed upon a verdict of "not guilty". The evidence establishes [redacted], causing "false" verdicts to be returned. In this, the jury are unanimous.

37. The evidence admitted does not reveal how or why the jury came to its verdicts (or non-verdicts), nor how or why the foreperson came to deliver verdicts which did not accurately reflect the position. It does not speak to whether the jury's position was reached through a misapplication of the law or upon a mistake of fact. "It does not seek to inquire into the reasons for a verdict",[43] nor does it touch on or reveal the jury's deliberative process.[44] It does not invade "the privacy of the discussions in the jury box or in the retiring room"[45] any more than did the Associate's questions in open court as to whether, on each charge of murder, 10 or more had agreed upon a verdict of "not guilty". The evidence tendered simply reveals the unanimous view of the jurors that the foreperson's delivery of the verdicts on each charge of murder did not accurately communicate the position of the jury on those charges.

38. To adapt the words of this Court in *Smith*, it does not at all strain language to characterise such evidence as extrinsic to the deliberations of the jury.[46]

39. *Nanan v The State*[47] (**Nanan**), upon which Zefi and Jakaj rely, is distinguishable in critical respects. There, the Court received evidence from only of the 12 jurors. The absence of evidence from all jurors agreeing as to the alleged error is critical having regard to the policy considerations identified in *Wigmore*[48] regarding the correction of a verdict. That factor was

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[40] *Case stated on acquittal; R v Stakaj* (2015) 123 SASR 523 at [12] (Kourakis CJ), [114], [116] (Gray and Sulan JJ).
[41] Appearing at *Wigmore on Evidence* (1961) McNaughten Revision, Vol VIII, §2355 at [717-719].
[42] Statement of Agreed Facts at [5].
[43] *Ras Behari Lal v King-Emperor* (1933) 60 LR Ind App 354 (Lord Atkin), quoted with approval by the Court in *Smith v Western Australia* (2014) 250 CLR 473 at [42].
[44] *R v Glastonbury* (2012) 115 SASR 37 at [32] (Sulan J, Kourakis CJ and Stanley J agreeing).
[45] *Ras Behari Lal v King-Emperor* (1933) 60 LR Ind App 354 (Lord Atkin), quoted with approval by the Court in *Smith v Western Australia* (2014) 250 CLR 473 at [42] (the Court).
[46] *Smith v Western Australia* (2014) 250 CLR 473 at [36] (the Court).
[47] [1986] 1 AC 860.
[48] *Wigmore on Evidence* (1961) McNaughten Revision, Vol VIII, §2355 at [717-719].

significant in *Nanan*.[49] Further, the affidavits there sought to be admitted were to the effect that each juror "was not aware that all of the 12 jurors had to be agreed upon the verdict".[50] That falls foul of the exclusionary rule by revealing that certain jurors agreed to return the verdict on the basis of a misapprehension as to the law.[51] The evidence admitted in the present case does not speak to such misapprehension; it remains limited to disclosing miscommunication.

40. The reliance by Jakaj on cases concerning the immediate (or almost immediate) correction of a verdict by a jury whilst still within the precincts of the Court,[52] tends to confuse the issue of admissibility of evidence with that of a power to correct verdicts. Those cases are concerned with the acts of the jury still acting as such, not with admission of *evidence* from jurors or former jurors at all. They do not speak to the question of admissibility.

Conclusion on admissibility

41. In certain cases "the application of the exclusionary rule to preserve finality would be contrary to the first duty of the courts to preserve the integrity of the system of criminal justice which they administer".[53] This is such a case, where ruling the evidence inadmissible "would tend to defeat rather than to advance" the maintenance of public confidence in juries and the integrity of jury verdicts.[54] Indeed, it "would lead to a loss of confidence in jury verdicts, would result in verdicts which have been truly vitiated being unchallengeable and would be contrary to justice and the proper administration of justice."[55]

42. Public policy does not require exclusion of the evidence of all 12 jurors establishing an error in the transmission of the jury's verdicts. The Court correctly admitted the relevant portions.

43. As to the alternative contention of Zefi[56] that if the portions tendered by the respondent were to be admitted, then the answers to other questions should also have been admitted, three points arise. First, given that all parties accept that the tendered (and admitted) portions of the affidavits fall to be construed in light of the whole of the affidavit material, the admission or non-admission of the other parts of the affidavits has no practical effect on either the meaning or the admissibility of the portions tendered. Second, and following from the first,

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[49] *Nanan v The State* [1986] 1 AC 860 at 871-872 (Lord Goff delivering the judgment of the Judicial Committee).
[50] *Nanan v The State* [1986] 1 AC 860 at 867 (Lord Goff delivering the judgment of the Judicial Committee).
[51] No consideration appears to have been given in that case as to whether the affidavits were capable of being admitted in part only.
[52] JS at [29] in particular, and the cases there cited.
[53] *Smith v Western Australia* (2014) 250 CLR 473 at [45] (the Court).
[54] *Smith v Western Australia* (2014) 250 CLR 473 at [35] (the Court); *R v Wilton* (2013) 116 SASR 392 at [19] (Blue J, Sulan and Kelly JJ agreeing); *R v Glastonbury* (2012) 115 SASR 37 at [30] (Sulan J, Kourakis CJ and Stanley J agreeing).
[55] *R v Wilton* (2013) 116 SASR 392 at [31] (Blue J, Sulan and Kelly JJ agreeing).
[56] ZS at [70](c).

the other portions, even if admitted, cannot alter the meaning or effect of the portions relied upon, as articulated above at [16]. Third, the *entirety* of the affidavits are clearly not admissible, with much of their content demonstrably revealing matters intrinsic to deliberations.[57]

B. JURISDICTION, POWER AND ABUSE OF PROCESS

44. The Supreme Court's power to grant the remedies sought is sourced in its inherent jurisdiction. The respondent does not suggest that there is some broad inherent power in the Court to set aside jury verdicts of acquittal affected by error. Rather, where the integrity of the judicial process has been unacceptably compromised, the Supreme Court is empowered to set aside impugned perfected judgments or orders. This is a high test, but one which is met by the unusual and extraordinary circumstances of the present case.

45. The affidavit evidence admitted establishes that the verdict returned by the jury on the charge of murder in respect of each appellant was false, in that each of the majority verdicts of not guilty had not been reached. The gravity of a return of a false verdict is rooted in the common law's development of the jury trial system as a bulwark against state power. By their pleas of not guilty, the defendants were to be taken to put themselves upon the country for trial.[58] That is, by their pleas of not guilty they were to be taken to demand trial by a jury.[59]

46. Section 6 JA relevantly provides that a criminal trial in the Supreme Court is, subject to that Act, to be by jury. The reference in s 6 JA to trial by jury is a reference to a common law institution.[60] In *Huddart, Parker & Co Pty Ltd v Moorehead* O'Connor J identified the essential features of the institution of trial by jury as:

> ... the method of trial in which laymen selected by lot ascertain under the guidance of a Judge the truth in questions of fact arising either in a civil litigation or in a criminal process.[61]

47. In *Duncan v Louisiana*,[62] the Supreme Court of the United States succinctly articulated why trial by jury is considered one of the bulwarks of liberty. Whilst the interposition of a jury between the State and the State's justices protects the citizen against "unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher

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[57] In the Court below, Zefi contended that if the portions tendered by the respondent were to be admitted, then the entirety of the affidavits should be admitted. No submission was made in the terms now put in the parentheses at ZS [70](c); namely, that that if the Court were to admit the portions tendered by the respondent then it should admits certain other specific portions of the affidavits which Zefi contends are not intrinsic to jury deliberations. Given Zefi never identified those particular aspects of the material which it contends are extrinsic and admissible, nor indicated that he sought to tender only that material in the event that the Court ruled the respondent's portions admissible, it is unsurprising that the Court below did not rule upon such tender.

[58] *Criminal Law Consolidation Act 1935* (SA), s 284(1).

[59] *Maher v The Queen* (1987) 163 CLR 221 at 229 (the Court).

[60] *Cheatle v The Queen* (1993) 177 CLR 541 at 549 (the Court).

[61] (1909) 8 CLR 330 at 375 (O'Connor J).

[62] 391 US 145 (1968) at 151-152 (White J delivering the opinion of the Court); see also *Kingswell v The Queen* (1985) 159 CLR 264 at 300-302 (Deane J).

authority", it also reflects the special confidence that the community reposes in a body of one's peers to determine guilt or innocence as being the appropriate safeguard against unwarranted interference with liberty.[63] The "essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence".[64]

48. The common law insisted upon unanimity[65] of all 12 jurors. So prized was this that if a juror died or was taken ill a fresh jury or a replacement had to be sworn.[66] Sections 55, 56 and 57 JA are statutory modifications to the common law institution of trial by jury required by s 6 JA. Any statutory abridgement of that right ought to receive a strict construction.[67]

49. On the charges of murder, the jury could not return a majority verdict of guilty but could, after deliberating for at least 4 hours and having not reached unanimity, return a majority verdict of not guilty,[68] being one in which 10 or 11 jurors concurred.[69] Further, the jury could not proceed to consider the alternative charge of manslaughter in relation to any of the accused, unless and until it had either unanimously or by majority verdict determined to acquit the particular accused of murder.[70] In this case, the jury having never resolved to return majority verdicts of not guilty on each charge of murder, the verdicts recorded and upon which the Court entered its judgment did not comply with s 57(1)(a) or s 57(3). In this respect, the verdicts were unlawful for non-compliance with s 57.

50. Further, however, that unlawfulness was a product of a critical defect in the process: the communication of false verdicts. The Court's acceptance of the (unlawful) verdicts was predicated on the fundamental premise that the answers given by the jury foreperson to the Associate were a true and accurate communication of the verdicts of the jury. That they were not, misled the Court in a profound and fundamental manner, with the direct consequence that the Court entered judgments which were defective in an equally fundamental way.

Inherent jurisdiction and power

51. The inherent power of a particular court "is the power which a court has simply because it is

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[63] *Williams v Florida* 399 US 78 (1970) at 87 (White J delivering the opinion of the Court); *Duncan v Louisiana* 391 US 145 (1968) at 156 (White J delivering the opinion of the Court).
[64] *Williams v Florida* 399 US 78 (1970) at 100 (White J delivering the opinion of the Court); *Brownlee v The Queen* (2001) 207 CLR 278 at [21] (Gleeson CJ and McHugh J).
[65] *Cheatle v The Queen* (1993) 177 CLR 541 at 550-559 (the Court); *Newell v The King* (1936) 55 CLR 707 at 713 (Evatt J).
[66] *Wu v The Queen* (1999) 199 CLR 99 at [21] (Gleeson CJ and Hayne J), [27] (McHugh J), [41] (Kirby J).
[67] *Newell v The King* (1936) 55 CLR 707 at 711-712 (Latham CJ), 712 (Dixon J), 713 (Evatt J).
[68] *Juries Act 1929* (SA), s 57(1)-(2).
[69] *Juries Act 1929* (SA), s 57(4)(a).
[70] *Juries Act 1929* (SA), s 57(3); *R v Thomas* [1996] SASC S5911; BC9606347 (Duggan J, Cox and Prior JJ agreeing).

a court of a particular description".[71] It refers to "the inherent power necessary to the effective exercise of the jurisdiction granted".[72] It "requires no authorizing provision"[73] and is "something which flows from the essential character" of superior courts.[74]

52. To properly determine the ambit of a particular court's inherent powers, the nature of the jurisdiction conferred on that court must first be characterised. Importantly, this is not a task of determining what powers must necessarily attach to a court by implication from statutory provisions conferring its jurisdiction.[75] "The distinction between inherent jurisdiction and jurisdiction by implication is not always made explicit, but it is … fundamental".[76]

53. The inherent powers are not "displaced or abrogated by general words in a statute nor by statutory provisions or rules which overlap with them".[77] "[T]he mere fact that a statute or rule of court addresses itself in a particular way to a particular matter does not usually exclude by implication a superior court's wider inherent powers relating to that matter if they are appropriate".[78]

54. It is apparent, then, that the availability of the inherent powers for a particular purpose will not generally be affected by whether or not recourse is available to a party by way of an appeal.[79] Where a particular issue may be remedied in the exercise of a court's statutory powers on appeal, and where that same issue might also be remedied by the exercise of powers within the inherent jurisdiction, the lack of need to resort to the inherent powers might tend to obscure the fact of the concurrency of the powers and the availability of the inherent jurisdiction. By contrast, cases where a right of appeal to have a defect cured is not available to a particular party might on occasion tend to bring to the forefront the role of the inherent jurisdiction, but it is not to be supposed that the absence of an appeal right somehow broadens or limits the scope for its available exercise.

The Inherent Jurisdiction of the Supreme Court of South Australia

55. The Supreme Court of South Australia is the superior court of record in that State, "in which

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[71] *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 7 (Menzies J, Barwick CJ and Walsh and Stephen JJ agreeing).
[72] *Keramianakis v Regional Publishers Pty Ltd* (2009) 237 CLR 268 at [36] (French CJ, Hayne, Heydon, Crennan, Kiefel and Bell JJ agreeing).
[73] *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 7 (Menzies J, Barwick CJ and Walsh and Stephen JJ agreeing).
[74] *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [41] (French CJ) referring with approval to Jacob, "The Inherent Jurisdiction of the Court", *Current Legal Problems*, 23 (1970) 23.
[75] *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 7 (Menzies J, Barwick CJ and Walsh and Stephen JJ agreeing); *Grassby v The Queen* (1989) 168 CLR 1 at 16-17 (Dawson J, Mason CJ and Brennan, Deane and Toohey JJ agreeing).
[76] *Grassby v The Queen* (1989) 168 CLR 1 at 17 (Dawson J, Mason CJ and Brennan, Deane and Toohey JJ agreeing).
[77] *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [41] (French CJ).
[78] K Mason QC, "The Inherent Jurisdiction of the Court" (1983) 57 Australian Law Journal 449 at 457.
[79] *Bailey v Marinoff* (1971) 125 CLR 529 at 532 (Menzies J); Cf ZS at [32]; JS at [46], [48]; SS at [40]-[41]; N,H submissions (**NS**) at [6.7.4].

has been vested all such jurisdiction (whether original or appellate) as is at the passing of [the *Supreme Court Act 1935* (SA) (**SCA**)] in, or capable of being exercised by that court".[80] Section 17(2) of the SCA sets out the express conferrals of jurisdiction.

56. The Court is also a court of law and equity.[81] "[I]ts powers are identified by reference to the unlimited powers of the courts at Westminster".[82] The general responsibility for the administration of justice gives rise to the inherent power in a superior court of unlimited jurisdiction. Such a court, "[i]n the discharge of that responsibility … exercises the full plenitude of judicial power".[83] Whilst there is no Australian court with "unlimited jurisdiction",[84] the powers of the state Supreme Courts are still nevertheless identified by reference to the unlimited powers of the English courts.[85]

57. Section 17 SCA operates to "assimilate", rather than translate directly, the powers of the old English courts into the Australian federal structure.[86] So, whilst "there can be no unthinking transplantation to Australia of what has been said in English cases about the consequences of a court being established as a 'superior court of record'",[87] proper consideration of the Court's inherent powers requires adverting to its nature as a superior court of record in which resides the general responsibility for the administration of justice in the State.[88] The Court performs the critical functions of the third arm of government; with ultimate responsibility for administering the coercive powers of the State in the administration of justice.

58. This then raises the scope of the Court's inherent powers. However, noting Lord Diplock's caution against "anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty…to exercise this salutary power",[89] the respondent does not here address the full range of the Supreme Court's inherent powers.[90]

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[80] *Supreme Court Act 1935* (SA), s 6.
[81] *Supreme Court Act 1935* (SA), s 17(1).
[82] *Grassby v The Queen* (1989) 168 CLR 1 at 16 (Dawson J, Mason CJ and Brennan, Deane and Toohey JJ agreeing).
[83] See *Grassby v The Queen* (1989) 168 CLR 1 at 16 (Dawson J, Mason CJ and Brennan, Deane and Toohey JJ agreeing), speaking of the NSW Supreme Court; see also, *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [40] (French CJ), *Pelechowski v Registrar, Court of Appeal* (NSW) (1999) 198 CLR 435 at [50] (Gaudron, Gummow and Callinan JJ).
[84] *New South Wales v Kable* (2013) 252 CLR 118 at [30]-[31] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); see also *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at [107] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[85] *Grassby v The Queen* (1989) 168 CLR 1 at 16 (Dawson J, Mason CJ and Brennan, Deane and Toohey JJ agreeing); see also, *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at [50] (Gaudron, Gummow and Callinan JJ); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [40] (French CJ); *Eastman v DPP (No 2)* (2014) 9 ACTLR 178 at [151] (the Court).
[86] *Lipohar v The Queen* (1999) 200 CLR 485 at [76]-[77] (Gaudron, Gummow and Hayne JJ).
[87] *New South Wales v Kable* (2013) 252 CLR 118 at [29] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
[88] *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264 at 270 (the Court).
[89] *Hunter v Chief Constable of West Midlands* [1981] 3 All ER 727 at 729 (Lord Diplock).
[90] See *R v Moke & Lawrence* [1995] 1 NZLR 263 at 267 (Thomas J).

59. That the Court has inherent jurisdiction that functions as a separate head of jurisdiction was made plain by Dawson J in *Grassby v The Queen*[91] (***Grassby***). An example is to be found in its power to punish for contempt of an inferior court.[92] Such proceeding may be commenced in the Supreme Court despite there being no proceeding in that Court to which it relates.

60. This source of power is protective in nature[93] and extends to the maintenance by the Supreme Court of its authority,[94] and to protecting the processes of inferior courts.[95]

61. To limit the exercise of the Court's inherent power to protect its own processes or the processes of an inferior court to circumstances where it acts as an adjunct to some other substantive proceeding with its own head of jurisdiction, would cause the availability or denial of this power to turn on whether or not another head of jurisdiction was first available or continued to be available. The existence or otherwise of a substantive head of jurisdiction is not rationally linked to the protective purposes for which the inherent jurisdiction exists. To contend to the contrary would result in an arbitrariness in the availability of the power.

62. A second example is the power to set aside a perfected judgment for fraud. In *Clone Pty Ltd v Players Pty Ltd (In Liq) & Ors*,[96] Kourakis J (as he then was) commented that the "power of a court to set aside perfected judgments for fraud can be understood as an instance of a wider power to protect its own processes from abuse". Such proceedings may be brought in the original jurisdiction of the Court.

Protection against Abuse of Process

63. A superior court must have control over its own processes, including an ability to prevent or protect itself from abuse or misuse of its processes.[97]

64. The inherent power of a superior court to combat abuse of its processes derives from its fundamental responsibility to administer justice. These powers inhere in the Court in order to ensure it does not become an instrument for injustice.[98] In *Cocker v Tempest*,[99] Alderson B described the court's power over its own process as "unlimited". It extends "to all those

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[91] (1989) 168 CLR 1 at 16-17 (Dawson J, Mason CJ and Brennan, Deane and Toohey JJ agreeing).
[92] *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 360 (Dixon CJ, Fullagar, Kitto and Taylor JJ); *Grassby v The Queen* (1989) 168 CLR 1 at 17 (Dawson J, Mason CJ and Toohey J agreeing).
[93] *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 363 (Dixon CJ, Fullagar, Kitto and Taylor JJ).
[94] I H Jacob, *The Inherent Jurisdiction of the Court* (1970) Current Legal Problems 23.
[95] *Whitten v Hall* (1993) 29 NSWLR 680.
[96] [2012] SASC 12 at [99] (Kourakis J as he then was).
[97] *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [41]; [43]-[44] (French CJ); R *v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 7 (Menzies J, Barwick CJ and Walsh and Stephen JJ agreeing); *Hunter v Chief Constable of West Midlands* [1981] 3 All ER 727 at 729 (Lord Diplock).
[98] *Rogers v The Queen* (1994) 181 CLR 251 at 255-256 (Mason CJ); *Walton v Gardiner* (1993) 177 CLR 378 at 393 (Mason CJ, Deane and Dawson JJ). Given this end, the powers available are broad and "undefined"; *Grassby v The Queen* (1989) 168 CLR 1 at 16 (Dawson J, Mason CJ and Brennan, Deane and Toohey JJ agreeing).
[99] (1841) 7 M & W 502 at 503-504 (Alderson B).

categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness".[100] The need to do justice is paramount.[101] This was recognised as early as 1883, in *R v Burns*[102] and has been recognised expressly by this Court.[103]

65. The categories of abuse of process are not closed.[104] In *Ridgeway v The Queen*, Gaudron J resisted any temptation to limit to fixed categories the circumstances which could amount to an abuse of process of the Court, as maintaining public confidence in the administration of justice "depends on ensuring that judicial proceedings serve the ends of justice, not injustice".[105] Notions of justice and injustice must reflect contemporary values and reflect the circumstances of the particular case.[106] However, this does not have the effect that "abuse of process is a term at large or without meaning".[107]

66. Unlawfulness alone is not sufficient to reach a conclusion that there has been an abuse of process.[108] This Court has identified that "two fundamental policy considerations affect abuse of process in criminal proceedings".[109] The first is that "the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike".[110] The second is the consideration that "unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice".[111] Bearing in mind these policy considerations, "[t]he concept of abuse of process extends to a use of the court's processes in a way that is inconsistent with those fundamental requirements".[112] Consequently, the concept extends beyond those categories of mischief that emerged in the 19th and 20th centuries, such as sham proceedings, proceedings employed for ulterior purposes, manifestly

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[100] *Walton v Gardiner* (1993) 177 CLR 378 at 393 (Mason CJ, Deane and Dawson JJ), quoted with approval in *Rogers v The Queen* (1994) 181 CLR 251 at 255-256 (Mason CJ).
[101] *R v Moke & Lawrence* [1995] 1 NZLR 263 at 267 (Thomas J).
[102] *R v Burns* (1883) 9 VLR 191 at 193 (Higinbotham J, Stawell CJ and Holroyd J agreeing).
[103] *Williams v Spautz* (1992) 174 CLR 509 at 520 (Mason CJ, Dawson, Toohey and McHugh JJ).
[104] *Moti v The Queen* (2011) 245 CLR 456 at [10] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[105] (1995) 184 CLR 19 at 75 (Gaudron J).
[106] See further, *Rogers v The Queen* (1994) 181 CLR 251 at 255 (Mason CJ).
[107] *Jeffery & Katsauskas v SST Consulting* (2009) 239 CLR 75 at [28] (French CJ, Gummow, Hayne and Crennan JJ).
[108] *Moti v The Queen* (2011) 245 CLR 456 at [53] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[109] *Moti v The Queen* (2011) 245 CLR 456 at [57] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[110] *Williams v Spautz* (1992) 174 CLR 509 at 520 (Mason CJ, Dawson, Toohey and McHugh JJ); quoted with approval in *Moti v The Queen* (2011) 245 CLR 456 at [57] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[111] *Williams v Spautz* (1992) 174 CLR 509 at 520 (Mason CJ, Dawson, Toohey and McHugh JJ); quoted with approval in *Moti v The Queen* (2011) 245 CLR 456 at [57] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[112] *Moti v The Queen* (2011) 245 CLR 456 at [57] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

groundless or purposeless proceedings or those oppressive or vexatious in nature.[113]

67. Further, "[t]he counterpart of a court's power to prevent its processes being abused is its power to protect the integrity of those processes once set in motion".[114] The guiding principle, given that the Supreme Court is a superior court with responsibility for the administration of justice in the State, is that the Court's processes should not be used in ways which denigrate public confidence in the administration of justice or bring it into disrepute.[115] Maintenance of the integrity of the Court's processes is of the utmost importance.

68. Protection of the Court's ability "to function as a court of law" is to be considered by reference to the use of its processes "by State and citizen alike".[116] In this case, the respondent having laid an Information under s 275(1) of the *Criminal Law Consolidation Act 1935* (SA) (**CLCA**), and the defendants having pleaded not guilty, the State and the defendants alike, and indeed the public, were entitled to a determination of the cause "in the usual manner".[117]

69. A failure to achieve this compromises the essential integrity of the Court's processes and would bring the administration of justice into disrepute among right-thinking people. It amounts to a use of the Court's processes in a way that is inconsistent with the fundamental requirement that it preserve its ability to function as a court of law and guard against erosion of public confidence in the Court's role in the criminal justice system.

70. If the protective power of this Court justifies the setting aside of a perfected judgment for fraud in order to avoid the tendency that fraud left unaddressed would bring the administration of justice into disrepute,[118] no reason in logic exists to deny the Court power to do the same where its integrity is unacceptably compromised in some other way.

71. It is of no assistance to look for the existence of an abuser or to postulate the possibility of the Court being an abuser. The threat to integrity that an apprehension of bias poses demonstrates as much. It is contrary to the rationale and source of the inherent power to act for such a purpose to confine its available exercise to circumstances where the compromise of the Court's integrity is traceable to the act of a particular party or non-party, when a state

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[113] *Jeffery & Katauskas v SST Consulting* (2009) 239 CLR 75 at [27]-[28] (French CJ, Gummow, Hayne and Crennan JJ).
[114] *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 391 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
[115] *Rogers v The Queen* (1994) 181 CLR 251 at 256 (Mason CJ); *Secretary of State for Trade and Industry v Baker* [1998] EWCA Civ 943 (Lord Justice Chadwick).
[116] *Williams v Spautz* (1992) 174 CLR 509 at 520 (Mason CJ, Dawson, Toohey and McHugh JJ); quoted with approval in *Moti v The Queen* (2011) 245 CLR 456 at [57] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[117] *Criminal Law Consolidation Act 1935* (SA), s 284(1).
[118] *Clone Pty Ltd v Players Pty Ltd (In Liq) & Ors* [2012] SASC 12 at [97] (Kourakis J, as he then was).

of affairs (like those giving rise to an apprehension of bias) might equally compromise the Court's integrity. The power to prevent an abuse of process is but an example of the inherent power that enables the Court to do all "acts which it needs must have power to do in order to maintain its character as a court of justice" and discharge its supervisory role.[119]

Relief

72. In the present case, the judgments were perfected. As a general rule, a perfected judgment of the Court cannot be disturbed.[120] This general rule exists to give effect to the fundamental principles about finality of litigation.[121]

73. In *Bailey v Marinoff*[122] (***Bailey***), an appellant had had his appeal dismissed by failing to serve his appeal books by the requisite date, serving them six days late. Justice Menzies identified the issue as being "concerned with the power of a court to make an order in litigation which, without any error or lack of jurisdiction, has been regularly concluded and is no longer before the court."[123] Soon after *Bailey*, this Court acknowledged in *Gamser v Nominal Defendant*[124] (***Gamser***) that these statements were general in nature, and must be subject to exceptions and qualification. Justice Aickin identified that the general rule "is no doubt subject to the rule that a judgment apparently regularly obtained may be impeached upon the ground of fraud".[125] Justice Murphy recognised the possibility that "some extraordinary circumstances" might empower the Court, in the exercise of its inherent jurisdiction, to interfere with a perfected judgment.[126]

74. In the context of considering the power to set aside a judgment upon the discovery of fresh evidence, Dixon CJ said in *Council of the City of Greater Wollongong v Cowan*:[127]

> "If cases are put aside where a trial has miscarried through misdirection, misreception of evidence, wrongful rejection of evidence or other error and if cases of surprise, malpractice or fraud are put on one side, it is essential to give effect to the rule that the verdict, regularly obtained, must not be disturbed *without some insistent demand of justice.*" (*Emphasis added*)

75. In *Commonwealth Bank of Australia v Quade*[128] this Court emphasised that "the general rule formulated by Dixon CJ is directed to the ordinary case". Setting aside a judgment vitiated by

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[119] *Bremer Vulkan v South India Shipping* [1981] AC 909 at 977 (Lord Diplock).
[120] *Bailey v Marinoff* (1971) 125 CLR 529 at 530 (Barwick CJ).
[121] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [34] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Burrell v The Queen* (2008) 238 CLR 218 at [15] (Gummow A-CJ, Hayne, Heydon, Crennan and Kiefel JJ).
[122] (1971) 125 CLR 529.
[123] *Bailey v Marinoff* (1971) 125 CLR 529 at 531 (Menzies J).
[124] *Gamser v Nominal Defendant* (1976) 136 CLR 145.
[125] *Gamser v Nominal Defendant* (1976) 136 CLR 145 at 154 (Aicken J).
[126] *Gamser v Nominal Defendant* (1976) 136 CLR 145 at 151 (Murphy J).
[127] (1955) 93 CLR 435 at 444 (Dixon CJ).
[128] (1991) 178 CLR 134 at 140 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

fraud is one obvious example of an exercise of the Court's broader inherent power to protect its processes against abuse,[129] where the occasion for it outweighs the interests of finality in a particular case. Historically, this inherent power was exercised by the courts of equity.[130]

76. The question is whether the present state of affairs amounts to an abuse of the Court's processes that by "some insistent demand of justice" empowers the Court in the exercise of its inherent jurisdiction to set aside its perfected judgment. Ultimately the test must return to a consideration of the principles underpinning the source of and rationale behind the power, asking whether the integrity of the judicial function has been unacceptably compromised.

77. Having regard to the pivotal role of the jury, denial of an actual determination of the cause by the jury is a denial of an essential feature of a trial by jury. Given "[t]he purpose of criminal proceedings ... is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence...",[131] a purported disposal of those proceedings absent determination of the cause by the jury or otherwise premised on a miscommunication of that determination, fails to achieve even the minimum object of the proceedings. Whilst the Court "undoubtedly acted on an assumption of regularity, in truth ... it was disabled from the due discharge of its imperative ... functions"[132] with respect to the reception and recording of verdicts in its disposition of criminal proceedings. These are the very type of "extraordinary circumstances" Murphy J left open for intervention in *Gamser*.

78. Had the misstatement by the jury foreperson become known at the time the verdicts were being delivered, the Court would not have accepted them.[133] Further, if the false nature of the verdicts had become known whilst the jurors were still in the precincts of the Court, despite the judgments having already been accepted and the jury discharged, the Court would have had the power to set them aside.[134]

79. *R v Snow* does not alter the position.[135] That case was concerned with whether s 73 of the Constitution conferred an appellate jurisdiction on this Court to set aside a verdict of "not guilty". It had been accepted by the Crown that the judgment could not be impeached for as long as the verdict stood. Further, the Crown did not assert that a new trial could be granted

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[129] *Clone Pty Ltd v Players Pty Ltd (in liq)* [2012] SASC 12 at [77], [99] (Kourakis J, as he then was); *Nixon v Loundes* [1909] 2 Ir R 1 at 10-11 (Dodd J).
[130] *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 540 (Kirby P, Hope and Samuels JJA agreeing).
[131] *Jago v District Court (NSW)* (1989) 168 CLR 23 at 47 (Brennan J).
[132] *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at [51] (the Court).
[133] Indeed, could not have accepted them, having regard to s 57 of the *Juries Act 1927* (SA).
[134] *R v Cefia* (1979) 21 SASR 171.
[135] Cf *Case stated on acquittal; R v Stakaj* (2015) 123 SASR 523 at [26] (Kourakis CJ); ZS at [38]; JS at [37]-[46]; SS at [48]; NS at [6.3].

after an acquittal under the laws of South Australia.[136] From that uncontested premise, this Court held, by majority, that s 73 did not confer jurisdiction on the High Court to grant a new trial. The statements of the majority as to the unexaminability of a jury's verdict except for error on the face of the record[137] were obiter and must be examined in light of the development of the jurisprudence over the last 100 years, discussed above, as to the necessity for the Supreme Court to be capable of safeguarding its institutional integrity and the consequent necessary scope of its inherent jurisdiction.

80. The minority in *Snow*, referring specifically to the question of the jurisdiction under s 73, recognised that the approach to acquittals should not be fettered by the practice of English courts.[138] That understanding in 1915 illustrates that the inquiry is not assisted by a characterisation of verdicts, and specifically acquittals, as "sacrosanct" or carrying some form of "sanctity".[139] Such words are descriptors of judicial policy that fail to inquire into the necessity and scope of the inherent power. That there are exceptions is well established. This Court in *Grassby* articulated the existence of the necessary inherent jurisdiction. The historical robustness of the apparent inability to challenge acquittals should rather be viewed as demonstrative of the unusual and extraordinary circumstances, contemplated in both *Gamser* and *Cowan*, necessary to establish that the integrity of the judicial process has been unacceptably compromised such that the Supreme Court is empowered to set aside an impugned perfected judgment or order.

81. The Court's record reflects the disposal of a criminal proceeding in accordance with jury verdicts which are known to be false – that is, verdicts which the jury never resolved to return.[140] That amounts to such exceptional circumstance.

Discretion

82. Although identification of whether the present state of affairs is properly characterised as an abuse of process may involve the weighing of interests, this is not to say that once that weighing task has been performed, and an abuse identified, the Court can decline to act within the scope of its powers to remedy it. In this, the comments of Gaudron and Gummow JJ regarding the grant of a stay for an abuse of process are apposite:

> The power to stay is said to be discretionary. In this context, the word "discretionary" indicates that, although there are some clear categories, the circumstances in which

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[136] R *v Snow* (1915) 20 CLR 315 at 321 (Griffiths CJ).
[137] R *v Snow* (1915) 20 CLR 315 at 324 (Griffiths CJ).
[138] R *v Snow* (1915) 20 CLR 315 at 334-335; 349-351 (Isaacs J); 353-354 (Higgins J).
[139] R *v Weaner* (1931) 45 CLR 321 at 356 (Evatt J).
[140] And, indeed, verdicts which could not have been accepted by the Court had there been no miscommunication at the time of delivery of the verdicts, having regard to s 57 of the *Juries Act 1927* (SA).

proceedings will constitute an abuse of process cannot be exhaustively defined and, in some case, minds may differ as to whether they do constitute an abuse. It does not indicate that there is a discretion to refuse a stay if proceedings are an abuse of process or to grant one if they are not.[141]

83. The authority relied upon by Zefi and Jakaj[142] does not assist. The comments of Kirby J in *DJL v The Central Authority*[143] are not addressed to the exercise of the inherent power in a superior court of record to protect itself from an abuse of process.

C. ORDERS

84. The respondent contends that the appeals should be dismissed with no order as to costs.

10 85. In the event that the respondent is unsuccessful:

(i) the conviction appeals of Stakaj and N, H remain to be determined by the Full Court of the Supreme Court. To the extent that such order is necessary, those appeals should be remitted to the Full Court for hearing and determination.

(ii) the respondent does not resist an order as to costs save with respect to the costs relating to the conviction appeals of Stakaj and N,H, and with respect to the costs associated with the respondent's application in the Court below for a question to be reserved. As to the conviction appeals, s 363(1) CLCA precludes such an order. As to the application for a question to be reserved, that proceeding is not properly before this Court, and the respondent is in any event liable to pay those costs by force of s 351B(1) CLCA.[144]

20 **Part VII: TIME ESTIMATE**

86. The respondent estimates two and a half hours will be required for its oral argument.

Dated: 6 May 2016

A P Kimber SC	C D Bleby SC	F J McDonald
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[141] *R v Carroll* (2002) 213 CLR 635 at [74] (Gaudron and Gummow JJ).
[142] See ZS at [80]; JS at [60].
[143] (2000) 201 CLR 226 at [108] (Kirby J).
[144] *Criminal Law Consolidation Act 1935* (SA), s 351B(1).

ANNEXURE A

Further relevant statutory provisions

1. *Criminal Law Consolidation Act 1935* (SA), ss 275, 284
2. *Juries Act 1927* (SA), ss 55 and 56
3. *Supreme Court Act 1935* (SA), s 6

Criminal Law Consolidation Act 1935 (SA)

275—Information may be presented in name of Director of Public Prosecutions

(1) Any person may be put upon his trial at any criminal sessions of the Supreme Court or District Court, for any offence, on an information presented to the Court in the name and by the authority of the Director of Public Prosecutions.

(2) Every rule of law and enactment for the time being in force in the State relating to indictments and to the manner and form of pleading thereto and to the trial thereon, and generally to all matters subsequent to the finding of the indictment, shall apply to any information so presented.

(3) The Supreme Court and the District Court must make rules for expediting prescribed proceedings and, if there has been a determination by a bail authority under the *Bail Act 1985* that the defendant in such proceedings is a serious and organised crime suspect, the trial of the matter must be commenced within the period of 6 months after the making of that determination, unless the determination ceases to apply or the Court determines—

(a) on its own initiative, that it is not reasonably practicable for the Court to deal with the matter within that period; or

(b) on application by the Director of Public Prosecutions or the defendant, that exceptional circumstances exist that justify the matter being set down for trial at a later date.

(4) For the avoidance of doubt, any power of the Supreme Court or the District Court to order the transfer of proceedings under this or any other Act or law applies to proceedings brought under this section in the same way as it applies to any other criminal proceedings.

(5) In this section—

prescribed proceedings means proceedings brought under this section for—

(a) an alleged serious and organised crime offence; or

(b) an offence joined in the same information as an alleged serious and organised crime offence.

284—Plea of not guilty and refusal to plead

(1) Any person arraigned on any information who pleads not guilty thereto shall, by that plea, without any further form, be taken to have put himself upon the country for trial; and the court shall, in the usual manner, proceed to the trial of that person accordingly.

(2) If any person, being so arraigned, stands mute, of malice, or is dumb, or will not answer directly to the information, it shall be lawful for the court to order a plea of not guilty to be entered on his behalf and the plea so entered shall have the same effect as if he had actually pleaded not guilty.

Juries Act 1927 (SA)

55—Separation of jury

(1) The court may, if it thinks there are proper reasons to do so, permit the jury to separate.

(2) Such a permission may be granted even though the jury has retired to consider its verdict or to consider whether to return a verdict without hearing further evidence.

(3) When the court permits a jury to separate, it may impose conditions to be complied with by the jurors.[1]

Example—

1 For example—

(a) a condition might be imposed requiring the jurors to reassemble at a specified time and place;

(b) a condition might be imposed prohibiting the jurors from discussing the case with anyone (except another juror) during the separation.

56—Continuation of trial with less than full number of jurors

(1) If during the course of a criminal trial the presiding judge is satisfied that, by reason of the ill health of a juror or a matter of special urgency or importance, a juror should be excused from further attendance, the judge may order that the juror be excused from further attendance during that trial and for such further period (if any) as the judge determines.

(2) If during the course of a criminal trial a juror dies or is excused under subsection (1), or fails to attend without lawful excuse, the trial will, subject to any contrary direction by the presiding judge, continue with the reduced number of jurors, provided that the number of jurors has not been reduced to less than 10.

Supreme Court Act 1935 (SA)

6—Continuance of Supreme Court

The Supreme Court of South Australia as by law established is hereby continued as the superior court of record, in which has been vested all such jurisdiction (whether original or appellate) as is at the passing of this Act vested in, or capable of being exercised by that court.