IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY No A16 of 2016

BETWEEN **DAVID ZEFI**

Appellant

and **DIRECTOR OF PUBLIC PROSECUTIONS**

Respondent

APPELLANT'S SUBMISSIONS

REDACTED IN ACCORDANCE WITH ORDER OF GORDON J DATED 27 APRIL 2016

PART I: Internet publication

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

PART II: Issues presented by the appeal

2 The appeal raises the following issues:

a. In the absence of any statutory provision expressly conferring such jurisdiction, and where express and limited legislative provision is made for criminal appeals, does a State Supreme Court have an inherent jurisdiction to set aside perfected orders of that Court that there be an acquittal (and conviction), entered following a trial by jury and in accordance with the verdict delivered by a jury, the verdict having been apparently regularly delivered in the presence of all jurors, without objection or indication of dissent being raised by any of them?

b. Is evidence of the answers given by each individual juror [redacted] admissible in evidence?

c. In determining whether such evidence is admissible — and, if so, in acting upon it — should regard be had to answers given by the same jurors to other questions forming part of the same set of interrogatories which bear on the interpretation of the answers given by the jurors [redacted]?

d. Did the admissible evidence (if any) support a finding that the jurors did not agree upon the verdicts to be delivered?

e. If so, did such failure of the jurors to agree, or any non-compliance with s 57(3) of the *Juries Act 1927* (SA), result in the verdicts being "unlawful" or "invalid" in some

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sense that relevantly entitled the Full Court to set aside perfected orders of the Supreme Court?

f. Is the process of the Supreme Court abused by reason of a jury, through no fault of either party to the proceedings, returning a verdict of acquittal based upon a misunderstanding as to the number of jurors that must agree on such a verdict?

g. In all the circumstances of this case, should the Supreme Court, in the exercise of its discretion, have declined to set aside the verdicts of acquittal?

PART III: Section 78B of the *Judiciary Act 1903* (Cth)

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

PART IV: Citation of reasons for judgment of the Supreme Court

4 The citation for the authorised report of reasons for judgment of the Full Court of the Supreme Court of South Australia is *R v Stakaj* (2015) 123 SASR 523.

PART V: Relevant facts

Trial and verdicts

5 The appellant, David Zefi, was charged with murder. He was tried before Vanstone J and a jury, jointly with three other defendants, Rrok Jakaj, Dario Stakaj and a youth HN, each of whom was also charged with murder. On Wednesday 17 September 2014, the jury retired to consider its verdicts and commenced its deliberations.

6 At 2:27pm on Monday 22nd September 2014, the jury returned to deliver its verdict. In response to questions from the judge's associate, the foreperson of the jury announced that the jury found the appellant not guilty of murder and guilty of manslaughter. In answer to a further question by the associate, the foreperson affirmed that the verdict of not guilty to murder was the verdict of ten or more of the jury.

7 The questions were repeated in relation to each of the other defendants, and the same answers were given. Each of the defendants was found not guilty of murder and guilty of manslaughter. No member of the jury indicated any objection to or dissent from the verdicts or the answers to questions given by the foreperson.

8 Vanstone J discharged the jury at about 2:34pm. The *allocutus* was then read to each of the defendants. The Court was adjourned, rising at 2:55pm on 22nd September 2014.

Issues concerning the verdict, steps to obtain evidence from jurors, and perfection of orders

9 At about 4pm on 22nd September 2014, the person who had acted as the foreperson of the jury, acting alone and not together with or in consultation with any of the other persons who had been jurors in the trial of the defendants, made contact with an officer of the Court. At about 4:50pm, the foreperson met with the Acting Jury Manager. At about 5:10pm, the

Acting Jury Manager informed the Acting Sheriff of an issue relating to the verdicts. Between 24 and 26 September 2014, signed statements were obtained from each of the other persons who had acted as jurors in the trial of the defendants, in the form of answers to interrogatories drafted by the trial judge.

10 The interrogatories asked 7 questions of each juror.[1]

11 On 30 September 2014 at about 3pm, the Director of Public Prosecutions ("**the Director**") and the legal representatives of each of the defendants received copies of a memorandum of the Acting Jury Manager and an affidavit of Vanstone J's associate. This was the first notification to the parties that there was any issue in relation to the verdicts.

12 On 2 October 2014, the matter was called on before Vanstone J for sentencing submissions. Senior Counsel for the prosecution, Mr Pearce QC, said that he would need to take instructions as to what, if anything, the prosecution might do. Vanstone J indicated her view that "the matter is really out of my hands". Mr Pearce agreed, stating that he had come to the view that "the jury is probably *functus officio*" and that Vanstone J "no longer has a residual discretion to try and remedy any such defect". Vanstone J indicated that she proposed to proceed to hear sentencing submissions and to sentence. The prosecution and the defendants then proceeded to make submissions as to sentence.

13 On 7 October 2014, the matter was listed for sentence. No submissions were made in relation to any issue concerning the verdicts. Vanstone J sentenced the defendants.

14 Following the sentencing of the defendants, between 7 and 10 October 2014, the Clerk of Arraigns and Vanstone J signed a Report of Prisoner Tried in respect of each of the defendants. It was common ground in the Full Court below that, at the latest, the judgment of the Court accepting the verdicts of the jury was perfected at that point. Before that occurred, no application was made to defer sentencing or arrest perfection of the judgment.

15 The Director filed an application seeking orders setting aside the verdict on 16 January 2015, 116 days after the jury's verdict was delivered and 107 days after the parties were first informed of the subject matter of the application. The application was referred for hearing by the Full Court and is the subject of the judgment from which this appeal is brought.

16 On 11 February 2015, without the consent of the appellant, an order was made by the Supreme Court (Sulan J) for the Registrar to obtain affidavits from each of the jurors. A sworn affidavit was obtained from each juror which in each case adopted the answers given

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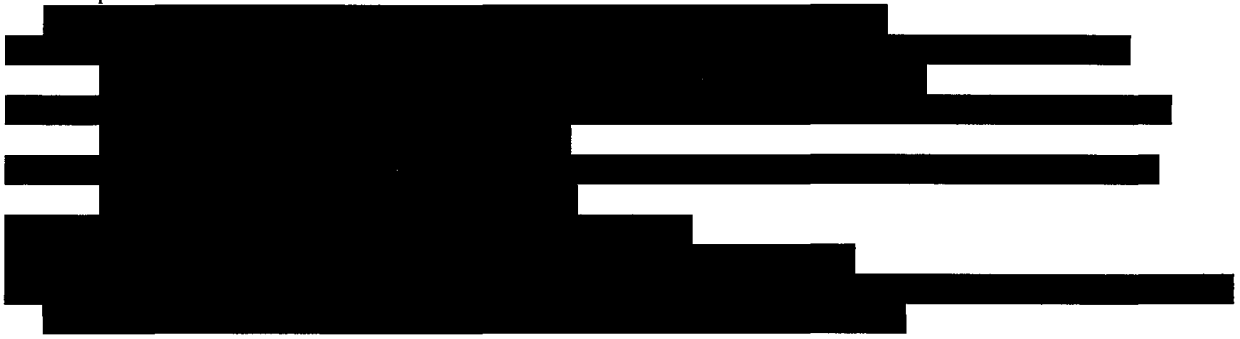
[1] The questions were:



between 24 and 26 September 2014 to the interrogatories drafted by the trial judge. In the Full Court, the Director sought to adduce in evidence only part of the foreperson's affidavit, and each juror's response to only question 5 of the interrogatories.

17 On 5 March 2015, the Director filed a further application seeking orders from the Full Court to require Vanstone J to reserve certain questions of law for its consideration and determination. That application was referred for hearing by the Full Court at the same time as the hearing of the application filed on 16 January 2015.

Full Court hearing and decision

18 The Director's applications were heard in the Full Court, concurrently with appeals by Stakaj and HN against their convictions for manslaughter. The Full Court (by majority) granted the Director's application filed on 16 January 2015 and ordered that the jury verdicts of not guilty of murder be quashed, that the convictions of manslaughter of each of the defendants be quashed, and that their sentences be set aside. The Court ordered that, in the case of each defendant, there be a retrial on the charge of murder.

19 The majority (Gray and Sulan JJ) admitted the affidavit material sought to be adduced by the Director to establish there was a "material irregularity" in the announcing of the verdict, in that the foreperson responded "yes" to the question as to whether each of the not guilty verdicts on the charge of murder was the verdict of 10 or more of the jury, "when the correct response was 'no'".[2] The majority considered that the jurors were unanimous in the view that the foreperson made an error when announcing the verdicts, and that the verdicts of not guilty of murder did not accurately reflect the verdicts reached in the jury room.[3] The "evidence ... [was] extrinsic to the deliberations of the jury".[4]

20 The majority held that the evidence disclosed that the jury had not complied with s 57 of the *Juries Act 1927* (SA), resulting in "unlawful verdicts."[5] The unlawful verdicts were said to give rise to an abuse of process, allowing the Court to hear, and allow, the Director's application within its inherent jurisdiction.[6] The "conduct" said to amount to an abuse was, first, "the foreperson's mistake in the responses to the questions asked by the Associate, and the unanimous mistake made by the jury in acquiescing to those responses at the time of the delivery of the verdicts"[7] and secondy, the Court's acceptance of the unlawful verdicts.[8]

21 The majority considered that "[a]s a consequence of non-compliance with s 57 of the *Juries Act*, a valid verdict or determination has not been made in this case" and that "[t]he orders entered in the Court record did not reflect the determination of the Court, in this case of the

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2 (2015) 123 SASR 523 at [113].
3 (2015) 123 SASR 523 at [116].
4 (2015) 123 SASR 523 at [120].
5 (2015) 123 SASR 523 at [139].
6 (2015) 123 SASR 523 at [139].
7 (2015) 123 SASR 523 at [140].
8 (2015) 123 SASR 523 at [139].

jury."[9] The Supreme Court, in the exercise of its inherent jurisdiction, had the power to "recall the order" and correct the "invalid determination."[10]

22 Kourakis CJ (dissenting) considered that the decision of this Court in *R v Snow*[11] bound the Supreme Court to dismiss the Director's application.[12] His Honour considered the principle of the inviolability of judgments of acquittal based on jury verdicts to be of such central importance that the development of the law of abuse in civil proceedings could not be used to overrule it "by a side wind".[13] His Honour considered that a decision made by a constituent part of a court, right or wrong in law, was not an abuse of itself, and the development of the law of abuse was not germane to the issue.[14]

23 Kourakis CJ disagreed with the majority as to the application of s 57(3) of the *Juries Act*.[15] His Honour considered that there was no evidence of non-compliance with the section, and that any such evidence would involve inquiry into the deliberations of the jury.[16]

24 Kourakis CJ concluded that the affidavit evidence sought to be adduced by the Director was admissible on the appeals by Stakaj and HN, to show that the foreperson communicated verdicts of not guilty of murder which the jury had not resolved to return.[17]

PART VI: Argument

The sanctity of acquittal by jury: the common law

25 In *R v Snow*, Griffith CJ spoke of "the absolute protection afforded by a verdict of not guilty under the common law of all the States".[18] In the same case, Gavan Duffy and Rich JJ explained:[19]

> First, out of respect for life when all felonies were capital, and, later, out of respect for character and reputation, the Courts resisted every attack on the inviolability of the verdict of "not guilty," and that inviolability has remained part of the substantive law to the present day.

26 Evatt J observed in *R v Weaver* that "[t]he jury's verdict of not guilty has a special constitutional finality and sanctity which are always regarded as an essential feature of British criminal jurisprudence".[20] In *R v JS*, both Spigelman CJ (with whom McClellan CJ at CL,

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9 (2015) 123 SASR 523 at [159].
10 (2015) 123 SASR 523 at [164].
11 (1915) 20 CLR 315.
12 (2015) 123 SASR 523 at [26].
13 (2015) 123 SASR 523 at [2].
14 (2015) 123 SASR 523 at [34].
15 (2015) 123 SASR 523 at [46]-[48].
16 (2015) 123 SASR 523 at [47].
17 (2015) 123 SASR 523 at [20].
18 *R v Snow* (1915) 20 CLR 315 at 323. See also *R v Wilkes* (1948) 77 CLR 511 at 516 per Dixon J.
19 (1915) 20 CLR 315 at 364.
20 (1931) 45 CLR 321 at 356. See also *R v Benz* (1989) 168 CLR 110 at 112 per Mason CJ; *R v Glennon* (1992) 173 CLR 592 at 595 per Mason CJ and Toohey J.

Hidden and Howie JJ agreed) and Mason P accepted that the absolute finality of a jury verdict of acquittal was a "fundamental common law principle".[21] Mason P said:[22]

> [T]he common law recognised that a verdict of acquittal could not be set aside by the trial judge, or challenged by any process of appeal or judicial review, or ignored by the launching of a fresh prosecution. These principles applied even where the verdict stemmed from judicial error in the form of a ruling on evidence or misdirection[.]

27 No authority was cited by either the Director or the majority in the court below in which a perfected judgment entered on the basis of verdict of a jury, apparently regularly delivered in the presence of all jurors, has later been set aside in the absence of express statutory authority (eg, a right of appeal).

The statutory context

28 Part 11 of the *Criminal Law Consolidation Act* ("**CLCA**") was enacted against that common law background.

29 It deals exhaustively with "appeals on the criminal side" by either prosecution or defendant.[23] Section 352 of the CLCA makes careful and particular provision for appeals to the Full Court from decisions in criminal cases. It does so by distinguishing between particular categories of cases, by specifying the particular persons who may appeal (by right or with permission), and the particular kinds of orders against which they may appeal:

a. Section 352(1) applies "if a person is convicted on information" and provides that the convicted person may, in that case, appeal against the conviction.

b. Section 352(1)(b) applies "if a court makes a decision on an issue antecedent to trial that is adverse to the prosecution", while s 351(1)(c) applies "if a court makes a decision on an issue antecedent to trial that is adverse to the defendant".

c. Section 352(1)(ab) applies "if a person is tried on information and acquitted", and provides that the Director may appeal against the acquittal if, but only if, "the trial was by judge alone" or "the trial was by jury and the judge directed the jury to acquit the person".

30 The potential for appeal in a case of acquittal is thus specifically addressed, and deliberately limited in such a way as to preclude any appeal against a verdict of acquittal by a jury (other than a directed acquittal). This respects and reinforces the common law sanctity of an acquittal by verdict of a jury.

31 The Parliament has, by limiting s 351(1)(ab), thus made a deliberate decision *not* to confer a right on the prosecution to challenge the acquittal of an accused person following a trial by jury. That limitation is then further reflected in the careful scheme for the reservation of questions of law to the Full Court, which is created by ss 350 and 351A in particular. That

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[21] (2007) 230 FLR 276 at 286 [26]-[27] per Spigelman CJ and at 307 [179] per Mason P.

[22] (2007) 230 FLR 276 at 306 [171], citing *United States v Sanges* 144 US 310 at 312 (1892); *R v Snow* (1915) 20 CLR 315; M L Friedland, *Double Jeopardy* (Oxford Clarendon Press, 1969), Ch 10.

[23] *R v Millhouse* (1980) 24 SASR 555; *R v Garrett* (1988) 49 SASR 435, especially at 445 per Cox J; *Southern Adelaide Health Service v C* (2007) 97 SASR 556 at 567-70 [21]-[26] per White J.

scheme enables the Director, in limited circumstances, to obtain a correct answer to a question that arose in the course of a trial which ended in acquittal, while preserving the finality of the verdict of acquittal itself, and the judgment reflecting the verdict.

32 It is hardly to be supposed that the Parliament, against a common law background that recognised jury acquittal as sacrosanct:

a. so carefully delineated the categories of cases in which an appeal may be brought, enabling appeals against a conviction by a jury or judge alone, and against an acquittal by judge alone, but not enabling appeals against an acquittal by a jury;

b. provided for a particular mechanism by which the prosecution, following an acquittal, could unilaterally compel the Full Court to consider a question of law or a question involving the exercise of a judicial discretion; and

c. made specific provision to exclude the possibility of the Full Court, on such a reservation of a question of law, making any order which would affect the acquittal,

yet that the Court was nevertheless to be at liberty to set aside an acquittal by a jury on an application by the prosecution made outside the regime of appeals and questions of law reserved provided for in Part 11 of the CLCA.[24]

This is not a case of the jury "correcting" its verdict

33 The verdict of a jury may be "corrected", by the jury *acting as such*, at any time up until the discharge (in substance and not merely in form) and dispersal of the jury.[25] After that time, the individual persons who acted as jurors are no longer able to act *as a jury*. Up until that point, the jury itself may withdraw or correct its verdict. The correction of a verdict in these circumstances involves the direct act of the jury; it does not rely upon the admission of evidence, whether from jurors or from any other source.

34 In the present case, no issue concerning the verdict was raised until well after the jury had been discharged and had dispersed. This is not a case of the jury "correcting" its verdict in the sense discussed in authorities such as *R v Cefia*.[26] When an issue was raised, it was the unilateral act of one person who had been a member of the jury, in the absence of consultation between him and the other persons who had served as jurors. It was not an act of *the jury*.[27]

No inherent jurisdiction to quash perfected orders based on a jury acquittal

35 The jurisdiction of the Court to set aside or otherwise affect a final judgment entered in Supreme Court criminal proceedings is, as submitted above, exhaustively defined by Part 11

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[24] Cf *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

[25] Authorities differ as to exactly when this point is reached: cf, eg, *R v Gough* [1993] AC 646 at 658 per Lord Goff; *R v Hodgkinson* [1954] VLR 140; *R v Andrews* (1985) 82 Cr App R 148; *R v Cefia* (1979) 21 SASR 171; *R v Atkinson* (1907) 7 SR (NSW) 713; *Re Donovan's Application* [1957] VR 33.

[26] (1979) 21 SASR 171.

[27] Cf *R v Andrews* (1985) 82 Cr App R 148 at 154.

of the CLCA. There is no other common law source of jurisdiction of the kind invoked by the majority in the Full Court.

36 The majority in the Court below reasoned: "As a superior court of record, the Court has an inherent jurisdiction to review an order entered that is infected by error, and in particular is non-compliant with section 57 of the *Juries Act*."[28] This is wrong.

37 It was common ground in the Full Court that the Director's application had been made only after the Court's orders had been perfected. In *Bailey v Marinoff*, this Court authoritatively held that there is no inherent power in a court to deal further with a proceeding that has been dismissed by a formal order once that order has been entered in the records of the court (ie, once it has been "perfected").[29] That basic principle was affirmed in *Gamser v Nominal Defendant*.[30]

38 Having regard to the special value accorded to a verdict of acquittal following trial by jury, the rule applies with, if anything, even greater force in criminal proceedings. Thus in *R v Snow*, Griffith CJ said:[31]

> In my opinion, when the proceedings upon an indictment have been concluded by verdict followed by judgment, the Court cannot, under the British system of criminal law, unless expressly authorized by Statute, examine the validity of the proceedings except so far as they appear on the record.

His Honour accepted "that, by the law of South Australia a new trial could [not] be granted after a verdict of acquittal *on any ground whatever*".[32] Similarly, Gavan Duffy and Rich JJ held that "a verdict of 'not guilty' given by a jury on a sufficient indictment in a purely criminal trial conducted by a competent Court is final".[33] The principle was most recently reaffirmed by this Court in *Burrell v The Queen*[34] and *Achurch v The Queen*.[35]

39 The Court has no inherent jurisdiction or power to set aside or re-open a perfected judgment, even in civil cases, in the absence of fraud or other limited exceptions,[36] none of which

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[28] (2015) 123 SASR 523 at [162].

[29] (1971) 125 CLR 529 at 530-1 per Barwick CJ, at 531-2 per Menzies J, at 537 per Walsh J (Owen J agreeing generally); see also *DJL v Central Authority* (2000) 201 CLR 226 at 245 [38] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

[30] (1977) 136 CLR 145 at 147 per Gibbs J, at 150 per Murphy J and at 153-4 per Aicken J (Barwick CJ and Stephen J agreeing).

[31] (1915) 20 CLR 315 at 324.

[32] (1915) 20 CLR 315 at 325. (Emphasis added.)

[33] (1915) 20 CLR 315 at 363. See also *R v Weaver* (1931) 45 CLR 321 at 332-3 per Gavan Duffy CJ, Starke and McTiernan JJ.

[34] (2008) 238 CLR 218 at 223-6 [14]-[28] per Gummow A-CJ, Hayne, Heydon, Crennan and Kiefel JJ.

[35] (2014) 88 ALJR 490. See also *DJL v The Central Authority* (2000) 201 CLR 226 at 289-91 [184]-[189] per Callinan J, and the observation of Evans J in *Tasmania v Coy* [2004] TASSC 151 at [4] that "[w]hat is of fundamental importance is that the court is satisfied of the error and where the error is to be dealt with by the court of trial it [ie, the court of trial as opposed to the jury] must not be *functus officio*". The court of trial is *functus officio* once it has perfected its judgment finalising the proceedings.

[36] *Gamser v Nominal Defendant* (1977) 136 CLR 145 at 154 per Aicken J (Barwick CJ and Stephen J agreeing); *Clone Pty Ltd v Players Pty Ltd (in Liq)* [2012] SASC 12 at [97] (fraud); *Burrell v The Queen* (2009) 238 CLR 218 at 224-5 [21] (slip rule) and at 225 [26] (orders made *ex parte* or in denial of natural justice left open).

applied in the circumstances of the present case. The appellant also respectfully adopts the reasons of Kourakis CJ on this issue.[37]

No abuse of process

40 Assuming that the Court does have an inherent power to set aside a perfected judgment entered as a consequence of abuse of process, even in criminal proceedings and even in relation to an acquittal following trial by jury, the present proceedings involved no abuse of process, and nothing remotely analogous to abuse of process. There was no procedural step taken by the appellant in the criminal proceedings which could conceivably be characterised as an abuse.

41 The primary concern of the doctrine of abuse of process is with the *abuse* (that is, the wrongful *use*) of a court's process by a party to proceedings in the court. Thus the classic statement of Lord Denning in *Hunter v Chief Constable of West Midlands Police* that the powers of the court include:[38]

> [T]he inherent power which any court of justice must possess to prevent *misuse* of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. (Emphasis added.)

42 In *Rogers v The Queen*, McHugh J identified the following categories of abuse of process:[39]

> (1) the court's procedures *are invoked for an illegitimate purpose*; (2) the *use* of the court's procedures is unjustifiably oppressive to one of the parties; or (3) the *use* of the court's procedures would bring the administration of justice into disrepute.

43 In *Batistatos v Road Traffic Authority (NSW)*, it was said that "the failure to take, as well as the taking of, procedural steps and other delay in the conduct of proceedings are capable of constituting an abuse of the process of the court".[40] What was in contemplation was the commencement of proceedings, or the taking of a step in proceedings *by one of the parties.*

44 Similarly, in *Jeffery & Katauskas v SST Consulting*, French CJ, Gummow, Hayne and Crennan JJ, citing Sir Jack Jacob,[41] identified four "categories of conduct" which had been held to give rise to abuse of process. They were:[42]

a. proceedings which involve a deception on the court, or are fictitious or constitute a mere sham;

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[37] (2015) 123 SASR 523 at [21]-[42].
[38] [1981] 3 All ER 727 at 729.
[39] *Rogers v The Queen* (1994) 181 CLR 251 at 286, cited with approval in *Moti v The Queen* (2011) 245 CLR 456 at 464 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *PNJ v The Queen* (2009) 193 A Crim R 54 at 56 [3] per curiam; *Batistatos v Road Traffic Authority (NSW)* (2006) 226 CLR 256 at 267 [15] per Gleeson CJ, Gummow, Hayne and Crennan JJ.
[40] (2006) 226 CLR 256 at 267 [15] per Gleeson CJ, Gummow, Hayne and Crennan JJ.
[41] I H Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems* 23 at 43.
[42] (2009) 239 CLR 75 at 93 [27].

b. proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way;

c. proceedings which are manifestly groundless or without foundation or which serve no useful purpose;

d. multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.

45 When speaking of the extension of abuse of process beyond those categories, their Honours spoke of "conduct of a party or non-party".[43]

46 It is not to be concluded that a court's *process* has been *abused* merely because the substantive outcome of particular proceedings might be said to be, in some sense, "unjust" or "erroneous" or even "unlawful". Abuse of process is not to be equated with error of law, procedural error or an erroneous result.

47 Preventing abuses of their process undoubtedly conduces to the maintenance of public confidence in the courts. But the power to prevent abuse of process is not to be treated as though it were simply a synonym for maintaining public confidence in the courts.[44] The Court is not at large to re-open cases or set aside final judgments, under the rubric of preventing abuse of process, merely because a decision may have been affected by error (in this case, as the majority of the Full Court described it, "the foreperson's mistake in the responses to the questions of the Associate, and the unanimous mistake made by the jury in acquiescing to those responses at the time of the delivery of the verdicts"[45]). If the power to prevent abuse of process extended so far, appellate and supervisory judicial review jurisdiction would be virtually redundant.

48 In the case of a criminal trial by jury, the jurisdiction of the court is exercised by the court constituted by a judge and jury. In exercising its function of adjudging criminal guilt and delivering its verdict, and answering questions ancillary to the delivery of the verdict, the jury acts as a component part of the court. It cannot be said that the *jury*, or the *foreperson of the jury*, engaged in an abuse of the process of the Court by answering, in good faith, the questions put to them. Nor can the acceptance of the verdicts and the making of orders by the Court constitute an abuse. A court cannot abuse its own process.[46] As Kourakis CJ rightly said in dissent in the Full Court: "A decision made by a constituent part of a court may be right or wrong in law but it is not possible to characterise it as an abuse of itself."[47]

49 Even under the broader rules-based power recognised in civil cases, the Court will not reverse a final determination merely because it is persuaded that it was affected by error.[48]

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43 (2009) 239 CLR 75 at 94 [28].

44 Cf (2015) 123 SASR 523 at [164] (Gray and Sulan JJ).

45 (2015) 123 SASR 523 at [140] (Gray and Sulan JJ).

46 *Killick v Commissioner of Police (NSW)* [2014] NSWSC 781 at [41] per Simpson J; *Neill v County Court of Victoria* [2003] VSC 328 at [71] per Redlich J.

47 (2015) 123 SASR 523 at [34].

48 *Bailey v Marinoff* (1971) 125 CLR 529 at 539; *Clone Pty Ltd v Players Pty Ltd (in Liq)* [2012] SASC 12 at [70], citing *R v Burrell* (2008) 238 CLR 218 at 224 [19].

"Invalid" verdicts and "unlawful verdicts"

50 The majority in the Full Court proceeded on the basis that the verdicts in the present case were reached otherwise than in compliance with s 57(3) of the *Juries Act*, and that a verdict so reached is "invalid".[49] As Kourakis CJ correctly pointed out, the purpose of s 57(3) "is to allow a verdict of not guilty of the major offence to be returned, if such a verdict is reached, before the discharge of the jury if it cannot reach a verdict on the alternative offence".[50] No contravention of s 57(3) was established. The appellant adopts the reasoning of Kourakis CJ on this issue.[51]

51 In any event, even if non-compliance with s 57(3) were established, it would not result in a jury verdict being "invalid" in any relevant sense. It is not meaningful to speak of a *verdict* being "invalid". A verdict itself has no immediate legal consequence; it is the communicative act of the jury, in reliance upon which the court may enter judgment. Nor is it helpful in this context to speak of the verdict of a jury as an "unlawful verdict"[52] — for any judgment, order or verdict affected by an error of law of any kind might be so described.[53]

52 In reality, what the Director sought to set aside, and what the Full Court did set aside, was not the *verdict* of the jury but a perfected *judgment or order* of the Supreme Court. Orders of the Court, once entered, are fully legally effective unless and until set aside.[54] No question properly arises about the effect of any non-compliance with s 57(3) on the *verdict*, because the jury's *verdict* of not guilty of murder has merged in the Court's *judgment* of acquittal.

53 In their Honour's reasons in the court below, Gray and Sulan JJ appeared to suggest that an "invalid" verdict of acquittal does not attract the principles concerning the sanctity and finality of jury verdicts.[55] But it was not explained why non-compliance with s 57(3) of the *Juries Act* should be treated as rendering a verdict "invalid" while other fundamental errors that might be made by juries in reaching their verdicts (for example, failure to apply the correct standard of proof) do not.

54 In any event, the Director's application was advanced on the basis that the Court might set aside the judgments of acquittal or verdicts of not guilty only if there was an abuse of process (or, perhaps, something "analogous" to an abuse), and, despite the characterisation of the verdicts as "invalid" or "unlawful verdicts", the finding of abuse of process was an essential step in Gray and Sulan JJ's reasoning to a conclusion that the Court had that power.

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[49] (2015) 123 SASR 523 at [161].
[50] (2015) 123 SASR 523 at [47].
[51] (2015) 123 SASR 523 at [46]-[48].
[52] (2015) 123 SASR 523 at [88], [113], [133] and [139] (Gray and Sulan JJ).
[53] So, in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 393 [100], it was recognised that an act done in breach of a legislative requirement was "unlawful" even though it might not have the consequence that a subsequent decision was "invalid".
[54] *New South Wales v Kable* (2013) 252 CLR 118; *Cameron v Cole* (1944) 68 CLR 571; cf *Jenkins v DPP* [2013] NSWCA 406.
[55] (2015) 123 SASR 523 at [159] and [161].

The exclusionary rule and evidence as to unanimity / majority

55 The evidence which the Full Court admitted, and upon which the majority relied, is evidence falling within the exclusionary rule relating to jury deliberations and is inadmissible. The underlying policy of the exclusionary rule aims to preserve the secrecy of jury deliberations, and to maintain the integrity and finality of a formally expressed verdict.[56]

56 Two cases have directly considered verdicts apparently not arrived at unanimously, where unanimity was required by law. In both cases, it was held that evidence of the jury's apparent error was inadmissible, because the method by which the jury itself determined what its verdict was to be, formed part of its deliberation.

57 In *Nanan v The State (Trinidad and Tobago)*,[57] the defendant was convicted of murder following trial by jury. There was no protest to the verdict from any of the jurors. The judge then proceeded to pass sentence.

58 The following day, the foreperson of the jury and another juror informed the Registrar of the court that, although the foreperson had said that the jury's verdict was unanimous, the jury were actually divided 8:4 in favour of conviction. Later, declarations were sought that the verdict, conviction and sentence were of no effect. The foreperson and three other jurors swore affidavits in support of that application, and all stated that they were not aware that all 12 jurors had to agree upon the verdict, and that there was in fact a division of eight jurors in favour of one verdict and four in favour of another.

59 The application was dismissed on the basis that the evidence of the jurors was inadmissible. An appeal to the Trinidad and Tobago Court of Appeal was dismissed. The appellant appealed by leave to the Judicial Committee of the Privy Council and that appeal, too, was dismissed. The Judicial Committee accepted that the presumption was not irrebuttable.[58] In rejecting the admissibility of the affidavits, Lord Goff said:[59]

> The affidavit evidence Braithwaite J was invited to admit in the present case was, in the opinion of their Lordships, no more than evidence which, if accepted, showed that (for some unexplained reason) four members of the jury, including the foreman, were acting under a misapprehension in agreeing to a verdict of guilty. ... It may be said that the alleged misapprehension in the present case, if it existed, was of a fundamental kind; but the same may be said of other misapprehensions, for example as to the facts of the case or as to the applicable law, which can likewise lead to an erroneous verdict. In such cases, however, evidence of the misapprehension is equally inadmissible.

60 In *Biggs v Director of Public Prosecutions*,[60] the trial judge had accepted verdicts of "not guilty" from the jury. A short time later, the jury was recalled, and indicated that the verdicts

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[56] *R v Minarowska* (1995) 83 A Crim R 78 at 87, quoted with approval in *Smith v Western Australia* (2014) 250 CLR 473 at 481 [30].

[57] [1986] AC 860, cited without disapproval in *Smith v Western Australia* (2014) 250 CLR 473 at 476 [11].

[58] [1986] AC 860 at 872.

[59] [1986] AC 860 at 871-2.

[60] (1997) 17 WAR 534. *Biggs* was referred to in *R v Ciantar* (2006) 16 VR 26 at 71 [159]-[160] but the Victorian Court of Appeal unfortunately appears to have confused Heenan J's judgment (which was actually reversed by the Full Court) with the judgment of the Full Court itself. In any event, *Ciantar* was a case where the jury was able to "correct" their verdict before discharge in fact, and *while still acting as a jury*.

of "not guilty" had not been unanimous (and had not been the verdict of at least ten jurors). The appellant applied to the Supreme Court of Western Australia for a declaration that the trial judge's orders setting aside the not guilty verdicts were invalid, and for declarations that the judgements of acquittals and the verdicts of not guilty were valid.

61 Heenan J characterised the jury's error as merely involving communication of the verdict rather than an aspect of the deliberations of the jury. On appeal, the Full Court rejected that characterisation, holding that the jury was presumed to have agreed to the foreperson delivering the verdicts of not guilty. It was held that the evidence "[did] not suggest any error in the delivery of the verdict, but rather a misapprehension on the part of at least some of the jurors as to the basis on which they might agree upon a verdict".[61]

62 *Biggs* and *Nanan* are supported by other cases in which evidence of jurors has been held inadmissible to prove that one or more of the jurors did not consent to a verdict.[62]

The affidavit evidence of the jurors was wrongly admitted

63 The evidence adduced from the jurors was highly unsatisfactory.

64 First, the statement of the foreperson[63] recorded [redacted]. (The Director sought to rely only upon the latter statement.) The foreperson's affidavit does not reveal [redacted] whether [redacted] because the verdict which he announced *miscommunicated* the decision of the jury, or because the jury's decision was not in fact reached in accordance with what he regarded as a proper procedure. That distinction was crucial to the admissibility of the evidence. The affidavit of the foreperson was therefore inadmissible.

65 Secondly, the evidence of the jurors in the present case (apart from the foreperson) was obtained by court officers asking each juror a series of questions. Seven questions, some with numerous sub-parts, were asked of each juror (other than the foreperson). The parties were not consulted about, and did not influence, the form of the questions to be asked of the jurors. They were informed of the issue only after all of the jurors had been called in to respond to questions [redacted].[64]

66 It is clear enough that the answers as recorded on the questionnaire [redacted] do *not* represent a verbatim record of all that was said to them, or by them.[65] It is also clear that:

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61 (1997) 17 WAR 534 at 558.

62 *Bedelph v The Queen* [1979] Tas R 249 at 253-4 per Green CJ, Crawford and Everett JJ; *R v Roads* [1967] 2 QB 108 at 113-15 per Lord Parker CJ.

63 Signed on 23 September 2014.

64 Statement of Agreed Facts at [12]-[13].

65 [redacted]

a. each juror was required (or, at least, is likely to have considered that they were required) to meet with both the Acting Jury Manager and the Acting Sheriff;

b. the jurors must have been told, at the least, that there was a problem of some kind with the verdicts, or that another juror had raised a question as to whether there was a problem with the verdicts, which justified their being questioned by court officials; and

c. each juror was questioned by two court officers, the Acting Jury Manager and the Acting Sheriff, but there is no evidence as to:

i. what was said between the officers of the court and the jurors before they were required to provide their answers to questions in relation to the verdicts;

ii. how the questions were asked;

iii. which officer asked which question;

iv. whether any further explanation of the meaning of any of the questions was sought by any juror;

v. whether any further explanation of any question was given to any juror and, if so, what explanation was given and by whom and to which juror(s); or

vi. the understanding of each juror of questions the terms of which were inherently ambiguous (except insofar as their understanding is revealed by the various answers given by them).

67 Given the strictness of the exclusionary rule, and the important public policy lying behind it, it was essential that great care be taken in any questioning of jurors, to ensure that any questions asked were clear, that all questions and answers would be admissible having regard to the exclusionary rule, and that the jurors' answers could not have been affected by any extraneous information supplied, advertently or inadvertently, by the court officials.

68 There is no evidence that the necessary care was taken. Consequently:

a. questions were asked of jurors which should never have been asked, having regard to the exclusionary rule (most obviously, question 6);[66]

b. several of the questions asked of the jurors were ambiguous (see further below);

c. the answers given by the jurors were correspondingly ambiguous, in that it was not always clear how each juror had understood the ambiguous questions, nor what each juror had meant by his or her answers to those questions; and

d. the formulation of some of the questions was capable of influencing the juror's understanding of the applicable law (eg, questions 3 and 7), appreciation of the error which they were alleged to have made, and their interpretation of the other questions asked of them.

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[66] See also CLCA, s 246(3). [redacted]

69 In the Full Court, in relation to jurors other than the foreperson, the Director sought to tender *only* question 5 and the answers given to question 5, which asked: [redacted] (The way the question was actually posed orally is unknown.)

70 The appellant contends that:

a. evidence of the answers given by each juror to question 5 was inadmissible;

b. at least for the purpose of assessing whether evidence of the answers given to question 5 is admissible, the Court should have had regard to the answers given by jurors to (at least) question 1, because those answers are probative of the meaning, and thus the admissibility, of the answer given by each juror to question 5; and

c. alternatively, if the answer to question 5 is admissible, the answers to other questions in the questionnaire should also have been admitted (at least insofar as they did not disclose jury deliberations), as the jurors' answers to them provide relevant context without which the answers given to question 5 cannot properly and fairly be assessed.[67]

71 The Full Court unanimously held that question 5 and each juror's answer to it were admissible. The appellant contends that the Full Court erred in so holding.

72 Question 5 itself was patently ambiguous. On the most obvious meaning of question 5, the jurors were effectively being invited to compare the verdict given in court with what they *then* understood to be the "correct" approach to deciding upon a verdict. That is, they are likely to have understood question 5 as asking whether, in retrospect, they were still satisfied that each of the verdicts delivered by the jury was "correct" as a matter of law. On this understanding, the answer to question 5 was merely capable of disclosing an error by the jurors concerning the legal principles they applied in determining their verdict, rather than revealing that the verdict delivered in court did not accord with a verdict that the jury had agreed upon in the jury room.

73 Without considerable further explanation, it is unlikely that *any* juror (and *a fortiori*, *every* juror) would have understood question 5 as requiring them to perform a comparison between the verdict (if any) agreed upon by the jury in the jury room and the verdict delivered in open court. The wording of the question was not apt to convey that meaning, particularly to a lay juror with no appreciation of the exclusionary rule or the distinction underpinning *Nanan* and *Biggs*. It follows that the answers given by the jurors to question 5 are not probative of the only relevant issue: whether there was an error *in communication of the agreed verdicts*. Evidence that was so uncertain was not probative and was inadmissible.

74 Further, the answers given by some of the jurors to question 5, which *were* admitted into evidence, did tend to reveal aspects of the deliberations of the jury. For example:

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[67] Gray and Sulan JJ (2015) 123 SASR 523 at [75] recited the submission of the appellant to the effect that, if the answer to question 5 was to be admitted then the remaining questionnaire evidence should also be admitted. No member of the Full Court addressed that submission. In deciding to admit only the answer to question 5 into evidence, no consideration was given to the jurors' answers to other questions.

[redacted]

75 In addition, the answers given by jurors to certain other questions that were asked of them *were* probative of those jurors' beliefs as to whether there had been a miscommunication of the verdicts, and their understandings of question 5, and therefore also the meanings of their answers to question 5.

76 The first question asked of each juror — [redacted] — was answered by several of them in such a way that the answer given was clearly probative of the relevant question. The answers given by jurors to question 1 included the following (emphasis added):

[redacted] (Juror B)

[redacted] (Juror C)

[redacted] (Juror E)

[redacted] (Juror F)

[redacted] (Juror G)

[redacted] (Juror H)

[redacted] (Juror J)

[redacted] (Juror K)

[redacted] (Juror L)

77 These answers demonstrate that at least some (and probably most) of the jurors maintained that the verdicts delivered by the foreperson *did* accurately communicate verdicts that had been reached by the jury; what the foreperson said reflected the verdicts which the jury as a whole had agreed (rightly or wrongly) were to be delivered by the foreperson.

78 In the Full Court, Kourakis CJ concluded that "all of the jurors agree ... that the verdicts of not guilty to murder ... were miscommunicated"[68] and that "the jury did not reach, and did not resolve to return, a verdict of not guilty to murder".[69] It is respectfully submitted that the answers to question 5 — the only evidence relied upon by the Director in respect of 11 of the 12 jurors — do not support those conclusions. The jurors were never asked whether there was a "miscommunication", or whether the foreperson "misspoke". Moreover, the answers given by several jurors to question 1 *expressly* contradicted those findings.

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[68] (2015) 123 SASR 523 at [10].
[69] (2015) 123 SASR 523 at [12].

79 All members of the Full Court erred in finding that the evidence established that this was a case of miscommunication rather than erroneous understanding. For the reasons explained above, the evidence simply did not establish that what had happened was an "error in the transmission of [the jury's] act from the jury room to the courtroom". It certainly did not establish that "all of the jurors agree" that that was so, as required by *Wigmore*.[70] On the contrary, the evidence tended to established that the error, if there was one, lay in the method of determination of what "their act" (ie, the act of the jury as a whole) was to be.

Error in exercise of discretion

80 If (contrary to the submission above) the Court had power to set aside the judgment, the power was discretionary.[71] "The applicant bears a heavy burden to persuade a court that he or she did not occasion the mistake and has moved for relief with relevant expedition."[72] In the Full Court, the appellant had submitted that the discretion should be exercised against the Director, but the Full Court did not address the discretion at all.

81 The discretion ought to have been exercised against quashing the orders, having regard to:

a. the conduct of the appellant in no way caused or contributed to any error;

b. the Director's delay in commencing its application (well outside the statutory time limit for commencing appeals in criminal matters);

c. the fact that the Director stood by while the Court proceeded to sentence and perfect its orders in the proceedings, knowing of the essential facts forming the basis for his application, thereby acquiescing in the finalisation of the proceedings;

d. the public interest in the finality of litigation;

e. considerations of double jeopardy;[73]

f. the fundamental status accorded by the common law to acquittal following the verdict of a jury; and

g. the legislative choice to extend to the prosecution only a particular limited avenue to agitate questions arising in proceedings ending in acquittal following verdict of a jury.

Costs

82 If this Court accepts that the Supreme Court had no jurisdiction in the circumstances of this case to hear and determine the Director's application, the appellant contends that he should have his costs of the proceedings below, as well as his costs of the application for special leave to appeal and the appeal to this Court.

83 Section 40(1) of the *Supreme Court Act 1935* (SA) confers a general power on the Supreme Court of South Australia to award costs in its discretion. Section 363(1) of the CLCA has no

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[70] *Wigmore on Evidence*, "§2355 Mistake in Announcement", quoted in (2015) 123 SASR 523 at [114] per Gray and Sulan JJ.

[71] See, eg, *Players Pty Ltd (in Liq) v Clone Pty Ltd* [2015] SASC 133 and cases there cited.

[72] *DJL v The Central Authority* (2000) 201 CLR 226 at 270 [109] per Kirby J.

[73] Cf *R v Brougham* (2015) 122 SASR 546 at 549-51 [6]-[9].

application to the present proceedings (not being an appeal or motion for a new trial) and, accordingly, the general power as to costs in s 40(1) of the *Supreme Court Act* was available.

84 In cases where purported criminal appeals (including purported appeals by the prosecution), have been held incompetent, courts have considered it appropriate to order that the appellant pay the costs of the purported appeal proceedings. For example:

a. In *Thompson v Master-Touch TV Service Pty Ltd (No 3)*, the Federal Court awarded costs in an incompetent appeal against an acquittal, relying upon the general power conferred by s 43 of the *Federal Court of Australia Act*.[74]

b. In *Bartlett v Commonwealth DPP*, an appeal was held to be incompetent and an award of costs was made against the would-be appellant, despite s 35(2) of the *Criminal Appeal Act 2004* (WA), which provides that "[t]he Court of Appeal cannot order a party to an appeal under this Part to pay another party's costs of or relating to the appeal".[75]

c. In *Markisic v Vizza*, the New South Wales Court of Criminal Appeal upheld an award of costs under s 76 of the *Supreme Court Act 1970* or the Court's inherent jurisdiction to prevent abuse of its process", holding that there was "ample authority that where a court enquires as to whether it has jurisdiction in a given matter, there is power to order costs".[76] This was so, notwithstanding s 17(1) of the *Criminal Appeal Act 1912* (NSW), which provided that "[o]n the hearing or determination of an appeal, or any proceedings preliminary or incidental thereto under this Act, no costs shall be allowed on either side".

85 If the appellant is correct to submit that the Supreme Court had no jurisdiction to hear and determine the Director's application, the Court had power to order costs on the same basis.

86 The costs below included the costs of the Director's application for a direction that the trial Judge reserve questions of law for the Full Court. Section 351B(1) of the CLCA provides that the Crown is liable to pay the costs in proceedings "for the reservation and determination of the question". Accordingly, the appellant should have his costs of that application.

PART VII: Applicable statutory provisions

87 The applicable statutory provisions, as they have existed at all relevant times, are:

a. *Juries Act 1927* (SA), ss 6, 57; and

b. *Criminal Law Consolidation Act 1935* (SA), ss 348-352, 363.

c. *Supreme Court Act 1935* (SA), s 40.

88 The full text of the above provisions is set out in the Annexure to these submissions. Each of the provision is still in force, in the same form, at the date of filing these submissions.

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[74] (1978) 38 FLR 397 at 415 per Deane J (Smithers and Riley JJ agreeing).

[75] [2013] WASCA 223 at [18].

[76] [2002] NSWCCA 53 at [24]-[34] per Stein JA (Dowd and Barr JJ agreeing), citing *Proust v Blake* (1989) 17 NSWLR 267 at 272 per Samuels JA.

PART VIII: Orders sought by the appellant

89 The appellant seeks the following orders:

1. The orders of the Full Court of the Supreme Court of South Australia made on 25 October 2015 are set aside.
2. In lieu thereof, substitute the following orders:
   a. The application of the Director dated 16 January 2015 is dismissed.
   b. The application of the Director dated 5 March 2015 is dismissed.
   c. The Director is to pay the appellant Zefi's costs of the two applications.
3. The Director is to pay the appellant Zefi's costs of the application for special leave to appeal and the appeal to this Court.

PART IX: Time estimate

90 The appellant estimates that two and a half hours will be required for the presentation of his oral argument.

~~15~~ 28 April ~~2015~~ 2016

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ANNEXURE

PART VII: Applicable statutory provisions

***Juries Act 1927* (SA), ss 6 and 57**

Part 1—General provisions as to trial by jury

...

6—Criminal trial to be by jury

(1) A criminal trial in the Supreme Court or the District Court is, subject to this Act, to be by jury.

(2) The jury is, subject to this Act, to consist of 12 persons qualified and liable to serve as jurors.

...

Part 6—Proceedings upon trial

...

57—Majority and alternative verdicts

(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.

(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.

(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,

and ***by majority*** has a corresponding meaning.

...

Criminal Law Consolidation Act 1935 **(SA), ss 246, 348-350**

Part 7—Offences of a public nature

...

Division 3—Offences relating to judicial proceedings

...

246—Confidentiality of jury deliberations and identities

(1) This section applies in relation to juries in criminal, civil or coronial proceedings in a court of the State, the Commonwealth, a Territory or another State whether instituted before or after the commencement of this section.

(2) A person must not disclose protected information if the person is aware that, in consequence of the disclosure, the information will, or is likely to, be published.

Maximum penalty:

In the case of a body corporate—$25 000.

In any other case—$10 000 or imprisonment for 2 years.

(3) A person must not solicit or obtain protected information with the intention of publishing or facilitating the publication of that information.

Maximum penalty:

In the case of a body corporate—$25 000.

In any other case—$10 000 or imprisonment for 2 years.

(4) A person must not publish protected information.

Maximum penalty:

In the case of a body corporate—$25 000.

In any other case—$10 000 or imprisonment for 2 years.

(5) Subsection (2) does not prohibit disclosing protected information—

(a) to a court; or

(b) to a Royal Commission; or

(ba) to the Independent Commissioner Against Corruption, the Deputy Commissioner, an examiner or an investigator under the Independent Commissioner Against Corruption Act 2012 or in the course of making a complaint or report under that Act; or

(c) to the Director of Public Prosecutions, a member of the staff of the Director's Office or a member of the police force for the purpose of an investigation concerning an alleged contempt of court or alleged offence relating to jury deliberations or a juror's identity; or

(d) as part of a fair and accurate report of an investigation referred to in paragraph (c); or

(e) to a person in accordance with an authorisation granted by the Attorney-General to conduct research into matters relating to juries or jury service.

(6) Subsection (3) does not prohibit soliciting or obtaining protected information—

(a) in the course of proceedings in a court; or

(b) by a Royal Commission; or

(ba) by the Independent Commissioner Against Corruption, the Deputy Commissioner, an examiner or an investigator under the Independent Commissioner Against Corruption Act 2012 or in the course of the assessment of a complaint or report under that Act; or

(c) by the Director of Public Prosecutions, a member of the staff of the Director's Office or a member of the police force for the purpose of an investigation concerning an alleged contempt of court or alleged offence relating to jury deliberations or a juror's identity; or

(d) by a person in accordance with an authorisation granted by the Attorney-General to conduct research into matters relating to juries or jury service.

(7) Subsection (4) does not prohibit publishing protected information—

(a) in accordance with an authorisation granted by the Attorney-General to conduct research into matters relating to juries or jury service; or

(b) as part of a fair and accurate report of—

(i) proceedings in respect of an alleged contempt of court, an alleged offence against this section or an alleged offence otherwise relating to jury deliberations or a juror's identity; or

(ii) proceedings by way of appeal from proceedings referred to in subparagraph (i); or

(iii) if the protected information relates to jury deliberations—proceedings by way of appeal from the proceedings in the course of which the deliberations took place if the nature or circumstances of the deliberations is an issue relevant to the appeal.

(8) This section does not prohibit a person—

(a) during the course of proceedings, publishing or otherwise disclosing, with the permission of the court or otherwise with lawful excuse, information that identifies, or is likely to identify, the person or another person as, or as having been, a juror in the proceedings; or

(b) after proceedings have been completed, publishing or otherwise disclosing—

(i) information that identifies, or is likely to identify, the person as, or as having been, a juror in the proceedings; or

(ii) information that identifies, or is likely to identify, another person as, or as having been, a juror in the proceedings if the other person has consented to the publication or disclosure of that information.

(9) This section does not apply in relation to information about a prosecution for an alleged offence against this section if, before the prosecution was instituted, that information had been published generally to the public.

(10) Proceedings for an offence against this section must not be commenced without the consent of the Director of Public Prosecutions.

(11) In this section—

protected information means—

(a) particulars of statements made, opinions expressed, arguments advanced and votes cast by members of a jury in the course of their deliberations, other than anything said or done in open court; or

(b) information that identifies, or is likely to identify, a person as, or as having been, a juror in particular proceedings;

publish, in relation to protected information, means communicate or disseminate the information in such a way or to such an extent that it is available to, or likely to come to the notice of, the public or a section of the public.

...

Part 11—Appellate proceedings

Division 1—Preliminary

348—Interpretation

In this Part, unless inconsistent with the context or subject matter—

ancillary order means—

(ba) an intervention order or restraining order issued under section 19A of the *Criminal Law (Sentencing) Act 1988*; or

(c) an order for the restitution of property under section 52 of the *Criminal Law (Sentencing) Act 1988*; or

(d) an order for compensation under section 53 of the *Criminal Law (Sentencing) Act 1988*,

made by the District Court, or by the Supreme Court in the exercise of its criminal jurisdiction at first instance;

appellant includes a person who has been convicted and desires to appeal under this Act;

conviction in relation to a case where a court finds a person guilty of an offence but does not record a conviction, includes the formal finding of guilt;

court means the Supreme Court or the District Court;

information means an information on which a person is put upon his trial for any crime or offence at any criminal session of the Supreme Court or before any court of Oyer and Terminer and General Gaol Delivery or at any sitting of the District Court, as the case may be;

issue antecedent to trial means a question (whether arising before or at trial) as to whether proceedings on an information or a count of an information should be stayed on the ground that the proceedings are an abuse of process of the court;

judge means a judge of the Supreme Court or the District Court;

sentence includes any order of the court of trial or of the judge thereof made on, or in connection with, a conviction with reference to the convicted person, or any property, or with reference to any moneys to be paid by the person, and also includes an order under section 39 of the *Criminal Law (Sentencing) Act 1988* discharging the convicted person, without imposing a penalty, on the person entering into a bond.

349—Court to decide according to opinion of majority

The determination of any question before the Full Court under this Act shall be according to the opinion of the majority of the members of the Court hearing the case.

Division 2—Reference of questions of law

350—Reservation of relevant questions

(1) In this section—

relevant question means a question of law and includes a question about how a judicial discretion should be exercised or whether a judicial discretion has been properly exercised.

(2) A court by which a person has been, is being or is to be tried or sentenced for an indictable offence may reserve for consideration and determination by the Full Court a relevant question on an issue—

(a) antecedent to trial; or

(b) relevant to the trial or sentencing of the defendant,

and the court may (if necessary) stay the proceedings until the question has been determined by the Full Court.

(3) Unless required to do so by the Full Court, a court must not reserve a question for consideration and determination by the Full Court if reservation of the question would unduly delay the trial or sentencing of the defendant.

(4) A court before which a person has been tried and acquitted of an offence must, on application by the Attorney-General or the Director of Public Prosecutions, reserve a question antecedent to the trial, or arising in the course of the trial, for consideration and determination by the Full Court.

(5) The Full Court may, on application under subsection (6), require a court to refer a relevant question to it for consideration and determination.

(6) An application for an order under subsection (5) may be made by—

(a) the Attorney-General or the Director of Public Prosecutions; or

(b) a person who—

(i) has applied unsuccessfully to the primary court to have the question referred for consideration and determination by the Full Court; and

(ii) has obtained the permission of the primary court or the Supreme Court to make the application.

(7) If a person is convicted, and a question relevant to the trial or sentencing is reserved for consideration and determination by the Full Court, the primary court or the Supreme Court may release the person on bail on conditions the court considers appropriate.

351—Case to be stated by trial judge

(1) When a court reserves a question for consideration and determination of the Full Court, the presiding judge must state a case setting out—

(a) the question reserved; and

(b) the circumstances out of which the reservation arises; and

(c) any findings of fact necessary for the proper determination of the question reserved.

(2) The Full Court may, if it thinks necessary, refer the stated case back for amendment.

351A—Powers of Full Court on reservation of question

(1) The Full Court may determine a question reserved under this Part and make consequential orders and directions.

Examples—

The Full Court might, for example, quash an information or a count of an information or stay proceedings on an information or a count of an information if it decides that prosecution of the charge is an abuse of process.

The Full Court might, for example, set aside a conviction and order a new trial.

(2) However—

(a) a conviction must not be set aside on the ground of the improper admission of evidence if—

(i) the evidence is merely of a formal character and not material to the conviction; or

(ii) the evidence is adduced for the defence; and

(b) a conviction need not be set aside if the Full Court is satisfied that, even though the question reserved should be decided in favour of the defendant, no miscarriage of justice has actually occurred; and

(c) if the defendant has been acquitted by the court of trial, no determination or order of the Full Court can invalidate or otherwise affect the acquittal.

351B—Costs

(1) If a question is reserved on application by the Attorney-General or the Director of Public Prosecutions on an acquittal, the Crown is liable to pay the adjudicated costs of the defendant in proceedings for the reservation and determination of the question.

(2) If the defendant does not appear in the proceedings, the Crown must instruct counsel to present argument to the Court that might have been presented by counsel for the defendant.

Division 3—Appeals

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.

...

363—Costs of appeal

(1) On the hearing and determination of an appeal or new trial or any proceedings preliminary or incidental thereto under this Act, no costs shall be allowed on either side.

...

Supreme Court Act 1935 (SA), s 40

Part 2—Jurisdiction and powers of the court

...

Division 3—Miscellaneous powers

...

40—Power of court with regard to costs

(1) Subject to the express provisions of this Act, and to the rules of court, and to the express provisions of any other Act whenever passed, the costs of and incidental to all proceedings in the court, including the administration of estates and trusts, shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid.

(2) If—

(a) an action for the recovery of damages or any other monetary sum is brought in the court; and

(b) the action might have been brought in the District Court; and

(c) the plaintiff recovers less than an amount fixed by the rules for the purposes of this paragraph,

no order for costs will be made in favour of the plaintiff unless the court is of the opinion that it is just, in the circumstances of the case, that the plaintiff should recover the whole or part of the costs of action.

...