

BETWEEN:



TRISTAN KAY CASTLE
Appellant

and

THE QUEEN
Respondent

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APPELLANT'S SUBMISSIONS

Part I: Publication

1. This submission is in a form suitable for publication on the internet.

Part II: Statement of issues

- 20 2. Should the doctrine of extended joint enterprise recognised by the Court in *McAuliffe v The Queen* (1995) 183 CLR 108 be reconsidered and revised or abandoned, in light of the decisions of the Supreme Court of the United Kingdom and the Privy Council in *R v Jogee; Ruddock v the Queen* [2016] UKSC 8, [2016] UKPC 7?
3. Did the Full Court err in applying the proviso on the basis of its own assessment of Castle's evidence, where inadmissible evidence had been wrongly left to the jury as contradicting her evidence and her evidence contradicted the prosecution's case?
- 30 4. Did the Full Court err by applying the proviso where it found that the evidence at trial proved Castle's guilt beyond reasonable doubt, but did not find her conviction was inevitable?
5. Was a miscarriage of justice caused by the trial judge's failure to remind the jury of the salient aspects of Castle's evidence, where her evidence contradicted important prosecution evidence which the trial judge reminded the jury of at length? If so, can the proviso be applied?
- 40 6. Was evidence that the co-appellant Bucca possessed black pistols some months prior to the shooting relevant and admissible pursuant to s. 34P of the *Evidence Act 1929*?¹

Part III: Notices under s. 78B of the *Judiciary Act 1903*

7. Notice under s. 78B of the *Judiciary Act 1903* is not required to be given.

Part IV: Citation of the decision of the Court below

8. Decision of the Full Court of the Supreme Court of South Australia (**the Full Court**) in *R v Castle; R v Bucca* [2015] SASCF 180 (**Reasons**).

¹ See paragraph [81] below.

Part V: Factual background

9. At 6.36 am on Sunday 3 February 2013, Adrian McDonald (**McDonald**) was shot and killed at a carwash at Parafield in the northern suburbs of Adelaide. At the time he was shot, he was sitting in and then in the process of getting out of, the front passenger seat of a car driven by Castle. Castle and the co-appellant Jason Bucca (**Bucca**) were jointly tried before the Honourable Justice Peek and jury on a charge of murder.² Both were convicted.
- 10 10. At trial it was common ground that another person was inside the car when McDonald got into it at the car wash and that McDonald was shot by that person. The prosecution case was that the other person (the shooter) was Bucca. The prosecution case was that Castle was guilty of murder pursuant to the common law doctrines of joint enterprise or extended joint enterprise.
11. Castle's principal defence (and her evidence) was that the shooter was Wesley Gange (**Gange**), she didn't know he had a pistol before he shot McDonald and she hadn't intended McDonald be harmed. Her secondary defence (put by her counsel)³ was that even if Bucca was the shooter, it had not been proven that Castle knew Bucca had a pistol before McDonald was shot, nor that she was a party to a joint enterprise with Bucca to murder or assault McDonald, nor that she foresaw the possibility that Bucca would murder McDonald with a weapon.
- 20
12. Bucca's defence was simply that he was not the person who shot McDonald.
13. Castle gave evidence at the trial. She said that she had no intention of harming McDonald when she met him at the carwash. She was the only witness who saw the other person in the car and saw McDonald shot. No other witness saw the actual shooting, nor was it recorded by surveillance cameras. Castle had been in a relationship with McDonald, which ended in January 2013. Shortly after that she commenced a relationship with Bucca, which continued at the time of the shooting.
- 30
14. Gange and Bucca were associates and were together shortly before the shooting. Both had *animus* towards McDonald at the time he was killed. Gange died before the trial. Bucca did not give evidence.
15. The prosecution case relied upon circumstantial evidence, plus evidence of admissions made by Bucca. The main items of circumstantial evidence the prosecution relied upon were:⁴
- 40
- 15.1 Telephone communications records consisting of text messages and records of telephone calls made by mobile phones used from time to time by Castle, Bucca, Gange, McDonald and other persons.⁵ (**telephone communications records**)

² Contrary to s. 11 of the *Criminal Law Consolidation Act 1935* (SA).

³ T2581.5, T2587-2589, T2593

⁴ Reasons [2]

⁵ Exhibit P15

- 15.2 Evidence identifying the location of mobile phone towers that particular mobile phones (which had been used from time to time by Castle, Bucca, Gange and McDonald) had used at particular times to relay phone calls or had otherwise electronically registered with, allowing an inference to be drawn as to the approximate location of the mobile phone at a particular time. **(mobile phone tower evidence)**
- 10 15.3 CCTV footage taken at the house of James Bristow (**Bristow**) at Cadell Court, Happy Valley and at the Big Bucket Carwash at Parafield where McDonald was shot. **(CCTV footage)**
- 15.4 The existence of conflict between Bucca and McDonald concerning \$1,000 McDonald owed to Bucca and Bucca's belief McDonald broke into a house Bucca and Gange had been renting and stole some property.⁶
- 15.5 Evidence from the witness Tamara Pascoe (**Pascoe**) that Bucca possessed three boxes containing black pistols some months before the shooting.⁷
- 20 15.6 Evidence from the witness **M** that Bucca had possessed a pistol two or three weeks before the shooting.⁸
- 15.7 Evidence from **M** about conversations involving herself, Gange, Bucca and Castle on the evening before the shooting.⁹

M said that at around 5.30 – 6.30 pm on 2 February 2013, Castle and Bucca came to her residence whilst she and Gange were home. They sat down at an outdoor table in the backyard and engaged in conversation, which conversation included:

- 30 - Castle saying she was going to try and organize for McDonald to meet her and Bucca was going to be there.
- Castle saying that to arrange the meeting she was going to pretend she wanted to get back with McDonald.
- Castle suggesting she would get McDonald to meet her by offering him oral sex or some other sexual act.
- Bucca calling McDonald a fucking dog and appearing angry.

- 40 15.8 Evidence from **M** as to Gange's whereabouts at about the time McDonald was shot. **(M's alibi evidence)**¹⁰

M's evidence implied that Gange was at home with her when the shooting occurred. She was the only witness to give evidence about Gange's location at about the time of the shooting. She said she no longer had a memory of whether Gange was with her when the shooting occurred. However, at an earlier time she said she had remembered he was with her at that time. She

⁶ Gange was also of that belief and his property had been stolen.

⁷ Reasons [76] - [79]

⁸ Reasons [81], T1310-1321, T1398-1401, T1430

⁹ T1305, T1322-1327, T1367, T1443-1444

¹⁰ T1328, T1373-1375, T1459-1462, T1465, T1481-1483

couldn't recall what time she had been told that the shooting occurred or how she had learnt the time. M said she might have taken drugs on the morning of the shooting and that she had been drinking heavily the night before.

16. A combination of the telephone communications records, mobile phone tower evidence and CCTV footage was relied upon by the prosecution to prove a sequence of events, particularly over the 24 hours or so before the shooting – see Castle's Chronology and the Full Court's Reasons at [11].
- 10 17. The circumstantial evidence of the telephone communications records and mobile phone tower evidence was important to the prosecution case, but it was not infallible or capable of proving Castle's guilt by itself. It relied upon the drawing of the uncertain inference that particular phones were in the personal possession of Castle, Bucca and Gange at particular times.
18. M was the principal prosecution witness. Much of her evidence was in dispute and her credibility was in issue. At the time of the shooting, M was a heavy user of the drug "ice"¹¹, as was her then partner, Gange. She admitted to paranoia¹², drug-induced psychosis¹³ and auditory hallucinations¹⁴ as a result of her drug use.
- 20 19. In addition to the circumstantial evidence, the prosecution case was supported by two purported admissions made by Bucca, namely:
- 19.1 What was claimed to be a confession by Bucca that he shot McDonald, which was overheard by Pascoe (but which the Full Court later held was not an admission at all, but an exculpatory statement).
- 19.2 Bucca's statement to Detective Georg at 3.30 pm on 3 February 2013 that he had been with Castle for 95% of the preceding 24-hour period.
- 30 20. Castle was the only defence witness. Her evidence is summarized later. She disputed important aspects of M's evidence. She said Gange was with her when she met McDonald and Gange unexpectedly shot him. She didn't know Gange had a gun before he used it. She had not gone to meet McDonald with any intention of harming him, nor had she thought that Gange was going to do so.¹⁵

Part VI: Statement of argument

A. Extended joint enterprise

- 40 21. In 1995, in *McAuliffe v The Queen* (1995) 183 CLR 108 (*McAuliffe*) the Court for the first time recognized a doctrine of secondary common law criminal liability known as extended joint enterprise.¹⁶ In doing so the Court relied heavily upon the decisions of the Privy Council in *Chan Wing-Siu v The Queen* [1985] AC 168 (*Chan*

¹¹ T1298, 1344

¹² T1298

¹³ T1361

¹⁴ T1426-1428

¹⁵ T2192-2193

¹⁶ It has also been called extended common purpose or parasitic accessory liability.

Wing-Sui) and *Hui Chi-Ming v The Queen* [1992] 1 AC 34 and the decision of the English and Wales Court of Appeal in *R v Hyde* [1991] 1 QB 134.

22. On 18 February 2016, the Supreme Court of the United Kingdom and the Privy Council (**the Supreme Court**) delivered their decisions in *R v Jogee; Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7 (*Jogee*), overruling and disapproving the previous authority this Court relied upon in *McAuliffe* in recognizing the existence of extended joint enterprise. The Supreme Court held that a wrong turn was taken in *Chan Wing-Siu*, based on an incomplete and in some respects erroneous reading of earlier authorities, coupled with generalised and questionable policy arguments.¹⁷

Reconsideration of *McAuliffe*

23. Castle submits that the Court took a wrong turn in *McAuliffe* and that the common law of Australia does not recognize the doctrine of secondary criminal liability known as extended joint enterprise. Castle applies for leave to re-open *McAuliffe* in so far as it recognized the existence of extended joint enterprise. Castle submits that having granted leave for *McAuliffe* to be re-opened, this Court should overrule it.¹⁸
- 20 24. There is no doubt that the Court has the power to review and depart from its previous decisions. Such a course will not be taken lightly.¹⁹ The following criteria are always relevant to an application to re-open an earlier decision of the Court (with Castle's submissions in italics):²⁰
- 24.1 Whether the earlier decision rested upon a principle carefully worked out in a significant succession of cases – *The analysis in Jogee demonstrates that the principle was not based on a solid line of authority.*
- 30 24.2 Whether there was a difference between the reasons of the Justices constituting a majority in the earlier decision – *McAuliffe was a unanimous decision of five Justices.*
- 24.3 Whether the earlier decision had achieved a useful result, or on the contrary, had led to considerable inconvenience – *The doctrine established in McAuliffe has been the subject of much controversy and criticism in common law jurisdictions, culminating in its eventual overruling in Jogee.*²¹
- 40 24.4 Whether the earlier decision had been independently acted upon in a way which militated against consideration – *This has not occurred in the relevant sense, but as a High Court authority it has of course been followed.*

¹⁷ *R v Jogee; Ruddock v the Queen* [2016] UKSC 8, [2016] UKPC 7 at [79]

¹⁸ As well as the related cases of *Gillard v The Queen* [2003] HCA 64; (2003) 219 CLR 1 and *Clayton v The Queen* [2006] HCA 58; (2006) 168 A Crim R 174

¹⁹ *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438

²⁰ *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438 – 439; *Alqudsi v The Queen* [2016] HCA 24 at [65] – [67] per French CJ

²¹ See for example, McNamara, “A judicial contribution to over-criminalisation?: Extended joint criminal enterprise liability for murder” (2014) 38 Crim LJ 104 and Krebs, “Joint Criminal Enterprise” 73 (2010) *Modern Law Review* 578

25. The appellant submits that leave to re-open *McAuliffe* should be granted for the reasons described in the preceding paragraph and because:

25.1 *Chan Wing-Siu*, on which *McAuliffe* was based, was overruled in *Jogee*.

25.3 Powerful reasons were given in *Jogee* to re-open the question whether the common law recognised secondary criminal liability according to the doctrine of extended joint enterprise.

10 25.3 For the reasons set out in *Jogee*, the decision in *McAuliffe* was clearly erroneous. Its maintenance is contrary to the public interest.

25.4 Whilst *stare decisis* is a sound policy, it does not automatically trump the need for desirable change in the law, especially if the change is necessary to maintain consonance with more fundamental doctrines and principles.²²

20 25.5 Whilst six Justices in *Clayton v The Queen*²³ (Kirby J dissenting) refused to reconsider *McAuliffe*, that was partly due to the lack of acceptance by any other court of final appeal that the doctrine of extended joint enterprise should be abolished.²⁴ That is no longer the case since *Jogee*. Furthermore, on 17 May 2016 the Court of Final Appeal for Hong Kong granted leave for an appeal to be heard on whether the doctrine of extended joint enterprise should continue to be applied in Hong Kong in light of the decision in *Jogee*.²⁵

Extended joint enterprise - what *McAuliffe* decided

30 26. In *McAuliffe* the Court considered, for the first time, the situation where a joint criminal enterprise is in existence and one party to the joint enterprise foresees, but does not agree to, a crime other than that which is planned to be committed, and continues to participate in the joint enterprise.²⁶ The Court stated:

“... [T]he secondary offender in that situation is as much a party to the crime which is an incident of the agreed venture as he is when the incidental crime falls within the common purpose. Of course, in that situation the prosecution must prove that the individual concerned foresaw that the incidental crime might be committed and cannot rely upon the existence of the common purpose as establishing that state of mind.”

40 27. The Court held that the trial judge was not in error to direct the jury that if the appellant were engaged in a joint criminal enterprise (to rob or assault the victim) with the person whose violent acts killed the victim, they were guilty of murder if they had individually contemplated the intentional infliction of grievous bodily harm to the victim as a possible incident of the enterprise they continued to participate in.²⁷

²² *Imbree v McNeilly* (2008) 236 CLR 510 at [45]

²³ [2006] HCA 58; (2006) 168 A Crim R 174

²⁴ [2006] HCA 58; (2006) 168 A Crim R 174 at [18]

²⁵ *HKSAR v Chan Kam Shing* [2016] HKCFA 33

²⁶ (1995) 183 CLR 108 at 117

²⁷ *Ibid* at 118

28. Thus the principle of extended joint enterprise was recognized, extending the crimes for which a participant in a joint criminal enterprise was guilty to include crimes which were not expressly or tacitly part of the agreed joint enterprise (or shared intention of the participants); the extension applying to all crimes that a participant foresaw as a possible incident of the joint enterprise.

Why *McAuliffe* should be overruled

- 10 29. In *Jogee*, the Supreme Court engaged in a detailed review of the authorities on accessory liability, joint enterprise and extended joint enterprise.²⁸ The review was far deeper than had ever been conducted before. The review confirmed that extended joint enterprise as explained in *Chan Wing-Sui* was a new principle, quite different to the previous law.²⁹ The Supreme Court's review of *Chan Wing-Sui* revealed that the authorities on which the Privy Council had placed reliance in laying down the new principle of extended joint enterprise did not in fact support it.³⁰
- 20 30. The Supreme Court held that the doctrine of extended joint enterprise created in *Chan Wing-Sui* could not be supported by authority, principle or policy, except on the basis that it had been decided and then followed at the highest level.³¹ The Supreme Court nevertheless decided that the doctrine of extended joint enterprise should be overruled because, *inter alia*:
- 30.1 Deeper analysis had shown that the doctrine was not supported by past authority and in some cases was directly inconsistent with that authority.³²
- 30.2 The doctrine remained controversial, was a continuing source of difficulty for trial judges and had led to a large number of appeals.³³
- 30 30.3 Secondary liability was an important part of the common law and if a wrong turn had been taken, it should be corrected.³⁴
- 30.4 The adoption of foresight of what might happen as a test for the mental element for murder in the case of a secondary party was a serious and anomalous departure from the basic rule, which had resulted in the over-extension of the law of murder and reduction of the law of manslaughter.³⁵
- 30.5 The doctrine created the striking anomaly of having a lower mental threshold for guilt in the case of an accessory than for the principal.³⁶

²⁸ [2016] UKSC 8, [2016] UKPC 7 at [17] – [61], [80]

²⁹ *Ibid* at [62]

³⁰ *Ibid* at [62] – [72]

³¹ *Ibid* at [79]

³² *Ibid* at [17] – [61], [81]

³³ *Ibid* at [81]

³⁴ *Ibid* at [82]

³⁵ *Ibid* at [83]

³⁶ *Ibid* at [84]

30.6 As the common law had been unduly widened by the courts, it was proper for the courts to correct the error.³⁷

31. Castle submits that the doctrine of extended joint enterprise recognized in *McAuliffe* should also be abolished for the following further reasons:

31.1 The foundational English authorities on which the High Court of Australia based the doctrine have been convincingly discredited and overruled.

10 31.2 In the common law, foresight of what might happen is ordinarily no more than evidence from which a jury might infer the presence of intent. The error in the principle of extended common purpose was to equate foresight of a possibility with intent to assist, as a matter of law.³⁸

31.3 A lower mental state (foresight of a possibility) in the case of the secondary party than for the principal (intent) resulted in a lack of concurrence between moral culpability and criminal responsibility and punishment.

20 31.4 The doctrine cannot be reconciled with the Court's approach to the mental element necessary for complicity of a secondary participant in *Giorgianni v The Queen* (1985) 156 CLR 473.

31.5 The principle of extended common purpose remains controversial. As Kirby J said in 2006, "*This part of the common law is a mess.*" He added, "... *this form of secondary liability is disproportionately broad. It tilts the scales too heavily in favour of the prosecution.*"³⁹

30 31.6 Accepting that extended criminal enterprise was wrongly recognised by the Court in *McAuliffe*, it is proper for the Court to correct the error.⁴⁰

If *McAuliffe* is overruled Castle's appeal must be allowed

32. The trial judge directed the jury that Castle could be found guilty of murder on the basis that she was a party to a joint criminal enterprise with Bucca to murder McDonald⁴¹; or on the basis that she was a party to a joint criminal enterprise with Bucca that McDonald would be unlawfully assaulted or abducted, she had foreseen that in the course of carrying out that enterprise Bucca might use a weapon to murder McDonald and she nevertheless continued to participate in the enterprise.⁴²

40 33. The basis for the jury's verdict is unknown, but clearly it may well have been on the basis of extended joint enterprise. That was the basis on which the trial judge sentenced Castle⁴³ and the Full Court reasoned in applying the proviso.⁴⁴

³⁷ Ibid at [85]

³⁸ Ibid at [87]

³⁹ *Clayton v The Queen* [2006] HCA 58; (2006) 168 A Crim R 174 at [43]

⁴⁰ *Clayton v The Queen* [2006] HCA 58; (2006) 168 A Crim R 174 at [43]

⁴¹ SU10-14

⁴² SU14-19; 194-195, 242-244

⁴³ Sentencing remarks at page 9

⁴⁴ Reasons [129]

34. If the doctrine of extended joint enterprise recognised in *McAuliffe* is abolished, it is clear that Castle's trial involved a miscarriage of justice, given the second basis left to the jury to convict her of murder. Such a fundamental defect in the trial precludes the application of the proviso and requires a retrial.⁴⁵

B. Bucca's admissions and the use of the proviso

10 35. The evidence against Bucca included evidence of two alleged admissions made by him. The admissions were significant. The sole practical issue for the jury with respect to Bucca was whether it was proven he shot McDonald. For the prosecution case against Castle, the identity of the shooter was also important, particularly as she had given evidence that the shooter was Gange.⁴⁶

First admission

20 36. In examination in chief Pascoe gave evidence that a few days after McDonald was killed, she and her father were at Bristow's house.⁴⁷ Bucca and Gange arrived at the house and her father let them in.⁴⁸ When Bucca and Gange came in the news was on the television and Bucca asked with a laugh what was on the news tonight. Pascoe replied, "*Well you should know because our friend got killed.*"⁴⁹

37. Pascoe said her father took Bucca out to the backyard.⁵⁰ At some stage she went out there and saw her father and Bucca standing facing each other, talking loudly. She said, "*All I heard was Jason [Bucca] say that he didn't mean to do it and everything went sour.*"⁵¹ She said Bucca appeared distraught and devastated when he spoke.⁵² He had his hands in his head and was crying.⁵³

30 38. In cross-examination, Pascoe said that Bucca's exact words were, "*He didn't mean to do it, things went out of control.*"⁵⁴ The trial Judge asked Pascoe if from what she heard, she had formed any view (about who it was that didn't mean to do it) and she said she had not. She added, "*I didn't know who did it until I saw on the newspaper.*"⁵⁵ In the newspaper she saw that Castle and Bucca had been arrested.⁵⁶ In re-examination, Pascoe said she didn't know who Bucca was speaking about when he said, "*he didn't mean to do it.*"⁵⁷

⁴⁵ As in *Jogee* [2016] UKSC 8, [2016] UKPC 7 at [101] – [120]; *Clayton v The Queen* [2006] HCA 58; (2006) 168 A Crim R 174 at [130]

⁴⁶ However, even if the jury was satisfied the shooter was Bucca, there were other important issues the jury had to be satisfied with concerning Castle's complicity before she could be convicted.

⁴⁷ T1875-1876, 1882

⁴⁸ T1883, 1889

⁴⁹ T1889.22

⁵⁰ T1889.37

⁵¹ T1890.28

⁵² T1890.36

⁵³ T1891.2

⁵⁴ T1901.38-1902.9

⁵⁵ T1902.23

⁵⁶ T1902.26

⁵⁷ T1918.21

39. The trial Judge was of the view that Pascoe had failed, “... to appreciate the rather slight matter of grammar that can alter the whole meaning of her evidence” in relation to what she said she overheard Bucca say.⁵⁸
- 10 40. In his closing address the prosecutor asked the jury to consider whether Pascoe had understood the distinction between Bucca saying he (meaning himself) or he (meaning a third party) hadn’t meant to do it. The prosecutor said that what Pascoe had meant was a matter for the jury’s good sense and judgment. Plainly, the prosecutor invited the jury to view Pascoe’s evidence as evidence that Bucca had confessed to having shot McDonald.⁵⁹
41. Counsel for Castle addressed the jury about Pascoe’s evidence, putting that it should not be seen as evidence that Bucca had confessed to the shooting.⁶⁰ Bucca’s counsel did the same.⁶¹
42. In his summing up the trial judge read out some, but not all of Pascoe’s evidence on this topic. The trial Judge left Pascoe’s evidence to the jury to use as they saw fit.⁶² That included using it as a confession by Bucca to having shot McDonald.
- 20 43. The Full Court correctly held that Pascoe’s evidence of Bucca’s alleged admission had no evidentiary value as an admission against interest and should not have been left to the jury as a possible admission.⁶³

Second admission

44. Investigating officer Detective Georg gave evidence that he first spoke to Bucca in relation to the investigation by telephone on 3 February 2013 while Bucca was at Castle’s mother’s house, shortly after Castle had been arrested there.⁶⁴
- 30 45. During cross-examination by counsel for Bucca, Georg agreed that it was correct that the telephone call had been at about 3.30 pm (about 9 hours after the shooting) and that during the call, Bucca told Georg he had spent 95% of the last 24 hours with Castle.
- 40 46. During his closing address, counsel for Bucca referred to this evidence on six occasions.⁶⁵ He suggested that if Bucca was the shooter he would not have said such a thing to a police officer, as it connected him to Castle, who was in the car at the time of the shooting. Whilst counsel for Bucca adduced the evidence for that purpose, it was double edged – the other (it is submitted, more likely) use the jury would have made of the evidence was to reason that since Castle had been with the shooter at the

⁵⁸ T1913.13

⁵⁹ T2560-2561

⁶⁰ T2608-2609

⁶¹ T2619-2621

⁶² SU169-171

⁶³ Reasons [3], [21]

⁶⁴ T2053-2054

⁶⁵ T2624 (twice), T2629 (once) and T2683 (three times). The prosecutor and counsel for Castle did not refer to this evidence in their closing addresses.

time McDonald was shot, Bucca's statement to Georg made it more likely that Bucca was the shooter, rather than Gange.

47. In his summing up the trial Judge referred to this admission by Bucca and his counsel's submission that making this statement was not the action of a person who had made a plan to murder McDonald.⁶⁶ The trial Judge told the jury the evidence should be taken into account with all the other evidence in the case.⁶⁷ The jury were effectively left to use the evidence of the admission in whatever way they saw fit.

10 **The trial Judge fails to direct the jury properly about Bucca's admissions**

48. The trial Judge failed to direct the jury that Bucca's admissions were not admissible against Castle and could not be taken into account in her trial. The Full Court held that this error could be characterised as a wrong decision on a question of law or as a failure capable of resulting in a miscarriage of justice.⁶⁸ The error required Castle's appeal to be allowed unless the proviso could be applied.
- 20 49. The trial judge's failure to properly direct the jury led to the jury having regard to inadmissible evidence of Bucca's admissions when it considered its verdict for Castle. In a case involving a complicated mass of circumstantial evidence, which had to be carefully examined and weighed in order for the jury to consider whether it proved guilt beyond reasonable doubt, an obvious and much easier path for the jury would have been to focus on Bucca's admissions
- 30 50. Castle's defence case was that the person who shot McDonald was Gange and that she had not known he had a gun, that he had intended to harm McDonald and that she had not intended to harm McDonald herself. If the jury believed that the effect of Pascoe's evidence was that Bucca had confessed to shooting McDonald, that contradicted a central tenet of Castle's defence and her evidence that Gange was the shooter. This is likely to have had an unfairly devastating effect on the jury's view of Castle as a witness and on her defence in general.
- 40 51. It was common ground that Castle drove her mother's car, with a passenger, to the carwash and that she was sitting in the driver's seat when the passenger shot McDonald. Given this, if the jury relied on the evidence that Bucca admitted 9 hours after the shooting that he had spent 95% of the preceding 24 hours with Castle, they were bound to reason it was more likely that Bucca had been the passenger, not Gange. Once again, this contradicted a central tenet of Castle's defence and her evidence that Gange was the shooter. Again, this is likely to have had an adverse effect on the jury's view about Castle as a witness.
52. The assessment of Castle's evidence was a matter for the jury. The trial judge's error meant that the jury made that assessment using inadmissible evidence. The rectitude of the jury's conclusion about Castle's evidence (which they must have rejected) and their verdict, was vitiated by their likely use of inadmissible evidence. In these circumstances no weight can be placed on the jury's rejection of Castle's evidence.

⁶⁶ SU173

⁶⁷ SU173

⁶⁸ Reasons [28]

Nor does the jury's verdict provide a sound basis for deciding whether her guilt was proved beyond reasonable doubt.⁶⁹

The proviso

Legal principles

- 10 53. The proviso in s. 353(1) of the *Criminal Law Consolidation Act, 1935* (SA) requires the Full Court to dismiss an appeal if it considers that no substantial miscarriage of justice has actually occurred. To apply the proviso to dismiss an appeal, the Full Court must conclude that conviction was inevitable. It is not enough that a guilty verdict was open or that the prosecution case was strong or even overwhelming.⁷⁰
54. Because of the natural limitations attending an appellate court's role in considering only the written record of the trial, in many cases it will not be in a position to decide whether an appellant must have been convicted if the error had not been made.⁷¹
- 20 55. Where the respondent to an appeal submits that a guilty verdict was inevitable (as in this case), Castle meets the point by showing no more than that, had there been no error, the jury may have entertained a doubt as to her guilt.⁷² For it to be open for the Full Court to use the proviso to dismiss the appeal, it had to be satisfied that in the absence of the errors made during the trial it was not open to the jury to entertain a reasonable doubt as to Castle's guilt.⁷³
- 30 56. Even where the Full Court can say that conviction was inevitable, sometimes it will nevertheless allow the appeal and order a new trial, because some cases (or types of miscarriages of justice) do not permit the operation of the proviso in practical terms (that is, they mean the court is unable to say that a substantial miscarriage of justice has not occurred). An example is where there was a significant denial of procedural fairness at the trial.⁷⁴

The Full Court's (wrongful) application of the proviso in this case

57. The Full Court recognised that an admission naturally attracts the attention of a jury and may significantly influence their deliberations.⁷⁵ They stated:⁷⁶
- 40 "In those circumstances it is not possible to apply the proviso unless the other evidence rendered Mr Bucca's conviction inevitable or so overwhelmed the evidence of the disputed admission that the jury would not have relied on it in any material way." (my emphasis)⁷⁷

⁶⁹ *Weiss v The Queen* [2005] HCA 81; (2005) 224 CLR 300 at [50]

⁷⁰ *Weiss v The Queen* (2005) 224 CLR 300 at [45]; *Baini v The Queen* (2012) 246 CLR 469 at [33]

⁷¹ *Baini v The Queen* (2012) 246 CLR 469 at [29]

⁷² *Baini v The Queen* (2012) 246 CLR 469 at [31]

⁷³ *Lindsay v The Queen* [2015] HCA 16 at [86] per Nettle J

⁷⁴ *Weiss v The Queen* (2005) 224 CLR 300 at [45]

⁷⁵ Reasons [22]

⁷⁶ Reasons [22]

⁷⁷ It seems the Full Court erroneously viewed these as alternative bases for the application of the proviso.

58. Later in its judgement, the Full Court stated:⁷⁸

“In the ordinary course, the proviso could not be applied in a case in which the guilt or innocence of the appellant depended on an assessment of oral evidence. This is an exceptional case. Ms Castle’s evidence is not just implausible and inconsistent with the objective evidence, it is on its face so obviously false that it carries no weight at all.”

10 59. The Full Court then purported to engage in an assessment of Castle’s evidence. It firstly compared some aspects of Castle’s evidence with related aspects of the prosecution circumstantial evidence, including:⁷⁹

59.1 The content and timing of text messages from Castle to McDonald.⁸⁰

59.2 Mobile phone tower evidence - the location of mobile phone towers that mobile phones used by Castle, Bucca and Gange from time to time had had their calls relayed through, or had registered with, at particular times.⁸¹

20 59.3 M’s disputed alibi evidence for Gange.⁸²

60. The Full Court examined Castle’s evidence about the events following her arrival at the carwash up until a short time after the shooting and rejected the aspects of Castle’s evidence about these events relating to the identity of the shooter.⁸³ The Full Court concluded that particular aspects of Castle’s evidence were “bizarre”⁸⁴, “improbable”⁸⁵, “implausible”⁸⁶ and other similar epithets.⁸⁷

30 61. The Full Court was satisfied beyond reasonable doubt that Bucca was the shooter. The reasons given for this conclusion were perfunctory.⁸⁸ The conclusion was based in part on an acceptance of the disputed evidence given by M, which had been contradicted by Castle’s evidence. Castle submits that the assessment of disputed and conflicting witness evidence was not a task the Full Court could properly perform.

62. Having regard to the natural limitations attending the role of an appellate court, the Full Court was not in a position to decide on the basis of the written record alone that Castle must have been convicted if the error had not been made.⁸⁹ It was not appropriate for the Full Court to decide for itself that Castle’s evidence would and should be rejected – that was the jury’s constitutional role.

⁷⁸ Reasons [106]

⁷⁹ Reasons [107] – [126]

⁸⁰ Reasons [107] – [109]

⁸¹ Reasons [110] – [114], [116] – [117]

⁸² Reasons [110]

⁸³ Reasons [118] – [126]

⁸⁴ Reasons [107] – this concerned Castle’s evidence that her purpose in meeting McDonald was to arrange the return of personal items he had. This was hardly bizarre.

⁸⁵ Reasons [114], [124]

⁸⁶ Reasons [117]

⁸⁷ “patently false” - Reasons [118]; “not credible” - Reasons [120]; inherently unlikely - Reasons [120].

⁸⁸ Reasons [128]

⁸⁹ *Gassy v The Queen* [2008] HCA 18; (2008) 236 CLR 293 at [35] - [37]; *Baini v The Queen* [2012] HCA 59; (2012) 246 CLR 469 at [29], [32]

63. The Full Court concluded:⁹⁰

“We are satisfied beyond reasonable doubt that the appellant Ms Castle knew that Mr Bucca was in the Ford and that he was armed and intended to confront the deceased with a gun in order to detain him in the car until he could be confronted about the break-in. We are satisfied beyond reasonable doubt that Ms Castle foresaw that the gun might be used to kill Mr McDonald, or cause him grievous bodily harm, in the execution of that plan”

10 64. The Full Court reasons for these conclusions were again perfunctory.⁹¹ None of the reasons or the evidence in the case compelled the conclusions reached. The conclusions were at best “open”, but by no means inevitable.⁹² In reaching its conclusions, the Full Court completely ignored Castle’s evidence. Regardless of who the shooter was, her evidence was that she did not know the shooter had a gun or intended to harm McDonald. Whilst the Full Court pointed to difficulties with Castle’s evidence relating to the identity of the shooter, these did not mean that all of Castle’s evidence would necessarily, or inevitably, have been rejected by the jury.

20 65. The Full Court was, “... *satisfied that the alleged admissions were a minor part of the evidence and were so overwhelmed by the circumstantial evidence against each of the appellants that it is unlikely that they had any influence on the jury’s verdicts.*” This speculation was not a proper basis for the proviso to be applied.⁹³ Yet the Full Court concluded it was satisfied there had not been a substantial miscarriage of justice and applied the proviso.⁹⁴ But the former conclusion did not necessarily permit, let alone require, the latter conclusion. Furthermore, the Full Court failed to address the question of whether Castle’s conviction was inevitable, which it ought to have done before considering whether the proviso could be applied.⁹⁵

30 66. Castle submits that in the circumstances of this case and the trial judge’s errors, the proviso was simply not capable of being applied. The Full Court was not in a position to conclude that a guilty verdict was inevitable.⁹⁶

67. Additionally, and in any event, Castle submits that the trial Judge’s errors were such serious departures from the requirements of a fair trial that the proviso could not be applied.⁹⁷

C. Failure to remind the jury of Castle’s evidence – miscarriage of justice?

Castle’s evidence and how the trial Judge dealt with it

⁹⁰ Reasons [129]

⁹¹ Reasons [129]

⁹² Compare the Full Court’s Reasons at [61] – where it said that an inference of Castle’s culpability would “almost certainly be drawn” – this is an admission that her conviction was not inevitable.

⁹³ *Baini v The Queen* [2012] HCA 59; (2012) 246 CLR 469 at [33]

⁹⁴ Reasons [131]

⁹⁵ *Baida Poultry Pty Ltd v The Queen* [2012] HCA 14; (2012) 246 CLR 92 at [29]; *Baini v The Queen* [2012] HCA 59; (2012) 246 CLR 469 at [29], [32], [36]

⁹⁶ As the Court was not in *Gassy v The Queen* [2008] HCA 18; (2008) 236 CLR 293, a similarly complex circumstantial case in which there was a misdirection by the trial Judge.

⁹⁷ *Baini v The Queen* [2012] HCA 59; (2012) 246 CLR 469 at [33]. Castle further addresses the principles related to this situation later in these submissions.

68. Castle was the only defence witness. She gave evidence over the course of three days.⁹⁸ Her lengthy evidence included evidence to the following effect:

In the afternoon of 2 February 2013 she wanted to catch up with McDonald to talk to him.⁹⁹ She wanted to speak to him about sorting out the furniture, including for him to get his lounge and that from her Mum's house.¹⁰⁰

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Bucca, Gange, M, Castle and her daughter were all out the back at Gange's place, sitting around a table, when Wes asked her to contact McDonald and be a mediator to get his stuff back from McDonald.¹⁰¹ While she was sitting at the table she didn't hear Bucca or anyone else call McDonald a "fucking dog". Her making McDonald believe she wanted to get back together with him was not discussed at all.

If McDonald agreed to meet her, she expected only he and she would meet.¹⁰² She never suggested in Gange or M's presence that Bucca might come with her, or that Gange might like to come with her, to meet McDonald.

20

At 10.42 pm she sent a text message¹⁰³ to her Mum asking her if it was ok to borrow her car to grab the last of Bucca's stuff that was at Gange's house.¹⁰⁴ She asked to borrow her Mum's car for this because her car was already full up of stuff. She drove her car to my mother's house at about 11.30 pm on 2 February.¹⁰⁵ Not long after she got her Mum's car keys and drove back to Gange's place.

Later on she drove from Gange's place and picked up her daughter from her friend's grandad's place and drove to her Mum's place, arriving there about 1.30 am.¹⁰⁶ She put Aimee to bed at her Mum's place and laid in bed with her.¹⁰⁷ She fell asleep for a while.

30

She then got up and drove in her Mum's car to Gange's place.¹⁰⁸ She got there before 4.43 am. No one was there. She did not have keys for Wes's place. She sat in her Mum's car outside Gange's place waiting for just over half an hour. Then Bucca and Gange turned up there in Gange's car.¹⁰⁹ She had been expecting them to come.

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They went inside and started taking Jason's stuff from inside and putting it in her Mum's car. The things loaded included clothes, both loose and in bags, a toasting machine and round weights. While loading up the car she told Wes and Jason that she had text messaged McDonald about meeting at the RSL around the corner from her Mum's.¹¹⁰ At that time she intended to drive to her Mum's place with Bucca, drop him off there and then meet with McDonald. Wes said to her he wanted to come with her to meet McDonald.¹¹¹

⁹⁸ T2192-2447

⁹⁹ T2250

¹⁰⁰ T2253

¹⁰¹ T2254

¹⁰² T2255

¹⁰³ Exhibit P15, message no. 399

¹⁰⁴ T2268

¹⁰⁵ T2269

¹⁰⁶ T2271-2272

¹⁰⁷ T2273

¹⁰⁸ T2274

¹⁰⁹ T2275

¹¹⁰ T2277

¹¹¹ T2278

At 6.07 am she spoke to McDonald on the phone after he rang her.¹¹² They arranged to meet at the Big Bucket Carwash. Gange heard her on the phone to McDonald.¹¹³ He said he was coming with her to meet McDonald. Gange said he wanted to catch up with McDonald to get his things back, like his computer, fridge and some other things that McDonald had taken.¹¹⁴ After this she drove to the carwash with Wes.

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When she drove to the carwash her intentions were to meet McDonald to discuss the furniture and to organise for him to pick up his stuff from her Mum's place and sort out the mag wheels.¹¹⁵ After I had got to the carwash she realised that Bucca's mobile phone was in her Mum's car.

After arriving and parking at the carwash she got out of the car and went to the boot because she couldn't find her cigarettes.¹¹⁶ Her handbag was in the boot and she looked for her cigarettes in there.¹¹⁷ She didn't find them so she got back in the driver's seat. Then Gange was looking for his phone.¹¹⁸ He said he couldn't find it. She got out of the car again and looked in the boot but it wasn't there. She got back in the driver's seat.¹¹⁹

20

McDonald turned up.¹²⁰ Gange went between the front seats into the back seat of the car so she could speak with McDonald. McDonald and she sent text messages to each other.¹²¹ McDonald got out of his car and came over, then went back to his car, then came back over. He walked to the driver's side and she wound the window down. He asked what she wanted to talk to him about and she said we need to sort out the furniture. McDonald walked back to his car and then returned and got into the front passenger seat of her car.¹²² He had 2 cans of Bourbon and Cola with him. He handed one to Gange. The three of them then had a conversation.¹²³

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After a while Gange brought up the break-in. McDonald denied he had a part in it. Gange got angry and started yelling. She said she was going to get some smokes and went to drive to the nearby service station. After the car started to move, McDonald went to open the door. She slammed on the brakes and the first shot was fired.¹²⁴ McDonald was partly out of the car when the first shot was fired. Then 2 more shots were fired.¹²⁵ She looked over her shoulder and saw a gun in Gange's hands. She yelled at Gange and told him they needed to call an ambulance. She went for her phone. Gange grabbed her phone off her, pointed the gun at her and told her to drive.

She drove onto Main North Rd and towards Elizabeth Way.¹²⁶ Gange got her to pull into a side street.¹²⁷ He sent a text on her phone. Gange told her he was texting

¹¹² T2280. Exhibit P15, call no. 449

¹¹³ T2281

¹¹⁴ T2282

¹¹⁵ T2283

¹¹⁶ T2284

¹¹⁷ T2285

¹¹⁸ T2287

¹¹⁹ T2288

¹²⁰ T2289

¹²¹ T2290

¹²² T2291

¹²³ T2292

¹²⁴ T2293

¹²⁵ T2294

¹²⁶ T2295

¹²⁷ T2296

McDonald.¹²⁸ She was shocked and frightened. She dropped Gange off at some side street. He threatened her not to speak about it. He was still very angry. She felt anxious and upset. She drove up Philip Highway and sat in a side street for 20, 25 minutes.

Gange shot McDonald.¹²⁹ She did not know Gange had a gun when she arrived at the carwash. She had never seen the gun before the first shot was fired at McDonald.¹³⁰ When she went to the carwash she did not intend to harm McDonald, nor did she think Gange was going to hurt him.

10 She denied that in the presence of M she said she might give McDonald the impression she would meet with him and use sex as a lure.¹³¹ She denied that before she got to the carwash she had a plan to get McDonald into her car and drive off somewhere quieter.¹³²

The car was stopped in the carwash with her foot on the brake.¹³³ She didn't drive off immediately [after the first shot] because she couldn't believe what was happening. She was in shock, upset.¹³⁴ Gange said if you don't drive, you'll be next.

69. Castle's evidence of the events at the carwash was consistent with what could be seen on the carwash CCTV footage evidence. The gun used by the shooter was a pistol.
20 There was no reason to think it could not have been concealed on the shooter's person so that Castle was not able to see it before it was used.

70. The prosecutor dealt with Castle's evidence in his closing address.¹³⁵ He asked the jury to conclude that Castle had lied in her evidence. He said that didn't mean she was guilty, only that her evidence should be ignored.

71 In his closing address counsel for Castle asked the jury to consider the evidence Castle had given and to make allowances for the traumatic events she witnessed and the stress of being a witness.¹³⁶ He submitted Castle had done her best to tell the jury what had occurred on the morning of the shooting.
30

72. The trial Judge made only these references to Castle's evidence in his summing up:

72.1 Directed the jury to assess Castle's evidence in the same way as they assessed the evidence of other witnesses.¹³⁷ He finished the direction by stating, "*Whether, of course, you believe it is entirely a different matter...*"

72.2 Directed the jury that Castle had given evidence on oath that the shooter was Gange.¹³⁸

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¹²⁸ T2297

¹²⁹ T2192

¹³⁰ T2193

¹³¹ T2310-2311

¹³² T2328

¹³³ T2337

¹³⁴ T2339

¹³⁵ T2525-2527, 2534, 2564-2565

¹³⁶ T2611

¹³⁷ SU51

¹³⁸ SU67

- 72.3 As part of his summary of the prosecution case, referred to Castle's evidence that Gange travelled to the carwash in the front passenger seat of the car and had gone into the back seat by moving between the front seats before McDonald got into the car. The trial Judge then reminded the jury of the prosecutor's criticisms of that evidence in his closing address.¹³⁹
- 10 72.4 As part of his summary of the prosecution case, referred to Castle's evidence that Bucca's mobile phone was in her mother's car at the carwash. He then reminded the jury of the prosecutor's closing address in which he had said that Castle had given at least two inconsistent versions about how the phone had got into her car.¹⁴⁰
- 72.5 As part of his summary of the prosecution case, referred to Castle's evidence that after the shooting she dropped Gange off and then waited in a side street to compose herself, before driving to a house shared by Bucca and Gange, finding only Bucca present but not telling him about the shooting. He then reminded the jury of the prosecutor's criticism of that evidence in his closing address.¹⁴¹
- 20 72.6 Directed the jury to assess Castle's evidence when they were considering their verdict in relation to her. Directed the jury that if they were to consider, as the prosecutor suggested, that Castle had told a number of lies, that did not mean they would without more find her guilty. Directed the jury that it may mean that they reject her evidence but if they do that, they still must find she is guilty on the evidence available.¹⁴²
- 30 73. The trial Judge's treatment of Castle's evidence contrasted markedly with his treatment of the prosecution's evidence and witnesses. The trial Judge fully summarized the evidence of witnesses¹⁴³ who supported the prosecution case and read out *verbatim* a total of 20 pages of evidence given by the witnesses Bristow¹⁴⁴, Finn¹⁴⁵, M¹⁴⁶, DeLaine¹⁴⁷ and Pascoe.¹⁴⁸ None of Castle's evidence was read out to the jury, nor was any summary of it given. The trial Judge reminded the jury at length of M's evidence¹⁴⁹, but said nothing about Castle's evidence which directly contradicted it.
74. The fundamental task of a trial judge is to ensure a fair trial. One of the indispensable requirements is that the trial judge put fairly before the jury the case which an accused makes.¹⁵⁰ When a defendant has given evidence relevant to issues in dispute in a trial,

¹³⁹ SU116

¹⁴⁰ SU126

¹⁴¹ SU190 - 191

¹⁴² SU248

¹⁴³ For example, he referred to M's evidence in 22 pages of the summing up (SU132-133, 146-154, 160-168, 181, 196).

¹⁴⁴ SU135 - 137, 172 - 173

¹⁴⁵ SU141 - 144

¹⁴⁶ SU148 - 150

¹⁴⁷ SU155 - 160

¹⁴⁸ SU170 - 171.

¹⁴⁹ SU133, 161-162, 181, 196

¹⁵⁰ *RPS v The Queen* (2000) 199 CLR 602 at [41]

a reminder in the summing up of the salient aspects of that evidence is necessary in order for there to be a fair trial and in order for the defence case to be fairly put.¹⁵¹

75. Castle submits that given the circumstances of her trial and considering the summing up as a whole, a reminder of the salient aspects of her evidence was required and its absence resulted in the summing up being unfair and unbalanced.¹⁵² The summing up as a whole sent the clearest message to the jury that Castle's evidence was not worthy of consideration and should be summarily rejected.

10 The Full Court's approach and the correct approach

76. The Full Court accepted that *generally* it was the duty of a trial judge to summarise the salient aspects of a defendant's evidence and to fairly put the defence case.¹⁵³ The Full Court rejected Castle's complaint on the basis that:¹⁵⁴

20 Greater reference to the detail of Ms Castle's evidence would only have served to remind the jury of its improbability because Ms Castle's evidence did not logically address the Crown case. Ms Castle's evidence amounted to no more than a bare denial that Mr Bucca was the shooter and that she knew in advance that the shooter was armed. That central issue was dealt with in the summing up and left to the jury. No miscarriage of justice has been occasioned by the failure to remind the jury of Ms Castle's evidence about the surrounding circumstances when so much of it was inconsistent with objective and reliable evidence."

- 30 77. In response Castle submits that her evidence did logically address many aspects of the Crown case and was much more than a bare denial that Mr Bucca was the shooter and that she knew in advance the shooter was armed. This is apparent from the summary of her evidence. She was the only eyewitness to the shooting. The events she described in her evidence, and her evidence as to her state of mind, were directly relevant to the disputed issues at the trial. None of Castle's evidence about the events at the carwash, before, during or after the shooting was directly inconsistent with the prosecution evidence. Her evidence directly contradicted important evidence given by the prosecution witness M.

- 40 78. The Full Court's reasoning was that because Castle's evidence was not credible (in its opinion), no miscarriage of justice was caused by the trial Judge's failure to remind the jury about it. This reasoning was absurd and entirely missed the point. The trial Judge's failure meant that Castle did not receive a fair trial, or a trial according to law, and accordingly a miscarriage of justice occurred.¹⁵⁵ A trial Judge is not relieved of the obligation to put the defence case fairly because it might seem difficult to accept.¹⁵⁶

¹⁵¹ *R v Zilm* [2006] VSCA 72 at [6], [56] - [60], [80] - [83]; *R v Veverka* [1978] 1 NSWLR 478 at 481-482

¹⁵² An analogy can be drawn with the lack of balance in *Gassy v The Queen* [2008] HCA 18; (2008) 236 CLR 293, where directions which failed to contain any substantial reference to competing defence arguments (or in this case evidence) rendered the trial a miscarriage of justice.

¹⁵³ Reasons [64]

¹⁵⁴ Reasons [66]

¹⁵⁵ *Filippou v The Queen* [2015] HCA 29; (2015) 89 ALJR 776 at [13] - [14]

¹⁵⁶ *El-Jalkh v R* [2009] NSWCCA 139 at [152]

79. It was for the jury to decide if some or all of Castle's evidence would or would not be rejected, after her evidence and her defence had been fairly put before it. The trial judge's failure prevented the jury from being able to fairly assess Castle's evidence at all. In these circumstances not only was there a miscarriage of justice, but a substantial miscarriage of justice which precluded the operation of the proviso.¹⁵⁷

80. Castle submits that the trial Judge's error involved such a departure from the essential requirements of a fair trial that the proviso cannot be applied.¹⁵⁸ Her trial differed in a fundamental respect from that which the criminal justice system requires. The trial Judge's error was such a serious breach of the presuppositions of a fair trial by jury that it denies the application of the proviso.¹⁵⁹

D. Pascoe's evidence of Bucca's earlier possession of black pistols

81. Castle applies for leave to amend her grounds of appeal to include the co-appellant Bucca's ground of appeal on this issue. This was a ground of appeal on which Castle relied in her appeal to the Full Court. Castle adopts the co-appellant's Bucca's submissions on this issue. This evidence was also admitted in Castle's trial. If it was inadmissible, its admission in her trial involved a miscarriage of justice.

Part VII: Applicable statutory provisions - See Annexure A.


Part VIII: Orders sought

82. That the appeal be allowed and the order of the Full Court dismissing the appeal against conviction be set aside.

83. That it be ordered that Castle's appeal to the Full Court be allowed, Castle's conviction be quashed and there be a new trial.

Part IX: Oral argument

84. Castle estimates that the presentation of her oral argument will take 2 ½ hours.


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¹⁵⁷ *R v Veverka* [1978] 1 NSWLR 478 at 480F, quoting Edmund Davies J in *R v Badjan* (1965) 50 Cr App R 141 at 144, "Where a cardinal line of defence is placed before the jury and that finds no reflection at any stage in the summing-up, it is in general impossible, in the view of the court, to say that the proviso can properly be applied ..."; *R v Colbert* [2016] SASCFC 12 at [64].

¹⁵⁸ *R v Veverka* [1978] 1 NSWLR 478 at 482; *Baini v The Queen* [2012] HCA 59; (2012) 246 CLR 469 at [33]; *Filippou v The Queen* [2015] HCA 29; (2015) 89 ALJR 776 at [15]

¹⁵⁹ *Lee v The Queen* [2014] HCA 20; (2014) 252 CLR 455 at [34], [47], [48] and [51]

IN THE HIGH COURT OF AUSTRALIA
ADEALIDE REGISTRY

No. A26 of 2016

BETWEEN:

TRISTAN KAY CASTLE
Appellant

and

10

THE QUEEN
Respondent

ANNEXURE A
Statutory Provisions

Criminal Law Consolidation Act 1935 (SA)

20 Sections 11, 267 and 353(1), 353(2) – as in force on 3 February 2013 and as still in force

11—Murder

Any person who commits murder shall be guilty of an offence and shall be imprisoned for life.

267—Aiding and abetting

A person who aids, abets, counsels or procures the commission of an offence is liable to be prosecuted and punished as a principal offender.

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353—Determination of appeals in ordinary cases

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- (1) The Full Court on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which Castle was convicted should be set aside on the ground of a wrong decision on any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal; but the Full Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of Castle, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.
- (2) Subject to the special provisions of this Act, the Full Court shall, if it allows an appeal against conviction, quash the conviction and either direct a judgment and verdict of acquittal to be entered or direct a new trial