IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A26 of 2016

BETWEEN:

JASON LUKE BUCCA
Appellant

and

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

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Part I: INTERNET PUBLICATION

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

Part II: ISSUES ON APPEAL

2. The following issues are raised by the appeal:

   (i) Where evidence which has no evidential value as an admission is erroneously left to the jury as a potential admission, and where oral evidence is given exculpating the accused, is it open for an appellate court to reject that exculpatory oral evidence based on the combined force of objective evidence, and apply the proviso?

   (ii) Is evidence of possession by an accused, three or four months before an offence, of firearms of the same character as that used in the offence, admissible as part of a circumstantial case proving identity where the accused does not dispute the admissibility of evidence of possession of a firearm of the same character as that used in the offence, two or three weeks before the offence?

Part III: SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

3. Notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) need not be given.

Part IV: STATEMENT OF FACTS

4. To the summary of facts set out by the appellant, the respondent adds the following.

5. As to the evidence of M, there were three important aspects to her evidence. First, that the appellant had been in possession of a handgun two or three weeks before the shooting. Second, that at about 5.30-6.30pm on 2 February 2013 the appellant and Castle were making plans to meet the deceased (**McDonald**) by lying to him about the purpose of a meeting. Third, that Wesley Gange (**Gange**) had an alibi at the time of the shooting (he was with M). Each received significant support from objective or undisputed evidence.

6. As to the possession of the firearm, M's evidence received support from the evidence of Tamara Pascoe (**Pascoe**). That evidence is detailed at [83] below.

7. As to the second, between 6.16pm and 6.25pm Castle made a number of telephone calls to friends of McDonald.[1] She spoke to George Katsos (**Katsos**). She asked Katsos to pass on a message to McDonald, asking that he ring her.[2] At 6.31pm on Saturday 2 February 2013, he did. Over the following 12 hours, there were multiple texts and telephone communications between the two.[3] Her efforts were open to being seen as concerted, particularly in contrast to the period shortly before. Initially McDonald expressed reluctance to meet, asserting "*do ya think I'm that dumb*"[4] then later suggesting that he saw no reason to meet.[5] He queried Castle's motivation for the meeting, asking her "*how can I trust your not setting me up*".[6] At 8.07pm

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[1] See Exhibit P15 entries 320, 323.
[2] Katsos TX at 1494-1496.
[3] Exhibit P15 entries 330-502.
[4] Exhibit P15 entry 334.
[5] Exhibit P15 entries 350, 351.
[6] Exhibit P15 entry 363.

McDonald suggested they meet at the carwash at Bunnings.[7] After numerous texts, McDonald drove to the carwash at Parafield, arriving at about 1.50am and waited for the appellant.[8] She did not arrive and McDonald left. The arrival and departure of McDonald are captured by CCTV.[9]

8. Between 2.05am and 5.28am McDonald sent a series of text messages to Castle, questioning why she did not arrive as arranged.[10] Between 5.30am and 6.30am, Castle resumed contact with McDonald. Once again, she made arrangements to meet with him.[11] At 6.07am there was a 123 second telephone call between them and Castle agreed in evidence that it was during that call that the arrangements were made to meet at the carwash. CCTV footage showed her arriving at 6.20am and McDonald at 6.30am.[12]

9. Further, the appellant did not dispute that he visited Jim Bristow (**Bristow**) between 3.50am and 4.00am on 3 February, asking about the whereabouts of McDonald telling him that he wanted to catch up with McDonald about $1000 that was owed.[13]

10. As to the third, that M was at the Gosfield Crescent house at the time of the shooting and that Gange was with her was supported by the phone records. M's phone did not register any contact with telephone towers outside the Klemzig, Hampstead and Greenacres areas between 9.15pm on 2 February 2013 and 2.18am on 3 February 2013. The next connection between that phone, and any telephone tower, was not until 9.11am on Sunday 3 February 2013. At that time, M's phone sent a signal to the Modbury telephone tower, suggesting that M's phone was in the Modbury area shortly after 9.00am on the Sunday.[14] M said she did not leave the Gosfield Crescent house until "somewhere around" 8.00am on the Sunday morning, at which time she and Gange went to Bristow's house at 2 Cadell Court, Hope Valley.[15]

11. As for Gange's phone, the CCTV footage and the evidence of Bristow established that Bucca and Gange were in the Hope Valley area between 3.50am and 4.50am that morning. The phone tower evidence[16] further confirmed this by establishing that their phones were in that same area at the corresponding time. This supported the inference that both men were in possession of their phones during that period. Both men left the house at 4:50am.[17] Gange's telephone registered with the Hope Valley Reservoir tower at 8.47am on the Sunday morning.[18] The issue was where it (and, by extension, him – on the prosecution case) was between 4.50am and that time. As set out at [11] by the Full Court, from 5.14am until about 8.10am all calls made to and from Gange's phone were relayed through the Klemzig, Hampstead Gardens or Greenacres towers. This was consistent with his phone being at Gosfield Crescent, and not consistent with it being at or on the way to the carwash. These included calls to, and from, the appellant at 6.25am, to McDonald at 6.33am and to Castle at

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[7] Exhibit P15, entry 376.
[8] McDonald was accompanied by Katsos and Finn who were in a separate vehicle (Katsos TX 1498, 1505; Finn TX, 1525).
[9] Exhibit P7.
[10] Exhibit P15, entries 425-427, 435, 438, 455.
[11] Exhibit P15, entries 455-504.
[12] Exhibit P7.
[13] Bristow TX at 1585-1586.
[14] Exhibit P20.
[15] TX 1328.
[16] Exhibits P15 and P20.
[17] Exhibit P12 (footage from 2 Cadell Court).
[18] Exhibit P20.

6.34am; all remarkable events if he was at the carwash. For the reasons set out at [11] of the Full Court's judgment, this can be contrasted with the phones of both Castle and the appellant, which were together and moving in a fashion consistent with them travelling to, and being at, the carwash at the relevant times.

12. As to M's evidence that Gange was trading firearms for drugs,[19] M had only seen him with a firearm for shooting kangaroos prior to the incident.[20] After the shooting she had seen with him firearms, but only long weapons, not handguns.[21]

13. Insofar as the appellant suggests there was no relevant motive,[22] or at least no greater motive than existed for Gange, while both had animosity as a consequence of the break-ins, the appellant was owed $1000. He had sent a text to Bristow on 31 January[23] asking that McDonald be told of his desire for that money and mentioned the same debt to Bristow in the early hours of 3 February.[24] Whilst such matters may not provide much motive to plan to kill, they did give rise to the inference that he might enter a plan to confront McDonald with a loaded firearm.

14. As for the appellant being separated from his phone at the time of the shooting,[25] that evidence only came from Castle. It was open to reject that evidence for the reasons set out by the Full Court at [110]-[113]. Once rejected, the location of the three phones at critical times and the persons contacted, supported the inference that the appellant was with his phone at the time of this shooting and with Castle.

15. As for Gange having another phone,[26] the phone records indicate that Gange had the relevant phone with him that morning. Putting to one side that the phone tower evidence was consistent with it being with him, as set out at [11] in the judgment of the Court below, he was using it to communicate with the appellant the previous evening and that morning. It was also used to communicate with the appellant, Castle and McDonald in the minutes surrounding the shooting. Given Gange had been using the phone in the hours before, that another was doing so at that time, and to contact the appellant, Castle and McDonald was not an inference reasonably open. The text messages at 2.31am and 2.42am,[27] in all of the circumstances, do not give rise to the inference that Gange was using another phone that morning. The later message can be seen as a response to the first. The submissions at AS [35]-[36] must be viewed in the light of the cumulative force of the phone records.

16. As regards the DNA evidence,[28] it offered significantly greater support for the appellant's DNA being the contributor to relevant samples taken from the car than it did Gange,[29] and must be considered in light of the whole of the evidence.

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[19] Appellant's Submissions (**AS**) at [25].
[20] M TX at 1390, 1396.
[21] M TX at 1400-1401.
[22] AS at [26].
[23] Exhibit P15, entry 226.
[24] Bristow, 1584, 1586.
[25] AS at [33.1].
[26] AS at [33.2].
[27] AS at [34].
[28] See AS at [50.1].
[29] See Toop Mitchell TX at 2137-8 (the seat belt cushion); 2139-2140 (left rear seat lever); 2141-2142 (right rear seat lever); 2143-2145 (rear surface of larger section rear seat); 2146-2149 (two samples from the inside of the boot) inner shelf of boot). See also Summing Up at 119-122.

Part V: APPLICABLE LEGISLATIVE PROVISIONS

17. The applicable legislative provisions are those identified by the appellant.

Part VI: RESPONDENT'S ARGUMENT

The Proviso (Ground 2)

18. The only error found by the Full Court which related to the appellant's trial was with respect to evidence given by Pascoe of a comment said to have been made by the appellant. That comment was left to the jury as having been a potential admission. The Court below held that "Ms Pascoe's evidence was not evidence of an admission at all but, to the contrary, was evidence of a previous exculpatory statement."[30]

19. The error at trial lay in leaving the comment to the jury as a possible admission. That may be characterised as an error of law or as a basis upon which there was a miscarriage of justice. However, notwithstanding this finding, the Full Court was unanimously satisfied that no "substantial miscarriage of justice" had actually occurred.[31] This conclusion engaged the proviso to the common form appeal provision in s 353(1) of the *Criminal Law Consolidation Act 1935* (SA) (**CLCA**), and the Court was required to dismiss the appeal.[32]

Applicable Principles

20. Much has been said about the proper construction and application of the proviso to the common form appeal provision. Some preliminary observations of principle bear repeating.

21. First, questions as to the proper application of the proviso have at their root a task of statutory construction. "It is the words of the statute that ultimately govern, not the many subsequent judicial expositions of that meaning which have sought to express the operation of the proviso to the common form criminal appeal provision by using other words."[33]

22. Second, and related to the first, "it is neither right nor useful to attempt to lay down absolute rules or singular tests that are to be applied by an appellate court where it examines the record for itself ... It is not right to attempt to formulate other rules or tests in so far as they distract attention from the statutory test. It is not useful to attempt that task because to do so would likely fail to take proper account of the very wide diversity of circumstances in which the proviso falls for consideration."[34] Such an approach "invites error".[35]

23. Third, it is the appellate court itself which must determine whether a substantial miscarriage of justice has actually occurred.[36] This determination involves the making

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[30] CCA at [18].
[31] CCA at [3], [131].
[32] CLCA, s 353(1); as to the *requirement* to dismiss the appeal in these circumstances, see *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 (***Baiada***) at [25] (French CJ, Gummow, Hayne and Crennan JJ); *Lindsay v The Queen* (2015) 255 CLR 272 at [43] (French CJ, Kiefel, Bell and Keane JJ); *Filippou v The Queen* (2015) 89 ALJR 776 at [15] (French CJ, Bell, Keane and Nettle JJ).
[33] *Weiss v The Queen* (2005) 224 CLR 300 (***Weiss***) at [9] (the Court).
[34] *Weiss* at [42] (the Court).
[35] *Baiada* at [31] (French CJ, Gummow, Hayne and Crennan JJ).
[36] *Weiss* at [35], [39] (the Court); *Baiada* at [27] (French CJ, Gummow, Hayne and Crennan JJ); *Filippou v The Queen* (2015) 89 ALJR 776 at [15] (French CJ, Bell, Keane and Nettle JJ).

of a judgment.[37]

24. Fourth, the court's consideration begins with identifying the error that was made at trial.[38] Any determination of whether or not a substantial miscarriage of justice has actually occurred is to be performed having regard to the nature of the error within the context of the particular circumstances of the case and the particular issues at trial.[39]

25. Fifth, the appellate court's task is an objective one.[40] It is not an exercise in speculating or predicting what a jury – whether the jury at trial or some hypothetical future jury – would or might do.[41] In this connection, recognition of the possibility that the particular trial jury *might* have in fact reasoned impermissibly to guilt because of the error identified does not of itself prevent the conclusion that no substantial miscarriage of justice has actually occurred.[42] Indeed, "it will almost always be possible to say that that evidence *might* have affected the jury's view of the accused, or the accused's evidence".[43]

26. Sixth, the appellate court's task must be undertaken on the whole of the record of the trial,[44] and is to be performed with due regard to the "natural limitations" that exist in any appellate court proceeding on the record.[45]

27. Seventh, the appellate court must remember at all times that the standard of proof of criminal guilt is "beyond reasonable doubt".[46]

28. Bearing these principles in mind, "[t]he appellate court must make its own independent assessment of the evidence and determine whether, making due allowance for the 'natural limitations' that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty."[47]

29. There may be many cases where those natural limitations mean that the appellate court cannot reach the necessary degree of satisfaction. However, the mere fact that

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[37] *Baiada* at [25] (French CJ, Gummow, Hayne and Crennan JJ); see also *Baini v The Queen* (2012) 246 CLR 469 (***Baini***) at [26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) regarding s 274 of the *Criminal Procedure Act 2009* (Vic).

[38] *Baiada* at [30] (French CJ, Gummow, Hayne and Crennan JJ); see also *AK v Western Australia* (2008) 232 CLR 438 (***AK v WA***) at [42] (Gummow and Hayne JJ).

[39] See, for example, *AK v WA* at [42], [55] (Gummow and Hayne JJ); see also *Reeves v The Queen* (2013) 88 ALJR 215 (***Reeves***) at [51]-[58] (French CJ, Crennan, Bell and Keane JJ).

[40] *Cooper v The Queen* (2012) 87 ALJR 32 at [20] (French CJ, Hayne, Crennan and Kiefel JJ); *Weiss* at [39] (the Court).

[41] *Weiss* at [35], [39] (the Court); *Baini* at [33] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

[42] *Weiss* at [36] (the Court).

[43] *Weiss* at [36] (the Court).

[44] *Weiss* at [43] (the Court); *Baiada* at [28] (French CJ, Gummow, Hayne and Crennan JJ); *Baini* at [32] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). This includes the fact of the jury's verdict, although the significance of the verdict in the present case must be assessed in light of the capacity of the errors in the trial judge's directions to have led the jury to wrongly reason to guilt: *Reeves* at [51]-[58] (French CJ, Crennan, Bell and Keane JJ).

[45] *Cesan v The Queen* (2008) 236 CLR 358 at [128] (Hayne, Crennan and Kiefel JJ); *Weiss* at [39]-[41] (the Court).

[46] *Cooper v The Queen* (2012) 87 ALJR 32 at [20] (French CJ, Hayne, Crennan and Kiefel JJ); *Weiss* at [39] (the Court).

[47] *Weiss* at [41] (the Court) (footnotes omitted); see also *Baini* at [32] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

oral evidence was given on key issues which evidence was contested, or even contradicted by other oral evidence, does not of itself disable the appellate court from being capable of satisfaction that guilt has been established beyond reasonable doubt (or, subsequent to that, that no substantial miscarriage has actually occurred).[48]

30. Satisfaction on the part of the appellate court of the appellant's guilt beyond reasonable doubt is a necessary but not sufficient condition for the application of the proviso.[49] A further stage of analysis is required. Despite its own satisfaction as to guilt, an appellate court will nevertheless be unable to apply the proviso unless it is satisfied that the error in the particular trial in question "*in fact*" did not occasion a substantial miscarriage of justice.[50] This analysis focuses attention upon the particular error identified, the particular issues at trial, and the particular manner in which the trial proceeded.[51]

31. In some cases, the nature of the error or irregularity will be so serious or fundamental, that there remains a state of affairs properly characterised as a substantial miscarriage of justice.[52] Whilst "no single universally applicable criterion can be formulated" which identifies such cases,[53] the unanimous Court in *Weiss v The Queen*[54] suggested in dicta that cases where there has a been a significant denial of procedural fairness at trial may provide one such example.[55] The majority in *AK v Western Australia* considered that the failure of the trial judge to provide reasons for his decision in that case was another.[56] Of course, often where there has been such a serious departure from the requirements of a fair trial, the appellate court will in any event – because of those departures – be incapable of reaching satisfaction beyond reasonable doubt of the appellant's guilt.[57]

32. Such errors or irregularities, whether described as "serious departures" or "fundamental flaws" which go to the "essential requirements" of the proceedings, should not be the subject of attempts at exhaustive identification. Further, "it is neither possible nor useful to attempt to argue about the application of the proviso by reference to some supposed category of 'fundamental defects' in a trial."[58] Ultimately consideration is driven back to the language of the provision itself: whether "no substantial miscarriage of justice has actually occurred".

33. It has also variously been stated that the appellate court is to ask itself whether the accused's conviction was "inevitable", or whether the accused was deprived of a "real chance" of acquittal. Such expressions must not be taken as a substitute for the

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[48] *Reeves*. Cf AS at [72]; Castle's Submissions at [61]-[62].
[49] *AK v WA* at [53], [59] (Gummow and Hayne JJ); *Baiada* at [29] (French CJ, Gummow, Hayne and Crennan JJ); *Cesan v The Queen* (2008) 236 CLR 358 at [124] (Hayne, Crennan and Kiefel JJ); *Reeves* at [50] (French CJ, Crennan, Bell and Keane JJ); *Gassy v The Queen* (2008) 236 CLR 293 at [18] (Gummow and Hayne JJ); *Weiss* at [44]-[45] (the Court).
[50] *Reeves* at [51] (French CJ, Crennan, Bell and Keane JJ).
[51] See *Reeves* at [51]-[58] (French CJ, Crennan, Bell and Keane JJ).
[52] *Filippou v The Queen* (2015) 89 ALJR 776 at [15] (French CJ, Bell, Keane and Nettle JJ); *Baini* at [33] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[53] *Weiss* at [44] (the Court).
[54] (2005) 224 CLR 300.
[55] *Weiss* at [45] (the Court); see also *Libke v The Queen* (2007) 230 CLR 559 at [46] (Kirby and Callinan JJ, in dissent).
[56] See *AK v WA* (2008) 232 CLR 438 at [59] (Gummow and Hayne JJ).
[57] *Evans v The Queen* (2007) 235 CKR 521 at [42] (Gummow and Hayne JJ).
[58] *Baiada* at [23] (French CJ, Gummow, Hayne and Crennan JJ).

language of s 353(1) CLCA.[59] They are apt to "mask" the nature of the appellate court's statutory task[60] and are "liable to distract attention" from that task.[61]

34. On one view, questions as to "inevitability" or "fair chances of acquittal" might often (if not always) be resolved by virtue of the appellate court having itself come to satisfaction of guilt beyond reasonable doubt on the record. For once an appellate court has determined, on the record, that there is no reasonable hypothesis consistent with innocence (thereby being satisfied of guilt beyond reasonable doubt),[62] logic necessitates the conclusion that it was not open to a reasonable jury to *accept* any such hypothesis consistent with innocence.[63] Equally, where an appellate court concludes that the only reasonable verdict available on the evidence properly admissible at trial was a guilty one, then that court cannot itself fail to be satisfied of guilt beyond reasonable doubt.

35. In the event that determination of whether the error in the trial "in fact" occasioned a substantial miscarriage of justice gives work to the concepts of "inevitability" or "fair chances of acquittal" beyond merely emphasising the high standard of proof and the natural limitations of the appellate task,[64] and in fact poses questions that are not resolved by the appellate court's satisfaction of guilt beyond reasonable doubt, then the analysis which they invite is one concerned with the relationship between the particular error identified and the particular issues at trial. In essence, attention is directed to whether there is any real likelihood, in all the circumstances, of the particular trial jury having reasoned impermissibly to guilt as a result of the error.[65] It appears it was an analysis of this nature which was undertaken by the plurality in *Reeves v The Queen*.[66] It is also the approach reflected in the reasons of the Court below in this case.

36. The Full Court addressed itself to matters in substance akin to those addressed by the plurality in *Reeves*, such that (assuming those conclusions were properly reached – a matter addressed below), there is no error in its conclusion that no substantial miscarriage of justice had actually occurred.

Reaching Satisfaction of Guilt Beyond Reasonable Doubt

37. In light of the particular submissions made by the appellant, one further preliminary observation is necessary.

38. The principles identified above do not have the consequence that each and every intermediate inference or conclusion drawn from the evidence by the appellate court must, in isolation, have been the only intermediate inference or conclusion reasonably

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[59] *Weiss* at [33] (the Court); see also *Baiada* at [31] (French CJ, Gummow, Hayne and Crennan JJ); *Reeves* at [51] (French CJ, Crennan, Bell and Keane JJ).
[60] *Weiss* at [33] (the Court).
[61] *Weiss* at [40] (the Court).
[62] Assuming it is capable of making that determination, noting that in many cases it will be incapable of doing so due to the "natural limitations" attending the appellate review.
[63] See *Baiada* at [35] (French CJ, Gummow, Hayne and Crennan JJ). See also *Baini* at [33] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *AK v WA* at [59] (Gummow and Hayne JJ).
[64] Cf *Weiss* at [40] (the Court).
[65] *Reeves* at [51]-[58] (French CJ, Crennan, Bell and Keane JJ), [65] (Gageler J).
[66] See *Reeves* at [51-[58] (French CJ, Crennan, Bell and Keane JJ). It may be observed that Gageler J left open the possibility that in a case of that nature either one of satisfaction of guilt beyond reasonable doubt, or exclusion of the possibility that there was any real likelihood that the trial jury had reasoned impermissibly to guilt as a result of the error, might have been sufficient in order for the appellate court to apply the proviso; at [66].

open. What is necessary is that the strands of evidence in the circumstantial prosecution case, taken in combination, properly ground satisfaction of guilt beyond reasonable doubt (or, the "inevitability" of the conviction).

39. In light of the appellant's submissions, three uncontroversial observations are necessary to repeat:

    (i) The only intermediate matters (evidence or inferences) which must be excluded beyond reasonable doubt are those matters *inconsistent* with the appellant's guilt;

    (ii) The only intermediate matters which must be accepted beyond reasonable doubt are those which constitute an indispensable link in reasoning to the appellant's guilt;[67]

    (iii) Exclusion of matters inconsistent with guilt, and acceptance of matters indispensable to a conclusion of guilt, can occur by force of the combined effect of other circumstantial evidence.[68]

40. With respect, various of the appellant's submissions are advanced contrary to at least the first and third propositions identified above. As to the first, for example, it was not necessary for the Full Court to reject beyond reasonable doubt the evidence[69] of the statement made by the appellant to Detective Georg,[70] nor for it to reject beyond reasonable doubt other evidence which merely "raised the possibility of Gange's involvement".[71] Neither was evidence *inconsistent* with a finding of guilt such that the Full Court had to exclude it as a reasonable possibility before it could be satisfied beyond reasonable doubt of the appellant's guilt. As to the third proposition, for example, it was not necessary that Castle's text messages, on their own, conclusively determine the issue of identity.[72] It was only necessary that that evidence, in combination with other evidence, satisfy the Court beyond reasonable doubt that the appellant was the shooter.

The approach of the Court below

41. Before setting out why it found that in this case no substantial miscarriage of justice had actually occurred, the Full Court expressly recognised that:

    (i) their satisfaction of guilt beyond reasonable doubt was a necessary, but not sufficient, condition for the application of the proviso;[73]

    (ii) determining whether a substantial miscarriage of justice had actually occurred was not a matter of speculating about what a properly instructed jury would do, or would have done, on the admissible evidence, absent the error or miscarriage demonstrated;[74]

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[67] *Shepherd v The Queen* (1990) 170 CLR 573 at 579 (Dawson J).
[68] *R v Hillier* (2007) 228 CLR 618 at [46] (Gummow, Hayne and Crennan JJ); *Shepherd v The Queen* (1990) 170 CLR 573 at 579 (Dawson J).
[69] Either the truth of the statement, or the fact that it was exculpatory.
[70] Cf AS at [70.1]. First, that evidence was capable of being interpreted as exculpatory or inculpatory, such that it could not be said to be evidence inconsistent with guilt. Second, even if that evidence was interpreted only as exculpatory, it was still not inconsistent with a finding of guilt.
[71] Cf AS at [70.2].
[72] Cf AS at [69.4].
[73] CCA at [103].
[74] CCA at [104].

(iii) the appeal Court must make its own independent assessment of the evidence, making due allowance for the natural limitations that attend that task;[75]

(iv) in the ordinary course, the proviso could not be applied in a case where guilt or innocence depended upon an assessment of oral evidence.[76]

42. To make a proper assessment of the Full Court's conclusion as to the application of the proviso and the validity of their reasoning on that topic, it is necessary to understand not only the approach broadly taken by the Court to the issue, but to identify carefully the particular order in which essential findings were made (the steps), and the Court's reasons for those findings.

The first step: Rejection of Castle's evidence

43. The first step was to consider the evidence of Castle and for the Court to conclude whether its essential aspects were to be rejected (beyond reasonable doubt). Castle's evidence was the only direct account of the events in question. Castle's evidence was directly incompatible with guilt on the part of each of the appellant and Castle, such that rejection beyond reasonable doubt of the critical aspects of her evidence amounted to an essential precondition to the application of the proviso in this case.[77]

44. The Court below held that, on the critical issues,[78] Castle's evidence could be attributed no weight, holding:

> 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.[79]

45. It is necessary to examine closely the reasons of the Court. In doing so, it is to be borne in mind that on a review of the evidence at trial, an appellate court will sometimes be capable of rejecting oral evidence (including that of an accused) in light of the objective evidence.[80]

46. Whilst the Court was not required to make reference to every aspect of the evidence,[81] it did give particularly detailed reasons for finding that Castle's evidence was "obviously false". In analysing those reasons, it is relevant to consider whether reliance upon any disputed oral evidence contrary to that of Castle was necessary in order for the Court to reach its conclusion. None was. The Court was cognizant of the limitations attending its task. Its extensive, if not exclusive, reliance upon the objective evidence in its reasoning to this conclusion bespeaks that cognizance, as does its manner of expression of the conclusion itself.[82]

47. Eleven distinct reasons for the Court's conclusion may be identified.[83] The respondent addresses each in turn. The jury did have the advantage of seeing and hearing Castle

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[75] CCA at [104].
[76] CCA at [106].
[77] In respect of both the appellant and Castle.
[78] Although the Full Court's conclusion that Castle's evidence could be given "no weight" is not expressly limited to her evidence on the critical issues, so much is necessarily implicit. For example, there could be no doubt that her evidence that she had been the female driver at the carwash was true and accurate.
[79] CCA at [106]. See also the conclusion at [127].
[80] *Reeves* at [45]-[46] (French CJ, Crennan, Bell and Keane JJ); cf AS at [72].
[81] *Reeves* at [46] (French CJ, Crennan, Bell and Keane JJ); cf AS at [68.3].
[82] CCA at [106]. Namely, that Castle's evidence was "inconsistent with the objective evidence" and "on its face" obviously false.
[83] CCA at [107]-[126].

give her oral evidence. However, if the objective evidence, the inferences to be drawn from that objective evidence, and inherent improbabilities in her evidence (having regard to matters of common sense and experience) had the combined effect that the content of her evidence on the critical issues (i.e. her account) was necessarily false, then her particular presentation in the witness box assumes no significance.

48. Further, the issue is not that other approaches might have been taken to one or more of the eleven reasons identified.[84] The issue is whether the cumulative force of those reasons safely allows the relevant conclusion to be reached: that her evidence on the critical issues could not be a reasonable possibility. It is not enough to attack, even successfully, some aspects of the particular reasoning process adopted unless the conclusion cannot stand.

49. The Court's first reason is set out at [107]-[108] of the judgment. It concerns Castle's denial that her text messages to McDonald were designed to persuade him to meet with her in the hope of some reconciliation (part of the plan as overheard by M).[85] The Court gave several reasons for finding that aspect of her evidence to be false. None involved consideration of M's evidence:

    (i) The messages were expressed in affectionate terms and could in this way be contrasted with earlier messages.

    (ii) The messages recommenced just days after the alleged theft (i.e. a theft that she deposed she believed McDonald had committed and which thereby spoke against her expressing herself affectionately unless it was not genuine).

    (iii) The asserted purpose of the meeting (the return of personal items) was implausible having regard to the time of the meeting, the absence of any reference to that topic in the messages, the location from which the property was to be recovered and the absence of any past efforts to retrieve it.

    (iv) Castle's evidence that she had accidently expressed herself in affectionate terms was not credible, leaving open only that it was deliberately expressed in that way, which, in light of the whole of the evidence (including the events at the carwash), left as the only explanation open that she was in fact implementing a plan of the type about which M had given evidence.

50. The second reason is set out at [109] and relates to Castle's explanation for the text sent to Bristow at 5.01am.[86] The Court's three bases[87] for finding that explanation fanciful relied only upon the objective evidence of the telephone records, CCTV footage and evidence of distance between the relevant locations, in combination with matters of common sense.

51. The third reason appears at [110]. Castle's evidence was that Gange was with her and the appellant at Sapphire Court between 5.00am and 6.00am and that they were

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[84] Cf AS at [68]-[69]. For example, see *Reeves* at [45]-[46], [49] (French CJ, Crennan, Bell and Keane JJ).

[85] Exhibit P15; Castle TX at 2306-2309, 2315-2316, 2343-2344, 2349-2351, 2356-2359, 2361-2379, (and, regarding the text "running xox") 2309-2311.

[86] Castle TX at 2372-2376.

[87] First, the implausibility that Castle would send a text to Bristow without first sending a text to the appellant or Gange, given they were the two people said to be keeping her waiting. Second, that there would have existed no reason for Castle to think the appellant did not have his keys with him unless the appellant had told her as much. Third, the time at which the appellant left Cadell Court, coupled with the evidence of the distance between that location and Castle's location, rendered it doubtful the appellant had not arrived by 5.01am.

loading up the car with the appellant's belongings.[88] This aspect of her evidence was important for at least three reasons. First, unless Gange was present then Castle's evidence that, unexpectedly, he had left Sapphire Court with her and travelled to the carwash could not be true. Second, if this period of time was spent loading up the car, then that time could not have been spent "circling" the carwash as alleged by the prosecution and as suggested by the phone records. Third, if items were being loaded into the boot, then the appellant could not have been secreted there immediately before the shooting. This aspect of Castle's evidence was rejected as false, given the phone records showed that Gange's phone was elsewhere.

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52. Whilst the Full Court made reference to the evidence of M as to Gange's whereabouts at that time, that reference does not indicate that reliance on her evidence was essential to the conclusion that Castle's evidence on this topic was a lie. The Court's reasons are consistent with it finding on the phone records that Castle had lied and observing that such a conclusion was consistent with M's evidence. Effectively, M's evidence gave further confirmation to a conclusion already reached. In the alternative, the phone records offered such (objective) support for the evidence of M that it was open to accept her evidence on that issue, despite it being disputed.[89]

20 53. The fourth reason is set out at [111]-[113]. Castle's evidence was that she did not leave Sapphire Crescent until after 6.00am.[90] That is, that in the preceding hour she was loading the car and not "circling" the carwash. The phone records[91] showed that evidence to be false.

54. As the Court considered,[92] the phone records could not be explained away by a technical error. It was not just one "glitch or erroneous computer record" that needed to be a reasonable possibility, but a multitude. The Court further observed that the pattern of movement revealed by the phone records was consistent with "a substantial body of circumstantial evidence from which the plan to entrap Mr
30 McDonald [could] be inferred."[93] Again, the Court did not rely upon the direct evidence of that plan (i.e. the disputed evidence of M), instead basing its conclusion on the "circumstantial evidence", including the telecommunications evidence more broadly.[94]

55. The Court's fifth reason appears at [114]. Castle's evidence was that while loading the car between 5.00am and 6.00am she was still planning to meet McDonald alone after leaving the appellant at her mother's home.[95] The Court did not hold that this aspect of her evidence was a lie, but that it was "improbable". It was open for it to do so. For example, there is no reason why a last minute decision of Gange to come with her to meet McDonald, would cause the original plan to drop the appellant at her
40 mother's to be abandoned. Further, and as the Full Court observed "more importantly", her account that Gange accompanied her conflicts with the evidence that communications from Gange's mobile phone during this period were relayed through the Klemzig tower (indicating that he had returned to Gosfield Crescent).

56. The sixth reason is set out at [115]-[117]. Castle gave more than one account for how she claimed the appellant's phone came to be in the car without him, thereby

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[88] Castle TX at 2313-2315, 2317, 2375.
[89] *Reeves* at [45]-[46] (French CJ, Crennan, Bell and Keane JJ).
[90] Castle TX at 2398-2400, 2409-2413.
[91] Exhibit P15.
[92] CCA at [113].
[93] CCA at [113].
[94] And, no doubt, in light of the events which did in fact take place at the carwash.
[95] Castle TX at 2318, 2327, 2380-2381.

explaining why the appellant was separated from his phone at the time of the shooting.[96] The Full Court identified several bases for rejecting that evidence. Each emanated from the phone records, which enabled the conclusion that Castle's evidence on this topic was "implausible" and could be excluded beyond reasonable doubt.

57. The seventh reason is articulated at [118]-[119]. It relates to aspects of Castle's account of the events at the carwash. The Court's rejection of this account was open. That it was "relatively unusual" that Gange would move to the backseat in the way Castle described was a matter of common sense, and an observation only reinforced by the undisputed evidence of his injuries. Similarly, common sense tends against the suggestion that a person would enter the vehicle despite the obvious presence of a person "whom he had reason to fear".

58. The eighth reason is identified in the first three sentences of [120]. It relates to Castle's evidence that when she received a call from Gange's phone (an improbable event in itself given that she claimed Gange was in the car at the time), she allowed Gange to answer the call but did not thereafter speak to Gange about it.[97] It was open to find that aspect of her evidence "not credible".

59. The ninth reason is set out in the final sentence of [120] and in [121]-[123]. It relates to Castle's evidence of calls made to the appellant's phone from Gange's phone at 6.25.10am and 6.25.46am.[98] For the reasons there given, it was open to the Court to conclude that Castle had lied about the calls appearing in the phone records. The reference to the oral evidence of Tuhukava is reference to evidence which was not disputed and which was confirmed by the phone records.[99]

60. The tenth reason appears at [124]. The Court found Castle's explanation for driving off within 30 seconds of McDonald entering her car[100] to be "most improbable". The objective evidence was that McDonald was smoking when he arrived.[101] She could have asked him for a cigarette. Further, she claimed that she drove off for this purpose in the midst of Gange arguing with McDonald.[102] It was open to doubt the likelihood of such a course. Finally, such departure would seem unlikely if the purpose of the meeting was for Castle to recover her property from McDonald.

61. The eleventh reason is explained at [125]-[126]. Castle gave an account of what occurred immediately after the shooting. She said that Gange had pointed the gun at her and threatened her life, then, while she was driving away, he had obtained her phone and used it to send a text (to McDonald and designed to give her an ailibi). She then dropped him in the street, but shortly thereafter went to his house (even though he may have been there).[103] It was open to the Court below to conclude that such an account was "inherently unlikely".

62. In light of the combined force of the reasons given, the Full Court did not err in concluding that Castle's evidence was "so riddled with patent falsehoods that it

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[96] Castle TX at 2319, 2442-2444.
[97] Castle TX at 2401-2403.
[98] Castle TX at 2423-2427.
[99] Exhibit P20.
[100] Castle TX at 2335, 2405.
[101] CCTV footage from the carwash (Exhibit P7). See also the XXN of Castle at TX 2405.
[102] Castle at TX 2293, 2335, 2405.
[103] Castle at TX 2305, 2339, 2381-2385, 2391, 2393, 2398, 2417-2419.

[could] be given no weight at all".[104]

The next step: Satisfaction of the appellant's guilt beyond reasonable doubt

63. The next step of the Court was to consider its finding with respect to the guilt of the appellant.[105] The Full Court was satisfied beyond reasonable doubt that the appellant shot McDonald. If that finding was made, satisfaction of all elements was inevitable.

64. In considering the reasons given for this conclusion, it is important to note three particular matters:

First, and contrary to the appellant's submissions,[106] the rejection of Castle's evidence as a reasonable possibility was not used in a positive way against the appellant. The relevance of that rejection was simply that Castle's evidence provided no impediment to a conclusion that the appellant was the shooter (or, indeed, the ultimate conclusion that no substantial miscarriage of justice had actually occurred).

Second, the extent to which the reasoning of the Court relied upon evidence with respect to which the jury enjoyed a relevant advantage.

Third, the extent to which the matters specifically set out at [128] properly drew upon the detailed consideration already given to the objective evidence, and conclusions already drawn.

65. The Court expressly identified six reasons for being satisfied beyond reasonable doubt that the appellant was the shooter (and, thus, necessarily, of his guilt beyond reasonable doubt). Taken together, the Full Court did not err in its conclusion.

66. As to the first (that the phones of Castle and the appellant were circling the carwash early that morning and were in the car at the time of the shooting), two points may be made. First, that the appellant's phone was in the car at the time of the shooting was not disputed.[107] Second, the conclusion that the phones were "circling" the carwash at the relevant time was the clear inference arising from the undisputed phone records and the conclusion that repeated error was not a reasonable possibility.[108]

67. As to the second (motive), the evidence giving rise to the relevant motive was not disputed. Motive arose from dissatisfaction with McDonald because of the break-in and a $1000 debt. That evidence was not disputed by the appellant (or, for that matter, Castle), such that the Full Court was in the same position as the jury to conclude whether it gave rise to a relevant motive. Bristow gave evidence that the appellant spoke to him in the early hours of the morning and said that he wanted to catch up with McDonald about the $1000 that was owed, that he wanted it straightaway, and that in the appellant's presence the break-in had been mentioned by Gange.[109] In cross-examining Bristow, the appellant did not dispute this.[110] The appellant had also sent a text message to the same effect.[111]

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[104] CCA at [127].
[105] CCA at [128].
[106] AS at [67.1].
[107] The appellant did not object to the tender of the charts or other phone records. This was also Castle's evidence, and the appellant did not cross-examine her.
[108] See CCA at [113].
[109] Bristow TX at 1586.
[110] Bristow TX at 1615. It was also Castle's evidence that the appellant was "annoyed" about both the break-in and the $1000 debt not having been re-paid: Castle TX at 2366, 2416.
[111] Exhibit P15 entry 266.

68. It is also necessary to recognise the nature of the particular plan the Full Court attributed to the appellant, for it is *that* plan to which the evidence of motive must be said to relate. Whilst the break-in and $1000 debt may not have provided much of a motive to kill a person, the Court did not reason that it was. To the contrary, the Court found that the relevant plan was not to kill,[112] but to "confront the deceased with a gun in order to detain him in the car until he could be confronted about the break-in".[113]

69. As to the third and fourth (the evidence of M that a plan was discussed by Castle to lure McDonald and the text messages in apparent execution of that plan) it is appropriate to deal with these matters together. Whilst M's evidence was disputed, in the circumstances of this case the Full Court was not precluded from accepting her evidence on this topic, despite the natural limitations attending its task. By the time the Court was drawing its conclusion at [128], Castle's evidence to the contrary had already been excluded as a reasonable possibility without any reliance upon M's evidence.[114] Castle's explanations having been rejected, it remained for the Court to determine whether it accepted M's account as to a plan. Such conclusion may not have been appropriate without the Court having had the benefit of seeing and hearing M give her evidence, except that on the whole of the evidence – including the phone records and the undisputed aspects of the events at the carwash – no reasonable inference remained open other than that a plan in the nature of the one relayed by M was being executed.[115]

70. As to the fifth (regarding Gange's presence at the Gosfield Crescent house at the time of the shooting), there is again no difficulty with the Court's reference to M's evidence. The only direct evidence to the contrary had come from Castle, and by this stage the Court had rejected her version beyond reasonable doubt without reliance upon M's evidence. That account having been rejected, in all the circumstances the only inference which remained a reasonable possibility was that Gange was with his phone and not in the car. Further, there was no dispute that someone was in the car with Castle and that person was the shooter. Critically, the trial (quite properly) proceeded on the basis that if the shooter had not been Gange, then it was the appellant.[116] The cumulative effect of these matters is that acceptance of M's evidence – that Gange had been at Gosfield Crescent at the time of the shooting – was inevitable.

71. As to the sixth (the difficulty with which a man with Gange's injuries would have in hiding in the boot and moving from there into the compartment of the car). The evidence of Gange's injuries and mobility had not been challenged.[117] The evidence as to the dimensions of the boot and the opening into the back seat through which he would have had to manipulate himself was also not disputed.[118] Once Castle's evidence could be given no weight, the jury enjoyed no advantage over the Court below.

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[112] Cf AS at [69.2].
[113] CCA at [129].
[114] CCA at [107]-[108]. See [46]-[62] above.
[115] Even if another inference might have otherwise remained open, M's version received such significant support the undisputed evidence that the Court could accept her account: see *Reeves* at [45]-[46] (French CJ, Crennan, Bell and Keane JJ).
[116] These were the terms in which the trial judge directed the jury (Summing Up at 29), and no complaint was made.
[117] M TX at 1294-1297, 1476, 1484-1487; Finn TX at 1522-1523; see also Castle TX at 2385-2388.
[118] Strange TX at 1749-1751.

The next step: Satisfaction of Castle's guilt beyond reasonable doubt

72. Although not directly relevant to the appellant's appeal, it may be noted that the Court then addressed its satisfaction beyond reasonable doubt of the matters pertaining to Castle's guilt.[119]

The penultimate step: Consideration of matters other than satisfaction of guilt

73. Having reached satisfaction that the appellant's (and indeed Castle's) guilt was established beyond reasonable doubt, the Court did not simply proceed to conclude that no substantial miscarriage of justice had actually occurred.[120] Having acknowledged that such satisfaction could not necessarily resolve that question,[121] the Court turned its attention back to the evidence to which the trial judge's error had related, and its place within the context of the whole of the case at trial.

74. To conclude safely that no substantial miscarriage of justice had actually occurred, attention was to be given to the nature and significance of the error in the context of the issues and conduct of the trial.[122] The Court's conclusion in this respect appears at [130], and its effect must be understood in light of the test it identified for itself at [22]: that is, whether the other evidence rendered the appellant's conviction "inevitable" or so overwhelmed the disputed admission that the jury "*would not* have relied on it in any material way".[123] In substance, this amounts to a conclusion that the error in this trial did not "in fact" occasion a substantial miscarriage of justice[124] – or, put another way, that there is no real likelihood that the jury reasoned impermissibly to guilt as a result of the error identified. For the reasons which follow, the Court was, with respect, correct so to conclude.

75. As already noted, the sole issue in the appellant's trial was whether he was the shooter. As a result of the trial judge's erroneous direction, the jury were (improperly) left with a choice as to the effect of the appellant's out of court statement overheard by Pascoe (i.e. as being exculpatory or inculpatory). The risk arising from the error lay in the possibility that the jury might reason to the appellant's guilt on the basis of (wrongly) interpreting the evidence as inculpatory.

76. However, as the Full Court identified, consideration of the statement alone could not resolve the ambiguity.[125] Thus, in order for the jury to determine whether the statement was to be viewed as exculpatory or inculpatory (if indeed they were to rely upon it at all) it necessarily had to do one of two things:

    (i) look to the entirety of Pascoe's evidence on the topic to resolve the ambiguity; or

    (ii) determine that the ambiguity could not be resolved by only considering Pascoe's evidence on the topic.

77. In the first circumstance, resolution of the ambiguity on the basis of Pascoe's evidence alone was only capable of being resolved in favour of the appellant. The Full Court identified as much in concluding that "Pascoe's answers in cross-examination

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[119] CCA at [129]. See Respondent's Submissions in *Castle v The Queen* (A24 of 2016) at [70]-[74].
[120] Cf AS at [67.2], [73].
[121] CCA at [103].
[122] *Reeves* at [51]-[58] (French CJ, Crennan, Bell and Keane JJ); see also *AK v WA*.
[123] CCA at [22] (emphasis added).
[124] See *Reeves* at [51] (French CJ, Crennan, Bell and Keane JJ).
[125] CCA at [12]-[22].

and re-examination *unequivocally show*"[126] that her evidence was of an exculpatory statement.[127] In this postulated circumstance, there exists no risk that the jury relied impermissibly on the evidence in reasoning to the appellant's guilt.

78. In the second circumstance, the ambiguity was only capable of being resolved upon consideration of the balance of the evidence in the case against the appellant. If the balance of the circumstantial case led the jury to conclude that the statement was inculpatory, then that would only be because the balance of the evidence had caused the jury to conclude that the appellant was the shooter. That being so, the risk that the jury might incorrectly accept that evidence as inculpatory was only capable of occurring in circumstances where the remainder of the prosecution case had already satisfied the jury that the appellant was the shooter.[128]

79. The Full Court was thereby correct to conclude that the jury would not have relied upon on the statement in any material way and were then properly in a position to conclude that no substantial miscarriage of justice had actually occurred.[129]

The final step: Conclusion as to substantial miscarriage of justice

80. It recorded that final necessary state of satisfaction at [131], at which point it was duty-bound to apply the proviso and dismiss the appeal.

Pascoe's Evidence of Firearm Possession (Ground 1)

Pascoe's evidence and the trial judge's direction

81. Pascoe's evidence falls to be considered against the background of certain other evidence regarding the particular type of firearm which may have been used to kill McDonald.

82. M gave evidence that, about two or three weeks before the shooting, the appellant brought a handgun to her house and showed it to Gange.[130] The admissibility of this evidence was not disputed.[131] M drew a picture of the firearm she claimed to have seen, which picture was tendered, and three photographs of firearms that M was asked to look at were also tendered. One of those, KM-2, depicted a firearm which M described as "very similar" to the firearm she had seen the appellant produce.[132] Another, KM-3, was "very close" to the firearm she had seen.[133] KM-3 depicted a

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[126] CCA at [18] (emphasis added), see also at [12]-[22] generally.
[127] As an out of court statement of a purely self-serving or exculpatory nature (i.e. not mixed), it was in fact inadmissible for this purpose: *Barry v Police* (2009) 197 A Crim R 445 at [67] (Kourakis J); *Melbourne v The Queen* (1999) 198 CLR 1 at [13] (McHugh J).
[128] This is not a case where it is possible that the jury may have (wrongly) used the admission to allow it to reach satisfaction beyond reasonable doubt that the appellant was the shooter. Because the ambiguity of the evidence meant it was, at worst, equivocal, any reliance upon it as inculpatory can only have occurred in circumstances where the jury had, without reliance on that evidence, come to the view that the appellant was the shooter.
[129] It is implicit in the Court's finding that the statement in question was a minor part of the evidence that the trial judge's misdirection could not be characterised as a fundamental flaw.
[130] M TX at 1310-1313.
[131] Even though it could not be conclusively demonstrated that the handgun M saw had been the firearm used to kill McDonald, evidence of possession of an object which "*might*" have been used in the commission of the crime alleged is admissible; *Thompson and Wran v The Queen* (1968) 117 CLR 313 at 316 (Barwick CJ and Menzies J), referred to with approval in *Festa v The Queen* (2001) 208 CLR 593 at [186] (Kirby J).
[132] M TX at 1314-1318.
[133] M TX at 1318.

Glock 17. Expert evidence established that only a small number of firearms left marks on a projectile the same as those fired at McDonald.[134] One such firearm was a Glock 17.[135] Thus, it was open to the jury to conclude that the firearm which had been used to kill McDonald was a Glock 17 (and, indeed, that the firearm M claimed to have seen in the appellant's possession had been that Glock 17).

83. Pascoe gave evidence that approximately three or four months before the shooting she was present when the appellant showed her father three handguns.[136] In November 2014 Pascoe was then shown a number of photographs of firearms. She identified one as "similar" to one of the three handguns she had seen the appellant show her father,[137] but it was accepted that that particular handgun could not have been the firearm used in the shooting. Pascoe was unable to give much detail about the other two firearms she had seen, other than that each was a handgun. Hence, neither was able to be excluded as having been a Glock 17.

84. The direction given to the jury with respect to Pascoe's evidence invited the jury to consider whether one of the firearms she had seen was the Glock 17:

> One of them she remembered and said it was very like another pistol that she was shown in the photograph which could not be a pistol that fired the projectiles but of course she was not able to say very much at all about the other two. So you have a situation where one of the other two could of course be the Glock that was later seen by [M]. I mean, there is reason to believe that it was a Glock, the pistol that was seen by [M], I will put it that way, closer to the time of the shooting on 3 February 2013. So you do have two bodies of evidence there of Bucca in possession of pistols, and are coming from two different witnesses, and the prosecution would say at a relevant time, a time not too distant from the shooting in February, and once again that's a matter for you to assess.[138]

85. In addition, the trial judge gave specific directions about the impermissible uses to which the evidence regarding the appellant's firearm possession was not to be put.[139]

The approach of the Court below

86. The Court below took the view that Pascoe's evidence was evidence of "discreditable conduct" on the part of the appellant, such that s 34P of the *Evidence Act 1929* (SA) governed its admissibility.[140] It is arguable that evidence of mere firearm possession, in the absence of evidence of that possession being unlawful or put to some discreditable use, is not properly characterised as evidence of discreditable conduct.[141] If that is correct, then Pascoe's evidence was not even rationally capable of being put to an impermissible use.[142] Further, if it was not discreditable, the Full Court's treatment of it as such was in the appellant's favour.

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[134] De Laine TX at 1066-1067, 1070-1071, 2069.
[135] De Laine TX at 1066-1067, 1070-1071, 2069.
[136] Pascoe TX at 1876-1881, 1907-1909, 1912.
[137] Pascoe TX at 1893-1897.
[138] Summing Up at 169.
[139] Summing Up at 53.
[140] CCA at [89]-[90].
[141] In *Driscoll v The Queen* (1977) 137 CLR 517 the evidence was of the applicant's possession of *unlicensed* weapons (with respect to the cache of weapons at the accused's address), see at 532, and of the applicant discharging a firearm in order to *assault* another person, see at 535.
[142] Cf CCA at [96].

87. In any event, even proceeding on the basis that the Court below did,[143] Pascoe's evidence regarding all three firearms was admissible. The Full Court identified it as relevant and admissible for two primary purposes.

    (i) It was evidence capable of giving rise to the inference that one of the firearms Pascoe had seen the appellant produce was the *particular* firearm used to kill McDonald.

    (ii) It was evidence tending to establish that the appellant had *access* to handguns (that is, items of "the same character" as the item used to kill McDonald).

10 Each of these primary purposes was also, in turn, accompanied by a further important purpose, relating to the credibility and reliability of the disputed evidence of M.

Possession of the Particular Firearm Used

88. M's evidence of the appellant's possession of a handgun two to three weeks before the shooting was relevant and admissible because it was evidence of possession of an object which "*might*" have been used in the commission of the crime alleged.[144] As already observed, the appellant did not contend otherwise.

89. Pascoe's evidence of the appellant's possession of three handguns three to four
20 months before the offence was relevant and admissible on the same basis. Only one of the three handguns seen by Pascoe was excluded as being capable of being the particular firearm used in the shooting. It remained the case, then, that one of the other two firearms *might* have been the particular handgun used to kill McDonald.

90. The principle of completeness[145] necessitated the admission of Pascoe's evidence of all three handguns, despite one having been excluded as the particular firearm used.

91. In addition, it is to be recalled that the appellant disputed M's evidence about seeing him with a firearm two to three weeks before the shooting. Pascoe's evidence was
30 also relevant to the assessment of M's (disputed) evidence. If it could be inferred from Pascoe's evidence that the appellant had had possession of the particular firearm used in the offence, this tended to increase the likelihood that M's evidence – insofar as it suggested he had had possession of the particular firearm – was true. Pascoe's evidence was thus also relevant and admissible in that it tended to confirm the credibility and reliability of M's evidence.

Access to an Item of the "Same Character"

92. Even if the view was taken[146] that, on the whole of the evidence it was not open to conclude that one of the handguns seen by Pascoe had been used in the shooting,
40 her evidence remained admissible. Possession of an item "of the same character" as that used in the crime is admissible even if it is not possible that that item was used in the actual offence charged.[147]

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[143] Namely, that it is properly characterised as evidence of discreditable conduct.

[144] *Thompson and Wran v The Queen* (1968) 117 CLR 313 at 316 (Barwick CJ and Menzies J); see also *Festa v The Queen* (2001) 208 CLR 593 at [186] (Kirby J).

[145] *Thompson and Wran v The Queen* (1968) 117 CLR 313 at 317 (Barwick CJ and Menzies J); *Driscoll v The Queen* (1977) 137 CLR 517 at 533 (Gibbs J); see also *Festa v The Queen* (2001) 208 CLR 593 at [186] (Kirby J).

[146] Contrary to the respondent's submissions.

[147] *Thompson and Wran v The Queen* (1968) 117 CLR 313 at 316 (Barwick CJ and Menzies J). Many of the examples given by Barwick CJ and Menzies J – "a supply of gelignite, detonators, wires and batteries" – are necessarily items that had not been used in the offence charged (as they

93. It was relevant for the jury to know whether the appellant might be able to access an item of "the same character" as that used in the commission of the offence. Indeed, to have been the shooter, the appellant needed to have had a handgun. Thus, evidence capable of supporting the inference that the appellant had the means or ability to acquire handguns ("access") was relevant. The evidence of Pascoe permitted of that conclusion. Evidence of such means or ability does not rely upon any propensity of the appellant.[148]

94. In considering the significance of the ability to access an item, it is necessary to have regard to the nature of the item in question. Handguns (indeed, firearms) are not items readily accessed, and in this respect differ qualitatively from widely available items, such as knives or baseball bats, which can be adopted for use as a weapon.[149]

95. The conclusion that Pascoe's evidence was relevant to demonstrate "access" bears no inconsistency with this Court's decision in *Driscoll v The Queen*. Relevantly, the Court there held that two bodies of evidence were inadmissible: evidence of other weapons found in a cache at the applicant's home, and evidence of the applicant having, on a previous occasion, discharged a "black gun" at the feet of another person. As regards the other weapons in the cache, the specificity of the evidence in that case was such that certain of the items could be excluded as not being of the "same character" as the firearm used in the offence. The one item which was of the same character was admissible. It was also evidence in relation to which the principle of completeness had no relevant application.[150] With respect to the "black gun", the generality of that evidence did not permit of a conclusion that the item was not of the same character as the firearm used in the offence. However, the Court determined that that evidence was inadmissible because of its extraordinarily prejudicial nature. Unlike the present case, the evidence was not of mere possession, but that the item had been discharged by the applicant to assault another person. It thus "tended to show that the applicant was a man of violent disposition who was likely to use firearms", and for that reason should not have been admitted.[151] Finally, in *Driscoll*, whether or not the applicant had "access" to an item of the character used in the shooting was not a fact in issue, it having been accepted that the applicant had had access to another machine pistol.

96. As before, this "access" use of Pascoe's evidence was also capable of tending to support the evidence of M.

Probative value "substantially outweighed" any prejudicial effect

97. Proceeding on the basis that the Court below did – namely, that Pascoe's evidence was evidence of discreditable conduct on the part of the appellant – it was necessary that the probative value of her evidence "substantially outweigh" any prejudicial effect

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would not remain to be later seen by police in the possession of the accused), but merely items of the same character as those used.

[148] Cf AS at [83].

[149] The appellant relies upon Priest JA in *Murrell v The Queen* [2014] VSCA 334 at [122] (AS at [79]). That comment was made in the context of finding (in dissent) that the firearms described could not have been the firearms used, although Priest JA accepted that evidence of possession of a tool of crime which might have been used in the offence is admissible. The passage does not assist the appellant.

[150] *Driscoll v The Queen* (1977) 137 CLR 517 at 533 (Gibbs J).

[151] *Driscoll v The Queen* (1977) 137 CLR 517 at 535 (Gibbs J). It may also be noted that it was an impermissible use of this very nature in respect of which the jury in this case were specifically directed: see Summing Up at 53.

it may have had.[152] In determining this question, the Court was required to have regard to whether the permissible uses of the evidence could be kept sufficiently separate and distinct from any impermissible reasoning (in this case, that the appellant had a general criminal propensity or a propensity to commit offences with firearms).[153]

98. The Court below was, with respect, correct to conclude that the whole of Pascoe's evidence was admissible for the purposes identified.

99. To the extent that the probative value of Pascoe's evidence may be said to have been weakened by the generality of her evidence, two observations fall to be made. First, the generality of her evidence does not serve to weaken the probative value of her evidence insofar as it is demonstrable of the appellant having *access* to handguns (and insofar as that use also supported the evidence of M). Second, any resultant reduction in the probative value of her evidence as regards whether she saw the appellant possessing the *particular* firearm used in the offence does not have the consequence that the evidence "cannot rationally affect" the strength of that inference.[154]

100. Further, even assuming that Pascoe's evidence was capable of giving rise to impermissible propensity reasoning, and even putting to one side the direction the jury were given on this issue,[155] it is difficult to see what prejudicial effect her evidence could have occasioned above and beyond the identical risk of prejudice arising from M's evidence. That is, given the admission of M's evidence that the appellant had possession of a firearm two to three weeks before the shooting, what further prejudicial effect could have been occasioned by the admission of Pascoe's evidence? In the result, given the (unchallenged) admission of M's evidence, any prejudicial effect capable of arising from Pascoe's evidence was, at best, negligible.

101. Finally, as the Court below noted,[156] there was no suggestion before the Full Court that appropriate directions were not given, nor is that complaint made now.

Part VII: TIME ESTIMATE

102. The respondent estimates that 2.5 hours will be required for the presentation of its oral argument (with respect to the appellant and Castle in total).

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[152] Section 34P(2)(a), *Evidence Act 1929* (SA).
[153] Section 34P(3), *Evidence Act 1929* (SA).
[154] Cf AS at [80].
[155] Summing Up at 53.
[156] CCA at [96].