

10 BETWEEN:



EVERARD JOHN MILLER

Appellant

and

THE QUEEN

Respondent

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### THE APPELLANT'S SUBMISSIONS

#### Part I – Internet Publication

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

#### Part II – Statement of issues

- 40 2. During the trial for murder and aggravated causing harm, a pharmacologist gave unchallenged evidence that the appellant's level of intoxication, at the time of the offending, would have significantly impaired his decision making and his ability to foresee the consequences of certain decisions. It was accepted that the appellant could only be convicted of murder and aggravated causing harm on the basis of either joint criminal enterprise or extended joint criminal enterprise. The appellant was convicted. Was it unreasonable to convict him in such circumstances?
3. On the whole of the evidence, should the court below have found that the appellant's convictions were unreasonable and could not be supported by the evidence and should have been set aside?

#### Part III – Notices under s 78B of the *Judiciary Act*

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

**Part IV – Citation for the reasons of the court below**

5. The appeal is from a decision of the South Australian Court of Criminal Appeal, unreported at *R v Presley, Miller and Smith* [2015] SASCF 53 (CCA). That was an appeal against conviction by jury verdict.

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**Part V – Relevant facts as found or admitted**

6. Miller was jointly charged with three others (Betts, Presley and Smith) with one count of murder and a second count of aggravated causing harm contrary to s. 11 and s. 24(1) respectively of the *Criminal Law Consolidation Act 1935* (SA).<sup>1</sup>

The prosecution case against the appellant

7. In summary, the prosecution case was that Miller was part of a group of aboriginal men who attacked and killed Clifford Hall (Hall) and assaulted Wayne King (King) shortly before 11pm on 12 December 2012 at Grant Street, Elizabeth Park in South Australia.<sup>2</sup> The prosecution contended that the attack on Hall and King formed part of a joint criminal enterprise between the accused.<sup>3</sup>

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8. Earlier in the evening Betts and Presley had an altercation with two residents of Grant Street, Hall and King (the first confrontation). Miller was not present for the first confrontation as he was at Presley's house drinking with others. Presley and Betts then went to a nearby residence at 33 Hayles Road (Presley's house) and returned to Grant Street with others (Miller and Smith and perhaps others) and a violent altercation ensued (the second confrontation) during the course of which Hall was stabbed by Betts and King was injured. Hall died from his injuries.

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9. The prosecution case against the appellant was that he attended the second confrontation with others who were armed with weapons, including a 33 cm knife, baseball bat and shovel, that were too large to be concealed<sup>4</sup>.

10. It was not part of the prosecution case that Miller did the actual killing of Hall or inflicted the harm to King. Nor was it part of its case that there was any agreement or understanding to kill Hall. It relied solely on an agreement or understanding to cause really serious harm to the men in Grant Street who confronted Betts and Presley earlier<sup>5</sup>.

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In these footnotes: a reference to the Court of Criminal Appeal's judgment is identified as "CCA" followed by the paragraph number. A reference to a page of the transcript at trial is identified as "T" followed by the page and where possible line number. A reference to the Summing up is identified as "SU" followed by the page in the original document.

<sup>1</sup> Section 24 of the CLCA provides as follows: (1) A person who causes harm to another, intending to cause harm, is guilty of an offence.

Maximum penalty:

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(a) for a basic offence—imprisonment for 10 years;

(b) for an aggravated offence—imprisonment for 13 years.

<sup>2</sup> CCA at [3]

<sup>3</sup> CCA at [6]-[7]

<sup>4</sup> CCA at [42]

<sup>5</sup> SU38L40-50.

Miller's movements

11. The witness Willis gave evidence that, on the afternoon and evening of 12 December 2012, Miller had been drinking at the Elizabeth Tavern<sup>6</sup>.
12. Miller and the witness Willis travelled from the Elizabeth Tavern to a house at 33 Hayles Road, Elizabeth Park<sup>7</sup>.
13. The co-accused Betts, Presley, Smith and the witness Amii Turner (Presley's then girlfriend) were also present at the address<sup>8</sup>.

The first confrontation

14. During the evening, Betts, Presley and Ami Turner left a residence at 33 Hayles Road to buy marijuana<sup>9</sup>. Miller remained at the house<sup>10</sup>.
15. Betts, Presley and Turner walked to Grant Street. A laneway leads from Grant Street (in between numbers 10 and 12 Grant Street) through to Butterfield Road. Butterfield Road forms a T-junction with Hayles Road.
16. As Betts, Presley and Turner walked back towards Hayles Road, Betts urinated against the fence of 12 Grant Street<sup>11</sup>.
17. Hall approached Betts and Presley at the entrance to the laneway and indicated he did not want anyone doing that on the street<sup>12</sup>. Hall was joined by the witnesses King and Finlay-Smith<sup>13</sup>.
18. The eyewitnesses gave varying accounts as to what took place during the first confrontation. King<sup>14</sup> and Finlay-Smith<sup>15</sup> heard Hall use the phrase 'black cunts'.
19. Finlay-Smith said King and Hall were abusing the two aboriginal men and King hit one of the men with a clenched fist to the man's jaw. Either King or Hall pushed one of the aboriginal men before the punch was thrown<sup>16</sup>.
20. Betts and Presley then returned to 33 Hayles Road with Turner<sup>17</sup>.

Return to 33 Hayles Road

21. Evidence was given by Willis about what occurred when Betts and Presley returned to the residence at Hayles Road. He said:
- 21.1. He heard Betts say that he had been struck by three whitefellas that jumped him in the alleyway.<sup>18</sup>

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<sup>6</sup> T760L28

<sup>7</sup> T760L31

<sup>8</sup> T760L35

<sup>9</sup> T762L4-9

<sup>10</sup> T762L21-22

<sup>11</sup> T282L18-19

<sup>12</sup> T282L18-19

<sup>13</sup> T138L12-14 King; T595-599 Finlay-Smith

<sup>14</sup> T163L31-32

<sup>15</sup> T600L11-16

<sup>16</sup> T599L14-38

<sup>17</sup> T762L28-29

<sup>18</sup> T762L31-32

21.2. Betts had a bloodied lip.<sup>19</sup>

21.3. Presley said 'lets go back and see what these people – go and see what the problem is.'<sup>20</sup>

10 21.4. He saw Betts Presley Smith and the appellant leave the residence. He followed them in his car and saw them going into the laneway. He did not get out of his car.<sup>21</sup>

21.5. The only weapon he saw the men leave with was a baseball bat held by Presley and no one else had any object in his hands.<sup>22</sup>

#### The second confrontation

22. The prosecution called a number of eyewitnesses<sup>23</sup> to the second confrontation during which Hall was fatally stabbed and King injured.

20 23. None of the eyewitnesses identified the appellant as one of the attackers at Grant Street, nor the nature of his purported involvement in the second confrontation. According to the evidence of Finlay-Smith one of the persons did not take part in the attack and was without a weapon. This person is unidentified but could have been Miller. In his sentencing remarks the trial judge described Miller as a "blow in".

24. Willis said that 4 people departed 33 Hayles Road on the second occasion. A number of other eyewitnesses said that there were as few as four but some said more.

#### Weapons

30 25. There was evidence that four possible weapons were taken or used by those attacking Hall and King: a knife, a baseball bat, a bottle and a shovel<sup>24</sup>.

26. No prosecution eyewitness gave evidence that they saw any person armed with a knife. Willis did not see Betts or any other person leave the house at 33 Hayles Road with a knife<sup>25</sup>. There was no direct evidence from which the jury could infer the appellant knew that Betts was armed with a knife, at anytime leading up to, or during the attack. The prosecution relied upon the size of the knife for an inference that it must have been seen by the four co-accused.

40 27. There was no evidence given as to where the shovel came from and it is possible that it came from Hall's premises and was collected at the scene and probably belonged to Hall<sup>26</sup>.

28. A Passionpop bottle was found at the scene with a blood stain on it, but it is not clear from the evidence whether the bottle was used as a weapon or whether the blood stain was transferred to the bottle by some other means.

29. There was no evidence identifying the appellant as being armed with a weapon (apart

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<sup>19</sup> T762L38

<sup>20</sup> T763L6-7

50 <sup>21</sup> T765L24-766L7

<sup>22</sup> T763L24

<sup>23</sup> Bateman; Finlay-Smith; Oldenhampson; King.

<sup>24</sup> CCA at [4]

<sup>25</sup> T763L20-32

<sup>26</sup> T236L24-38

from a statement by Presley which was inadmissible against Miller<sup>27</sup>), nor any forensic evidence linking the appellant with any weapon seized from the scene or associated with the attack.

Miller's presence at the scene

- 10 30. At trial Dr Donnelly gave evidence for the prosecution regarding blood spots on the sneakers Miller was wearing at the time of his arrest<sup>28</sup>.
31. Dr Donnelly gave evidence that the pattern of the deceased's blood on Miller's shoes was inconsistent with him having kicked a bloodied person<sup>29</sup>.
32. The evidence was consistent with airborne blood having been deposited on the shoes without Miller having participated in the attack<sup>30</sup>.

Return to 33 Hayles Road

- 20 33. The witness Turner (who had remained at 33 Hayles Road) woke to see Betts, Presley, Smith and Miller at the house. She described Betts and Presley as 'going off their heads at each other and screaming'.<sup>31</sup>
34. Willis gave evidence that he saw Betts, Presley, Smith and Miller return to the premises together<sup>32</sup>. The baseball bat was with them but he could not recall who was holding it<sup>33</sup>.
35. Willis recalled one of the group other than Betts said 'we smashed them. We had a fight.' He could not recall who said this<sup>34</sup>. Miller was present when this was said.
- 30 36. At about 12pm, Willis drove Miller, Smith and Betts to 51 Northampton Crescent, while Presley remained at 33 Hayles Road<sup>35</sup>.
37. Betts and Miller were arrested at 51 Northampton Crescent at about 1.52am<sup>36</sup>.

Evidence of Miller's intoxication

38. Willis gave evidence that Miller was intoxicated and had been drinking early in the evening at the Elizabeth Tavern and at 33 Hayles Road before he left to go to Grant Street<sup>37</sup>.
39. There was no direct evidence that Miller consumed any alcohol after the second confrontation.
- 40 40. The second confrontation occurred at approximately 11pm. An alcohol breath test was performed on Miller about 3 hours after the second confrontation. The test

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<sup>27</sup> SU147

<sup>28</sup> T1396L23-31

<sup>29</sup> T1509L26-36

<sup>30</sup> T1449L32-36

<sup>31</sup> T954-5

50 <sup>32</sup> T767-768

<sup>33</sup> T767

<sup>34</sup> T768L29-32

<sup>35</sup> T817

<sup>36</sup> T090L22-27

<sup>37</sup> T823-824L16-38

produced a reading of 0.167 mg of alcohol per litre of blood<sup>38</sup>.

41. At about 9.20am a blood sample was taken from Miller that revealed a blood alcohol reading of 0.139mg of alcohol per litre of blood<sup>39</sup>.

42. The blood sample also showed the presence of diazepam, nordiazepam, cannabis and carboxy THC<sup>40</sup>.

Constable Penn

43. Constable Penn gave evidence that Miller was extremely intoxicated by something, unsteady on his feet, slurred his speech, struggled to keep his eyes open and smelt of alcohol<sup>41</sup>. He was lethargic and fell asleep in the holding cell.

The pharmacologist's evidence

44. At trial a pharmacologist, Dr Majumder, gave uncontradicted evidence about Miller that:

44.1. at 11pm on 12 December 2012 his blood level may have been somewhere between 0.292 and .342%<sup>42</sup>;

44.2. a blood alcohol concentration of that level would equate to between 14 and 17 standard drinks being consumed<sup>43</sup>;

44.3. at these estimated levels, a person's decision making will be significantly impaired, as would a person's ability to concentrate<sup>44</sup>;

44.4. he would have problems with foresight and planning<sup>45</sup>;

44.5. his alcohol levels may be too high for him to have acted aggressively<sup>46</sup>;

44.6. the presence of diazepam and cannabis in the sample could have enhanced the effects of alcohol on him<sup>47</sup> and possible side effects include confusion and impaired thinking<sup>48</sup>;

44.7. the effect of the alcohol may have been that he would be staggering and may have fallen over;

44.8. if he had continued drinking after the second confrontation (of which there was no evidence)<sup>49</sup>, his blood alcohol level would still be comparable to the calculated range depending on the amount consumed<sup>50</sup>.

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<sup>38</sup> T1081L8 I.K. Maskall

<sup>39</sup> T1189L25 H.J. Lindsay

<sup>40</sup> T1189-1190L20-26

<sup>41</sup> T1122

<sup>42</sup> T1545L16

<sup>43</sup> T1548

<sup>44</sup> T1550L15-25; T1551L11-12

<sup>45</sup> T1551L11-14; T1559L18-21

<sup>46</sup> T1552L4-10

<sup>47</sup> T1555L21-27

<sup>48</sup> T1553L31

<sup>49</sup> Prosecution address at T1706L12-15

<sup>50</sup> T1547L27-1548L1

The trial judge's summing up

45. In a lengthy summing up (306 pages) Stanley J gave directions on, inter alia, intoxication and joint criminal enterprise and extended joint criminal enterprise at various places throughout the summing up.
- 10 46. For example, the trial judge noted that in this case, the prosecution did not allege any agreement or understanding to kill Hall and that it relied solely on an agreement or understanding to cause really serious harm to the men in Grant Street who confronted Mr Betts and Mr Presley in the first altercation<sup>51</sup>.
47. In relation to extended joint criminal enterprise the trial judge said that a person might reach an agreement or understanding with others simply to assault a person but in the course of the assault commits murder.<sup>52</sup> If the accused foresaw the possibility that the other party might unlawfully kill the deceased with murderous intent or intentionally inflict really serious bodily harm and the accused continued to participate with that degree of foresight. The trial judge added that if the accused did not contemplate that the other party might have the relevant intention, then the accused could not be guilty of murder. It appears that he did not go on to say that the accused might be guilty of manslaughter.<sup>53</sup>
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48. In relation to manslaughter the trial judge directed the jury that if there was an agreement to use force with the result that there was an unlawful and dangerous assault, the accused could be convicted of manslaughter but not of murder.<sup>54</sup>
49. The appellant was convicted by jury of murder and aggravated causing harm with intent to cause harm.
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50. The appellant appealed to the Court of Criminal Appeal (court below) on grounds, inter alia, that his convictions were unreasonable and could not be supported having regard to the whole of the evidence<sup>55</sup>.

The Court of Criminal Appeal

51. The court below accepted that the appellant could only be convicted of the offences on the basis that he was part of a joint criminal enterprise or extended joint criminal enterprise<sup>56</sup>.
52. Upon consideration of the ground of whether the verdict could be supported having regard to the evidence, the court below does not detail, nor refer to, the evidence:
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- 52.1. given by the pharmacologist as to Miller's blood alcohol levels; and
- 52.2. given about the possible enhancing effects of cannabis and diazepam on Miller's intoxication; and
- 52.3. of the impairment of his ability to foresee or understand the consequences of his actions; and

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50 <sup>51</sup> SU at 38L40--50

<sup>52</sup> SU43

<sup>53</sup> SU42-43

<sup>54</sup> SU49

<sup>55</sup> CCA at [126]

<sup>56</sup> CCA at [6] and [7]

52.4. of Constable Penn as to the appellant's intoxicated appearance at the time of arrest/detention i.e his unsteadiness and slurring of speech.

53. The court below dismissed the appellant's appeal<sup>57</sup>:

54. The consequence of the CCA not dealing with the matter is that this court is in just as good a position as the court below to determine the matter.

## Part VI – The Appellant's Arguments

55. The appellant contends that his two convictions cannot be supported having regard to the evidence, for the reasons set out below.

### Joint Criminal Enterprise

56. The evidence of the pharmacologist and Constable Penn casts serious doubt upon the capacity of the appellant to enter into an agreement for the purposes of the law of joint enterprise or extended joint enterprise and the capacity of the appellant to understand the nature of such an agreement for the following reasons.

57. It can be readily inferred from the evidence given by the pharmacologist, that the impairment caused to the appellant's thinking processes by his intoxication would have affected his capacity (a) to agree to any plan for the purposes of joint criminal enterprise (b) to understand the nature of any plan that he might have agreed to be part of and (c) to foresee the possibility of the infliction of really serious harm or death.

58. There is a difference in degree between an agreement to cause really serious harm and an agreement to inflict an unlawful and dangerous assault. The former is relevant to the charge of murder and the latter to the charge of manslaughter. Intoxication could affect an appreciation of the distinction between the two. The appellant may not have understood that the plan was to cause the former, as contrasted with the latter.

59. What Presley said before the group went to Grant Street is relevant to ascertaining precisely what the plan was. In that regard, there are several relevant considerations. To begin with, what Willis said may not have been the actual words used by Presley or attributed to Presley by Willis<sup>58</sup>.

60. Moreover, it would be wrong to construe the meaning of the words with the benefit of hindsight. The words may have a number of possible meanings: (1) the literal – that is what might be called exploratory (2) to ascertain the identity of the assailants (3) to remonstrate with them or to persuade them not to engage in that conduct again; (4) to warn them off the area; (5) to inflict minor harm or minor injury (6) to inflict really serious harm or to kill; the last being highly improbable and, in any event, not a meaning advanced by the prosecution as part of their case theory.

61. Willis' evidence was that he observed Presley with the baseball bat but saw no one else having a weapon<sup>59</sup>.

62. There was no direct evidence from which the jury could that infer the appellant knew

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<sup>57</sup> CCA at [127] and [157]

<sup>58</sup> T763

<sup>59</sup> T823

that Betts was armed with a knife, at any time leading up to or during the attack. A 33cm knife could be concealed under clothing and probably would be in public streets.

- 10 63. In relation to the baseball bat there is no direct evidence as to why it was taken to Grant Street although a sober person in Miller's position would need weigh the following possible purposes: (a) to prevent an assault on the group – to be used as a deterrent (b) to be used to threaten in support of (i) admonition or (ii) a demand that they leave the area (c) to be used defensively, if necessary; (d) to be used offensively to inflict minor harm; (e) to be used offensively to inflict really serious harm or possibly but probably not death. In fact it was also used to bang on or run along back fences.
- 20 64. There is no direct evidence of when or where the shovel was obtained. It is possible that it was obtained en route to Grant Street. King's evidence was that the deceased had a truck on which there was a shovel.<sup>60</sup>
65. There is no direct evidence that Miller was a direct participant (as contrasted with his mere presence) at the melee. Finlay-Smith gave evidence that a person chased him and that that person did not hit anyone<sup>61</sup>. He described the person as tall and skinny, wearing a basketball singlet and of aboriginal appearance.
66. Mr Miller had no motive to attack either Mr Hall or Mr King as he did not know them and was not involved in the first altercation. He appeared only to have been an acquaintance of Mr Willis. He was described by the trial judge in his sentencing remarks as a "blow in".
- 30 67. The evidence of the pharmacologist was not shaken in cross-examination and the prosecutor correctly and fairly submitted to the jury that there was no evidence one way or the other as to whether the appellant drank more or did not drink any more after the melee<sup>62</sup>.
68. On the whole of the evidence there is a serious doubt about whether Mr Miller had the capacity to come to an agreement or understanding about what was to occur with the others.

#### Extended Joint Criminal Enterprise

- 40 69. The evidence of the pharmacologist and Constable Penn also casts serious doubt upon the capacity of the appellant to foresee the consequences of Betts' actions for the purposes of the law of extended joint criminal enterprise, particularly bearing in mind the possibilities referred to in paragraphs [61 and 69 above].
70. The requirement that a person might foresee that one of the possible consequences of the implementation of the agreement is the death of another seems to contain two elements. First, the person must have foreseen that the conduct of another participant may result in the death of a victim and secondly, that the actor may have the requisite intention sufficient for liability for murder: *McAuliffe V The Queen*<sup>63</sup>.
- 50 71. It is not known if there was any conversation between Betts/Presley and Miller before the melee. If there was, it is not known what was conveyed by Betts/Presley to Miller.

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<sup>60</sup> T236L24-36

<sup>61</sup> T609L18-22; T612L32-34

<sup>62</sup> T1706L12-14 and L33-34

<sup>63</sup> (1995) 183 CLR 108 at 114-118

It is not known if Miller would have understood or comprehended what was conveyed by Betts/Presley.

72. Willis' evidence was that Betts, Presley, Smith and Miller left Hayles road, only Presley was armed with a baseball bat.
- 10 73. There is no direct evidence that Miller saw Betts with the knife either before or during the melee. Indeed, no other witness saw the knife before or when Hall was stabbed. It is not known where Betts was in relation to Miller during the melee.
74. There is no direct evidence as to how the knife was transported to the scene. The total length of the knife was approximately 30cm and the blade was approximately 20cm<sup>64</sup>.
75. There is insufficient evidence upon which a jury could reasonably find that Miller knew that Betts had a knife and foresee that Betts proposed to use it during the melee with the consequence that Hall or another might die. It follows that, if the jury found Miller guilty of murder on the basis of extended joint criminal enterprise, then it was in error in so doing.
- 20 76. There was no evidence given that the baseball bat could be or was to be used as a murder weapon and it follows that no inference could reasonably be drawn that the presence of the baseball bat gave rise to the foreseeability of the death of a person. It also follows that the jury could not reasonably have come to that conclusion that Miller was guilty of murder on the basis of extended joint criminal enterprise by virtue of the presence of the baseball bat. *A fortiori*, the passion pop bottle.
77. There is no direct evidence as to when the shovel was obtained, or from where the shovel was obtained, or who wielded it, or whether Miller was aware of its presence or use during the melee. It follows that it could not be the basis upon which a jury could find that Miller was guilty of murder on the basis of extended joint criminal enterprise.
- 30 78. It seems that the trial judge did not direct the jury that, for Miller to be guilty of manslaughter on either joint criminal enterprise or extended joint criminal enterprise, Miller must not have foreseen that Betts had the requisite intention for murder.<sup>65</sup>

#### Section 268 CLCA

79. It is common ground that s.268 of the Criminal Law Consolidation Act 1935 (SA) does not apply to this case.
- 40 80. The law applicable is the common law concerning intoxication as set out in *R v O'Connor* (1980) 146 CLR 64.

#### **Part VII – Applicable Statutory provisions**

81. Section 353(1) of the *Criminal Law Consolidation Act 1935* (SA) is relevant to the argument in this case. It appears below in the form it took at the time of the trial and decision in the court below; it has not been materially amended since then.
- 50 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

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<sup>64</sup> T1424L21-24

<sup>65</sup> SU42

10 supported having regard to the evidence, or that the judgment of the court before which the appellant 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 the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

**Part VIII – Orders sought**

82. The appellant seeks orders that:

82.1. The appeal be allowed.

82.2. The order of the Court of Criminal Appeal of South Australia, dismissing the appellant's appeal to that court be set aside.

20 82.3. The appellant's convictions for murder and aggravated causing serious harm with intent to cause harm be quashed.

82.4. The appellant be acquitted of murder and aggravated causing serious harm with intent to cause harm.

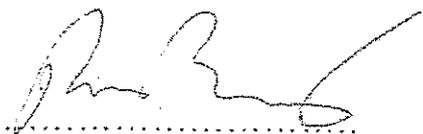
82.5. In the alternative, that the conviction of murder be replaced with a conviction of manslaughter.

82.6. In the further alternative, there be an order for a re-trial.

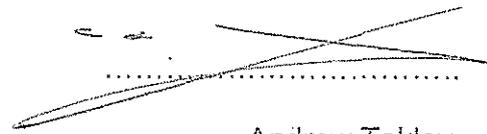
30 **Part IX – Estimate of length of oral argument**

1.5 to 2 hours for the appellant.

Dated 21 December 2015

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