HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN: DEREK JOHN BROMLEY
Appellant
and
THE KING
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

PART I: This outline is in a form suitable for publication on the internet.

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

1. **The evidence of Carter is unreliable, before, during and after the offence**: The evidence of Carter, where able to be tested, is errant and unreliable at every level of generality. The appellant's oral submissions will focus on 3 areas of evidence: (a) Carter's evidence relating to the period from when the taxi entered Hindley Street until the end of trip; (b) Carter's evidence concerning events on the riverbank; and (c) Carter's description of what occurred immediately after he left the riverbank.
   a. ***Carter's evidence concerning the taxi ride*****:** the applicant will address the following topics: **t**he direction from which the taxi entered Hindley Street [Carter **BFM1 260**; George **BFM1 420, 436-437, BFM5, 1562-3, 1566**]; whether Carter purchased a flagon; [Carter **BFM1 205, 263**; George **BFM1 458**]; how the taxi fare was paid; [Carter **BFM1 205, 264**; George **BFM1 429**]; the clothing worn by the dapper person; (smartly dressed, wearing a white suit, tie and a hat) [George at **BFM1: 424, 449-50, 450-452**; Burden **BFM1: 387, 402, 403**; Griggs **BFM2:** 519; Margaret Bromley **BFM1: 470, 471**; PAG **BFM5: 1609, 1621, 1628**; Brusnaham **BFM: 186**; Harvey **BFM1: 80**]; where the party of four departed the taxi [Carter **BFM1 204, 263**; George **BFM1 429-430**]. The applicant will also address George's photo identification of the applicant [George **BFM1: 431-3; 446-449, 459-60**] and the conversation about the dapper person having gotten out of gaol [George **BFM1: 426, 455-456**].

b. ***Carter's evidence in respect of the events on the banks of the River Torrens*** is inaccurate: It is contradicted by the evidence of Dr Manock and the new pathology evidence, including in respect of the following matters:

i. That the deceased had been stripped naked in the attack [Carter **BFM1: 209-210, 227, 303**; Harvey **BFM1: 78**; Manock **BFM1: 331**].

ii. That a barbell (as well as kicking and punching) was used in the attack [Carter **BFM1: 207-209, 310-311**; Manock **BFM1: 373-374**; Professor Thomas **BFM5: 1729, 1734-1736**].

c. ***Carter's account of events after the attack*** is also contradicted in many respects by the evidence of the police officers who gave evidence at the trial, including as to:

i. That the applicant and Karpany were together on the Morphett Street Bridge and that Carter gave them water and that Karpany had and retained Carter's blue airways bag [Carter **BFM1: 211, 212-213, 215, 216-7, 229-230**; Burden **BFM1: 379-384**, **385-386**; Griggs **BFM2: 504-5, 508-9, 510-512, 517, 519** photos 1-8 **BFM5, 2030 and following**; Moyle **BFM 2: 523-4, 524-5**; Hrybyk **BFM2: 542-3**].

ii. That the applicant did not get into a police car when spoken to by police on the Morphett Street Bridge [Carter **BFM1: 214, 215, 277, 278**; Burden **BFM1: 385-6, 390**; Griggs **BFM2: 509-10, 510-512, 513-514**; Moyle **BFM2: 525, 526**].

2. **The new psychological and psychiatric evidence is compelling**:

a. This evidence was undisputed by the Crown. Dr Brereton was briefed but not called by the Crown. A principal element of the undisputed medical opinion was that there was an extremely high likelihood that Carter's account of events was inaccurate in some detail and that there is no way of telling an accurate recollection from an inaccurate one [**BFM5: 2003-2004 [24.21]-[24.23]**; Court of Appeal's reasons: **CAB: 272-274**; **[550], [551], [553], [556] and [558]**. Almost the entirety of Carter's evidence would have to be corroborated before his account could be considered reliable [**BFM5: 2004**]. The experts were in agreement on these matters: **CAB: 272 [545].** Effectively, rather than applying the undisputed evidence, the Court of Appeal rejected it and substituted their own views: **CAB: 161-162 [136]-[141]**.

b. Dr Sugarman's evidence focuses on suggestibility. Dr Sugarman looks at the effect of the medical condition as reflected in the hospital notes: **BFM5**: **1954, 1956-7, 1958,**

1959-60, 1963, 1964-7, 1968, 1970; Court of Appeal reasons: **CAB: 267-268 [518]-[523], 174-181 [176]-[194], 180 [189]-[190], 181 [196]**.

3. **The relevant legal principles:** Three essential conditions for the Court of Appeal to have jurisdiction to give permission for a second appeal. The evidence (a) is fresh within the meaning of s 353A(6)(a) [**JBA Part A, Doc 3, p6**]; (b) is compelling within the meaning of s 353A(6)(b); and (c) should, in the interests of justice, be considered on an appeal. Evidence is compelling if it is reliable, substantial and highly probative in the context of the issues in dispute at the trial. The following authorities are relevant:

   a. *Ratten v The Queen* (1974) 131 CLR 510 at 517-518 [**JBA Part C, Doc 5, pp57-58**] - Once the preconditions set out in s 353A are established, it will then be open to the Court to receive further new evidence from the appellant on a more flexible basis.

   b. *R v Keogh (no 2)* (2014) 121 SASR 307 at [99], [112], [113], [139], [141], [143], [232]:

      i. New evidence to be highly probative "in the context of" the issues at trial.

      ii. Change in evidentiary landscape –defence not held to forensic decisions [232].

   c. *Van Beelan v The Queen* (2017) 262 CLR 565 at [27], [28], [30].

      i. Finality should yield in the face of fresh and compelling evidence which, when taken with the evidence at the trial, satisfies the Full Court that there has been a substantial miscarriage of justice. [27]

      ii. Substantiality requires evidence to be of real significance or importance with respect to the matter it is tendered to prove. Evidence that is reliable and substantial will often be highly probative in the context of the issues in dispute at the trial, but not always. A line of defence that was not apparent at the time of trial may meet the third criterion because it bears on the proof of guilt. [28]

      iii. Interests of justice will commonly favour considering compelling evidence. [30]

   d. *Rodi v Western Australia* (2018) 265 CLR 254 at [28], [37], [38].

      i. The test for miscarriage of justice is a significant possibility that the jury might have acquitted the appellant had that evidence been available to it. [28]

      ii. Appellate court is to act upon the view most favourable to an appellant [37].

Dated: 17 May 2023

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