HIGH COURT OF AUSTRALIA
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THE REGISTRY ADELAIDE

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A8 of 2017

BETWEEN:

FRITS GEORGE VAN BEELEN
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 issue raised by the appeal is whether, in the particular circumstances of this case, fresh evidence which establishes that opinion evidence given at trial as to the deceased's time of death was scientifically unsound:

   (i) is "substantial";

   (ii) is "highly probative in the context of the issues in dispute" at trial; and

   (iii) establishes that there was a "substantial miscarriage of justice";

   within the meaning of s 353A of the *Criminal Law Consolidation Act 1935* (SA) ("CLCA"). The circumstances of this case include that the impugned opinion was similarly challenged at trial by the leading of contrary evidence, that civilian evidence alone compelled an inference that death occurred no later than 20 minutes after the time advanced by the opinion, that before, during and after that further 20 minutes there was a paucity of persons at the location where the deceased was killed, and that the circumstantial case subsisting against the appellant is compellingly probative of guilt.

Part III: SECTION 78B OF THE *JUDICIARY ACT 1903*

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

Part IV: STATEMENT OF FACTS

Procedural history

4. On 19 October 1972 the appellant was convicted of the murder of Deborah Leach ("Deborah"). That conviction was set aside on appeal and a new trial ordered.[1] On 16 April 1973 the appellant's second trial (the trial the subject of this appeal) commenced before a jury. On 12 July 1973 the appellant was again convicted. A subsequent appeal to the Full Court of the Supreme Court was dismissed.[2] An application for special leave to appeal to the High Court was refused, as was an application for leave to appeal to the Privy Council.[3] On 5 February 1974, a petition for mercy was submitted. The whole of the applicant's case was referred to the Full Court of the Supreme Court under s 369 of the CLCA, dealt with as if an appeal and dismissed.[4]

Key evidence at trial

Non-expert evidence

5. On 15 July 1971 Deborah was 15 years of age. She left school at 3.30pm with her classmate, Janice Hazelwood. They walked about 300 yards to Deborah's home and parted company.[5] Deborah changed from her school uniform and took her dog to the

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[1] *R v Van Beelen* (1973) 4 SASR 353.
[2] *R v Van Beelen (No 3)* (1973) 7 SASR 125.
[3] *Van Beelen v The Queen* (1973) ALJR 666n.
[4] *In the matter of a Petition by Frits Van Beelen* (1974) 9 SASR 163.
[5] T 144-6.

beach. At about 4.00am on 16 July Deborah's body was found by police on Taperoo Beach. Her body, except for part of a foot, was covered in seaweed.[6] She was wearing a white singlet, brown jumper and slacks. The singlet was in place but the jumper was pulled up.[7] Her underwear and slacks had been completely removed from her right leg. On her left side, both were pulled down to the calf. She had been sexually assaulted. Semen and an injury to her vagina were found.[8]

6. Deborah was last seen alive at about 4.00pm on 15 July, by two witnesses. She was first seen then by Janice's mother, Mrs Hazelwood, who was driving home along Deborah's street. Mrs Hazelwood saw Deborah walking across a paddock towards Taperoo Beach, and thought the dog was running loose.[9] If Deborah continued west towards the beach she must have come to a car park and a track leading onto the beach. A short distance north of the car park was a kiosk. At the south side of that kiosk was a track leading to the beach down which vehicles could proceed. There were bushes along that track and to the west of the car park. At a time first fixed by the owner of the kiosk, Mr Tajak, as being about 3.45pm or 3.50pm – later said to be before 4.00pm – Mr Tajak saw a dog run across the track south west of the kiosk, followed by a girl.[10]

7. The appellant's counsel did not submit at trial that the two girls might not have been the same.[11] There was no objection to the learned trial judge summing up on the basis that Mr Tajak had left before 4.00pm and this was after he had seen the girl.[12]

8. The route Deborah was taking took her past where the appellant's car was parked at least from 4.00pm, if not from about 3.15pm.[13] Her body was later found approximately 600 feet from where the appellant indicated his car had been parked.[14]

9. As was her habit, Deborah's mother, Mrs Leach, came home from work at about 4.40pm.[15] Deborah was not home. Each night Deborah took the dog to the beach, but was "always home before [she] got home normally".[16] After 10 minutes she decided her daughter should be home and looked out the front window. She could only see the dog playing on the seaweed.[17] She went to the beach. It was 4.50pm. When she arrived at the beach she looked around, saw no-one and called out to Deborah. There was no response and she took the dog home.[18] Mrs Leach returned to the beach and again saw no sign of Deborah. The only people she saw were two men walking their horses in the water and a young girl on a horse. She went to a nearby telephone and rang her husband. He arrived home soon afterwards and went to the beach to search.[19]

10. The prosecution called all known persons on the beach in the vicinity of where the body

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[6] T 308-9.
[7] T 313-5.
[8] T 622, 626-9.
[9] T 157-9.
[10] T 239-240.
[11] Appellant's Closing, T 2611-2, 2627, 2641.
[12] Summing Up, T 2815.
[13] T 261.
[14] T 2219.
[15] T 282.
[16] T 283-4.
[17] T 284.
[18] T 285.
[19] T 290-1.

was found between about 2.00pm and 4.20pm. Mrs Drummond arrived at the beach with her father, Mr Lukeman, and her young child at 2.00pm. She fished from the beach. The three of them left at about 3.40pm to pick up Mrs Drummond's son at 3.45pm. While on the beach Mrs Drummond saw two couples walking along the beach from Outer Harbour; the first an old couple, the second a young couple. Both walked in a southerly direction away from the boat from which they had likely come, and back again. She spoke with the old couple on the return leg but did not speak with the young couple. She also saw Mr Streeter sitting behind her on the seaweed and three men fishing in a boat. She saw no one else.[20] Mr Lukeman also saw the old couple and spoke with them, and saw Mr Streeter. He also saw the three men fishing in the boat and the young couple walking.[21] As the two of them drove from the beach and onto the road, Mr Lukeman saw a motor car which he believed to be a "cherry" coloured "Datsun" turning onto the track leading to the beach. Mrs Drummond also saw a car with a young man in it pass them as they drove out.[22]

11. Mr Streeter had taken his dog to the beach sometime after 2.00pm. He noticed two couples on the beach. He passed them moving away from the vicinity where Deborah was later found, before he came across Mrs Drummond, Mr Lukeman and the child. He returned home at about 3.50pm to watch a race on which he had a wager.[23]

12. There were three fishermen on the beach in the vicinity of where Deborah's body was later found. Mr Shiels, in the company of Mr Dickson and Mr Keating, drove onto the beach towing a boat and trailer at about 3.15pm. At that time, Mr Shiels saw a red Torana car near the lifesaver's shed west of the kiosk.[24] Once on the beach he saw a woman standing close to the water (on the prosecution case, Mrs Drummond), a dog (on the prosecution case, Mr Streeter's) and two men further back (on the prosecution case, Mr Lukeman and Mr Streeter). While on the water he saw two men on the beach in about the same place as he had seen the two men before. He was unable to say whether they were the same two people. He saw them go off the beach towards the kiosk and in the direction of Lady Gowrie Drive. He saw no others.[25] On coming onto the beach Mr Dickson saw a man and woman he thought were fishing (Mrs Drummond and Mr Lukeman), while on the water he noticed no-one on the beach (but was not looking) and once back on the beach, he saw no-one.[26] The three men left the sea, put the boat back on the trailer and proceeded home. On the way out from the beach Mr Shiels noticed the red Torana in what he believed to be the same spot he had seen it earlier.[27] That was about 4.20pm (he had asked the time upon arriving at Mr Dickson's house). Mr Dickson also saw the Torana on leaving the beach. The first three letters on the number plate were RCC (the appellant's car).[28]

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[20] T 179.
[21] T 200-1.
[22] T 173-4. Assuming this was the appellant (he was 23 years of age and driving a red Torana) consistent with him being there at 3.15pm (Shiels T2589), leaving and returning at about 3.30pm. The appellant said in the evidence read at trial he had been to Taperoo at least three times that day (see [18] below) and it was open to find the first time was at about 12 noon (see [15] below]).
[23] T 222.
[24] T 258-9.
[25] T 262.
[26] T 354.
[27] T 263.
[28] T 263-4, 355.

13. The prosecution did not purport to exclude the possibility of others beyond those identified above being on the beach. The prosecution case was this was a "very, very deserted sort of place [and if] there was anyone else there other than the [appellant] then it [was] a very small number of people".[29] There was no complaint about the direction, "the beach appears to have been little used on the day in question" and that it "is possible that one or more persons not known to us were ... not observed".[30]

The appellant's accounts

14. The appellant admitted being on the beach from about 4.00pm[31] until about 4.30pm.[32]

15. When first questioned by police on 29 July 1971 he said that he was on the beach at Taperoo in his car and that until about 4.25pm his car was parked on the south side of the lifesaver's shed alongside some green bushes, facing the sea. He had left home that day at about 8.00am, taking his wife to her work in the city. He drove around town, went home once, and had then turned back and driven along the beaches. He said that he had first arrived at Taperoo Beach at about 12 noon, that he had driven onto the beach at the back of the kiosk twice, the last time being at about 4.00pm. At that time he went for a walk along the beach in a southerly direction for about half an hour and turned back. He did not see anyone on the beach. He was asked what clothing he was wearing. He said "black trousers, a red or blue jumper, I cannot think which one I was wearing". After he left the beach he went to the city and picked up his wife from work at 5.00pm.[33] The appellant's wife confirmed this in her uncontested evidence.[34]

16. The appellant read of Deborah's murder the next day but did not tell police he was on the beach as he did not "want to get involved in it". Police accompanied the appellant to his home having told him they wanted to collect the clothing that he had been wearing on the day.[35] The appellant handed police a red and black jumper.[36] On the prosecution case, also collected, but not produced by the appellant, was a blue jumper.[37]

17. On 6 October 1971 police took the appellant to Taperoo Beach before arresting him. He showed police he had walked high on the beach[38] and told them he had not stopped and sat on any seaweed.[39] He indicated the position he had parked his car.[40]

18. The appellant's evidence from the first trial was led.[41] He said on 15 July he had driven from Glenelg to Taperoo (a distance of approximately 13.4 miles[42]) on at least three occasions. On the final occasion he parked his car east of the lifesaver's shed and

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[29] Prosecution Closing, T 2714.
[30] Summing Up, T 2820-1.
[31] Cf Appellant's Submissions at [5], which assert that he was on beach from 4.10pm to 4.30pm. See Appellant's evidence from the first trial read into the transcript, T2307, 2314.
[32] Appellant's Unsworn Statement, T 2399. This is also the time given on more than one occasion in the Appellant's Closing, T 2612-3, 2624.
[33] Exhibit P184, Appellant's typewritten and signed statement to Det. Zeunert, read to the jury at T 1128.
[34] T 2411.
[35] T 2204.
[36] T 913.
[37] T 914.
[38] T 2210.
[39] T 2211, 2216-7.
[40] T 2209.
[41] T 2239-2350.
[42] T 2221.

walked south. He walked on the high side of the beach between the seaweed and bushes,[43] the closest he got to the bank of seaweed was about 20 yards.[44] He did not see anyone on the beach.[45] He said that he had been wearing his blue jumper, not his red and black one, having worn his blue jumper because it was one of his best and he was looking for a job. He did not apply for any jobs that day despite having looked in the newspaper to see if there were any advertised.[46] By 6 October 1971 he was satisfied that he had been wearing the blue jumper but did not tell police.

19. The appellant did not give evidence in the second trial, but made an unsworn statement. He said that he could not add much to what he had told the jury in the previous trial. [47]

Expert forensic evidence: clothing and fibres

20. Nineteen (19) red fibres and seventeen (17) black fibres were found on the upper part of Deborah's singlet. Also found was a single blue fibre.[48] All were foreign to the clothing of Deborah and the appellant's counsel conceded the red and black fibres had not come from her clothing.[49] The blue fibre was consistent with blue fibres found at Deborah's home and the appellant's own expert agreed that it was of no significance.[50] Black fibres were also found at her home, but not in conjunction with red fibres. Indeed, no red fibres matching those on the singlet were found at Deborah's home.[51]

21. The red and black fibres on the upper singlet and red and black fibres from the appellant's jumper were subjected to several tests.[52] The appellant's expert agreed the tests were appropriate and had been "very comprehensive". All tests, including a test by the appellant's own expert (Thin Layer Chromatography) showed that the fibres found on the singlet were consistent with the fibres of which the appellant's jumper was made. They also broadly corresponded as to relative frequency.[53] Seaweed and three brown fibres were found on the appellant's red and black jumper. Two of the three fibres corresponded with the brown fibres from Deborah's jumper.[54]

Expert forensic evidence: time of death

22. Based on Deborah's stomach contents, the evidence of the prosecution's forensic pathologist, Dr Manock, was to the effect that death occurred three to four hours after Deborah's last meal (lunch). Based on a significant number of assumptions, including, but not limited to, that Deborah took lunch between 12.30-12.45pm, the meal, and her having consumed nothing thereafter (despite being subsequently in a cooking class), Dr

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[43] T 2245-6, 2320.
[44] T 2324.
[45] T 2246.
[46] T 2267-9.
[47] Appellant's Unsworn Statement, T 2399.
[48] Also found were a number of white fibres not regarded as significant given how common such fibres were – see T 804.
[49] Appellant's Closing, T 2607, 2625, 2657, 2665; Summing Up, T 2838.
[50] T 2520-1.
[51] T 873.
[52] These tests are conveniently summarised in the evidence of the appellant's expert, Mr Fish, T 2514-2520.
[53] T 982; Summing Up, T 2835.
[54] T 2146-2148; Summing Up, T 2810, 2840.

Manock put time of death between 3:30-4:30pm and no later than 4:30pm.[55]

23. The appellant called his own expert, Dr Pocock. His evidence was that stomach contents provides an unreliable method for time of death and it was not possible to estimate time of death to within an hour by that means.[56] Based on stomach contents, he would not have fixed a time of death.[57]

The new evidence in the Court below

24. The new evidence, given by Professor Horowitz, is to the following effect:

(i) it is not possible to estimate time of death from stomach contents with any degree of accuracy;[58]

(ii) before the mid-1970s there were no techniques which would enable reliable measurement of the rate of gastric emptying;[59]

(iii) Deborah's meal may empty completely in less than three hours or more than eight hours (or perhaps 2.8-11.3 hours);[60]

(iv) in light of the evidence of Dr Manock at trial that 25% of Deborah's last meal remained in her stomach post-mortem, this point would be reached between about 2-8.5 hours of consumption.[61]

Part V: APPLICABLE LEGISLATIVE PROVISIONS

25. See Annexure.

Part VI: RESPONDENT'S ARGUMENT

Second or Subsequent Appeals: s 353A

26. The appellant appeals against a refusal of permission by the Court below on an application for permission to appeal pursuant to s 353A of the CLCA. The terms and operation of that provision warrant explication.

27. Section 353A(1) is a "double function"[62] provision: it creates a substantive legal avenue for a person convicted on information to bring a second or subsequent appeal against that conviction, and it confers jurisdiction[63] on the Full Court of the Supreme Court with respect to that avenue. Section 353A(2) qualifies the appeal right, making it

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[55] T 638-9, 641, 643-4. In so far as Dr Manock spoke at one point of the possibility of 4:15 pm, he expressly stated that one cannot be very precise (T 639) and this depended in any event upon assumptions, including the assumption as to timing of the last meal. Without objection, the Summing Up referred at points to 4:30 pm (T 2809, 2819.

[56] T 2533, 2539.

[57] T 2545.

[58] Exhibit A1, p 2-3; evidence of Professor Horowitz 17, 39.

[59] Evidence of Professor Horowitz 8-10.

[60] Exhibit A1, p2; Professor Horowitz's evidence 8-9, 12, 33-4.

[61] Evidence of Professor Horowitz, 33-4.

[62] *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 165-166 (Dixon J); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 130 (Gummow J).

[63] *R v Keogh (No2)* (2014) 121 SASR 307 at [75] (the Court); *R v Drummond (No 2)* [2015] SASCFC 82 at [50] (Gray J), [239], [241]-[242] (Blue J).

subject to a grant of permission.[64] Subsections (3)-(5) provide for the way in which the Court is to dispose of such appeals.[65] The Court may only allow an appeal under s 353A where it is satisfied that there was a "substantial miscarriage of justice".[66]

28. Subsection (1) delineates the scope of the jurisdiction it confers. Several preconditions are imposed. The appeal must be a second or subsequent appeal,[67] it must be brought by a person who has been convicted on Information against their conviction, there must be evidence relating to the offence for which the person has been convicted which is "fresh" as defined in s 353A(6)(a), that evidence must also be "compelling" as defined in s 353A(6)(b) and that evidence must be such as "should, in the interests of justice, be considered on appeal". The appellant bears the onus of establishing each precondition, on the balance of probabilities.[68]

29. The first condition identified above recognises that s 353A may only be engaged where an appellant has exhausted their appeal rights under s 353. The strict limitations of finality attending a s 353 appeal[69] remain unmodified, as does the essentially unfettered referral mechanism available under s 369. These contextual matters, read with the terms of s 353A, bring into sharp relief the simultaneous breadth and narrowness of the further exception to the principle of finality[70] created by s 353A and the very limited and particular mischief to which that exception has been directed.

30. The breadth of the exception is supplied by the phrase "second or subsequent appeal" in subs (1). In theory, an unlimited number of applications may be brought. This breadth of the exception in s 353A, far exceeding that of a s 353 appeal, is commensurately moderated by the narrowly confined matters which condition its availability.

31. It is only by a strict construction of the restrictions imposed upon the availability of a s 353A appeal that the efficacy of the (obverse) breadth and narrowness of a s 353 appeal can be maintained. If the circumstances capable of enlivening appeals under s 353A were liberally construed then, read with the absence of any limitation on the number of applications which may be brought under that provision, the strict limitations on re-opening or re-agitating a s 353 appeal would be undermined.

32. Similarly, retention of the mechanism of referral under s 369, which is both exercisable "at any time"[71] and legislatively unconstrained in the circumstances for its exercise, reinforces the narrow compass of s 353A.

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[64] *R v Keogh (No 2)* (2014) 121 SASR 307 at [77] (the Court); *R v Drummond (No 2)* [2015] SASCFC 82 at [51] (Gray J), at [241], [246] (Blue J).
[65] *R v Keogh (No 2)* (2014) 121 SASR 307 at [75] (the Court).
[66] Section 353A(3); see *R v Keogh (No 2)* (2014) 121 SASR 307 at [85] (the Court); *R v Drummond (No 2)* [2015] SASCFC 82 at [246].(Blue J).
[67] As opposed to a first appeal brought under s 353 CLCA.
[68] *R v Keogh (No 2)* (2014) 121 SASR 307 at [80] (the Court); *R v Drummond (No 2)* [2015] SASCFC 82 at [51] (Gray J).
[69] See *Grierson v The King* (1938) 60 CLR 431 at 434 (Rich J), 435 (Starke J), 435-436 (Dixon J), 437 (McTiernan J); *Burrell v The Queen* (2008) 238 CLR 218 at [24] (Gummow A-CJ, Hayne, Heydon, Crennan and Kiefel JJ); *R v Edwards (No 2)* [1931] SASR 376 at 378 (Angas Parsons, Napier and Piper JJ).
[70] For a succinct statement of that principle see *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [34] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Burrell v The Queen* (2008) 238 CLR 218 at [15] (Gummow A-CJ, Hayne, Heydon, Crennan and Kiefel JJ).
[71] Section 369(1), CLCA.

33. From these matters of legislative context emerge an intention, manifest in the terms of s 353A, that the principle of finality should yield in one further circumstance, but that that circumstance must be strictly construed. To be genuinely coherent with the mechanisms in ss 353 and 369, and preserve the values underpinning the principle of finality, a robust threshold must attend s 353A.

Fresh

34. The requirement in subs (1) that the evidence be "fresh" is given content by subs (6)(a). Whether subparagraph (i) is met in a given case will be easily discernible from the record of the trial. The reference in subparagraph (ii) to "reasonable diligence" "requires an objective assessment of what the applicant could reasonably be expected to have done in all of the circumstances leading up to and including the trial".[72]

Compelling

35. Subsection (6)(b) stipulates three features which evidence must possess to be "compelling" for the purposes of s 353A(1). There is overlap in their content.[73]

36. The first feature – that the evidence be ***"reliable"*** – directs attention to the quality of the evidence and whether it is sufficiently trustworthy or accurate to provide the Court with a sound basis for drawing inferences or conclusions.[74]

37. The second requires that the evidence be ***"substantial"***. Substantiality is a protean concept.[75] Whilst it may be observed that evidence can only be substantial where it is both relevant and of sufficient weight or import, neither of those qualities are meaningful (or assessable) in the abstract. As the term appears in subs (6)(b)(ii) – i.e. in isolation – its content can only be discerned by reference to the context within which it appears, and the purpose for which it is deployed.

38. Given its role as a mandatory limb of a jurisdictional precondition for an appeal under s 353A, the ultimate question on such an appeal is critical to this task. The Court is only empowered to allow an appeal under s 353A where it thinks there was a "substantial miscarriage of justice".[76] The substantiality requirement in subs (6)(b)(ii) must therefore be one that the evidence is substantial *with respect to* that question.

39. Such observation does not elevate this feature of the jurisdictional precondition to one which wholly pre-empts or forecloses the ultimate question to be decided on appeal. Where the Court concludes jurisdiction has been established – and, therefore, that on balance the evidence is substantial in its ability to bear upon the question of a substantial miscarriage of justice – it remains for the Court to assess whether the evidence in fact establishes that there was a substantial miscarriage of justice.[77]

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[72] *R v Keogh (No 2)* (2014) 121 SASR 307 at [102], see also [98]-[100] (the Court); *R v Drummond (No 2)* [2015] SASCFC 82 at [52] (Gray J). This is consistent with the common law position, as to which see: *Ratten v The Queen* (1974) 131 CLR 510 at 517 (Barwick CJ, McTiernan, Stephen and Jacobs JJ agreeing).

[73] *R v Drummond (No 2)* [2015] SASCFC 82 at [324] (Blue J).

[74] *R v Keogh (No 2)* (2014) 121 SASR 307 at [105] (the Court); *R v Drummond (No 2)* [2015] SASCFC 82 at [325] (Blue J).

[75] *Stojanovski v Australian Dream Homes Pty Ltd* [2015] VSC 404 at [45] (Dixon J).

[76] Section 353A(3)-(4).

[77] See [53]-[59] below.

40. The inclusion in s 353A of a threshold assessment of substantiality which directs attention to the ability of the evidence to affect the ultimate question on the appeal is unsurprising. Recalling that s 353A creates a significant and (theoretically, at least) interminably available exception to the principle of finality, an inability to engage the jurisdiction on such an appeal where the evidence is not, on balance, capable of making out the sole ground on which the appeal is permitted to succeed is unexceptional.

41. Once it is seen that the substantiality of the evidence can only be assessed by reference to its ability to bear upon the ultimate question of a substantial miscarriage of justice, it is apparent that all those matters which are relevant to the ultimate question are also relevant to the threshold assessment of whether the evidence is relevantly "substantial".

42. Third, to be "compelling", the evidence must also be ***"highly probative in the context of the issues in dispute at the trial of the offence"*** within the meaning of s 353A(6)(b)(iii). The construction of this limb is not without complication. Read literally, it does not appear to identify the matter(s) of which the evidence must be "highly probative". Silence on this topic returns attention to the matters of legislative context which assisted in discerning the reference point for an assessment of substantiality. However, that approach sees the content of this third limb wholly subsumed by the substantiality enquiry of the second limb. That is, determination that evidence is highly probative of a substantial miscarriage of justice in the context of the issues in dispute at trial necessarily involves a conclusion that the evidence is substantial in its ability to bear upon the question of a substantial miscarriage of justice.

43. The constructional imperative for each limb of subs (6)(b) to retain some identifiably distinct work is borne out in the structure of the provision. Unlike a composite legislative phrase which may more readily be accepted to be tautologous,[78] subs (6)(b) is structured in three separate subparagraphs, with each limb conjunctively aggregated, to define the scope of a jurisdictional precondition. A construction demoting one of those limbs to mere drafting aesthetics should not be adopted absent necessity.

44. Distinct operation for the second and third limbs may be achieved either by reducing the ambit of the "substantial" limb, or by shifting the ambit of the "highly probative" limb. Taking the former approach would require an assessment of "substantiality" somehow gutted of any consideration of the context of the way in which the trial proceeded. Where the object of the substantiality enquiry necessarily directs consideration to the relationship between the evidence and the issue of a substantial miscarriage of justice, any attempt to divorce that enquiry from the way the trial was run is at best artificial in the extreme, but, more likely, simply impossible.

45. The better view is that the second limb remains a broad threshold assessment of the ability of the evidence to bear meaningfully upon the ultimate question in the appeal, but that the third limb invites a much narrower task. The terms of the third limb give primacy to the issues in dispute at the trial. Effect is given to that manifest intention if the third limb is understood as an assessment of the probative value of the fresh evidence *with respect to* the issues in dispute at the trial. Effectively, the preferred

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[78] For example, "misleading and deceptive": see *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198 (Gibbs CJ).

construction is: it is highly probative *of* the issues in dispute at the trial of the offence.[79] This approach retains the essential focus of the limb ("the issues in dispute at the trial") and receives strong contextual and purposive support.

46. Contextually, it provides distinct work for each of the second and third limbs. For example, evidence going to the offender's identity might be substantial in its ability to bear upon the question of a substantial miscarriage, but if identity was not in issue at the trial – the sole issue being, say, mens rea – then the evidence will not be highly probative for the purposes of the third limb. Equally, evidence which might be highly probative of an issue in dispute at trial – say, provocation – will nevertheless be insubstantial as regards any substantial miscarriage of justice if the appellant was convicted of manslaughter. Whilst such circumstances might be few, that the provisions assume sufficiently distinct operations on such a construction cannot be doubted.

47. Further, recalling the significant exception to finality supplied by the provision, that the exception should be unavailable in such circumstances is uncontroversial. There is good reason to deny an appellant a second or subsequent appeal where the issue they seek to agitate was never disputed by them at trial, or where the evidence is assessed as unable to substantially bear upon the question of a substantial miscarriage of justice.

48. As the focus of the third limb, it is necessary to identify the level of abstraction at which the "issues in dispute" are to be identified.[80] In one sense, one issue in any criminal trial is that of guilt (or non-guilt) of the offence.[81] However, that is not an "issue" within the meaning of the third limb.[82] The use of the plural "issues" discloses that a given trial must be capable of containing multiple issues in dispute. Further, characterising the question of guilt as the relevant issue would again serve to subsume the third limb within the substantiality requirement of the second limb.

49. Neither does the third limb invite attention to individual contested facts or opinions. First, it artificially strains the language of "issues in dispute at trial" to characterise a specific contested fact or opinion as such an "issue". Second, identifying the issues at such a near level of abstraction would tend to render nugatory the "*highly* probative" aspect of the third limb. Relevant fresh evidence will necessarily speak to a particular fact or opinion, which fact or opinion will in turn (presumably) have some relevance to a broader issue in the trial. Provided the fresh evidence is reliable (as required by the first limb) then such evidence will always be highly probative of the specific fact or opinion it supports or undermines. The third limb requires more. It directs attention to the real issues in dispute at the trial (matters such as consent, cause of death, opportunity or motive), rather than the minutiae of specific contested facts or opinions.

50. Finally, assuming evidence is relevant to an issue in dispute, whether or not that evidence is *highly* probative of that issue requires consideration of the other evidence at trial which bore upon that issue. If the fresh evidence is to the same or similar effect as evidence given at trial on the issue, or adds little in light of other evidence bearing on the issue, it will not be highly probative within the meaning of the third limb.

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[79] Cf *R v Keogh (No 2)* (2014) 121 SASR 307 at [112] (the Court); *R v Drummond (No 2)* [2015] SASCFC 82 at [160] (Peek J), [327] (Blue J).
[80] *R v Keogh (No 2)* (2014) 121 SASR 307 at [110] (the Court).
[81] *R v Keogh (No 2)* (2014) 121 SASR 307 at [110]-[111] (the Court).
[82] *R v Keogh (No 2)* (2014) 121 SASR 307 at [111] (the Court).

Interests of justice

51. The final determination called for by the jurisdictional preconditions in s 353A(1) is whether evidence both "fresh" and "compelling" should, "in the interests of justice", be considered on appeal. Whilst it is neither possible nor desirable to attempt a precise definition of this phrase, that it involves the judicial evaluation of a broad range of factors[83] which comprehend, inter alia, "the acquittal of the innocent, the conviction of the guilty [and] the public interest in seeing those things happen"[84] is not to be doubted.

52. It will be rare that evidence which is both fresh and compelling within the meaning of s 353A(1) should nevertheless not, in the interests of justice, be considered on appeal. However, where other (fresh and compelling) evidence is extremely probative of the appellant's guilt of the offence – for example, where the appellant has given post-conviction evidence on oath detailing his or her commission of the offence and disclosing esoteric knowledge of it – it may well not be in the interests of justice for his or her fresh exculpatory evidence to be considered on an appeal.

Substantial miscarriage of justice

53. Determining that which may amount to a "substantial miscarriage of justice" within the meaning of s 353A(3) must commence with consideration of the text of the provision, rather than cases decided under different provisions.[85]

54. What emerges critically from that text is that appeals under s 353A have a narrow compass. They are concerned with only one ultimate question – whether "there was a substantial miscarriage of justice" – and that question is only ever engaged where fresh (and compelling) evidence has been adduced. The result is that s 353A does not invite a search for some error of law or other irregularity at trial,[86] or whether the conviction was unreasonable or unsupportable by the evidence at trial. Rather, the provision implicitly directs attention (only) to the potential impact that the fresh and compelling evidence may have had upon the jury if it had been available at trial.[87] The task is to determine whether there was a substantial miscarriage of justice *by reason* of the fact that the (fresh and compelling) evidence now adduced was not called at the trial.[88]

55. In this, an obvious analogy may be drawn with those appeals brought under s 353[89] in which an appellant adduces fresh evidence to seek to establish that there was a "miscarriage of justice" within the meaning of that provision. On such appeals, fresh evidence will only establish a "miscarriage of justice" if the Court considers that there is a significant possibility that the jury, acting reasonably, would have acquitted the appellant if the fresh evidence had been before it at trial.[90] This reflects the approach – derived from a recognition of the importance of finality – that a verdict regularly

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[83] *BHP Billiton Ltd v Schulz* (2004) 221 CLR 400 at [172] (Kirby J).
[84] *R v Prisk & Harris* [2009] QSC 315 at [25] (Martin J).
[85] See *Baini v The Queen* (2012) 246 CLR 469 at [14] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[86] Cf *R v Keogh (No 2)* (2014) 121 SASR 307 at [128] (the Court); *R v Drummond (No 2)* [2015] SASCFC 82 at [366] (Blue J).
[87] See *Gallagher v The Queen* (1986) 160 CLR 392 at 397-398 (Gibbs CJ).
[88] See *Gallagher v The Queen* (1986) 160 CLR 392 at 395 (Gibbs CJ), 402 (Mason and Deane JJ), 409-410 (Brennan J), 414 (Dawson J); *Mickelberg v The Queen* (1989) 167 CLR 259 at 301 (Toohey and Gaudron JJ).
[89] And the common form appeal provision generally.
[90] See *Gallagher v The Queen* (1986) 160 CLR 392 at 399 (Gibbs CJ), 402 (Mason and Deane JJ); *Mickelberg v The Queen* (1989) 167 CLR 259 at 273 (Mason CJ), 291-292 (Deane J), 301 (Toohey and Gaudron JJ).

obtained is not lightly to be set aside because of the discovery of fresh evidence.[91]

56. The expression that approach finds in the threshold for identifying a "miscarriage of justice" on a fresh evidence appeal brought under s 353 can be given no less prominence in a second or subsequent appeal under s 353A. Indeed, the position is *a fortiori* on a s 353A appeal, where a heightened jurisdictional threshold is imposed by s 353A(1),[92] and where it is a "substantial" miscarriage of justice which must be established before an appeal may be allowed.

57. In the result, the task in identifying a "miscarriage of justice" under s 353 in a fresh evidence appeal effects a constructional "baseline" of sorts for a court's satisfaction of a "substantial miscarriage of justice" under s 353A(3). For a court to be satisfied that fresh and compelling evidence discloses a "substantial miscarriage of justice" within the meaning of s 353A(3) more readily than it may be satisfied that fresh evidence discloses a "miscarriage of justice" on a fresh evidence appeal under s 353 would create a class of cases where the fresh evidence advanced would fail to establish a miscarriage of justice such a s 353 appeal, but would nevertheless demonstrate a substantial miscarriage of justice on a s 353A appeal. As a matter of context, purpose and basic legislative coherence, such a construction of s 353A(3) is unavailable.

58. At a minimum then, s 353A(3) requires the appellant satisfy the Court there is a *significant possibility* that the jury acting reasonably would have acquitted the appellant if the fresh and compelling evidence had been before it. Indeed, this was the unanimous view of the Court below.[93] The use of the adjective "substantial" suggests the appellant must in fact establish something more. Having said that, it is not profitable to attempt a formulation in substitute of the language of the provision. Ultimately, the Court must be satisfied that the fresh and compelling evidence establishes that there was a "substantial miscarriage of justice", recalling that will be unable to be established absent creation of *at least* a significant possibility that the jury acting reasonably would have acquitted the appellant had the evidence been before it.

59. Plainly enough, that question "can only be answered in the context of, and by reference to, 'the probative force and the nature of the evidence already adduced at the trial'".[94]

Application of s 353A to this case

60. The members of the Court below were unanimous that the new evidence it admitted was "fresh" within the meaning of s 353A[95] and relevantly "reliable".[96] They diverged on three important matters; namely, whether, within the meaning of s 353A, the fresh evidence was: (i) "substantial", (ii) "highly probative in the context of the issues in dispute at the trial", and (iii) such as to disclose that "there was a substantial

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[91] *Gallagher v The Queen* (1986) 160 CLR 392 at 413 (Dawson J).

[92] That is, that the evidence is "fresh", "compelling" and "should, in the interests of justice, be considered on an appeal".

[93] See *R v Van Beelen* (2016) 125 SASR 253at [59]-[60], [76] (Kourakis CJ), [173] (Vanstone and Kelly JJ). Cf *R v Keogh (No 2)* (2014) 121 SASR 307 at [128] (the Court); *R v Drummond (No 2)* [2015] SASCFC 82 at [55] (Gray J), [176] (Peek J), [371], [374] (Blue J).

[94] *Gallagher v The Queen* (1986) 160 CLR 392 at 402 (Mason and Deane JJ), quoting *Craig v The King* (1933) 49 CLR 429 at 439 (Rich and Dixon JJ); see also *Mickelberg v The Queen* (1989) 167 CLR 259 at 301 (Toohey and Gaudron JJ).

[95] See *R v Van Beelen* (2016) 125 SASR 253 at [62] (Kourakis CJ), [157] (Vanstone and Kelly JJ).

[96] See *R v Van Beelen* (2016) 125 SASR 253 at [64] (Kourakis CJ), [158] (Vanstone and Kelly JJ).

miscarriage of justice".[97] The conclusions of Kourakis CJ, however, must be approached with caution given several errors disclosed in his Honour's reasoning.

61. As to the first and third enquiries, Kourakis CJ (wrongly) reasoned that the fact that the jury might have convicted on the basis of Dr Manock's evidence[98] necessarily established a significant possibility of acquittal. As to the second, the "contested fact"[99] identified by Kourakis CJ is, for the reasons discussed above at [49], not an "issue in dispute" within the meaning of s 353A(6)(b)(iii).

62. The following analysis – undertaking the enquiries necessitated by s 353A in this case – confirms the correctness of the conclusions reached by the majority on each.

10 Fresh

63. It is accepted Professor Horowitz's evidence of further scientific work conducted into gastric emptying rates from the mid-1970s and, to the extent that they are based on that further work, his opinions, amount to fresh evidence within the meaning of s 353A.[100]

Compelling

64. The reliability of the fresh evidence is not contested. The real issues are whether that evidence is "substantial" and "highly probative in the context of the issues in dispute at the trial" within the meaning of s 353A(6)(b)(i) and (ii), respectively. The appellant must establish that it is both; the respondent contends that it is neither.

65. There are three matters which disclose that the appellant's fresh evidence is not
20 ***substantial***: the nature and extent of the contest at trial regarding the scientific evidence as to time of death, the civilian evidence bearing upon the opportunity for another to have committed the offence, and the nature and strength of the subsisting circumstantial case implicating the appellant.

66. The first of these was, alone, sufficient to satisfy the majority in the Court below that the fresh evidence was not "substantial" within the meaning of s 353A(1).[101] Recalling that, as used in s 353A(1), that limb asks whether the fresh evidence is substantial in its ability to bear upon the question of whether there is (at least) a *significant possibility the jury would have* acquitted the appellant, the nature and extent of the contest at trial regarding the issue to which the fresh evidence is directed assumes importance.

30 67. Dr Manock's evidence regarding time of death was fulsomely contested and contradicted. He was cross-examined about his use of stomach contents to form his opinion,[102] and at one stage counsel for the appellant read to Dr Manock, verbatim, a number of passages from textbooks that highlighted the difficulty in estimating time of death from stomach contents.[103] The appellant led detailed evidence from his own

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[97] The majority was not satisfied that any of these conditions was met: see *R v Van Beelen* (2016) 125 SASR 253 at [162]-[164], [166], [174] (Vanstone and Kelly JJ). The Chief Justice, in dissent, was satisfied of them all: see at [66], [72], [76]-[78] (Kourakis CJ).

[98] See *R v Van Beelen* (2016) 125 SASR 253 at [70]-[71], [76] (Kourakis CJ).

[99] *R v Van Beelen* (2016) 125 SASR 253 at [65] (Kourakis CJ).

[100] See *R v Van Beelen* (2016) 125 SASR 253 at [157] (Vanstone and Kelly JJ), see also at [62] (Kourakis CJ).

[101] *R v Van Beelen* (2016) 125 SASR 253 at [162] (Vanstone and Kelly JJ).

[102] T 643-658, 676-693, 707.

[103] T 676-681, 684-9. See also 710-2.

expert, Dr Pocock, which directly challenged the soundness of Dr Manock's approach to the issue. Dr Pocock was asked expressly whether, in his opinion, estimation of time of death from stomach contents was reliable.[104] He responded that it was not and proceeded to read passages from textbooks which supported his opinion.[105] In his address, counsel for the appellant returned to the issue[106] and put bluntly,"[t]he fact of the matter is that the whole weight of medical knowledge surrounding this problem of estimating time of death from stomach contents is against Dr Manock".[107]

68. Properly, neither the prosecutor[108] nor the trial judge[109] suggested that acceptance of Dr Manock's opinion as to time of death was necessary for satisfaction of guilt.

10 69. The fresh evidence advanced simply tends to confirm the correctness of the opinions put into evidence by the appellant at trial: there is a wide variation between individuals in gastric rates of emptying,[110] estimating time of death from stomach contents is generally unreliable,[111] and an estimate as precise as Dr Manock's cannot reliably be made.[112] The further studies conducted since the mid-1970s tend to fortify further Dr Pocock's expert evidence, which already received significant support from the textbooks and science of the time and which support itself was also before the jury.[113]

70. To observe that, despite that evidence, it nevertheless remained open to the jury to accept Dr Manock's opinion, does not resolve whether the fresh evidence is relevantly "substantial".[114] Whilst such an observation may be a necessary condition for
20 satisfaction of that limb, that the ultimate enquiry is one which engages with the significance of the possibility of acquittal, means it cannot be a sufficient condition.

71. The nature and extent of the contest at trial regarding the scientific evidence of time of death reduces the impact of Professor Horowitz's evidence to one of mere confirmatory effect. In those circumstances, the evidence is not substantial with respect to the question of whether there was a "substantial miscarriage of justice" within the meaning of s 353A(3). The majority in the Court below was therefore correct to conclude on this basis that such evidence was not "substantial" within the meaning of s 353A(6)(b)(ii).

72. Two other matters further strengthen the conclusion that the fresh evidence is not relevantly "substantial": The civilian evidence bearing upon the opportunity for another
30 to have committed the offence, and the nature and strength of all the other evidence probative of the appellant's guilt.

73. The time of Deborah's death was relevant to "opportunity", which in turn was relevant to the major issue at trial; the identity of the offender. Two counterpart, but distinct, strands of the circumstantial prosecution case were sourced in the notion of "opportunity": first, that the appellant had the opportunity to commit the offence, and

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[104] T 2533.
[105] T 2533-9.
[106] T 2629, 2639-2642.
[107] T 2629.
[108] Prosecution Closing, T 2739-2740, 2745-6.
[109] Summing Up, T 2817-2820, 2915.
[110] T 2539.
[111] T 2533.
[112] T 2545.
[113] T 676-681, 684-9, 2535-9.
[114] Cf *R v Van Beelen* (2016) 125 SASR 253 at [70]-[71] (Kourakis CJ).

second, that the opportunity for some other male person to have done so was limited.

74. The fresh evidence does not diminish the appellant's opportunity, nor does it increase the opportunity for another male to have committed the offence in the time the appellant was on the beach. It can only logically impact upon the degree of opportunity for another male to have committed the offence at a time outside the period the appellant was on the beach. The civilian evidence reveals both that the available period of time beyond when the appellant was on the beach was no more than 20 minutes, and that the further opportunity supplied by those 20 minutes was in fact particularly slight.

75. The unchallenged evidence was that Deborah was alive and on the beach by 4.00pm. The appellant admitted he was there then and until about 4.30pm. As the prosecutor put,[115] more telling than the scientific evidence as to time of death was the unchallenged evidence of Mrs Leach and the conclusion to be drawn from that evidence as to when Deborah had died. Given her evidence, Deborah had been killed by about 4.50pm (arguably 4.40pm). As the Court below unanimously concluded,[116] even with the fresh evidence, this civilian evidence limited the time within which Deborah could have died to no more than 20 minutes beyond that estimated by Dr Manock.

76. The true significance of this further 20 minutes for the possibility of another unidentified male having committed the offence must be assessed in light of the civilian evidence, and the appellant's own accounts, concerning the paucity of persons at this particular beach on that afternoon, before, during and after the time Deborah was killed.

77. The prosecution called all those known to be on this part of the beach between 2.15pm and 4.20pm. In that period ten adults were certainly seen (plus Mrs Drummond's infant child). Six were accounted for by the evidence (Mrs Drummond, Mr Lukeman, Mr Streeter and the three fishermen). The balance were two couples. There was no objection to the jury being directed in terms consistent with both being from a liner moored a considerable distance away.[117] There was no challenge that both had been heading away from the vicinity before Mr Streeter came across Mr Lukeman, before each of Mr Streeter and Mr Lukeman left the beach and well before Deborah had arrived.[118] Mr Shiels referred to the possibility of another two men. If these were not in fact Mr Lukeman and Mr Streeter they had in any event headed away from the vicinity before about 4.20pm, if not as early as before 3.40pm. At 3.40pm Mrs Drummond, and at 4.20pm the fishermen, saw no one on the beach as they left. The appellant's own version was that whilst he was on the beach between 4.00pm and 4.30pm he saw no one. Finally, Mrs Leach saw no one on the beach at both 4.40pm and 4.50pm. Shortly after that, she saw only two men with their horses in the water and a girl. Her evidence was not tested or challenged in any way.

78. The civilian evidence bearing directly upon time of death and, more broadly, on the opportunity for another to be responsible, denies the fresh evidence the character of being substantial. In light of that evidence, the fresh evidence supplies only a further 20 minutes within which some other unknown male could have committed the offence, in circumstances where the beach at that time was, at most, sparsely populated.

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[115] Prosecution Closing, T 2745-6.
[116] *R v Van Beelen* (2016) 125 SASR 253 at [7] (Kourakis CJ), [138] (Vanstone and Kelly JJ).
[117] Summing Up, T 2822.
[118] Prosecution Closing, T 2713; Summing Up, T 2826, 2831.

79. Finally, the impact of the fresh evidence (such as it is) is confined to just one strand of the circumstantial case: that there was limited opportunity for someone else to have committed the offence. Plainly, the nature of a circumstantial case is such that each strand in turn may tend to reinforce the other strands of the case.[119] Where the strength of one strand is weakened, there may follow a weakening of the overall strength of the circumstantial case. Critically however, determining whether there is (at least) a significant possibility the jury would have acquitted[120] demands more than examination of the extent to which the relevant strand has been weakened;[121] the combined strength of all strands, including those which remain uncompromised, must also be examined.

10 80. That the balance of the prosecution case (the strands of which are unaffected by the fresh evidence) is compelling, further denies the fresh evidence being "substantial".

81. There was no dispute the appellant had, for most of the day, been driving alone to various beaches. Despite the availability of the car park at Taperoo Beach, he had parked his car in bushes where it might not be seen from the road.[122] The position he indicated to police as where he had parked his car meant if Deborah continued to the beach from where she was last seen at about 4.00pm, within moments she would have passed the appellant's car. The time Deborah was last seen coincided with the time the appellant said he had gone onto the beach; a choice he made despite not having done so at any earlier point in the day and knowing he had to collect his wife from the city at
20 5.00pm (requiring him to depart the beach by about 4.30pm). Deborah's body was later found only 600 feet from where the appellant parked his car.

82. The strength of the inference arising from the fibres present on the clothing of each of Deborah and the appellant is particularly telling. This is significant because it is powerful evidence of contact between the appellant and Deborah. As the prosecutor submitted, proof of the connection by the fibres evidence was necessary for guilt.[123]

83. There was no dispute at trial as to a number of aspects of the fibres evidence, including that: whomever attacked Deborah must have come into contact with her clothing, clothing is particularly susceptible to transfer of material,[124] the red and black fibres were on the upper singlet of Deborah and corresponded in every way with fibres
30 sampled from the appellant's jumper (i.e. appearance under microscope, response to more than one test and relative frequency), the red and black fibres on the singlet had not come from the balance of Deborah's clothing, red and black fibres had not been found together at her home (indeed no consistent red fibres were found there at all), on the appellant's jumper were three brown fibres two of which were indistinguishable from those of Deborah's jumper, Deborah was buried in seaweed and the appellant's red and black jumper had seaweed within it despite his assertion that he had only walked on the beach in the area between the seaweed and the land.[125]

84. Bearing in mind the absence of dispute about the above, the appellant's presence on the

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[119] *Chamberlain v The Queen* (1984) 153 CLR 521 at 536 (Gibbs CJ and Mason J).
[120] Such as those invited by the "substantiality" limb in s 353A(6)(b)(ii) and the "substantial miscarriage of justice" question posed by s 353A(3).
[121] As to which, in this case, see [74]-[79] above.
[122] Prosecution Closing, T 2679-2680.
[123] Prosecution Closing, T 2783.
[124] T 766.
[125] T 2245-6, 2320, 2324.

beach at the same time as Deborah, and him having at one point proffered the red and black jumper as the one he was wearing, as well as the way the case was put to the jury, the contest at trial was whether the fibres implicated the appellant or might have an innocent explanation. The possible innocent explanations were that the fibres were from the true offender or the product of some innocent contamination.

85. Even in light of the fresh evidence, neither hypothesis can be characterised as a "reasonable possibility", let alone permit the conclusion that there exists a significant possibility the jury would have acquitted the appellant. The first requires:

- an unknown male to be on the beach sometime between 4.00 and 4.50pm, and
- to be unseen by anyone, and
- to have attacked Deborah and, while doing so,
- to be wearing a jumper of the same composition as another man known to be on this sparsely populated beach within that time, and
- to deposit the fibres on Deborah's singlet, and
- to have buried her in seaweed, and
- the appellant not to be the source of those fibres, notwithstanding that:
  - the appellant's car was parked, in bushes, in the location Deborah would have passed if she continued to the beach from where she was last seen;
  - the appellant was on the beach between 4.00 and 4.30pm;
  - the red and black fibres on Deborah's singlet matched in every respect the fibres of a jumper owned by him and stated by him at one point to be the jumper he was wearing while on the beach;
  - his jumper had seaweed on it, despite the appellant's claim he had only walked on the beach and not in an area that would cause seaweed to attach; and
  - the appellant's jumper had on it two brown fibres matching, in every respect, the fibres of which Deborah's jumper was made.

The second requires that the unknown male deposited no fibres on Deborah's upper singlet during his attack,[126] and the coincidences of the first scenario attend 36 red and black fibres which were deposited on Deborah on another, unidentified occasion(s) from some other, unidentified source(s), not being her own home or clothing.

86. The strands of evidence probative of the appellant's guilt are so compelling that the limited expansion of opportunity supplied by the fresh evidence cannot be characterised as bearing substantially upon the question of whether there is a significant possibility that, had that fresh evidence been before the trial jury, it would have acquitted the appellant. If this be accepted, the evidence is not "substantial" and the appeal fails.

87. To determine whether the fresh evidence is ***highly probative in the context of the issues in dispute at the trial***, the "issues" to which that fresh evidence relates must be

[126] The only fibres on the upper singlet were the red and black ones, a single blue fibre (matching a blue fibre from Deborah's home) and white cotton fibres regarded as insignificant (see fn 48 and 50 above).

identified. The fresh evidence bears upon the issue of the time of Deborah's death. That issue was, in turn, one aspect of the evidence of opportunity, which in turn informed the major issue in dispute at the trial: the identity of the offender. Thus, the fresh evidence bears upon several issues in dispute at the trial within the meaning of s 353A(6)(b)(iii). Opportunity and identity being issues of a higher level of abstraction, and issues only impacted upon through the prism of "time of death", the issue of which the evidence will most readily be capable of being highly probative is necessarily "time of death". There being no doubt that time of death was in dispute at trial, and no doubt that the fresh evidence is relevant to that issue, the question posed by subs (6)(b)(iii) in this case is: Is the fresh evidence *highly* probative of the issue of time of death?

88. Whether the probative value of the fresh evidence can be properly characterised as "high" depends upon the other evidence at trial which bore upon that issue. The majority in the Court below concluded (correctly), that the appellant's fresh evidence is not highly probative for two reasons,[127] the second of which compounds the first.

89. First, its substance is of a largely similar effect to the scientific evidence regarding time of death the appellant led at trial.[128] Whilst it tends to confirm that evidence,[129] its probative effect must be assessed by how much it adds beyond the evidence already led at trial. That contribution is limited.

90. Second, *all* of the scientific evidence as to time of death was, and is, reduced to subsidiary importance in light of the uncontested civilian evidence bearing on the issue.[130] As the court below unanimously concluded, the civilian evidence permitted of a time of death no more than 20 minutes later than that postulated by Dr Manock.[131]

91. The result is the fresh evidence makes a limited contribution to the scientific aspect of the evidence regarding time of death, itself evidence largely overtaken by the civilian evidence. The majority in the Court below correctly concluded the fresh evidence was not relevantly "highly probative". If this be accepted, the appeal fails.

Jurisdiction

92. If either of the respondent's contentions denying that the fresh evidence is "substantial" or "highly probative" is accepted, then the Court below lacked jurisdiction to consider the evidence on an appeal,[132] and it was appropriate for it to refuse permission to appeal. If the fresh evidence is found to meet all three limbs of the "compelling" requirement (contrary to the respondent's contentions), it is accepted the evidence would be such as "should, in the interests of justice, be considered on an appeal".[133]

Substantial miscarriage of justice

93. If, contrary to the respondent's contentions, the fresh evidence is "compelling", it

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[127] *R v Van Beelen* (2016) 125 SASR 253 at [163] (Vanstone and Kelly JJ).
[128] *R v Van Beelen* (2016) 125 SASR 253 at [163] (Vanstone and Kelly JJ).
[129] See [69], [71] above.
[130] *R v Van Beelen* (2016) 125 SASR 253 at [164] (Vanstone and Kelly JJ).
[131] *R v Van Beelen* (2016) 125 SASR 253 at [7] (Kourakis CJ), [138] (Vanstone and Kelly JJ).
[132] See s 353A(1), CLCA.
[133] See s 353A(1), CLCA. In this, the respondent does not seek to defend the dicta of the majority in the Court below appearing at *R v Van Beelen* (2016) 125 SASR 253 at [165] (Vanstone and Kelly JJ).

remains for the appellant to establish that evidence demonstrates there was a "substantial miscarriage of justice" (s 353A(3)). Given that the jurisdictional requirement that the evidence be "substantial" directs attention to the ability of the fresh evidence to bear (substantially) on the question of whether there was a substantial miscarriage of justice within the meaning of s 353A(3), assessment of whether there was a substantial miscarriage of justice in a given case requires examination of the same matters relevant to the substantiality enquiry. Of course, the requirement the evidence be "substantial" for subs (6)(b)(ii) imposes a lower threshold than that demanded by the ultimate "substantial miscarriage" question posed by subs (3).

94. In the result, the fresh evidence fails to establish "there was a substantial miscarriage of justice" in the present case for the same reasons that, in the respondent's submission, it cannot be characterised as "substantial": see above at [65]-[86]. However, the test for a "substantial miscarriage of justice" being all the more stringent, the contention that the fresh evidence so fails is on this question all the more forceful.

95. Looking as it does at whether there is (at least) a significant possibility that the jury, acting reasonably, would have acquitted the appellant if the fresh evidence had been before it, the enquiry examines the potential impact of the fresh evidence on the trial jury, given the particular way the trial was run and the other evidence led. In the end, the nature and extent of the scientific evidence contradicting Dr Manock's opinion, the civilian evidence which extended his proffered time of death by no more than 20 minutes and which itself diminished the significance of all the scientific evidence on the issue, the way in which the jury was invited (by both the prosecutor[134] and trial judge[135]) to approach the issue of time of death, the evidence as to the paucity of persons on the beach at the relevant time which further diminished the significance of that further 20 minutes, and the other (unimpugned) pieces of circumstantial evidence compellingly probative of the appellant's guilt, combine to preclude a conclusion that there arises a significant possibility that the jury would have acquitted the appellant.

96. Although the Court below unanimously identified the question posed by subs (3) as one of a significant possibility the jury would have acquitted,[136] the divergent conclusions reached by the majority on the one hand and Kourakis CJ on the other, are explicable, at least in part, by the non sequiter in Kourakis CJ's reasoning. The error is revealed by the following purported adoption of deductive reasoning, wherein the premise cannot in fact sustain the conclusion:

> ... I proceed on the **premise**, for the reasons given above at [69]-[70] above, **that the jury may have convicted on the basis that** Dr Manock's impugned opinion was correct and that the applicant was therefore the only person with a real opportunity to murder Deborah before her death at 4:15pm or perhaps 4:30pm. **On that premise**, it is beyond argument that, on the fresh evidence, **there is a significant possibility that a jury would have acquitted the applicant.**[137] (Emphasis added)

97. His Honour's further reasoning at [77] – examining whether "a properly directed jury would necessarily convict" – suffers from further vices. First, it does not address itself

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[134] Prosecution Closing 2744-6; *R v Van Beelen* (2016) 125 SASR 253 at [141][143]
[135] Summing Up 2817-9, 2820; *R v Van Beelen* (2016) 125 SASR 253 at [145]-[146]
[136] See *R v Van Beelen* (2016) 125 SASR 253 at [59]-[60] (Kourakis CJ), [173] (Vanstone and Kelly JJ).
[137] *R v Van Beelen* (2016) 125 SASR 253 at [76] (Kourakis CJ).

to the question posed by s 353A(3). Second, it assumes that despite concluding there exists a "significant possibility a jury would have acquitted", whether "a jury would necessarily acquit" can remain an open question. A proper application of a test of "significant possibility of acquittal" necessarily forecloses the latter question. His Honour's conduct of that further enquiry is indicative of an erroneous approach to the first question and, in turn, that of a substantial miscarriage of justice. Third, his Honour's finding that "the prosecution evidence did not comprehensively exclude other sources of the fibres" appears founded on a reference in the Summing Up to "the possibility of alternative sources".[138] There were two such references. The first[139] was no more than a recitation of the defence case. The second[140] can only support Kourakis CJ's finding if read with no regard to the remainder of the sentence in which it appears (and, indeed, the following paragraph). Such a finding could only ever be made upon a consideration of the whole of the evidence. Finally, on a proper consideration of that evidence, and as set out at [85]-[86] above, the finding cannot be sustained.

98. On an enquiry properly directed to the question posed by s 353A(3), the impact of the fresh evidence does not rise so high as to create a significant possibility that the jury, had it had the evidence before it, would have acquitted the appellant. The appellant has not established a substantial miscarriage of justice within the meaning of subs (3).

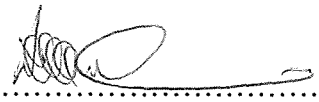
Orders

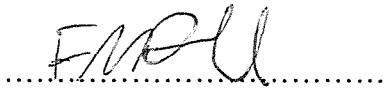
99. The appeal should be dismissed. In the event that the Court determines to allow the appeal, the appropriate orders are to allow the appeal, set aside Order 4 of the orders of the court below made on 13 July 2016, and in its place order that the appellant's application for permission to appeal be granted, his appeal be allowed, his conviction be quashed, and a new trial be had. The evidence being capable of founding a finding of guilt beyond reasonable doubt, there is no basis for this Court to order an acquittal.[141] There is also no warrant for a grant of declaratory relief as sought by the appellant.

Part VII: TIME ESTIMATE

100. The respondent estimates that 2 hours will be required for its oral argument.

Dated: 7 April 2017





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[138] *R v Van Beelen* (2016) 125 SASR 253 at [77] (Kourakis CJ).
[139] Summing Up, T 2811.
[140] Summing Up, T 2839.
[141] Cf Appellant's Notice of Appeal at [3.3].

ANNEXURE A:
Relevant statutory provisions

Criminal Law Consolidation Act 1935 (SA)

Division 3—Appeals

352—Right of appeal in criminal cases

(1) Appeals lie to the Full Court as follows:

(a) if a person is convicted on information—

(i) the convicted person may appeal against the conviction as of right on any ground that involves a question of law alone;

(ii) the convicted person may appeal against the conviction on any other ground with the permission of the Full Court or on the certificate of the court of trial that it is a fit case for appeal;

(iii) subject to subsection (2), the convicted person or the Director of Public Prosecutions may appeal against sentence passed on the conviction (other than a sentence fixed by law), or a decision of the court to defer sentencing the convicted person, on any ground with the permission of the Full Court;

(ab) if a person is tried on information and acquitted, the Director of Public Prosecutions may, with the permission of the Full Court, appeal against the acquittal on any ground—

(i) if the trial was by judge alone; or

(ii) if the trial was by jury and the judge directed the jury to acquit the person;

(b) if a court makes a decision on an issue antecedent to trial that is adverse to the prosecution, the Director of Public Prosecutions may appeal against the decision—

(i) as of right, on any ground that involves a question of law alone; or

(ii) on any other ground with the permission of the Full Court;

(c) if a court makes a decision on an issue antecedent to trial that is adverse to the defendant—

(i) the defendant may appeal against the decision before the commencement or completion of the trial with the permission of the court of trial (but permission will only be granted if it appears to the court that there are special reasons why it would be in the interests of the administration of justice to have the appeal determined before commencement or completion of the trial);

(ii) the defendant may, if convicted, appeal against the conviction under paragraph (a) asserting as a ground of appeal that the decision was wrong.

(2) If a convicted person is granted permission to appeal under subsection (1)(a)(iii), the Director of Public Prosecutions may appeal under that subparagraph without the need to obtain the permission of the Full Court.

353—Determination of appeals in ordinary cases

(1) The Full Court on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which 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.

(2) Subject to the special provisions of this Act, the Full Court shall, if it allows an appeal against conviction, quash the conviction and either direct a judgment and verdict of acquittal to be entered or direct a new trial.

(2a) On an appeal against acquittal brought by the Director of Public Prosecutions, the Full Court may exercise any one or more of the following powers:

(a) it may dismiss the appeal;

(b) it may allow the appeal, quash the acquittal and order a new trial;

(c) it may make any consequential or ancillary orders that may be necessary or desirable in the circumstances.

(3) If the Full Court orders a new trial under subsection (2a)(b), the Court—

(a) may make such other orders as the Court thinks fit for the safe custody of the person who is to be retried or for admitting the person to bail; but

(b) may not make any order directing the court that is to retry the person on the charge to convict or sentence the person.

(3a) If an appeal is brought against a decision on an issue antecedent to trial, the Full Court may exercise any one or more of the following powers:

(aa) it may revoke any permission to appeal granted by the court of trial;

(a) it may confirm, vary or reverse the decision subject to the appeal;

(b) it may make any consequential or ancillary orders that may be necessary or desirable in the circumstances.

(4) Subject to subsection (5), on an appeal against sentence, the Full Court must—

(a) if it thinks that the sentence is affected by error such that the defendant should be re-sentenced—

(i) quash the sentence passed at the trial and substitute such other sentence as the Court thinks ought to have been passed (whether more or less severe); or

(ii) quash the sentence passed at the trial and remit the matter to the court of trial for resentencing; or

(b) in any other case—dismiss the appeal.

(5) The Full Court must not increase the severity of a sentence on an appeal by the convicted person except to extend the non-parole period where the Court passes a shorter sentence.

353A—Second or subsequent appeals

(1) The Full Court may hear a second or subsequent appeal against conviction by a person convicted on information if the Court is satisfied that there is fresh and compelling evidence that should, in the interests of justice, be considered on an appeal.

(2) A convicted person may only appeal under this section with the permission of the Full Court.

(3) The Full Court may allow an appeal under this section if it thinks that there was a substantial miscarriage of justice.

(4) If an appeal against conviction is allowed under this section, the Court may quash the conviction and either direct a judgment and verdict of acquittal to be entered or direct a new trial.

(5) If the Full Court orders a new trial under subsection (4), the Court—

(a) may make such other orders as the Court thinks fit for the safe custody of the person who is to be retried or for admitting the person to bail; but

(b) may not make any order directing the court that is to retry the person on the charge to convict or sentence the person.

(6) For the purposes of subsection (1), evidence relating to an offence is—

(a) ***fresh*** if—

(i) it was not adduced at the trial of the offence; and

(ii) it could not, even with the exercise of reasonable diligence, have been adduced at the trial; and

(b) ***compelling*** if—

(i) it is reliable; and

(ii) it is substantial; and

(iii) it is highly probative in the context of the issues in dispute at the trial of the offence.

(7) Evidence is not precluded from being admissible on an appeal referred to in subsection (1) just because it would not have been admissible in the earlier trial of the offence resulting in the relevant conviction.

...

Division 5—References on petitions for mercy

369—References by Attorney-General

(1) Nothing in this Part affects the prerogative of mercy but the Attorney-General, on the consideration of any petition for the exercise of Her Majesty's mercy having reference to the conviction of a person on information or to the sentence passed on a person so convicted, may, if he thinks fit, at any time, either—

(a) refer the whole case to the Full Court, and the case shall then be heard and determined by that Court as in the case of an appeal by a person convicted; or

(b) if he desires the assistance of the judges of the Supreme Court on any point arising in the case with a view to the determination of the petition, refer that point to those judges for their opinion and those judges, or any three of them, shall consider the point so referred and furnish the Attorney-General with their opinion accordingly.

(2) If a full pardon is granted to a convicted person in the exercise of Her Majesty's mercy in relation to a conviction of an offence, the Attorney-General may refer the matter to the Full Court and the Full Court may, if it thinks fit, quash the conviction.