**No. M129 of 2018**

IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

ON APPEAL FROM THE SUPREME COURT OF VICTORIA (COURT OF APPEAL)

IN THE MATTER OF:

**DIRECTOR OF PUBLIC PROSECUTIONS REFERENCE NO 1 OF 2017**

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APPELLANT'S SUBMISSIONS

**Part I: SUITABILITY FOR INTERNET PUBLICATION.**

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

**Part II: CONCISE STATEMENT OF THE RELEVANT ISSUES.**

2. This appeal raises the following questions for consideration –

20 (a) whether the direction commonly referred to as the "*Prasad* direction" is contrary to law and should not be administered to a jury determining a criminal trial between the Crown and an accused person?

(b) whether the jury has a "right to acquit" exercisable of its own motion at any time after the close of the prosecution case?

**Part III: NOTICE UNDER THE *JUDICIARY ACT* 1903**

3. The appellant certifies that the question of whether notice should be given under section 78B of the *Judiciary Act* 1903 (Cth.) has been considered. Such notice is not considered to be necessary in this appeal.

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**Part IV: CITATION OF REASON FOR JUDGMENT**

4. The decision of the Court of Appeal ("the court below") is cited as *Director of Public Prosecutions Reference No 1 of 2017* [2018] VSCA 69 ("the judgment below".) **CAB 75**



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## Part V: STATEMENT OF MATERIAL FACTS

### Narrative of proceedings

5.1 Indictment F12622673 filed in the Supreme Court of Victoria charged that the "accused person" murdered the "deceased person" contrary to common law. On 15 November 2016 the accused person was arraigned in the Supreme Court and entered a plea of not guilty. A jury trial then commenced before Justice Lasry, with 13 jurors empanelled.[1] **CAB 5**

10 5.2 The following brief summary of facts is drawn from the ruling made by the trial judge in respect of the *Prasad* direction:[2] **CAB 19-20**

> [The accused person] is charged with the murder of [the deceased] on 18 July 2015 at Seaford. The deceased man [identity removed], was the de facto partner of the accused person and on that day the Crown case is that the pair engaged in a heated argument during which the accused person struck the deceased to the back of the head with a footstool which caused his death. The accused person then called '000' and reported having found the deceased on the floor, bleeding after a fall, which the Crown contend, and the accused person does not otherwise argue, was a lie told in several forms and on several
> 20 occasions.
>
> The accused person was given certain instructions during the '000' phone call, including the administration of cardiopulmonary resuscitation and could be heard saying certain things which the Crown had proposed to rely on as evidence of an implied admission in support of their case that the accused person murdered the deceased....
>
> The accused person agrees that she struck the deceased with a timber footstool, although the number of blows and the physical location of she and the
> 30 deceased at the time these blows were struck is in issue between the Crown and the accused person. She has asserted through counsel at the beginning of the trial in his response to the prosecution opening that at the time she struck the deceased she was acting in self-defence.
>
> There will also be an issue as to whether or not the prosecution can prove beyond reasonable doubt that the accused person had a murderous intent.

5.3 Immediately after the close of the Crown case, counsel for the accused person sought the administration of a *Prasad* direction, essentially on the basis that the prosecution

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[1] Empanelment pursuant to section 41(2) *Juries Act* 2000 (Vic)

[2] *DPP v [Accused Person],* Trial Transcript, 23/11/2016 at 690-691 **CAB 19 - 20**

case was not a particularly strong one insofar as the prosecution was required to prove beyond reasonable doubt that the accused person was not acting in self-defence.[3] **CAB 11-15**

5.4 Senior counsel for the Crown resisted the giving of a *Prasad* direction and submitted that there was "nothing before the jury about what precisely happened in the unit on the night" of the fatal blow.[4] Senior counsel also raised the issue of whether the Prasad direction remained a viable trial direction after the recent decision of the High Court in *R v Baden-Clay*.[5] It is also of note that at this stage there had been no ruling as to whether the prosecution could rely on various statements made by the accused person in a telephone call as incriminating conduct.[6] **CAB 15** **CAB 16** **CAB 19**

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5.5 The trial judge ruled that he would give a Prasad direction to the jury[7] and administered a longer than usual *Prasad* direction.[8] The trial judge informed the jury that as they had heard the whole of the Crown case they now had 3 choices: **CAB 19 – 22; CAB 24 -46**

- the right to deliver verdicts of "not guilty" to murder and manslaughter; or
- the right to deliver a verdict of "not guilty" to murder and an indication they wished to hear more evidence in respect of the charge of manslaughter; or
- they could indicate they wished to hear more evidence in respect of both charges.

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5.6 A ballot was conducted to reduce the jury from 13 to 12 persons and the jury retired to consider its decision.[9] The jury returned and advised that they would like to hear more evidence. The 13th juror re-joined the jury.[10] The judge advised the jury that the option of returning a not guilty verdict without hearing more remained open to the jury at any time.[11] The trial continued with the accused person giving sworn evidence. **CAB 49 -53; CAB 54** **CAB 54**

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[3] *DPP v [Accused Person]*, Trial Transcript, 22/11/2016 at 682-686; *R v Prasad* (1979) 23 SASR 161 at 163 per King CJ. **CAB 11 - 15**
[4] *DPP v [Accused Person]*, Trial Transcript, 22/11/2016 at 686 lines 4–6. **CAB 15**
[5] *DPP v [Accused Person]*, Trial Transcript, 22/11/2016 at 687; *R v Baden-Clay* (2016) 258 CLR 308. **CAB 16**
[6] *DPP v [Accused Person]*, Trial Transcript, 23/11/2016 at 690 lines 20–22. **CAB 19**
[7] *DPP v [Accused Person]*, Trial Transcript, 23/11/2016 at 690-693. **CAB 19 - 22**
[8] *DPP v [Accused Person]*, Trial Transcript, 23/11/2016 at 695-717. **CAB 24 - 26**
[9] *DPP v [Accused Person]*,Trial Transcript, 23/11/2016 at 720 – 724; section 48 *Juries Act* 2000 (Vic). **CAB 49 - 53**
[10] *DPP v [Accused Person]*,Trial Transcript, 23/11/2016 at 725 lines 6-7. **CAB 54**
[11] *DPP v [Accused Person]*,Trial Transcript, 23/11/2016 at 725 lines 15 – 21. **CAB 54**

5.7 On 24 November 2016 the defence case was closed. Immediately after the close of the defence case (and prior to closing addresses), the trial judge reminded the jury of the continuing operation of the *Prasad* direction and provided them with an opportunity to revisit their earlier decision.[12] Again, a ballot took place to reduce the jury to 12 persons.[13] The jury retired to consider its decision, following which the jury returned verdicts of not guilty.[14] **CAB 63 - 64** **CAB 64**

**Part VI: STATEMENT OF ARGUMENT**

10 6.1 On 23 March 2018 the Court of Appeal delivered judgment on the reference question. The Court was divided in its opinion. Maxwell P concluded that, whilst the *Prasad* direction was not contrary to law, such a direction should not be administered to a jury hearing a criminal trial.[15] On the other hand, Weinberg and Beach JJA (in a joint judgment) concluded that the giving of a *Prasad* direction, in appropriate circumstances, is not contrary to law.[16] **CAB 76 - 159** **CAB 159**

**The *Prasad* direction**

6.2 The *Prasad* direction derives from the judgment of King CJ in the South Australian decision of *R v Prasad*.[17] At the close of the prosecution case, defence counsel had 20 submitted that there was no case to answer, or alternatively, that the evidence was so unsatisfactory that it would be unsafe to allow the case to go to the jury. The trial judge rejected the submission. On appeal, the South Australian Court of Criminal Appeal held (by majority) that when there is evidence capable in law of supporting a conviction there is no discretion vested in the trial judge to direct the jury to acquit.

King CJ went on to make the following comments by way of *obiter dicta*:[18]

> It is, of course, open to the jury at any time after the close of the case for the prosecution to inform the judge that the evidence which they have heard is insufficient to justify a conviction and to bring in a verdict of not guilty
> 30 without hearing more. It is within the discretion of the judge to inform the jury

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[12] *DPP v [Accused Person]*, Trial Transcript, 24/11/2016 at 860–861.**CAB 63 - 64**
[13] *DPP v [Accused Person]*, Trial Transcript, 24/11/2016 at 861. **CAB 64**
[14] *DPP v [Accused Person]*, Trial Transcript, 24/11/2016 at 864. **CAB 66**
[15] *Director of Public Prosecutions Reference No. 1 of 2017* [2018] VSCA 69 at [4] & [110]. **CAB 76 – 159**
[16] Ibid at [267]. **CAB 159**
[17] (1979) 23 SASR 161.
[18] Ibid at 163.

> of this right, and if he decides to do so he usually tells them at the close of the case for the prosecution that they may do so then or at any later stage of the proceedings: Archbold, Criminal Pleading and Practice 39th ed. (1976) p.332. He may undoubtedly, if he sees fit, advise them to stop the case and bring in a verdict of not guilty.

6.3 As noted by Maxwell P, when King CJ identified the "right" of the jury to acquit, he drew expressly on English practice.[19] However, at the date of the decision in *Prasad*, the practice had already been criticised in a series of English decisions.[20] As with later English decisions, the criticism was not simply that: **CAB 87**

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(a) the trial judge had power to uphold a "no case" submission on the basis that, although there was evidence to sustain a conviction, the judge considered that a guilty verdict would be unsafe; and

(b) as such, if the judge was not prepared to take the responsibility for stopping the case, such responsibility should not be cast onto the jury.[21] **CAB 88**

6.4 Rather, the criticisms included:

(a) the risk of a jury coming to a provisional decision as to guilt;[22]

(b) problems associated with giving a limited direction; [23]

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(c) the direction seriously eroding conventional trial procedure;[24] and

(d) the direction cutting across the quintessential fact-finding function of the jury.[25]

6.5 A number of subsequent South Australian decisions recognised these issues. For example, in *Dean v The Queen*, Cox J observed:[26]

> A Prasad direction should not be given merely because the trial judge considers that the Crown case is not a very strong one. That would be to usurp the function of the jury.

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[19] *Director of Public Prosecutions Reference No. 1 of* 2017 [2018] VSCA 69 at [32]. **CAB 87**
[20] *R v Young* [1964] 2 All ER 480 at 481; *R v Falconer-Atlee* (1973) 58 Cr App R 348 at 356; *R v Mansfield* [1978] 1 All ER 134.
[21] *Director of Public Prosecutions Reference No. 1 of 2017* [2018] VSCA 69 at [36]; *R v Falconer-Atlee* (1973) 58 Cr App R 348 at 357; R v *Mansfield* [1978] 1 All ER 134 at 140. **CAB 88**
[22] *R v Young* [1964] 2 All ER 480 at 481.
[23] *R v Falconer-Atlee* (1973) 58 Cr App R 348 at 356-357.
[24] *R v Young* [1964] 2 All ER 480 at 481; *R v Falconer-Atlee* (1973) 58 Cr App R 348 at 356; *R v Mansfield* [1978] 1 All ER 134.
[25] Ibid.
[26] (1995) 65 SASR 234 at 239.

6.6 In *R v Pahuja*, King CJ stated:[27]

> The undoubted right of a trial judge to inform the jury of its power to bring in a verdict of not guilty at any time after the conclusion of the case for the prosecution, should be used sparingly and only when the judge is of opinion that the evidence for the prosecution, although capable in law of supporting a conviction, is insufficiently cogent to justify a verdict of guilty. Even in such a case, the judge should bear in mind that the evidence called by the defence might strengthen the prosecution's case.... There should be nothing in the nature of a pre-trial summing up. If the jury cannot properly reach a decision at that stage on the law as explained in the opening, perhaps clarified by a concise correction or explanation if necessary, it is better not to embark upon the course of action at all. A partial summing up at that stage of the trial is a serious departure from the due course of trial and is to be avoided. [emphasis added]

6.7 It is noted that a "partial summing up" of the evidence (or an incomplete charge) did occur in the trial the subject of the reference (a practice that has become more frequent in Victoria in cases involving the administration of a *Prasad* direction).[28]

**CAB 90 & 114**

6.8 The direction has also been adopted in New South Wales. In *R v Reardon*[29] Simpson J stated:[30]

> As was pointed out in *Prasad,* a direction by the judge to the jury as to the weight it should attribute to admissible evidence intrudes upon the jury function. The *Prasad* direction, in the terms stated in *Prasad* and as ordinarily given, carefully avoids trespassing upon that function. Nevertheless, to give such a direction can carry with it a suggestion to the jury that admissible evidence should be given little or no weight. A judge giving a *Prasad* direction has to tread a very fine line to avoid trespassing upon the jury function. A decision on an application for such a direction requires an assessment of the evidence in the Crown case but avoidance of conveying the results of that assessment.

6.9 In *Seymour v R*[31] Hunt AJA observed:[32]

> This case demonstrates the danger of giving a *Prasad* direction in circumstances where there may be a problem for the jury in understanding the real nature of the Crown case. In some cases, it may be possible for the

[27] (1987) 49 SASR 191 at 201.
[28] *Director of Public Prosecutions Reference No. 1 of 2017* [2018] VSCA 69 at [41] & [107]. **CAB 90, 114**
[29] (2002) 186 FLR 1
[30] Ibid at [157]
[31] (2006) 162 A Crim R 576
[32] Ibid at [66]

> direction to be expanded to make it clear how the Crown put its case, but it seems to me that to do so really negates the whole purpose of this procedure, which is premised on the jury being able, without the assistance of the trial judge or counsel, to judge the cogency of the evidence on which the Crown relies – without addresses and without a summing up.

6.10 A further relevant consideration has been the complexity or otherwise of the case. In *R v White & ors* (*No 8*)[33] Hulme J stated:[34]

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> A Prasad invitation is most appropriate in cases where little or no explanation of the law is required; the issues are straightforward; and there is no need for there to be any detailed review of the evidence. Such an invitation to the jury may most commonly be found in cases involving alleged personal or sexual violence, where the only evidence upon which the prosecution relies is that of the alleged victim and where there is a real issue as to whether the victim can be believed.

6.11 In *R v Dickson; R v Issakidis (No. 10)*,[35] Beech-Jones J stated:[36]

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> Nevertheless, I decline to give the *Prasad* direction. Such directions are usually reserved for simple cases in which the critical evidence against an accused appears to lack credibility or reliability ... Thus, in *R v Pahuja* (1987) 49 SASR 191, a *Prasad* direction of seventeen pages in length was criticised as being too long (218). In *Seymour*, the giving of a *Prasad* direction was criticised because it occurred in a case of joint criminal enterprise, but in circumstances where the jury received no assistance on what that concept meant (*Seymour* at [65] to [65]).

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> In this case the giving of a *Prasad* direction would occasion a serious injustice to the Crown.

**Prasad direction in Victoria**

6.12 The practice of administering a *Prasad* direction has been adopted in Victoria. For example, in *R v Smart*, the accused person was charged with murder. The defence sought a *Prasad* direction. The trial judge (Lasry J) ruled as follows:[37]

> In *Pahuja*, King CJ notes that in his opinion the decision whether to inform the jury of its power to bring back a verdict of not guilty must be made by the trial judge in light of his assessment of the case. It is my opinion that the evidence may not be sufficiently cogent to justify a verdict of guilty.

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[33] [2012] NSWSC 472

[34] Ibid at [6]

[35] [2014] NSWSC 1482

[36] Ibid at [5]-[6]

[37] *R v Smart (Ruling No. 5)* [2008] VSC 94 at [13].

6.13 The relevant test identified by Lasry J for the giving of a *Prasad* direction involves a qualitative (rather than a quantitative) assessment of the evidence by the judge – a task that is, and should only be, entrusted to the jury.[38] A task that should be undertaken with the benefit of detailed directions regarding the law.[39]

6.14 Further, Victorian courts accept the direction must be put simply and shortly.[40] The danger of a minimal direction is that it can only provide minimal assistance to the jury and lead them into error.

10 **Concession by Director before Court of Appeal**

6.15 A concession was made by the Victorian Director of Public Prosecutions before the Court of Appeal that a jury has a "right to acquit" exercisable of its own motion – that concession is no longer made. The Director now challenges the correctness of both propositions – first, the right of a jury (of its own volition) to acquit an accused person at any time after the close of the prosecution case; and secondly, the right of a trial judge to administer a direction which invites the jury to consider such an acquittal.

6.16 The assumed right to acquit is only exercisable in practice when the judge exercises a power to invite the jury to consider an acquittal. The jury is not aware of that right
20 until such a direction is given. Therefore the assumed right will never be exercised unless invited by the judge.[41]

6.17 In *R v Speechley*[42] the trial judge ruled defence counsel were not able to remind the jury of their common law right to return a verdict of not guilty at any time after the close of the prosecution case. The Court of Appeal stated:[43]

> In our judgement the judge was right to rule as he did. It appears to be accepted that a jury does have a right to acquit after the conclusion of the prosecution case, but we know of no case in which that right has ever been exercised other than at the invitation of the trial judge, and we are satisfied that
> 30 it can only be exercised if the trial judge invites the jury to consider exercising

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[38] See *R v R* (1989) 18 NSWLR 74 at 77-78, 81
[39] *R v AJS* (2005) 12 VR 563 at [54]-[55]
[40] See, for example, *DPP v Gillespie* (ruling no.2) [2012] VSC 553 at [10], *DPP v Kocoglu* [2012] VSC 184 at [13], *The Queen v Butler (Rulings 1-10)* [2013] VSC 688 at [164]
[41] See *R v Ling* (1981) 6 A Crim R 429 at 433
[42] [2004] EWCA Crim 3067
[43] Ibid at [51]

> it. That is because it is the duty of the judge to ensure that the trial is fair, both to the defence and to the prosecution, and he must therefore be in a position to decide when the time has come for the jury to be permitted to reach a decision. In almost every case in order to do justice the jury needs to listen to all of the evidence, the submissions of counsel, and the directions in law of the judge. Otherwise, for example in a case of murder, the jury might acquit without ever realising that a verdict of manslaughter was a possible alternative. So if a jury is invited by counsel, or seeks of its own motion, to return a verdict before being asked by the judge to do so the judge should in our judgement direct the jury that it is his duty to ensure that justice is done, and that it is not open to them to return a verdict until he invites them to do so.

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6.18 The assumed right of a jury to acquit at any stage after the close of the Crown case cannot exist independently of a direction from the judge.

**English practice prior to *Prasad***

6.19 The practice was criticised in the decision of *R v Young*[44] where the Court observed:

> It may be that the time has come – the court does not desire to rule on it – when this practice should be only rarely if ever, used, and that judges should more often take the responsibility themselves of saying to the jury that it is not satisfactory evidence on which they could convict, and, accordingly direct an acquittal.[45]

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6.20 In *R v Falconer-Atlee*[46] the Court of Appeal stated:[47]

> This Court has repeatedly said in recent years that this practice should not be followed. If a judge thinks that the case is tenuous, then, even though there is some evidence against the accused person, the judge, if he thinks it would be unsafe or unsatisfactory to allow the case to go to the jury even with a proper direction, should take upon himself the responsibility of stopping it there and then. If the judge is not prepared to stop the case on his own responsibility, it is wrong for him to try and cast the responsibility of stopping it on to the jury. In this case the jury declined to take the hint the judge offered. The case went on, and a good deal of evidence was called for the defence.

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6.21 In *R v Mansfield*[48] the Court of Appeal stated:[49]

> There grew up in the two or three decades before the early sixties, and probably for a short time after the early sixties, a practice of inviting the jury to stop the case. This court, in *R v Young,* ruled that that practice was bad and should stop.

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[44] [1964] 2 All E.R. 480
[45] Ibid at 482
[46] (1974) 58 Cr App R 348
[47] Ibid at 357
[48] [1978] 1All ER 134
[49] Ibid at 140

**Modern English practice**

6.22 At the time *Prasad* was decided, it is now clear that there is strong disapproval of such a practice in England;[50] and that such disapproval extends well beyond the fact that in England there is a different approach to directed acquittals than exists in Australia.[51] **CAB 157- 158**

6.23 In *R v Kemp*,[52] the Court of Appeal observed:[53]

> We were of the impression that this practice criticised by Roskill L.J., once quite prevalent, had died out, but it appears that it is still very occasionally done. The danger, as Mr Farley pointed out, is that if the jury do not accept the judge's invitation, something may go wrong with the verdict. He submits that juries are often keen to register their independence and do not like to feel that they are being pushed about by the judge. Indeed, if they feel leant upon by a judge in favour of the defence, the result may be positively counter to what the judge intended.

...

> Moreover, a jury may well use their common sense and read a mere intimation that they have a right to stop a case as an invitation to acquit, on the basis that a judge is not likely to be giving them the intimation unless he thinks that they should acquit. If a judge is going to do anything of this sort, and we do not encourage it, he should clearly, in our judgment, not go beyond a mere intimation of the right to stop, for fear that if he goes further and utters a clear invitation to acquit, the result may be as in the present case, leaving a convicted defendant with a grievance, however unjustified.

6.24 In *R v Speechley*,[54] the Court of Appeal observed:[55]

> We accept that in some cases judicial silence may mean that a trial lasts longer than it need because, for example, the strengths or weaknesses of the prosecution evidence may depend upon the view to be taken of a witness's reliability, and the judge cannot therefore accede to a submission of no case to answer simply because he regards the key prosecution witness as unreliable ... We therefore find it difficult to envisage any circumstance where in reality it will be appropriate in the interests of justice for a judge to invite the jury to acquit. Experience shows that when such invitations have been issued in the past they have all too often led to difficulties. [Emphasis added.]

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[50] See *Archbold*'s *Pleading, Evidence and Practice in Criminal Cases*, 63rd edition, published by Sweet & Maxwell, London (2015) at p. 511.

[51] The Australian position is governed by the decision in *Doney v The Queen* (1990) 171 CLR 207 - this difference was a factor relied on by Weinberg and Beach JJA in reaching their conclusion (see *Director of Public Prosecutions Reference No. 1 of 2017* [2018] VSCA 69 at [260]-[262]). **CAB 157 - 158**

[52] *R v Kemp* (1995) 1 Cr App R 151.

[53] Ibid at 158, 160-161.

[54] [2004] EWCA Crim 3067.

[55] Ibid at [53].

6.25 In *R v Collins & Ors*,[56] the Court of Appeal described the practice of inviting the jury to exercise a right to acquit as having been comprehensively disapproved and listed the specific dangers in doing so. The Court stated:[57]

> First and foremost this practice involves the jury in making a decision which will affect the future conduct of the trial without, as happened in this case, the benefit of speeches from all counsel or any legal directions from the judge. Secondly, the nature of the decision which the jury is asked to make is to decide whether or not the prosecution witnesses may be capable of belief. In other words the jury must reach a provisional conclusion. However, there is a risk that they may go further and decide at that stage that the witnesses are not just capable of belief but they are indeed telling the truth. Such a provisional conclusion, once reached, maybe very difficult to displace. Thirdly, as was explained in Kemp, juries are often keen to register independence and may react against what might be perceived to be pressure from judge to acquit a defendant. Fourthly, even though a judge may strive to avoid inviting a jury to acquit, a practice which has always met with disapproval, it may be very difficult to avoid giving that impression rather than simply informing a jury of its right to acquit, the latter conforming with the old practice before it also was disapproved. As the court said in Kemp "It may not be always very easy to distinguish between an invitation to acquit and a mere intimation of a right to stop the case". Fifthly, this practice is inherently more dangerous when a number of defendants are involved and the factual evidence is complex. Sixthly, it is unfair to the prosecution when it is given no opportunity to address either the judge or the jury and correct a mistaken impression of its case. The same applies to defendants, albeit in all such cases, the presumption will be that the judge has only adopted this procedure in order to obtain, more quickly, verdicts favourable to the defence. Seventhly, there may be particular dangers when as in this case the defence are contemplating not calling any evidence. Eighthly, since the coming into force of the provisions of s.58 of the Criminal Justice Act 2003 the prosecution has a right of appeal against a determinative ruling of a judge but will have no right of appeal against an acquittal by a jury following a judge informing them that they have a right to stop the case....
>
> We wish to emphasise the disapproval expressed by this court in *Speechley* of the practice of informing a jury of its right to stop the case. We find it very difficult now to envisage any circumstances when it would be appropriate for this practice to be adopted. In this case, if the judge, instead of informing the jury that it could stop the case, had solicited submissions of no case to answer (as in our judgment he ought to have done) he may very well have been persuaded that, not only this course should not have been adopted by him, but the prosecution case was of sufficient strength for there to be no question of it being stopped by him. [Emphasis added.]

[56] [2007] EWCA Crim 854.
[57] Ibid at [49] & [59].

6.26 Finally, in *R v H(S)*,[58] the Court of Appeal reviewed the earlier authorities and observed:[59]

> Although the common law recognised the right of a jury to acquit an acquitted person at any time after the close of the prosecution case, modern authorities disapprove of the practice....
>
> There is also another reason which bites if the jury should stop the case. Although arguments have always been articulated as on the basis that fairness must be visited both on the defence and the prosecution, fairness to the prosecution is now well recognised as requiring a proper focus upon the legitimate rights and interests of victims and witnesses. Once there is a case to answer, they are entitled to know that the jury has heard the case through to its conclusion culminating in a fair analysis of the issues from the judge. The few words offering the jury the opportunity to stop the case do not provide this and can only be approached by the jury on the basis of the broadest of broad brushes.

**Victorian legislation**

6.27 Section 234 of the *Criminal Procedure Act* 2009 (Vic) provides that the prosecution is entitled to address the jury for the purposes of summing up the evidence. The section establishes a clear right to a final address by counsel for the prosecution. It is not discretionary. It is a statutory right conferred on the prosecution.[60]

6.28 The existence of a right in the jury to return a verdict at any stage after the close of the prosecution case is contrary to that provision.[61] A *Prasad* direction is also inconsistent with the obligation of a trial judge to direct the jury "so as to enable the jury to properly consider its verdict".[62]

6.29 Sections 66 and 241(2)(b) of the *Criminal Procedure Act* 2009 (Vic) provides a procedure in respect of the making of a "no case" submission. There is no section providing for, or even contemplating, the giving of a *Prasad* direction.

6.30 The *Criminal Procedure Act* 2009 (Vic) codifies the procedure of making a "no case" submission. The Act codifies the right of the prosecution to address the jury where a

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[58] [2011] 1 Cr App R 14.
[59] Ibid at [49] & [50].
[60] See *R v Karounas* (1995) 63 SASR 451 at 467, 487
[61] Also see sections 235-238 *Criminal Procedure Act* 2009 (Vic).
[62] Section 238 *Criminal Procedure Act* 2009 (Vic).

case is left for their consideration. The Act does not codify a *Prasad* direction. The ratio of *Doney* is now part of the Act.

6.31 It is noted that section 213(2) of the *Criminal Procedure Act* 2009 (Vic) provides:

> Nothing in this Act removes or limits any powers of a trial judge that existed immediately before the commencement of this Act.

6.32 The giving of a *Prasad* direction is more appropriately described as a practice or procedure, rather than a "power" of the trial judge. This can be compared to the trial
10 judge's "power" to direct an acquittal.

6.33 The so-called "right to acquit" exercisable by the jury is not a right or power of a trial judge. If it exists, it is a "power" of the jury. The fact that a judge needs to give a direction to draw the jury's attention to this so-called right or power does not elevate that direction to a "power" of the judge as contemplated within section 213 of the *Criminal Procedure Act*.

6.34 The *Juries Act* 2000 (Vic) does not contemplate the giving of a *Prasad* direction. It permits more than 12 jurors to be empanelled and it provides for a ballot to reduce the
20 jury to 12 before the jury retires to consider its verdict.[63] However, if only 12 jurors may return a verdict, it follows that 13 jurors cannot deliver a verdict at any time following the close of the prosecution case. The judge sought to overcome this issue by balloting one off (and then impermissibly returning that juror to the panel when the jury wanted to hear more). This process demonstrates yet a further flaw in permitting a trial judge to deliver a *Prasad* direction in this day and age.

6.35 The *Jury Directions Act* 2015 (Vic), which has as one of its purposes to simplify and clarify the duties of a trial judge in giving jury directions in criminal trials,[64] does not contemplate the giving of a *Prasad* direction.

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[63] Section 48 *Juries Act* 2000 (Vic).
[64] Section 51(c) *Jury Directions Act* 2015 (Vic).

**Relevant High Court authority**

6.36 There is no High Court authority that directly considers the *Prasad* direction. However, insofar as there is High Court authority, such authority is more consistent with the *Prasad* direction being contrary to law rather than in accordance with law, as a decision to give a *Prasad* direction necessarily involves the trial judge making assessments about the probative strength of evidence (including issues of credibility and reliability).

6.37 In *Doney v The Queen*,[65] this Court stated:[66]

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> It follows that, if there is evidence (<u>even if tenuous or inherently weak or vague</u>) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter <u>must</u> be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty. [Emphasis added.]

6.38 In *R v Baden-Clay*,[67] this Court stated that the jury is to be properly regarded as "the constitutional tribunal for deciding issues of fact".

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6.39 Finally, in *IMM v The Queen*,[68] this Court stated that in determining the issue of "relevance" of evidence, a trial judge does not take into consideration issues of credibility and reliability of evidence.

**Conclusion**

6.40 The circumstances in which it is legitimate to administer a *Prasad* direction have been curtailed by subsequent South Australian decisions. The practice relied upon English authority for its legitimacy. However, more recent decisions of the English Court of Appeal have widely disapproved of the practice – the reasons given in those cases for decrying the practice were described by Maxwell P in his judgment as "cogent and compelling".[69]

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[65] (1990) 171 CLR 207.
[66] Ibid at 214 – 215.
[67] (2016) 258 CLR 308 at 329.
[68] (2016) 257 CLR 300.
[69] *Director of Public Prosecutions Reference No. 1 of 2017* [2018] VSCA 69 at [109]. **CAB 115**

6.41 In short, the practice is contrary to law (and should cease) as it has the capacity to deny both the prosecution and the defence the right to a fair trial. It deprives the Crown from its "entitlement" to deliver a closing address, and will invariably be seen by the jury as an invitation to acquit.[70]

6.42 The primary position of the Victorian Director of Public Prosecutions is that the *Prasad* direction is contrary to law rather than as Maxwell P determined that it should no longer be administered.[71]

10 6.43 It is noted that Maxwell P stated the practice was not "contrary" to law because there was no statutory provision, and no High Court authority, which would justify a conclusion that the practice is contrary to law,[72] in circumstances where the *Prasad* direction had become an entrenched part of Australian law.[73]

6.44 In response, it is submitted that

(a) although the State courts are bound by the doctrines of precedent, it does not follow that the respective courts below the High Court in the hierarchy have correctly applied or declared the common law;[74]

(b) although there is no direct High Court authority, the reasoning of this Court in

20 *Doney, IMM* and *Baden-Clay* is inconsistent with a *Prasad* direction; and

(c) even if this Court concludes that the *Prasad* direction is not contrary to the common law of Australia, the alternative submission of the Director is that the *Criminal Procedure Act* 2009 (Vic) does provide a statutory basis for concluding that the *Prasad* direction is now contrary to the law of Victoria. Indeed the *Criminal Procedure Act* 2009 (Vic) supports the proposition that, in Victoria, a jury verdict is not to be returned until after closing addresses and the delivery of a charge.

6.45 It is submitted that every effort should be made to provide assistance to the jury to

30 properly discharge their function. This must include the obvious benefit of listening to

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[70] Ibid at [4] **CAB 78**
[71] Ibid at [110] **CAB 115**

[72] Ibid at [4] **CAB 78**
[73] Ibid at [3] **CAB 77**
[74] *Lipohar v The Queen* (1999) 200 CLR 485 at [44]-[45]

any defence evidence, listening to closing addresses by both parties and listening to a full and comprehensive charge from the trial judge.

**Part VII: ORDERS SOUGHT**

7. The orders sought by the appellant are:

(i) that the appeal be allowed; and

(ii) that the reference question be answered in the affirmative, namely, that the giving of a *Prasad* direction is contrary to law, or in the alternative, that the giving of a *Prasad* direction should not continue to be administered to a jury determining a criminal trial between the Crown and an accused person.

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**Part VIII: TIME ESTIMATE**

8. The appellant estimates the hearing of this appeal will take half a day.

Dated: 26th day of September 2018

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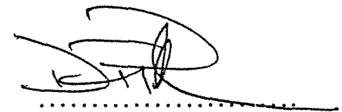

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