IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **No. M129 of 2018**

IN THE MATTER OF:

DIRECTOR OF PUBLIC PROSECUTIONS REFERENCE NO 1 OF 2017

RESPONDENT'S/ACQUITTED PERSON'S SUBMISSIONS

Part I: Certification of Suitability for Publication on the Internet

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

Part II: Concise Statement of Issues

2. The Acquitted Person agrees that the appeal raises the question referred to in paragraph 2(a) of the Appellant's Submissions.

3. The issue referred to in paragraph 2(b) of the Appellant's Submissions — whether the jury has a right to acquit exercisable of its own motion at any time after the close of the prosecution case — was the subject of a concession by the Appellant in the Court of Appeal.[1] The Court of Appeal accepted that concession. The Director ought not now be allowed to resile from that concession. Accordingly, that issue ought not arise for determination by this Court.

Part III: Section 78B Notices

4. The Acquitted Person certifies that no notice need be given under s 78B of the *Judiciary Act 1903* (Cth).

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[1] *DPP Reference No 1 of 2017* [2018] VSCA 69, [234] (Weinberg and Beach JJA), Core Appeal Book (**'CAB') 150**; Appellant's Submissions (**'AS'**), [6.15].

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Part IV: Statement of Material Facts

5. The Acquitted Person accepts the accuracy of the statement of material facts in the Appellant's Submissions ('AS'): **AS** [5.1]-[5.7]. The Acquitted Person also accepts the accuracy of the Appellant's Chronology, save that:
    a. on page 2, '23 November 2018' should read '23 November 2016'; and
    b. on page 2, in relation to the second 'choice' of which the jury were informed on 23 November 2016, see also **CAB 47**; and
    c. on page 3, '23 March 2017' should read '23 March 2018'.

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6. The Acquitted Person adds that in the course of delivering a *Prasad* direction to the jury on 23 November 2016, the trial judge:

    a. informed the jury that it had the right, if it chose to exercise it, to bring in verdicts of not guilty in relation to the offence of murder and the alternative charge of manslaughter at the conclusion of the prosecution case;[2] and
    b. informed the jury that it could indicate that it wished to hear more in relation to the charges;[3] and
    c. informed the jury that determination of the facts is a matter for the jury;[4]

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    d. informed the jury that in all criminal trials a jury has the right to bring in verdicts of not guilty at the conclusion of the prosecution case;[5] and
    e. gave the jury directions as to the elements of murder and the alternative charge of manslaughter;[6] and
    f. gave the jury a brief summary of the main evidence relevant to its consideration of the charges, together with directions on self-defence.[7]

Part V: Statement of Argument

The Prasad direction

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7. In *R v Prasad*,[8] King CJ stated that:

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[2] *DPP v [Accused Person]*, Trial Transcript, 23 November 2006, 695 (**CAB 24**).
[3] Ibid.
[4] Ibid 696 (**CAB 25**).
[5] Ibid.
[6] Ibid 697-704; 710-17 (**CAB 26-33**; **39-46**).
[7] Ibid 704-710 (**CAB 33-39**).

> 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 without hearing more. It is within the discretion of the judge to inform the jury 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.[9]

8. In modern practice, a *Prasad* direction has the features described at paragraph 6 above. The direction informs the jury that it has a right (which it may choose to exercise) to return verdicts of not guilty after the close of the prosecution case. When given, there will also then be directions as to the elements of the offence charged and an outline of the evidence relevant to the jury's determination. The jury will be directed (or reminded) that the decision on the facts of the case is a matter for it alone.

9. The decision to give a *Prasad* direction is within the discretion of the trial judge.[10] The direction ought to be given 'quite simply and shortly'.[11] While the trial judge's assessment of the strength of the prosecution case is relevant to the determination whether to give a *Prasad* direction, the judge must avoid conveying to the jury the results of his or her assessment.[12] The direction should 'not ordinarily be given in a case of any significant complexity'.[13] The case must be one where a simple and short direction will be sufficient in circumstances where the jury will not have heard closing addresses from counsel or a full summing-up from the trial judge.[14] The direction should be given 'sparingly'.[15] A conclusion that it would be inappropriate to exercise the discretion to give a *Prasad* direction in one case (or, indeed, most cases) cannot be used as the basis for a general conclusion that the giving of the direction is, in all cases, 'contrary to law'.

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[8] (1979) 23 SASR 161 ('*Prasad*').
[9] Ibid 163.
[10] *R v Reardon* (2002) 186 FLR 1, 32-33 [153] (Simpson J).
[11] *R v Pahuja* (1987) 49 SASR 191, 218 (Cox J) ('*Pahuja*').
[12] *R v Reardon* (2002) 186 FLR 1, 33 [157] (Simpson J).
[13] *DPP Reference No 1 of 2017* [2018] VSCA 69, [264] (Weinberg and Beach JJA) (**CAB 158**). See also *R v White* [2012] NSWSC 472, [6]-[7] (R A Hulme J).
[14] *Seymour v The Queen* (2006) 162 A Crim R 567, 595 [66] (Hunt AJA).
[15] *Pahuja* (1987) 49 SASR 191, 201 (Cox J).

10. The direction in this case, which can be considered 'typical' (apart perhaps from its length),[16] invited the jury to consider there and then whether it was in a position to bring in verdicts of not guilty, or whether it wished to continue. It was an invitation to the jury to consider its position, albeit at an earlier stage than in 'usual' trial procedure. Nothing in what was said compelled the jury to decide the matter one way or the other. Rather, the jury made its decision after hearing the trial judge emphasise that the determination of the facts was a matter for it alone.[17] It is most improbable that, after hearing that direction (together with a direction that in all criminal trials the jury has the right to return a verdict of not guilty at the close of the prosecution case), the jury would have perceived the direction as 'an invitation to acquit': cf **AS** [6.41]. The direction is not an invitation to bring in a particular verdict, but an invitation to the jury to consider whether to exercise its option to bring in a verdict of not guilty at the close of the prosecution case, or to continue. It is entirely speculative to assert that the jury would view the direction as an invitation to acquit.

History and precedent

11. The *Prasad* direction has a long history. It has been given in many cases,[18] and, in many others, trial judges have decided against giving it.[19] The discretion of a trial judge to give the direction in an appropriate case has not been doubted. The foundational case in Australia, *Prasad*, was decided in 1979. It has not been overturned in South Australia, and no court in any other Australian jurisdiction has held that it was wrongly decided. The Director does not point to any Australian authorities critical of *Prasad*. She accepts that there is no High Court authority that directly considers the *Prasad* direction: **AS** [6.36].

12. The Director asserts, however, that 'insofar as there is High Court authority, such authority is more consistent with the *Prasad* direction being contrary to law rather

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[16] In the Court of Appeal, Weinberg and Beach JJA described the trial judge's direction as 'impeccable': *DPP Reference No 1 of 2017* [2018] VSCA 69, [265] **CAB 158**.
[17] *DPP v [Accused Person]*, Trial Transcript, 23 November 2006, 696 (**CAB 25**).
[18] See, eg, *R v Ayles* (1993) 66 A Crim R 302; *R v Dean* (1995) 65 SASR 234, 239 (Cox J); *R v Smart (Ruling No 5)* [2008] VSC 94; *R v Rapovski (Ruling No 3)* [2015] VSC 356; *Gant v The Queen* [2017] VSCA 104.
[19] See, eg, *R v Reardon* (2002) 186 FLR 1; *DPP v Kocoglu* [2012] VSC 184; *DPP v Gillespie (Ruling No 2)* [2012] VSC 553; *R v White (No 8)* [2012] NSWSC 472.

than in accordance with law...': **AS** [6.36]. Reference is made to *Doney v The Queen*,[20] *R v Baden-Clay*[21] and *IMM v The Queen*.[22] None of the passages in those judgments relied upon by the Director assists her position.

13. In *Doney*, this Court stated that 'if there is evidence (even if tenuous or inherently weak or vague) 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 must be left to the jury for its decision'.[23] Nothing in that statement casts any doubt on the *Prasad* direction. Where a *Prasad* direction is given, the matter is 'left to the jury for its decision'. The effect of the direction is not to take the matter away from the jury, but to allow the jury to consider its position at, or subsequent to, the close of the prosecution case.

14. The Director's Submissions next refer to this Court's statement in *Baden-Clay* that the jury is to be viewed as 'the constitutional tribunal for deciding issues of fact'[24] (**AS** [6.38]). The Director also relies on the Court's conclusion in *IMM* that in determining the relevance of evidence, a trial judge should not take into consideration issues of credibility and reliability of evidence (**AS** [6.39]).

15. Three points are made in response to the Director's reliance on *Baden-Clay* and *IMM*. First, *Baden-Clay* was not a case about jury directions. It was an appeal from a decision of an intermediate appellate court that a verdict was unreasonable. To view the case as having anything to say about the correctness of *Prasad* is to take it too far out of its context. Secondly, and similarly, *IMM* was not a case about jury directions. It was a case about the proper construction of provisions of the uniform evidence law. Thirdly, both cases comment on the jury's role in a criminal trial as the trier of fact. As noted above in these submissions, nothing in the *Prasad* direction usurps the jury's role.

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[20] (1990) 171 CLR 207 ('*Doney*').
[21] (2016) 258 CLR 308 ('*Baden-Clay*').
[22] (2016) 257 CLR 300 ('*IMM*').
[23] (1990) 171 CLR 207, 214-5 (Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[24] *Baden-Clay* (2016) 258 CLR 308, 329 [65] (French CJ, Kiefel, Bell, Keane and Gordon JJ).

The right of the jury to stop the case

16. The Director contends, for the first time in this Court, that the jury in a criminal trial has no right to acquit, of its own motion, at any time after the close of the prosecution case: **AS** [6.15]. Before the Court of Appeal, the Director had conceded that the jury has such a right.

17. The Director should not be permitted to resile from the concession made before the Court of Appeal. The Director's concession, upon which the Court of Appeal acted, means that this Court does not have the benefit of any consideration by the Court of Appeal of whether the jury has such a right to acquit after the close of the prosecution case.

18. In any event, the jury in a criminal trial does have such a right. In *Prasad*, King CJ stated that it was '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 without hearing more'.[25] Similarly, in *Pahuja*, King CJ described as 'undoubted' the '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'.[26]

19. The existence of that right or power is also accepted in England. In *R v Speechley*, Kennedy LJ stated that:

> 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 it can only be exercised if the trial judge invites the jury to consider exercising it.[27]

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[25] (1979) 23 SASR 161, 163.
[26] (1987) 49 SASR 191, 201 (emphasis added).
[27] [2004] EWCA Crim 3067, [51]. See also *R v Collins* [2007] EWCA Crim 854, in which Gage LJ, giving the judgment of the English Court of Appeal, stated that '... we find it difficult to hold that the common law right of a jury to stop a case after the close of the prosecution no longer exists': at [48].

20. As a matter of practice, it is most unlikely that a jury would exercise its power to return verdicts of not guilty at the close of the prosecution case without having been told about that power.

21. Plainly, the *Prasad* direction presupposes that the jury does have a right to return verdicts after the close of the prosecution case. If it were otherwise, the *Prasad* direction would, absurdly, inform the jury of, and invite it to exercise, a power that it does not have. The lengthy history of the *Prasad* direction, and the fact that the correctness of *Prasad* has not been doubted in Australia, is a strong indicator that the right of the jury underlying the direction exists at common law. The Director points to no statutory provision which has the effect that that power of the jury (as distinct from a trial judge's power to inform the jury of that right by direction) no longer exists.

The English cases

22. The Director's submissions rely heavily on English authority, decided both before and after *Prasad.*

23. Given the strong precedential basis for the *Prasad* direction in Australia discussed above, considerable caution should be taken in relying on the English cases. That is all the more so given the different approach to directed acquittals applicable in England.[28] In any event, the English cases merely:

    a. express the reasons why a *Prasad* direction should only be given 'sparingly', and in appropriate cases;
    b. fall short of holding that a direction inviting the jury to consider its position after the close of the prosecution case is 'contrary to law',[29] or will never be appropriate; and

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[28] *Doney v The Queen* (1990) 171 CLR 207; cf *R v Galbraith* (1981) 73 Cr App R 124. Under the English approach, there is 'ample scope ... for trial judges to direct acquittals in cases they [regard] as particularly weak: *DPP Reference No 1 of 2017* [2018] VSCA 69, [259] (Weinberg and Beach JJA) **CAB 157.**

[29] *DPP Reference No 1 of 2017* [2018] VSCA 69, [186] (Weinberg and Beach JJA) **CAB 137.**

c. identify risks or concerns associated with giving a *Prasad* direction which are capable of being addressed by an appropriately-worded direction.

24. Under the heading 'Modern English practice', the Director refers to, and relies upon, *R v Kemp*,[30] *R v Speechley*,[31] *R v Collins*,[32] and *R v H(S)*.[33]

25. In *Kemp*, the trial judge had expressed to the jury concern that, because of the unavailability of witnesses, 'we would have to adjourn today and come back tomorrow to hear the rest of the evidence and counsel's submissions...'. He instructed the jury that the case could be brought to an end, without hearing from further witnesses, if the jury were 'all agreed that [they] have heard enough of it'. The judge then referred to the evidence of a defence witness who had contradicted the evidence of prosecution witnesses, stating that it was an 'account which ... you may think was entirely inconsistent with the account that you have heard from the three young women'.[34]

26. The Court of Appeal (McCowan LJ, Morland and Buckley JJ) observed that this direction, taken in context, would have been perceived by the jury as an intimation from the judge that 'they might well think, having heard that [witness], that it would be impossible for them to conclude that she was not giving an honest and accurate account'.[35] The Court of Appeal's observations on the practice of 'inviting' a jury to consider its position, quoted in **AS** [6.23], must be read in the context of the direction given in that case which could fairly be described as an 'invitation to acquit'. Any risk that a direction will be seen as an 'invitation to acquit' can be eliminated in a properly-worded direction which appropriately emphasises that the decision on the facts of the case is a matter for the jury alone.

27. The Court of Appeal observed in *Kemp* that 'a jury may well use their common sense and read a mere intimation that they have a right to stop a case as an

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[30] [1995] 1 Cr App R 151 ('*Kemp*').
[31] [2004] EWCA Crim 3067 ('*Speechley*').
[32] [2007] EWCA Crim 854 ('*Collins*').
[33] [2011] 1 Cr App R 14.
[34] *Kemp* [1995] 1 Cr App R 151, 153-4.
[35] Ibid 154.

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'.[36] That is inappropriately speculative, at least as a general statement. Further, any such risk, if it exists, is easily met by appropriate direction along the lines the trial judge gave in this case, informing the jury that 'in *all* criminal trials a jury has the right' to bring in a not guilty verdict at the close of the Crown case.[37]

28. *Speechley* did not directly raise the appropriateness of giving a *Prasad* direction. The relevant ground of appeal raised the question whether defence counsel — not the judge — could remind the jury of its right to acquit at any time after the close of the prosecution case. The Court (Kennedy LJ, Bell and Hughes JJ) concluded that the right to bring in a verdict of not guilty at that time 'can only be exercised if the trial judge invites the jury to consider exercising it'.[38] The Court went on to state that it found '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'.[39] That observation did not need to be made to decide the case. Further, the observation that appropriate circumstances to give the invitation may be 'difficult to envisage' differs from the practice of giving the direction 'sparingly'[40] only by degree.

29. In *Collins*, Gage LJ, giving the judgment of the Court, stated that the practice of inviting the jury to exercise its right to bring the trial to an end after the close of the prosecution case 'has been comprehensively disapproved'.[41] The Court did not, however, state that the practice could never be appropriate, or hold that it would necessarily be an error for a trial judge to give such a direction. Gage LJ appeared to acknowledge that there may be circumstances in which the direction was appropriate, noting that 'at the very least it [the practice of giving the direction] could only be exercised in the most exceptional circumstances and certainly not in a multi-handed case of some complexity'.[42]

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[36] Ibid 156.
[37] *DPP v [Accused Person]*, Trial Transcript, 23 November 2006, 696 (**CAB 25**) (emphasis added).
[38] [2004] EWCA Crim 3067, [51].
[39] Ibid [53].
[40] *Pahuja* (1987) 49 SASR 191, 201 (Cox J).
[41] [2007] EWCA Crim 854, [48].
[42] Ibid [48], [56].

30. The Court went on to list eight 'dangers' associated with giving such a direction.[43] In circumstances where the Court in *Collins* did not declare that a direction inviting the jury to consider whether to return a verdict of not guilty at the close of the prosecution was contrary to law, these 'dangers' are best viewed as illustrative of the reasons why the discretion to give a *Prasad* direction should be exercised 'sparingly', and only in appropriate cases where, for example, the factual evidence is not complex and there is only one accused (see the fifth 'danger' noted in *Collins*).[44]

10 31. Other 'dangers' mentioned in *Collins*, such as the risk of a jury being 'keen to register independence' and the need to avoid being seen as inviting the jury to acquit (see the third and fourth 'dangers') can be addressed by an appropriately worded direction which emphasises that the jury is the trier of fact. Other 'dangers' mentioned by Gage LJ concern possible prejudice to the prosecution in presenting its case. Again, this may be a proper matter for a trial judge to take into account in determining whether to exercise the discretion to give a *Prasad* direction. It is likely to be a more pressing concern where the prosecution evidence is complex and requires explanation by way of address.

20 32. In *R v H(S)*,[45] the trial judge had told the jury that he had withdrawn one count from their consideration, but that there was some evidence that would entitle them to convict on a second count, so it would be improper for him to withdraw the case on that count. He added that it was, however, open to the jury at any stage to acquit the accused. He told the jury to retire for 'two or three minutes' to consider whether they wanted to hear more evidence. After the jury returned with a not guilty verdict, the judge described the case as a 'scandalous waste of taxpayers' money'.[46] The Court of Appeal did not have to consider the correctness of a properly worded direction inviting the jury to consider its position at the close of the prosecution case.

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[43] Ibid [49].
[44] As to the undesirability of giving a *Prasad* direction where the Crown case is complex or difficult to understand without addresses and summing-up, see *Seymour v The Queen* (2006) 162 A Crim R 576, 595 [66] (Hunt AJA).
[45] [2011] 1 Cr App R 14.
[46] Ibid [14]-[15].

33. Leveson LJ (delivering the judgment of the Court) did, however, refer to criticisms of the practice, including those made in *Collins*, and also referred to the interests of victims and witnesses in having the trial heard through to a conclusion culminating in a fair analysis of the issues from the judge.[47] It is important to observe, however, that the Court did not hold that it would never be appropriate to give a properly worded direction. Leveson LJ expressly stopped short of doing so, stating that '[t]his is not the case in which to go further than the authorities have hitherto decided although we do echo and endorse the views expressed by this court in the cases set out above'.[48]

34. In summary, the English cases (i) express the reasons why a *Prasad* direction should be given only in rare cases, or 'sparingly';[49] and (ii) fall short of holding that a direction inviting the jury to consider its position after the close of the prosecution case will never be appropriate. The concerns about the practice identified in those cases can be addressed by appropriate direction. For those reasons, the English cases do not support the Director's contention that the giving of a *Prasad* direction is 'contrary to law'.

Statute

35. The Director's statutory argument — which Weinberg and Beach JJA described as 'strained and unconvincing'[50] — refers to various provisions of the *Criminal Procedure Act 2009* (Vic) ('CPA'), the *Jury Directions Act 2015* (Vic) ('JDA') and the *Juries Act 2000* (Vic).

36. The power to give a *Prasad* direction is a long-standing common law principle. In the decades since *Prasad* was decided, the power has been exercised in cases where it is appropriate to give such a direction. The direction protects the rights and

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[47] Ibid [50].
[48] Ibid [51] referring to *R v Falconer-Atlee* (1974) 58 Cr App R 348; *Kemp* [1995] 1 Cr App R 151; *Speechley* [2004] EWCA Crim 3067 and *Collins* [2007] EWCA Crim 854.
[49] See *Pahuja* (1987) 49 SASR 191, 201 (King CJ).
[50] *DPP Reference No 1 of 2017* [2018] VSCA 69, [266] **CAB 158**. Maxwell P similarly concluded that there was no statutory provision which would justify a conclusion that the practice of giving a *Prasad* direction in appropriate cases is contrary to law: *DPP Reference No 1 of 2017* [2018] VSCA 69, [4] **CAB 78**.

interests of a criminal accused by permitting the jury to bring an end to an unmeritorious trial at an earlier stage than typical in criminal procedure.[51] Against that context, it is noteworthy that not one of the Acts upon which the Director relies mentions the *Prasad* direction (whether by name or by description of its essential features), still less (expressly) abolishes it. Nor do any of those Acts on their proper construction, by necessary implication, abrogate the power to give the direction in an appropriate case. There is simply no manifest intention to alter the common law principle described in *Prasad*.[52]

37. Section 234(1) of the CPA, upon which the Director relies, provides that '[t]he prosecution is entitled to address the jury for the purpose of summing up the evidence — (a) after the close of all evidence; and (b) before the closing address of the accused, if any…'.

38. Section 234(1) does not abolish the common law power to give a *Prasad* direction.

39. First, the 'entitlement' conferred by s 234(1) cannot have been intended to be absolute. Section 226(1)(a) of the CPA provides that after the close of the prosecution case, an accused is entitled to make a submission that there is no case for the accused to answer. If that no case submission is accepted, then there will be no opportunity for the prosecution to address the jury. Nor will there be any opportunity if, before addresses, the trial judge determines to discharge the entire jury without verdict for any reason (as may occur if, for example, inadmissible evidence has been led and it is not possible to cure the consequential prejudice to the accused by direction). It could not sensibly be argued that s 234(1) curtails a trial judge's power to discharge the jury before the prosecutor's closing address. Section 234(1) therefore affords only a qualified entitlement. That entitlement must be construed as applying only where the trial is continuing and has not, for any reason (including the jury's exercise of its right to return a verdict of not guilty after the close of the prosecution case), come to an end before addresses. The above

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[51] *DPP Reference No 1 of 2017* [2018] VSCA 69, [233] (Weinberg and Beach JJA) **CAB 150**.

[52] See *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677, 682 (Mason J): 'The general rule is that the courts will construe a statute in conformity with the common law and will not attribute to it an intention to alter common law principles unless such an intention is manifested according to the true construction of the statute'. See also *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).

construction being open, it must be preferred over any alternative construction which is not consonant with the maintenance of common law powers.[53]

40. Secondly, s 234(1) of the CPA must be read together with s 213(2) of that Act, which provides that '[n]othing in this Act removes or limits any powers of a trial judge that existed immediately before the commencement of this Act'.[54] Section 213(2) thereby preserves 'powers' exercisable by a trial judge at common law. The word 'power' is not defined. It should not be given a narrow interpretation given that the evident purpose of s 213(2) includes the preservation of the common law powers of a trial judge.

41. The trial judge has a discretion whether or not to give a *Prasad* direction. The exercise of that discretion is the exercise of a 'power'. The JDA itself uses the terminology of 'power' to describe the giving of a jury direction when referring, in s 63(2), to the 'power of a trial judge to give the jury an explanation of the phrase "proof beyond reasonable doubt"'. Similarly, the giving of a *Prasad* direction, which includes giving the jury an explanation of its power to return a verdict of not guilty after the close of the prosecution case, is the exercise of a 'power' of a trial judge within the meaning of s 213(2) of the CPA.

42. Section 213(2) of the CPA therefore preserves the common law power to give a *Prasad* direction. In the context of that provision, it would be an error to attribute to the legislature an intent by virtue of s 234(1) to abrogate the *Prasad* direction.

43. The Director next states that the JDA and the *Juries Act 2000* do not 'contemplate the giving of a *Prasad* direction': **AS** [6.34]-[6.35]. It is not to the point that those Acts do not contemplate, or mention, *Prasad*. The question is whether any provision of those Acts abolishes, expressly or impliedly, the common law power to give a *Prasad* direction. Where it is intended that a provision of the JDA abolish a common law principle, this is stated expressly, together with a reference to the

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[53] *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625, 635-6 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ): '... where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred'.

[54] The common law power to give a *Prasad* direction existed long before the commencement of the CPA on 1 January 2010.

case or cases establishing the relevant common law principle.[55] The fact that *Prasad* is not expressly referred to in the JDA is a strong indicator that the legislature, in enacting the JDA, had no intention to abolish the *Prasad* direction.

Conclusion

44. The giving of a *Prasad* direction, in an appropriate case, is not contrary to law. It is a well-established principle in the common law of Australia that a trial judge may inform the jury of its right to return a verdict of not guilty at any time after the close of the prosecution case. No decision of this Court has abolished the principle, and no Victorian statutory provision has abolished the principle.

45. The direction serves an important public interest in saving time and expense in the administration of criminal justice.[56] It also protects the rights and interests of an accused person as it allows the accused to have 'the strain of undergoing a highly stressful experience lifted from his or her shoulders once the jury determined that they did not wish to hear any more evidence .[57] There is no reason why appropriately-worded *Prasad* directions should not continue to be given 'sparingly' in appropriate cases.

Part VII: Order Sought

46. The order sought by the Acquitted Person is that this appeal be dismissed.

Part VIII: Costs

47. In addition to the order referred to above at paragraph 46, the Acquitted Person seeks an order that the Appellant pay its costs of the appeal, and of the application for special leave to appeal. In that respect, at paragraph 4.1 of the Application for Special Leave to Appeal dated 19 April 2018, the Director expressly stated that

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[55] See *JDA* ss 4, 17, 44, 44E, 44G, 44K, 44M, 54, 62, 64D, 64G.
[56] *DPP Reference No 1 of 2017* [2018] VSCA 69, [233] (Weinberg and Beach JJA) **CAB 150**.
[57] Ibid.

'The Victorian Director of Public Prosecutions agrees to pay the reasonable costs of the acquitted person'.

Part IX: Time Estimate for Presentation of Oral Argument

48. The Acquitted Person estimates that 90 minutes will be required for presentation of oral argument on behalf of the Acquitted Person.

10 Dated: 12th October 2018

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