IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY **No. M129 of 2018**

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

IN THE MATTER OF:

DIRECTOR OF PUBLIC PROSECUTIONS REFERENCE NO 1 OF 2017

10 **APPELLANT'S REPLY**

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: REPLY

2. The respondent asserts the issue whether the jury has a right to acquit exercisable of its own motion at any time after the close of the prosecution case ought not arise for determination by this Court as this issue was the subject of a concession by the
20 appellant in the Court of Appeal.

3. The concession made in the Court of Appeal is not fatal to this appeal.

4. In *Pantorno v R*[1] Mason CJ and Brennan J stated:

> ...it can be said that there is a general rule - of practice or discretion, if not of jurisdiction – that this Court will not ordinarily set aside a judgment correctly and regularly pronounced when the only valid ground of appeal is raised for the first time in this Court. Grounds of appeal are not narrowly construed but they never the less confine the issues which, in any curial proceeding of an
> 30 adversarial kind, define what the court is to decide. And even when a point which counsel seeks to argue in this Court for the first time can be seen to fall within the grounds of appeal to an intermediate appellate court, this Court will not give effect to the point if evidence could have been given in the court below

[1] (1989) 166 CLR 466.

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> which by any possibility could have prevented the point from succeeding: *Coulton v Holcombe* [citation omitted]. But, absent such a possibility, there are some cases in which it is expedient in the interests of justice to allow a point to be raised on appeal which was not argued in the court below: see *O'brien v Komesaroff* [citation omitted].[2]

5. In *Smith v R*[3] Gleeson CJ, Gaudron, Gummow and Hayne JJ stated:

> There is no constitutional reason forbidding this Court, perceiving for the first time a flaw in the earlier conduct of proceedings, to permit a party to an appeal to the Court to raise a completely new legal proposition not previously advanced, whether at trial or on appeal [citation omitted]. Sometimes a fresh look at a problem can uncover a point that everyone has overlooked or mistaken and so prevent an injustice [citation omitted]. Such a new argument is only forbidden where procedural unfairness is caused to a party, such as might arise if a party could have met the point, if raised earlier, by tendering additional or different evidence.[4]

6. There is no constitutional bar to this Court considering the point not taken in the Court of Appeal by the appellant. The point is inextricably linked to the question for consideration being whether the *Prasad* direction is contrary to law. It is expedient to consider this point during this appeal, where special leave has been granted, rather than a wait for another vehicle in the future.

7. Further, there is no impact upon the respondent as the appeal comes to this Court by way of a DPP reference in which appellant has agreed to pay the costs of the respondent and the respondent has been acquitted of the offence.

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[2] Ibid at 475 - 476.

[3] (2001) 206 CLR 650.

[4] Ibid at [22].

8. It is in the interests of justice that both questions 2(a) and 2(b) raised by the appellant be considered by this Court. (Appellant's Submissions [2].)

Dated: 19th day of October 2018

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