IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY

No. A15 of 2016

BETWEEN:

RROK JAKAJ

Appellant

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

APPELLANT'S ~~SUMMARY OF ARGUMENT~~ SUBMISSIONS

PART I: FORM OF SUBMISSIONS

1. The Appellant certifies that these submissions are in a form suitable for publication on the Internet.

PART II: CONCISE STATEMENT OF THE ISSUES

2. The issues that arise in this appeal are:

   (a) Was it open to the Full Court of the Supreme Court of South Australia (**the Full Court**) to admit evidence of the 12 (former) jurors in relation to whether the jury had determined to return a verdict of not guilty to the charge of murder in respect of the Appellant?

   (b) In the exercise of its original jurisdiction, does the Full Court have a jurisdiction, power or function to:

      (i) quash a verdict of not guilty which has been recorded by the trial judge consequent upon a verdict of not guilty having been returned by the jury;

      (ii) set aside a judgment of acquittal based on a jury's verdict of not guilty; and

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(iii) thereby determine that the acquittal of the Appellant on the charge of murder was and is invalid or void?

PART III: SECTION 78B NOTICES

3. In light of the submissions herein, and matters thereby raised, the Appellant considers it unnecessary to give notice to the Attorneys-General of the Commonwealth and the States pursuant to s 78B of the *Judiciary Act 1903* (Cth).

PART IV: CITATION OF REASONS FOR JUDGMENT BELOW

4. The reasons for judgment of the Full Court (Gray and Sulan JJ; Kourakis CJ dissenting) are reported as *Case Stated on Acquittal (No 1 of 2015); R v Stakaj* (2015) 123 SASR 523 (**Reasons**).

PART V: STATEMENT OF MATERIAL FACTS

5. For the purposes of this Appeal, aside from the issue of the admissibility of the evidence of the 12 (former) jurors, the relevant facts and procedural background are not in issue.

6. On 7 August 2014, the Appellant and his three (then) co-accused were each arraigned on an Information containing a single count of murder.[1] After the Appellant's plea of not guilty, the trial commenced before Vanstone J and a jury of 12 in the Supreme Court of South Australia.[2]

7. On 17 September 2014, the jury retired to consider its verdicts.[3]

8. At 2:27 pm on 22 September 2014, the jury returned, in respect of the Appellant, two verdicts: (i) a verdict of not guilty of murder; and (ii) a verdict of guilty of manslaughter.[4]

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1 Reasons at 542 [51], 543 [60] [AB].

2 There having been no application by the Appellant and his (then) co-accused to be tried by a judge alone, the trial proceeded before a jury of 12 persons qualified and liable to serve as jurors: see *Juries Act 1927* (SA), s 6.

3 Reasons at 544-546 [62] [AB].

4 Reasons at 544-546 [62] [AB].

9. At 2:34 pm, no juror having expressed any dissatisfaction with those verdicts when they were announced by the foreperson, the jury was discharged,[5] and dispersed. The verdicts were accepted by the trial judge and the Information endorsed accordingly.[6]

10. At 2:55 pm, the *allocutus* having been administered to the Appellant on the charge of manslaughter,[7] the trial judge adjourned the proceeding to a later date for sentence.[8]

11. Later that afternoon, at about 4:00 pm, approximately one and a half hours after the jury had been discharged, and had dispersed, the (former) foreperson of the jury contacted an officer of the Court, indicating that he wished to meet about an undisclosed issue.[9]

12. At about 4:50 pm, the (former) foreperson met that Court officer.[10]

13. At about 5:00 pm, the Court officer informed the Acting Sheriff of "an issue in relation to the verdicts".[11]

14. Between 24 and 26 September 2014, another Court officer met with the (former) foreperson and each of the (former) jurors and obtained signed statements from them in the form of answers to interrogatories, which had been prepared by the trial judge.[12]

15. On 30 September 2014, the parties were advised of what had occurred.[13]

16. On 2 October 2014, the trial judge heard sentencing submissions. At that hearing, the Appellant and the Respondent (**the DPP**) were offered the opportunity to be heard in relation to the issue concerning the verdicts. Senior Counsel for the DPP

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5 Reasons at 546 [63]-[64] [**AB**].

6 Reasons at 546 [63] [**AB**].

7 Reasons at 546 [64] [**AB**].

8 Reasons at 546 [64] [**AB**].

9 Reasons at 546 [66] [**AB**].

10 Reasons at 546 [65] [**AB**].

11 Reasons at 546 [65] [**AB**].

12 Reasons at 546 [66] [**AB**].

13 Reasons at 546 [66] [**AB**].

"stated that he would need to take instructions on what the Director wished to do in relation to the issue. However, [he] indicated that he believed that the jury was *functus officio* and that the trial Judge likely no longer had a residual discretion to try to remedy any defect. Counsel for the Director did not oppose the Judge proceeding to sentence the defendants and the parties made submissions as to sentence".[14]

17. On 7 October 2014, the DPP raised no objection to the trial judge proceeding to sentence the Appellant,[15] and he was sentenced to five years and three months' imprisonment in respect of the conviction for manslaughter.

18. After that sentence had been imposed, the trial judge and a Clerk of Arraigns certified as correct and signed a report which included details of that sentence.[16]

19. On 24 October 2014, the Appellant filed an appeal against sentence.[17] (If the Appellant were to succeed in this Court, that appeal remains to be heard and determined by the Full Court.)

20. On 16 January 2015, the DPP filed an application[18] seeking orders, pursuant to the inherent jurisdiction of the Supreme Court, that each of the following be expunged or quashed:

(a) the Appellant's verdict of not guilty to murder (which had been returned by the jury at the conclusion of the trial of the Appellant, and which had been accepted and recorded by the learned trial judge);

(b) the Appellant's judgment of acquittal of murder entered by the learned trial judge;

(c) the Appellant's verdict of guilty of (the alternative offence of) manslaughter returned by the jury at the conclusion of the trial of the Appellant (and accepted and recorded by the learned trial judge).

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14 Reasons at 546-547 [67] [**AB**].

15 Reasons at 546-547 [67] [**AB**].

16 Reasons at 547 [68] [**AB**]. See the Report of Prisoner Tried [**AB**].

17 Notice of Appeal against Sentence dated 24 October 2014 [**AB**].

18 Reasons at 542 [53]. See the DPP's Application dated 16 January 2015, paragraphs 5-7 [**AB**].

21. The DPP also sought a new trial of the Appellant be ordered on the charge of murder.[19]

22. On 11 February 2015, the Full Court ordered that affidavits be obtained from each of the (former) jurors by the Registrar of the Supreme Court.[20]

23. Over the objection of the Appellant,[21] those affidavits were admitted in evidence in part by the Full Court.[22] They showed that the jury had not determined to return verdicts of not guilty to the charge of murder in respect of the Appellant.

24. Relying on that evidence, the Full Court then held that it had an inherent jurisdiction to: (i) quash the Appellant's verdict of not guilty to murder; (ii) quash his conviction of manslaughter; (iii) set aside his sentence of imprisonment for manslaughter; and (iv) direct that there be a re-trial of the Appellant on the charge of murder.[23]

PART VI: ARGUMENT

Grounds (i) and (ii): The evidence of the (former) jurors is inadmissible

25. After a jury has been discharged by the trial judge and it has separated (or dispersed), its (unequivocal) verdict (as pronounced by the foreperson and assented to by the entire jury) having been recorded, evidence from a juror(s) as to any misapprehension underlying the pronouncement of the verdict (here, the obligations on the jury under s 57(3) of the *Juries Act 1927* (SA)[24]) is inadmissible for the purpose of either altering (or correcting) the verdict given and recorded.[25]

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19 See the DPP's Application dated 16 January 2015, paragraph 8 [**AB**].

20 Reasons at 547 [70] [**AB**].

21 Reasons at 548 [75], 553-555 [89]-[96] [**AB**].

22 Reasons at 561 [121] [**AB**]. The evidence so admitted is set out in the Reasons at 548-549 [72]-[75] [**AB**].

23 Reasons at 570-571 [162]-[164], 571 [167] [**AB**]; Notice of Final Determination of Appeal dated 25 September 2015 [**AB**].

24 The effect of this sub-section is that "an accused must be found not guilty of the offence charged before a verdict can be taken in relation to an alternative offence: *R v Thomas* (unreported, Supreme Court of South Australia, Cox, Prior and Duggan JJ, 11 December 1996) at [2] per Duggan J, cited by Gray and Sulan JJ in the Reasons at 551 [81] [**AB**].

25 *Biggs v DPP* (1997) 17 WAR 534 at 544-545 per Kennedy J, 555-558 per Franklyn J (with whom Walsh J agreed at 558); *In Re Donovan's Application* [1957] VR 333 at 336; *Nanan v The State*

26. The Full Court concluded otherwise,[26] contrary to authority of the Full Court of the Supreme Court of Western Australia[27] and authority of superior courts in other common law jurisdictions.[28] It was wrong to do so.

27. It is plain that no evidence from any of the jurors concerning the content of any deliberations of the jury is admissible to impugn the verdict.[29] But the Full Court considered that the material in the affidavits did not trespass thereon; "the evidence sought to be adduced is extrinsic to the deliberations of the jury".[30] The question whether the (former) jury determined that the Appellant was not guilty, and how that verdict was arrived at, is, however, the very material which has long been held at common law to be that which must be protected by the exclusionary rule.

28. That this is the case is because, once they have been discharged and have dispersed, those 12 persons lose their character as a jury; they become "citizens who had discharged their duties as jurors".[31] In the circumstances of this case, it was too late[32] for any inquiry to be made of those 12 persons by the time the (former) foreperson contacted the Court some one and half hours later.[33]

29. There are cases where a jury has been entitled to correct a verdict, but they are few, and the circumstances carefully circumscribed.[34] It is not surprising that there are

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[1986] AC 860 at 871-872; *Head v R* [1986] 2 SCR 684 at 688-694; *R v Tawhiti* [1994] 2 NZLR 696 at 699-700.

26 Reasons at 561 [121] [AB].

27 *Biggs v DPP* (1997) 17 WAR 534 at 544-545 per Kennedy J, 555-558 per Franklyn J (with whom Walsh J agreed at 558).

28 *Nanan v The State* [1986] AC 860 at 871-872; *Head v R* [1986] 2 SCR 684 at 688-694; *R v Tawhiti* [1994] 2 NZLR 696 at 699-700.

29 *Smith v Western Australia* (2014) 250 CLR 473 at 476 [1] per French CJ, Crennan, Kiefel, Gageler and Keane JJ (and the cases there cited).

30 Reasons at [120] [AB].

31 *In Re Donovan's Application* [1957] VR 333 at 336.

32 The verdict had been accepted and the jury discharged, thus invoking the exclusionary rule in *Smith v Western Australia* (2014) 250 CLR 473 at 476 [1] per French CJ, Crennan, Kiefel, Gageler and Keane JJ.

33 See paragraph 11 above.

34 See:

(a) *R v Eyers* (1978) 19 SASR 244, which concerned a mistake as to verdict corrected before discharge of jury;

few cases because, once the jury has delivered its verdict, that verdict has been accepted by the trial judge and the jury has been discharged and it has dispersed, it is *functus officio*.[35] As a consequence, a jury cannot be recovered and no alteration (or correction) can be made to the verdicts recorded. No evidence of what was discussed by them is admissible to controvert that which was said in open court, assented to by each of them and accepted by the Court.

30. The inadmissibility of the (former) jurors' evidence is not altered by the fact that the DPP has invoked, or sought to invoke, the inherent jurisdiction of this Court. The evidence should have been held to be inadmissible as infringing upon the long-held, and undisputed, importance of the confidentiality of jury deliberations. To say, as the Full Court did,[36] that the resultant loss of confidence in jury verdicts justifies the tender of this material is to be distracted by an irrelevant question. Absent material of the nature considered in *Smith v Western Australia*[37] (namely, criminal misconduct), the question of admissibility is to be determined by application of the exclusionary rule, without an eye to the basis for the application. The approach of the Full Court is inconsistent with the application of similar exclusionary rules in

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(b) *R v Cefia* (1979) 21 SASR 171, which concerned a mistake as to verdict corrected before dispersal of jury;

(c) *R v Andrews* (1985) 82 Cr App R 148, where the jury had not yet been discharged;

(d) *R v Dwight* [1990] 1 NZLR 160, where the correction as to the verdict occurred prior to discharge of jury, the delivery of the jury's verdicts having been interrupted;

(e) *R v Loumoli* [1995] 2 NZLR 656, where the correction as to verdict subsequent to discharge, but before dispersal of jury;

(f) *R v Aylott* [1996] 2 Cr App R 169, where the jury had been discharged from giving verdict, but before dispersal, foreman stated that verdicts had been reached, and so verdicts then taken by trial judge;

(g) *R v Ciantar* (2006) 16 VR 26 at 68-73 [150]-[165], where the mistake as to verdict was corrected before discharge of jury; and

(h) cf. *Burke v R* [2002] 2 SCR 857, where an error in the court's recording of the verdict of the jury as pronounced by the foreman of the jury occurred, the verdict as pronounced not being repeated or confirmed by the court by the interrogation of the foreman, but the error was discovered immediately after the discharge of the jury but prior to the jury having separated or dispersed. The trial judge conducted an inquiry into the verdict of the jurors after the dispersal of the jury, and the trial judge then changed the verdict.

35 *Biggs v DPP* (1997) 17 WAR 534 at 558 per Franklyn J. See also, *Head v R* [1986] 2 SCR 684 at 694; *R v Loumoli* [1995] 2 NZLR 656 at 663-664, 665.

36 Reasons at 561 [121] per Gray and Sulan JJ [**AB**]. Kourakis CJ agreed with the majority on this point: at 527 [1] [**AB**].

37 (2014) 250 CLR 473 at 484 [45]-[46] per French CJ, Crennan, Kiefel, Gageler and Keane JJ.

relation to, for example, information the subject of legal professional privilege, where, absent criminality or waiver (the latter not arising here), the information is inadmissible, irrespective of the purpose for which it is sought to be tendered.[38] The exclusionary rule is well-established, based on very sound policy reasons, and only subject to the most limited exceptions. The DPP points to no relevant exception – because he cannot – to disapply this (very important) general rule of the administration of justice.[39]

31. It follows that the evidence relied upon by the Full Court should not have been received by it. It was *prima facie* inadmissible, and there was no relevant exception to the exclusionary rule to call in aid. On this basis alone, the DPP's application should have been dismissed.

Ground (iii): There is no inherent jurisdiction to set aside the jury's verdict of acquittal

32. If the evidence from the (former) jurors) which was relied upon by the Full Court is held by this Court to be inadmissible, then it is unnecessary for this Court to consider the existence of the inherent jurisdiction of a State Supreme Court to set aside a jury's verdict of acquittal. That is, the factual sub-stratum upon which the DPP relies to invoke the inherent jurisdiction of the Supreme Court of South Australia falls away.

33. But if, contrary to the above submissions, it is necessary to consider that question, there was no power for the Supreme Court to do what it purported to do here, and the DPP's application should, therefore, have been dismissed on this (further) basis too.

34. The majority of the Full Court considered, "[h]aving regard to its character as a superior court of record with the powers of the old English courts",[40] that it was permitted to control and correct the "invalid" determination of the jury.[41] To set aside the perfected judgment of acquittal was "a proper exercise of the Court's power

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38 See, for example, *Carter v The Managing Partner, Northmore Hale Davy & Leake* (1995) 183 CLR 121.

39 *Smith v Western Australia* (2014) 250 CLR 473 at 476 [1] per French CJ, Crennan, Kiefel, Gageler and Keane JJ.

40 Reasons at 563 [128] per Gray and Sulan JJ [AB].

41 Reasons at 571 [164] per Gray and Sulan JJ [AB].

to preserve and protect [its] procedures" because abuse of process extends to "precluding the undermining of confidence in courts generally".[42] It followed, their Honours reasoned, that the exercise of quashing a verdict of acquittal can be properly undertaken by a court to prevent a verdict which had been arrived at in contravention of s 57(3) of the *Juries Act 1927* (SA) from standing.

35. But the enlargement of the Court's inherent power in such a manner is contrary to principle, authority and history. The dissenting judgment of Kourakis CJ on this point is correct.

36. The (proper) starting point is that the judgment of the trial court was entered into the records of the Supreme Court,[43] and thereby perfected. It was not, therefore, open to the Supreme Court to re-open the proceeding the subject of that judgment, re-consider the question of what orders should be made in that proceeding and then erase or alter that judgment.[44]

37. It is a fundamental principle of the common law that a verdict of acquittal returned by a jury on indictment in a criminal trial conducted by a competent court is final and conclusive on the issue which the jury are sworn to try, namely, the issue of "guilty or not guilty" of the offences the subject of the charges on the indictment – whether or not the verdict of "not guilty" is tainted by irregularity or mistake.[45]

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42 Reasons at 571 [164] per Gray and Sulan JJ. [**AB**], citing *Smith v The Queen* (2015) 255 CLR 161.

43 See paragraphs 9 and 18 above.

44 *Burrell v The Queen* (2008) 238 CLR 218 at 223-225 [15]-[22] per Gummow A-CJ, Hayne, Heydon, Crennan and Kiefel JJ; *Achurch v The Queen* (2014) 253 CLR 141 at 152-154 [14]-[18] per French CJ, Crennan, Kiefel and Bell JJ.

45 *R v Snow* (1915) 20 CLR 315 at 363-365 per Gavan Duffy and Rich JJ; *R v Weaver* (1931) 45 CLR 321 at 332-333 per Gavan Duffy, Starke and McTiernan JJ, 356 per Evatt J; *R v Wilkes* (1948) 77 CLR 511 at 516-517 per Dixon J; *Davern v Messel* (1984) 155 CLR 21 at 36-37 per Gibbs CJ, 53-54 per Mason and Brennan JJ; *R v JS* (2007) 175 A Crim R 108 at 118-119 [26]-[30] per Spigelman CJ.

38. The rationale, at common law, for the proposition that an appeal did not lie at the suit of the Crown from a verdict of acquittal returned by a jury was because the verdict of the jury was "sacrosanct".[46]

39. The common law has long, therefore, recognised that a verdict of acquittal returned by a jury could not be set aside by the trial judge, or challenged by any process of appeal or judicial review, or "ignored" by the launching of a fresh prosecution.[47]

40. It must follow that when the South Australian Parliament provided that the trial of the offence of murder "is ... to be by jury",[48] the Parliament provided that the accused person so tried shall also have all the benefits incidental to trial by jury, and one of those benefits is that a verdict of "not guilty" shall be final and conclusive on the issue which the jury are sworn to try.[49]

41. Four (uncontroversial) propositions of law are pertinent.

42. First, there is a general presumption that the Crown has no right to appeal against an acquittal.[50]

43. Second, any statutory conferral of a prosecution power of appeal against either a sentence passed by a trial court or an acquittal returned by a jury constitutes a marked departure from the principles governing the exercise of penal jurisdiction and cuts across time honoured concepts of criminal administration.[51]

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46 *R v Snow* (1915) 20 CLR 315 at 321-323 per Griffith CJ, 363-364 per Gavan Duffy and Rich JJ; *R v Weaver* (1931) 45 CLR 321 at 356 per Evatt J; *R v Glennon* (1992) 173 CLR 592 at 595 per Mason CJ and Toohey J.

47 *R v Snow* (1915) 20 CLR 315; *R v JS* (2007) 175 A Crim R 108 at 138-139 [171] per Mason P.

48 *Juries Act 1927* (SA), s 6(1). This is subject to an exception, which was not here engaged, that the accused may elect, in certain circumstances, to be tried by judge alone: see s 7. These words are materially indistinguishable from the words "shall be by jury" in s 80 of the Constitution, at least for present purposes. See, generally, *Cheatle v The Queen* (1993) 177 CLR 541.

49 *R v Snow* (1915) 20 CLR 315 at 365 per Gavan Duffy and Rich JJ.

50 *R v Snow* (1915) 20 CLR 315 at 322 per Griffith CJ; *Davern v Messel* (1984) 155 CLR 21 at 29-31 per Gibbs CJ. See also, *Thompson v Mastertouch TV Service Pty Ltd* (1978) 19 ALR 547 at 550, 551, 552, 555 and 560.

51 *Williams v The Queen (No 2)* (1934) 50 CLR 551 at 561 per Dixon J; *Peel v The Queen* (1971) 125 CLR 447 at 452 per Barwick CJ; *Rohde v DPP* (1986) 161 CLR 119 at 128-129 per Deane J.

44. Third, as a consequence, express authorisation (that is, a specifically conferred power) is required to displace the presumption against the Crown enjoying a right of appeal.[52]

45. Fourth, a Crown appeal against either a sentence imposed by a trial judge or an acquittal returned by a jury is contrary to fundamental principle or constitutes a departure from the general system of law.[53]

46. Not one of these (uncontroversial) propositions would have ever needed to have been expressed if a court (here, the Supreme Court of South Australia) had the inherent jurisdiction to set aside a verdict of acquittal returned by a jury on a trial on indictment. Indeed, each of the authorities referred to in support of the four propositions at paragraphs 42 to 45 above is, by necessary implication, authority for the proposition that no court has an inherent jurisdiction to set aside a verdict of acquittal returned by a jury on indictment.

47. In this case, the DPP did not rely upon any statutory provision in its attempt to have this Court set aside the jury's verdict of acquittal on the charge of murder. It could not have; there is no such South Australian statutory provision.[54] In these circumstances, the jury's verdict of acquittal on the charge of murder being final and conclusive and sacrosanct, the Full Court was simply not empowered to set that verdict of acquittal aside.

48. Of course, State legislatures are capable, within constitutional limitations, of expanding those powers. The Parliament of South Australia could permit, like the

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52 *R v Snow* (1915) 20 CLR 315 at 322 per Griffith CJ; *Davern v Messel* (1984) 155 CLR 21; *Rohde v DPP* (1986) 161 CLR 119 at 128-129 per Deane J; *Byrnes v The Queen* (1999) 199 CLR 1 at 26-27 [53] per Gaudron, McHugh, Gummow and Callinan JJ, 35-36 [85] per Kirby J; *Bond v The Queen* (2000) 201 CLR 213 at 222-223 [27]-[29] per Gleeson CJ, Gaudron, McHugh, Gummow, Kirby and Hayne JJ. See also, *Thompson v Mastertouch TV Service Pty Ltd* (1978) 19 ALR 547 at 550, 551, 552, 555 and 560.

53 *R v Snow* (1915) 20 CLR 315 at 322-323 per Griffith CJ. See also, *Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J; *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 131-132 [86] per Hayne and Bell JJ.

54 cf. Of Australia's various jurisdictions, only Tasmania has enacted legislation permitting an appeal from an (undirected) acquittal *by a jury*: see *Criminal Code* (Tas), s 401(2). But, even with the existence of that statutory provision in that jurisdiction, "it has not been authoritatively determined that ... an order [quashing an acquittal] may be made in any event": *Attorney-General (Tas) v Arkinstall* (2013) 240 A Crim R 311 at 322 [45] per Pearce J (with whom Blow CJ and Tennent J agreed); *Director of Public Prosecutions v Cook* (2006) 166 A Crim R 234 at 249 [53] per Crawford J, 258-259 [93] per Blow J, 272 [153] per Tennent J.

Parliament of Tasmania,[55] an appeal from a jury's verdict of guilty. But it has not. And the inherent jurisdiction of the Court cannot be called upon to fill the (deliberate[56]) lacuna in the carefully-crafted provisions permitting various appeals (and statements of question of law) which are found in Part 11 of the *Criminal Law Consolidation Act 1935* (SA). Indeed, an appeal being "a creature of statute and, subject to constitutional limitations, the precise nature of appellate jurisdiction [being] expressed in the statute creating the jurisdiction or inferred from the statutory context",[57] there is simply no room for the inherent jurisdiction to expand to grant that which the legislature has not.

10 49. Turning to the accepted understanding of the Court's inherent jurisdiction, to say, as the Full Court does, that the Supreme Court's inherent powers extends to overturn a verdict of acquittal as part of that court's inherent powers, as those powers are to be understood by reference to the powers of the courts at Westminster, is erroneous. At federation, each State Supreme Court assumed the powers of those courts.[58] It must be emphasised, however, that, at that time, the powers of those English courts neither extended to, nor permitted, the setting aside of a verdict returned by a jury in a criminal trial and directing that a new trial be conducted.[59]

50. Indeed, as Kourakis CJ noted, the inviolability of judgments of acquittal based on jury verdicts has history far preceding Australia's federation.[60] His Honour went as

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55 See fn 51 above.

56 The relevant South Australian legislation, the *Criminal Law Consolidation Act 1935* (SA), permits a prosecution appeal from an acquittal but only in two prescribed circumstances, namely, if the trial was by judge alone or if the trial was by judge and jury and the trial judge directed the jury to acquit the person: see, respectively, ss 352(1)(ab)(i) and 352(1)(ab)(ii).

57 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 596 [56] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

58 See, relevantly, *Act No 31 of 1855-56* (SA), s 7. See further, *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 580-581 [97]-[100] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; 585 [113] per Heydon J. See also, *Grassby v The Queen* (1989) 168 CLR 1 at 16 per Dawson J; *Lipohar v The Queen* (1999) 200 CLR 485 at 515-516 [75]-[77] per Gaudron, Gummow and Hayne JJ.

59 *R v Bertrand* (1867) LR 1 PC 520 at 533-535; *R v Whelan* (1868) 5 WW & a'B (L) 7 at 21; *R v Duncan* (1881) 7 QBD 198 at 199-201; *R v Murphy* (1869) LR 2 PC 535 at 547ff. See also, to that same effect, *R v Snow* (1915) 20 CLR 315 at 321-323 per Griffith CJ, 354 per Higgins J, 364-365 per Gavan Duffy and Rich JJ; *Davern v Messel* (1984) 155 CLR 21 at 47-49 per Mason and Brennan JJ.

60 See Reasons at 528 [3]-[4], 534-537 [22]-[27], and the cases cited there.

far back as *R v Bear*,[61] in 1697, to illustrate the point, but the examples are far from few.[62] The position which prevailed in England at the time of Australia's federation was explained in clear and unambiguous terms by Lord Coleridge CJ in one such case, *R v Duncan*,[63] where the Chief Justice said that "[t]he practice of the Courts has been settled for centuries, and [it] is that in all cases of a criminal kind where a prisoner or defendant is in danger of imprisonment no new trial will be granted if the prisoner or defendant, having stood in that danger, has been acquitted".[64]

51. At federation, the Supreme Court of South Australia's inherent jurisdiction did not extend to it being able to set aside a jury's verdict of acquittal and direct that a new trial be conducted on the offence which was the subject of that acquittal. As such, it (and other State Supreme Courts) has never had, and does not now have, an inherent jurisdiction of that nature.

52. No reported case supports the Full Court's contention that orders of the nature sought by the DPP may be made by a court in the exercise of its inherent jurisdiction. No examples, other than the present case, are found in the case law of such an exercise of inherent jurisdiction.

53. Nor need there be such a jurisdiction to enable it to be properly described as a "Supreme Court of [a] State".[65] Indeed to so contend would be to ignore the absence of that jurisdiction of the courts at Westminster, as explained above.[66] Nor can it be said that the institutional integrity of the Supreme Court is in any way compromised or impaired by the absence of such a jurisdiction. Indeed, the inability of the Supreme Court to interfere with a verdict of a jury after trial is not surprising, in circumstances where the legislature has not conferred such a jurisdiction or power on that court.

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61 Citing *R v Bear* (1697) 2 Salk 646; 91 ER 547.

62 See the cases cited at footnote 59 above.

63 (1881) 7 QBD 198.

64 (1881) 7 QBD 198 at 199.

65 *Commonwealth Constitution*, s 73(ii).

66 See paragraphs 49-51 above.

54. Insofar as the majority sought to invoke concepts of abuse of process, they were in error to do so. True it is that the categories of abuse of process are not closed,[67] but that does not permit reasoning so as to expand the scope of the Court's inherent power beyond previously cognisable limits.

55. Any error or mistake made by the jury neither amounts to, nor leads to, any abuse of process. The integrity of the Court's process has not been compromised by any error made by the jury. The gravamen of that which is to be protected by abuse of process is some "misuse"[68] of the court's processes (whether by the taking of, or failure to take, steps in the proceeding[69]). There must be some conduct, invariably that of one of the parties to the proceeding, to invoke the relevant principles. But, here, it is not contended – nor could it be contended – that the Appellant, his (then) co-accused or the DPP did anything justifying the application of those principles. Indeed, the conduct relied upon by the majority is the conduct of the court itself, through the medium of the foreperson of the jury. There can be no abuse of a court's process based upon an error or mistake made by that court.

56. No reported case supports the DPP's contention that what occurred in this case and its consequences, constitutes an abuse of process or has led to the integrity of the Court's process being compromised.

57. Moreover, even if there has been an abuse of process or some compromise to the integrity of the Court's processes, the scope of the inherent jurisdiction of this Court does not extend so as to permit this Court to grant the relief sought by the DPP, for the reasons already explained at paragraphs 49 to 52 above.

58. It follows that there was no power for the Supreme Court to do what the Full Court purported to do here.

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67 See, for example, *Walton v Gardiner* (1993) 177 CLR 378 at 393-395.

68 *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 at 536 per Lord Diplock. See also, *Rogers v The Queen* (1994) 181 CLR 251 at 286 per McHugh J; *Moti v The Queen* (2011) 245 CLR 456 at 464 [11] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Batistatos v Road and Traffic Authority (NSW)* (2006) 226 CLR 256 at 267 [15] per Gleeson CJ, Gummow, Hayne and Crennan JJ.

69 *Batistatos v Road and Traffic Authority (NSW)* (2006) 226 CLR 256 at 267 [15] per Gleeson CJ, Gummow, Hayne and Crennan JJ.

59. Further, and in any event, by reference to the conduct of the DPP[70] in permitting the Appellant to be sentenced, the DPP has waived his entitlement to contend, or is otherwise precluded from contending (as he did in the Full Court), that the inherent jurisdiction of the Court can be invoked to expunge or quash the judgment of acquittal of murder of the Appellant and expunge or quash the conviction and sentence of the Appellant for manslaughter.

60. If, contrary to these submissions, this Court were to hold that the Full Court possesses an inherent jurisdiction to set aside a verdict of acquittal, the application should nevertheless be refused in the exercise of the Court's residual discretion.[71] Any such jurisdiction would only be capable of exercise in exceptional cases, and the applicant for such relief bears a "heavy burden" in persuading the Court to exercise its discretion to do so.[72] It should not do so for four reasons:

(a) the DPP was first aware of this issue on 30 September 2014,[73] yet permitted the Court to proceed to sentence the Appellant for manslaughter on 7 October 2014;[74]

(b) yet further delay occurred after sentence, because the DPP did not bring his application until 16 January 2015, over three months after he was first aware of the issue;[75]

(c) the principle of double jeopardy, "a *value* which underpins the criminal law",[76] posits here that only in a "truly exceptional" case should this Court quash a

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70 See paragraphs 15-17 above.

71 As to the existence of such a discretion, see *R v Brougham* (2015) 122 SASR 546 at 568 [65], where an appeal to the Full Court lay against an acquittal because the trial was by judge alone: s 352(1)(ab) of the *Criminal Law Consolidation Act 1935* (SA). See also, *R v PL* (2009) 199 A Crim R 199 at 215 [80], 216 [83] per Spigelman CJ (with whom McClellan CJ at CL and RA Hulme J agreed).

72 *DJL v The Central Authority* (2000) 201 CLR 226 at 269 [106] per Kirby J.

73 See paragraph 15 above.

74 See paragraphs 17 above.

75 cf. The time limit for appeals permitted by Part 11 of the *Criminal Law Consolidation Act 1935* (SA) is generally 21 days: see Supreme Court Criminal Rules 2014 (SA), r 107(1).

76 *Bui v DPP (Cth)* (2012) 244 CLR 638 at 649 [13] per French CJ, Gummow, Hayne, Kiefel and Bell JJ (emphasis in original), citing *Pearce v The Queen* (1998) 194 CLR 610 at 614 [10] per McHugh, Hayne and Callinan JJ, 626 [56] per Gummow J; *R v Carroll* (2002) 213 CLR 635 at 660-661 [84] per Gaudron and Gummow JJ.

verdict of acquittal entered by an intermediate appellate court[77] – the case is even stronger where a properly constituted jury has returned that verdict in open court after a trial; and

(d) further, the principle of finality, "[a] central and pervading tenet of the judicial system",[78] strongly points against the exercise of the discretion.

PART VII: APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

61. Sections 6(1) and 57(3) of the *Juries Act 1927* (SA) provide, and have provided at all relevant times:

> 6(1) A criminal trial in the Supreme Court ... is, subject to this Act, to be by jury.
>
> 57(3) Where an accused person is charged with a particular offence ("**the major offence**") and it is possible for a jury to return a verdict of not guilty of the offence charged but guilty of some other offence for which the person has not been charged ("**the alternative offence**")—
>
> (a) the jury must consider whether the accused is guilty of the major offence before considering whether he or she is guilty of the alternative offence; and
>
> (b) if the jury reaches a verdict (either unanimously or by majority) that the accused is not guilty of the major offence but then, having been in deliberation for at least 4 hours, is unable to reach a verdict on the question of whether the accused is guilty of the alternative offence—
>
> (i) the accused must be acquitted of the major offence; and
>
> (ii) the jury may be discharged from giving a verdict in respect of the alternative offence; and
>
> (iii) fresh proceedings may be taken against the accused on a charge of the alternative offence.

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77 *R v Benz* (1989) 168 CLR 110 at 146 per Gaudron and McHugh JJ, citing *Davern v Messel* (1984) 155 CLR 21 at 36-37 per Gibbs CJ, 53-54 per Mason and Brennan JJ. See also, *R v Wilkes* (1948) 511 at 516-517 per Dixon J.

78 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 17 [34] per Gleeson CJ, Gummow, Hayne and Heydon JJ. See also, *Burrell v The Queen* (2008) 238 CLR 218 at 223 [15] per Gummow A-CJ, Hayne, Heydon, Crennan and Kiefel JJ.

62. Section 352(1)(ab) of the *Criminal Law Consolidation Act 1935* (SA) provides, and has provided at all relevant times:

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

PART VIII: ORDERS SOUGHT BY THE APPELLANT

63. The Appellant seeks the following orders:

(1) The Appeal be allowed with costs.

(2) The Order of the Full Court of the Supreme Court of South Australia made on 25 September 2015 be set aside, and in lieu thereof, it be ordered that the Director of Public Prosecution's application dated 16 January 2015 be dismissed with costs.

PART IX: ESTIMATED TIME FOR ORAL ARGUMENT

64. The Appellant estimates the amount of time he requires for oral argument to be two and a half hours.

Dated: 15 April 2016.

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