IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No A19 of 2016

BETWEEN:

DARIO STAKAJ
Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS
Respondent

APPELLANT'S SUBMISSIONS

Part I: Publication

1. I certify that this submission is in a form suitable for publication on the internet.

Part II: Statement of issues

2. Does the Supreme Court of South Australia have the inherent jurisdiction or power to set aside a perfected judgment of acquittal based on a jury verdict of not guilty?

3. If such inherent jurisdiction or power exists, does the miscommunication of a jury's verdict constitute an abuse of the Court's process which warrants the exercise of that jurisdiction or power?

4. Is evidence admissible, as extrinsic to the deliberations of a jury, to prove that a verdict that has been delivered did not accurately reflect the verdict that a jury had agreed upon (or the fact of the jury's non-agreement on any verdict)?

Part III: Notices under s. 78B of the *Judiciary Act* 1903

5. The appellant does not consider that any notice under s. 78B of the Judiciary Act 1903 is required to be given.

Part IV: Citation of the decision of the Court below

6. The appeal is from the decision of the Full Court of the Supreme Court of South Australia (**FC**) in *Case Stated on Acquittal (No 1 of 2015); R v Stakaj and Others* [2015] SASCFC 139; (2015) 123 SASR 523 (**FC1**) and the supplementary reasons in *R v Stakaj; R v N, H* [2016] SASCFC 9 (**FC2**).

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Part V: Narrative statement of the relevant facts found or admitted

7. David Zefi (**Zefi**), Rrok Jakaj (**Jakaj**), the appellant and HN were jointly charged on Information laid in the Supreme Court of South Australia with having murdered Christopher Hatzis on 4 August 2012.

8. On 7 August 2014, Zefi, Jakaj, the appellant and HN were arraigned in the Supreme Court of South Australia before the trial judge, Justice Vanstone on the charge of murder. Each of them pleaded not guilty. A jury was empaneled and the trial commenced.[1]

9. The trial judge summed up to the jury on 16 and 17 September 2014 and the jury then retired to deliberate.[2]

10. On 22 September 2014, the jury returned to court to deliver its verdicts.

11. In response to questions from the trial judge's associate, the foreperson of the jury stated that in relation to the charge of murder, the jury's verdicts in respect of Zefi, Jakaj, the appellant and HN was not guilty, by a majority of ten or more.[3]

12. In response to questions from the trial judge's associate, the foreperson of the jury also stated that in relation to the alternative charge of manslaughter, the jury's unanimous verdicts in respect of Zefi, Jakaj and the appellant was guilty and in respect of HN the jury's verdict was guilty by a majority of ten or more.[4]

13. Whilst the verdicts were being taken, no member of the jury expressed any dissatisfaction with the verdicts given by the foreperson. The trial judge accepted the verdicts and her Associate endorsed the Information accordingly.[5]

14. At about 2.34 pm the trial judge discharged the jury.[6]

15. The *allocatus* was then administered to Zefi, Jakaj, the appellant and HN on the charge of manslaughter. At about 2.55 pm the trial judge adjourned the proceedings to a later date for sentencing submissions.[7]

16. At about 4.50 pm that same day the jury foreperson met with the Acting Jury Manager, Matthew Moro (**Moro**).[8] At about 5.10 pm Moro informed the Acting Sheriff, Steven Ferguson (**Ferguson**) about an issue in relation to the jury's verdicts.[9]

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[1] FC1 at [60]
[2] FC1 at [61], [62]
[3] Statement of Agreed Facts at [5]; FC1 at [62]
[4] Statement of Agreed Facts at [5]; FC1 at [62]
[5] Statement of Agreed Facts at [6]; FC1 at [63]
[6] Statement of Agreed Facts at [7]; FC1 at [64]
[7] Statement of Agreed Facts at [7]; FC1 at [64]
[8] Statement of Agreed Facts at [9]; FC1 at [65]
[9] Statement of Agreed Facts at [10]; FC1 at [65]

17. On 23 September 2014, Ferguson spoke to the Chief Justice of the Supreme Court of South Australia about the issue in relation to the jury's verdicts. The Chief Justice advised Ferguson to obtain a signed statement from the foreperson.[10]

18. Between 24 and 26 September 2014, Ferguson met with the foreperson and each of the other jurors and obtained signed statements from them in the form of answers to questions drafted by the Court.[11]

19. On 30 September 2014 the parties were advised of what had occurred by being provided with a copy of a memorandum from Ferguson dated 29 September 2014 and an affidavit sworn by the trial judge's Associate on 30 September 2014.[12]

20. On 2 October 2014 the proceedings were called on before Justice Vanstone for sentencing submissions. The parties were heard in relation to the issue concerning the verdicts. Counsel for the prosecution stated that he would need to take instructions as to what, if anything, the prosecution might do, but indicated that he had come to the view that, "the jury is probably *functus officio*" and that Justice Vanstone J, "no longer really has a residual discretion to try and remedy such a defect". Counsel for the prosecution did not oppose Justice Vanstone proceeding to sentence Zefi, Jakaj, the appellant and HN. Submissions as to sentence were then made by each of the parties. Justice Vanstone adjourned the proceedings to 7 October 2014 for sentence.[13]

21. On 7 October 2014 no submissions were made in relation to the issue about the verdicts. Justice Vanstone proceeded to sentence the defendants.[14]

22. After sentencing on 7 October 2014, a Report of Prisoner Tried was created and printed for each of Zefi, Jakaj, the appellant and HN using information that had been entered into the Supreme Court of South Australia's computer records. The four Reports of Prisoner Tried were certified and signed as correct by a Clerk of Arraigns and by Justice Vanstone.[15] These actions perfected the judgments of not guilty of murder for each of Zefi, Jakaj, the appellant and HN.

23. On 13 and 14 October 2014 respectively, the appellant and HN filed Notices of Application for Permission to Appeal against their convictions for manslaughter.

24. On 16 January 2015 the respondent filed an application seeking orders that the verdicts of not guilty of murder for each of Zefi, Jakaj, the appellant and HN be expunged or quashed and that the judgments entered by Justice Vanstone acquitting each of them of murder be expunged or quashed. The Application also sought orders that the verdicts of guilty of manslaughter for Zefi, Jakaj, the appellant and HN be expunged or quashed and that the judgments entered by Justice Vanstone convicting each of them of manslaughter be expunged or quashed.

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[10] Statement of Agreed Facts at [11]; FC1 at [66]
[11] Statement of Agreed Facts at [12]; FC1 at [66]
[12] Statement of Agreed Facts at [13]; FC1 at [66]
[13] Statement of Agreed Facts at [14]; FC1 at [67]
[14] Statement of Agreed Facts at [15]; FC1 at [67]
[15] Statement of Agreed Facts at [16]; FC1 at [68]

25. The respondent's application was heard by the Full Court of the Supreme Court of South Australia (**the FC**) together with grounds 1 and 2 of the appeal against conviction brought by the appellant. The balance of the appellant's grounds of appeal against conviction, which included a ground that his conviction was against the weight of the evidence and was unsafe and unsatisfactory, were deferred for later argument, as was HN's similar ground of appeal.[16]

Decision of the Full Court

26. The FC (by majority) granted the respondent's application and ordered that the verdicts of not guilty of murder recorded for Zefi, Jakaj, the appellant and HN be quashed. The FC (by majority) also ordered that the convictions for manslaughter recorded for Zefi, Jakaj, the appellant and HN be quashed and their sentences set aside. The FC (by majority) ordered that Zefi, Jakaj, the appellant and HN be retried on the charge of murder.[17]

27. The majority did not make any orders in relation to the appeals against conviction by the appellant and HN, apparently on the basis that as the convictions for manslaughter had been quashed, there were no longer any convictions against which an appeal could be maintained.[18]

28. The FC unanimously admitted the portions of the affidavit material from the foreperson and the other jurors that the respondent sought to tender.[19]

29. The affidavit evidence established that there had been a material irregularity in the announcing of the verdicts for the charge of murder. The evidence proved that whilst the foreperson responded, "Yes" to the Associate, indicating that each of the "not guilty" verdicts on the charge of murder for Zefi, Jakaj, the appellant and HN was the verdict of ten or more of the jury, the correct response had been "No".[20] In other words, the evidence established that there had been a miscommunication by the foreperson of the jury's verdicts for the charge of murder and the foreperson did not return verdicts which the jury, or ten or more of the jury, had agreed upon.

30. The majority reasoned that the miscommunication of the verdicts established an abuse of process sufficient to warrant the Court exercising an inherent jurisdiction and power to quash the verdicts and judgments of acquittal.

31. Kourakis CJ agreed that the portions of the affidavit material from the foreperson and the other jurors which the respondent sought to tender were admissible. He held that an enquiry into whether there had been a mistaken communication of the result of the jury's deliberations was not an enquiry into the deliberations themselves.[21] Kourakis CJ held that this evidence established there has been a miscarriage of justice in the convictions of the appellant and HN for manslaughter.[22]

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[16] FC1 at [20]
[17] FC1 at [167]
[18] FC2 at [21]
[19] FC1 at [89]-[121]
[20] FC1 at [113]
[21] FC1 at [11]
[22] FC1 at [20]

32. Kourakis CJ acknowledged that this miscarriage of justice would ordinarily result in an order for retrial (on manslaughter) for the appellant and HN, but he noted the need for the Court to first determine the appellant's and HN's remaining grounds of appeal (in particular the ground that the verdicts were unreasonable and could not be supported having regard to the evidence).[23] However, given the majority's decision, he said there was no utility in him doing so.[24]

33. Kourakis CJ also dissented from the majority on the disposition of the respondent's application to expunge or quash the acquittals of Zefi, Jakaj, the appellant and HN for murder. He held that the decision of the High Court in *R v Snow* (1915) 20 CLR 315 bound the Court to dismiss the respondent's application.[25] He held that the Court had no power to set aside the verdicts of not guilty of murder returned in favour of Zefi, Jakaj, the appellant and HN.[26]

Part VI: Statement of argument

34. The applicant submits that the majority erred in holding that the Court had an inherent jurisdiction and power to set aside the judgments of acquittal and hence in granting the respondent's application and declining to address the appeals against conviction brought by the appellant and HN.

35. The appellant contends that Kourakis CJ was correct in holding that:

35.1 the respondent's application should be dismissed for want of jurisdiction or power;

35.2 the evidence of the jury establishing that the foreperson had miscommunicated their verdicts was admissible on the appeals against conviction brought by the appellant and HN;[27] and

35.3 the appellant's and HN's convictions for manslaughter should be set aside, with their appeals listed for further hearing by the Court as to the unreasonable verdict ground.

36. Essentially, the applicant supports the reasoning of Kourakis CJ, including the following statement:[28]

> "The Director's application is premised on the existence of an implied power in criminal matters to do that which an express rule is thought necessary on the civil side. Alternatively, it proceeds as if notwithstanding the statutory abrogation of motions for a new trial, and the enactment of the common form criminal appeal

[23] FC1 at [20]
[24] FC1 at [20] and FC2 at [4]
[25] FC1 at [26]-[38]
[26] FC1 at [42]
[27] The majority reached the same conclusion – FC1 at [102]-[121]. The appellant also supports the reasoning and decision of the majority on this issue.
[28] FC1 at [39]

provisions, this Court retains a power to similar effect well after the completion of the trial. Moreover, the Director contends that in the time that the power has lain dormant it has shed its common law limitation and now extends to judgments of acquittal based on jury verdict. I reject that submission."

37. By way of summary, the appellant contends:

37.1 The Supreme Court of South Australia does not possess the jurisdiction or power (either from statute or inherently) to set aside or quash the jury verdicts of not guilty and perfected judgments of acquittal entered for Zefi, Jakaj, the appellant and HN.

37.2 If, contrary to the appellant's primary contention, the Supreme Court of South Australia does possess the jurisdiction or power to set aside or quash the jury verdicts of not guilty and the perfected judgments of acquittal entered for the Zefi, Jakaj, appellant and HN, the majority erred by exercising that jurisdiction or power in the circumstances of this case.

37.3 The exclusionary rule with respect to evidence of jury deliberations does not prevent the admission of evidence in this case, on the appeals against conviction by the appellant and HN, to establish that the foreperson of the jury miscommunicated the verdicts of the jury on the charge of murder.

37.4 The evidence establishes that the jury had not agreed to any verdicts in relation to the charge of murder and that the foreperson of the jury misspoke when he purported to return the verdicts he did on that charge.

37.5 On the appeals against conviction by the appellant and HN, the evidence establishes there was a miscarriage of justice for the purposes of s. 353(1) of the *Criminal Law Consolidation Act* 1935 (SA) (**the CLCA**). The common law required the jury to return a verdict on the charge of murder before returning a verdict on the alternative offence of manslaughter. As the jury had not agreed upon any verdict for murder (either unanimous or majority), they were unable to return a valid verdict on the alternative charge of manslaughter.

<u>The Supreme Court's statutory jurisdiction and powers to interfere with jury verdicts of not guilty and perfected judgments recording a jury's acquittal</u>

38. There is no statutory grant of jurisdiction or power to the Supreme Court of South Australia to set aside a jury's verdict of not guilty, or a perfected judgment of acquittal entered after a verdict of not guilty has been returned by a jury. No-one, including the majority, suggests otherwise.

39. Section 17 of the *Supreme Court Act* 1935 (SA) vests in the Supreme Court of South Australia the like jurisdiction as was formerly vested in, or capable of being exercised by, specified courts in England, including the English courts that exercised original criminal jurisdiction. Its effect is to confer a general original criminal jurisdiction on the Supreme Court. Section 17 does not confer any jurisdiction in relation to appeals

against decisions in the criminal jurisdiction. Such appeals are entirely regulated by statute.[29]

40. Parts 10 and 11 of the CLCA deal exhaustively with criminal appeals against jury verdicts by either the defendant or prosecution. They are a complete code in relation to appeals by the parties to criminal proceedings against orders made in the course of those proceedings.[30]

41. The respondent's statutory right to appeal against an acquittal after a trial by jury is extremely limited and was first created in 2008. If the trial was by jury and the defendant was acquitted, the respondent may only appeal against that acquittal, with the permission of the Full Court, if the trial judge directed the jury to acquit the defendant.[31] This right of appeal was inserted into s. 352 of the CLCA on 3 August 2008.[32] Its insertion was an implicit acknowledgement that absent specific statutory jurisdiction to quash a jury's acquittal, the Supreme Court of South Australia had no jurisdiction or power to interfere with it.

42. On 3 August 2008, legislative provisions were also inserted into the CLCA which expressly granted the respondent the right to apply to the Full Court for the quashing of an acquittal and the ordering of a retrial in the following circumstances:

42.1 If the acquittal was "tainted" and it was likely that a new trial would be fair.[33] The legislation provided that an acquittal was regarded as tainted if a person had been convicted of an offence involving the interference with the administration of justice in connection with the trial that resulted in the acquittal, and it is more likely than not that had it not been for the commission of the offence involving interference with the administration of justice, the defendant would have been convicted; or

42.2 If, in the case of the most serious crimes only, there was fresh and compelling evidence against the acquitted person in relation to the offence and it was likely that a new trial would be fair.[34]

43. In the circumstances of the case at bar, the South Australian Parliament has not chosen to give the prosecution any right to appeal against, or apply for the quashing of, a jury's verdict of acquittal, nor has it granted the Supreme Court of South Australia the jurisdiction or power to quash a jury's verdict of acquittal.

44. In providing for relatively plenary rights of appeal in respect of convictions[35], whilst at the same time very narrowly confining appeal rights in respect of acquittals by a jury, the legislature recognised the importance of finality in the case of jury verdicts of not guilty.

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[29] *R v Garrett* (1988) 49 SASR 435 at 438; *Legal Services Commission v WH* [2012] SASCFC 47 at [40]
[30] R v Millhouse (1980) 24 SASR 555; *Legal Services Commission v WH* [2012] SASCFC 47 at [54]
[31] s. 352(ab)(ii) of the CLCA
[32] Act No. 28 of 2008
[33] s. 336 of the CLCA.
[34] s. 337 of the CLCA
[35] s. 352(1) of the CLCA

Does the Supreme Court possess an inherent jurisdiction or power to interfere with jury verdicts of not guilty and perfected judgments of a jury's acquittal?

45. The appellant submits that the Supreme Court of South Australia does not possess an inherent power or jurisdiction to set aside a jury's verdict of not guilty or a perfected judgment of acquittal entered after a jury has returned a verdict of not guilty. Such an inherent jurisdiction or power has never previously been recognised in the superior courts of the United Kingdom or Australia. On the contrary, the existence of such a jurisdiction or power has been repeatedly denied.[36]

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46. The appellant submits that such a jurisdiction or power would, as Kourakis CJ said, be contrary to, "... *the centuries old principles and procedures of the common law which have accorded such judgments, subject to certain presently immaterial exceptions, inviolability*".[37] The appellant relies upon the discussion by Kourakis CJ of the historical existence and development of the principle of inviolability of jury verdicts of acquittal.[38]

47. The importance of the finality of judicial decisions generally (as emphasised by this Court in *Burrell v The Queen* (2008) 238 CLR 218), and the sacrosanct status of
20 judgments of acquittal based upon jury verdicts, both strongly militate against the existence of the inherent jurisdiction and power held by the majority to exist.

48. The existence of such a jurisdiction or power would also be contrary to the decision of this Court in *The King v Snow* (1915) 20 CLR 315 in which the Court held that no appeal lay against a judgment of acquittal based on a jury verdict of not guilty.[39] In *The King v Snow*, the whole Court acknowledged and proceeded on the premise that there was no procedure known to the common law by which a judgment discharging an accused on the basis of a jury's verdict of not guilty could be challenged.

30 49. At the hearing before the Full Court, the respondent did not challenge the correctness of *The King v Snow*. Nor did the respondent cite any decision contradicting or qualifying its effect. As Kourakis CJ stated:[40]

> "... I take the view that if there is a need to remedy the law in this respect, only Parliament can do so. This Court should not now abrogate the common law principle of inviolability of judgments of acquittal based on jury verdicts because it is too ancient and protects a liberty which is too important."

50. The appellant submits that there is no reason to assume that the breadth of the court's
40 inherent jurisdiction in the civil arena to interfere with perfected orders (whatever it might be)[41] must correspond with the breadth of the court's inherent jurisdiction in

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[36] See for example *R v Weaver* (1931) 45 CLR 321 at 356 per Evatt J; *R v Cheng* (1999) 48 NSWLR 616 at [18]-[20]; *R v Stone* (2005) 64 NSWLR 413 at [69]

[37] FC1 at [2]

[38] FC1 at [3]-[4], [21]-[38]

[39] (1915) 20 CLR 315 at 322-324 and 326 per Griffith CJ, 353-354 and 359-360 per Higgins J, 361-365 per Gavan Duffy and Rich JJ and 373-376 per Powers J

[40] FC1 at [45]

[41] In the civil arena, Rule 242 of the *Supreme Court Civil Rules 2006* (SA) confers a broad power to set aside perfected judgments - *Players Pty Ltd (In liquidation) v Clone Pty Ltd* (2013) 115 SASR 547. However, no such express power exists in the criminal arena.

the criminal arena, and in particular in the case of orders founded upon the verdict of a jury.

51. To the extent that there is an inherent jurisdiction to intervene so as to "correct" a jury's verdict in a criminal case, the appellant contends that the breadth of this jurisdiction is marked out by authorities such as *R v Cefia* (1979) 21 SASR 171 (and the authorities referred to therein, at 173). Whilst it has often been observed that the point at which it becomes too late to intervene to "correct" a jury's verdict is difficult to draw, nevertheless the authorities all accept that at some point both judge and jury become *functus officio* and the jurisdiction to intervene comes to an end.

52. The limited power for a jury to correct its own verdict is altogether different from the subsequent correction of a judgment based on that verdict. It is implicit in the authorities concerned with this limited jurisdiction to correct jury verdicts such as *R v Cefia* that there is no other, more general, inherent power on the part of the courts to intervene. If there was, one would expect the courts to refer to, and fall back upon, that more general power rather than be forced to determine whether the individual case falls within the limited jurisdiction referred to above.

53. For present purposes it is not relevant to determine where the line should be drawn; and, indeed, it may differ depending on the nature of the case and the error to be corrected. Whether the cut-off point is as early as the discharge of the jury, or as late as the trial judge signing the Record of Prisoner tried and thus perfecting the order, on any view the court's *R v Cefia* jurisdiction was no longer available in this case. While the respondent might have sought to invoke that jurisdiction at some earlier point in time, he did not, and it was no longer available when the respondent filed its application on 16 January 2015.

54. In holding that there existed a relevant inherent jurisdiction and power, which permitted the Court to quash the jury's verdicts of not guilty, the majority relied upon general authorities as to the existence of a broad jurisdiction to protect courts from abuses of their processes. However, the appellant submits that the case at bar did not involve an abuse of process or anything analogous to one.

55. Section 6 of the *Juries Act* 1927 (SA) relevantly provides that a criminal trial in the Supreme Court is, subject to that Act, to be by jury. That is a reference to the common law institution of trial by jury, with all of the fundamental aspects of trial by jury that the common law developed.[42] The appellant submits that the majority erred in holding that general authorities concerning abuse of process could be applied in the context of jury verdicts of not guilty and judgments of acquittal following such verdicts, so as to "... *by a side wind overrule an entrenched principle of such central importance* [as the inviolability of judgments of acquittal following jury verdicts of not guilty]."[43]

56. Further, and in any event, even if abuse of process was an applicable head of jurisdiction to set aside judgments of acquittal, the majority (FC1 at [139]-[140]) erred in characterising the jury's miscommunication or slip (and the Court's

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[42] *Cheatle v The Queen* (1993) 177 CLR 541

[43] FC1 at [34] per Kourakis CJ

consequential recording of judgments of acquittal) as involving an abuse of the Court's processes. To the contrary, as Kourakis CJ rightly held (FC1 at [34]), a decision made by a constituent part of a court may be right or wrong in law, but it is not possible to characterise it as an abuse of itself.

57. Authorities such as *Biggs v DPP* (1997) 17 WAR 534 make it plain that in the absence of a right of appeal, such "incorrect" verdicts must stand. In that case the jury misapprehended the requirement that it reach a unanimous verdict, yet the Full Court were of the view that this was not a sufficient basis for the trial judge to intervene once she was *functus officio*, and the acquittal ought to stand. The Full Court gave effect to the acquittal by making the *autrefois acquit* declaration sought by the defendant.

If the jurisdiction or power to quash the jury verdicts of not guilty does exist, the majority erred by exercising it in the circumstances of this case.

58. If, contrary to the appellant's primary contention, the Supreme Court of South Australia does possess an inherent jurisdiction or power to quash the jury verdicts of not guilty and the perfected judgments of acquittal entered for Zefi, Jakaj, the appellant and HN, the appellant submits that the majority erred by exercising that jurisdiction or power in the circumstances of this case.

59. Discretionary considerations, akin to those used to decide if relief should be granted in applications for judicial review and in civil applications for the reopening of proceedings and setting aside of a judgment, must also arise in relation to the exercise of a jurisdiction or power to quash jury verdicts of not guilty and perfected judgments of acquittal.

60. The appellant submits that the majority failed to give any, or alternatively, adequate, consideration to the relevant discretionary factors before it determined to quash the jury verdicts in this case.

61. In light of the following factors, the appellant submits the majority ought not to have exercised the jurisdiction or power to quash the jury verdicts of not guilty:

    61.1 The fundamental and sacrosanct status accorded by the common law to a jury's verdict of not guilty.

    61.2 The exposure of the appellant to double jeopardy, vexing him with a retrial and potential conviction for murder for a second time.

    61.3 The powerful policy arguments favouring finality in litigious proceedings.

    61.4 Parliament's decision not to provide the prosecution with a statutory right of appeal, or statutory power to apply for a jury's verdict to be quashed, in the circumstances of this case; in contrast to such a right of appeal and power to apply having been legislated for in other limited circumstances.

61.5 The respondent's consenting to the sentencing of the appellant and the perfecting of the judgment of acquittal, all the while being aware of the issue with the jury's verdicts.

61.6 The delay by the respondent in bringing his application. The application was filed 105 days after the appellant's acquittal by the jury; c.f. the 21-day time limit within which the appellant was required to file his application for permission to appeal against his conviction.

10 The consequences for the appellant if the appeal is allowed

62. If the majority's decision and orders are quashed, not only will the appellant's acquittal for murder stand, but his conviction for manslaughter will be revived. As a result of that, his appeal to the Full Court against his conviction for manslaughter will also be revived.

63. The appellant therefore seeks an order that this matter be remitted to the Full Court for further hearing and determination of the Appellant's appeal in Action No. 265 of 2014 in the Criminal Appeals Jurisdiction of the Supreme Court of South Australia.

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64. At the resumed hearing of his appeal against conviction, the appellant will seek an order from the Full Court quashing his conviction for manslaughter on the ground that it involved a miscarriage of justice. This is the order that Kourakis CJ would have made.[44]

65. For the purposes of his appeal against conviction, the appellant relies upon the same affidavit evidence adduced by the respondent on his application for the quashing of the jury verdicts, to prove that the foreperson mistakenly delivered murder verdicts that had not been agreed upon by the jury. Therefore, the appellant has a continuing
30 interest in this appeal on the issue of the admissibility of the jurors' evidence.

66. The appellant submits that that evidence establishes that the jury had not agreed to any verdicts in relation to the charge of murder against him and that the foreperson of the jury misspoke when he purported to return the verdicts he did. The evidence establishes on the appellant's appeal against conviction that there was a substantial miscarriage of justice for the purposes of s. 353(1) of the CLCA.

67. The common law required the jury to return a verdict of not guilty on the charge of murder before they could return a verdict on the alternative offence of manslaughter
40 - *Gammage v The Queen* (1969) 122 CLR 444 at 453; *Stanton v The Queen* [2003] HCA 29; (2003) 77 ALJR 1151 at [22]-[25], [27].

68. As the jury had not agreed upon any verdict for murder (either unanimously or by majority), they were unable to return a valid verdict on the alternative charge of manslaughter. Subject to the jury being given further time to deliberate and/or a direction of the kind referred to in *Black v R* (1993) 179 CLR 44 at 51, the only proper course was to discharge the jury.[45]

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[44] FC1 at [20]; FC2 at [4]
[45] *Stanton v R* at [22]

69. Because of the foreperson's miscommunication of the jury's verdicts the appellant lost the opportunity of the jury being discharged and him not being convicted of manslaughter. He did not receive a trial according to law.

Admissibility of evidence from the jurors

70. The appellant submits that the Full Court was correct to rule that the affidavit evidence sought to be tendered by the respondent was admissible.[46]

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71. The Full Court admitted into evidence the statement of the foreperson exhibited to his affidavit (except for that statement's final paragraph) and question five and the answer to it in each of the other jurors' statements exhibited to their affidavits.[47]

72. The appellant submits that the practical effect of the Full Court's ruling was to confine the evidence of the jurors it admitted to the outcome of their deliberations (that is, the verdicts agreed or not agreed by them), as opposed to evidence as to the content of their deliberations or the positions or votes cast by individual members of the jury.

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73. The so-called common law "exclusionary rule" is that once a trial has been determined by an acquittal or conviction upon the verdict of a jury, and the jury discharged, evidence of a juror or jurors as to the deliberations of the jury is not admissible to impugn the verdict.[48]

74. In *Ellis v Deheer* the exclusionary rule was expressed in terms of rendering inadmissible evidence of a juror, *"... either by way of explanation of the grounds upon which the verdict was given, or by way of statement as to what he believed its effect to be"*.[49]

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75. The rule is based upon considerations of public policy. It seeks to preserve the secrecy and unity of a jury's deliberations so as to (i) promote full and frank discussion amongst jurors, (ii) ensure the finality of the verdict, (iii) protect jurors from harassment, pressure, censure and reprisals, and (iv) maintain the public confidence in juries.[50]

76. The exclusionary rule is not a blanket rule that excludes the consideration of evidence from jurors in all cases. It does not deny the admissibility of evidence "extrinsic" to a jury's deliberations. The limits of the rule are determined by reference to its policy

40 rationale.[51]

77. For example, it is well recognised that evidence from jurors (even as to communications passing between jurors in the jury room) is admissible to establish

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[46] FC1 at [2], [10]-[20] per Kourakis CJ; at [102]-[121] per Gray and Sulan JJ
[47] FC1 at [71]-[73], [121]
[48] *Smith v Western Australia* (2014) 250 CLR 473 at [1]
[49] [1922] 2 KB 113 at 121
[50] *Smith v Western Australia* (2014) 250 CLR 473 at [30]- [31]
[51] *Smith v Western Australia* (2014) 250 CLR 473 at [27]-[29], [32]

an improper extraneous influence upon the jury's verdict - such as pressure exerted upon a juror or jurors.[52]

78. Similarly, in *Ras Behari Lal v King-Emperor*[53], the Privy Council held that evidence as to a juror's competence to understand the proceedings was not precluded by the exclusionary rule. As Lord Atkin said:[54]

> "The question whether a juror is competent for physical or other reasons to understand the proceedings is not a question which invades the privacy of the discussions in the jury box or in the retiring room. It does not seek to inquire into the reasons for a verdict."

79. In approving that decision and reasoning, the High Court in *Smith v Western Australia* held that it:[55]

> "... supports the view that the need to protect and preserve the finality of trial by jury as a justification for the exclusionary rule loses its force where the evidence in question does not go to the substance of the jury's deliberations, but, rather, to demonstrate the disruption of the deliberative process."

80. Here, the evidence from the jurors is not adduced so as to inquire into the reasons for the verdicts delivered, or otherwise as to the substance of the jury's deliberations. Rather, the evidence is adduced so as to establish that the delivery of the verdicts miscarried; that what the foreperson said in court misrepresented the jury's verdict (that is, the outcome or result of the deliberations, rather than the jury's reasons, or the substance of their deliberations).

81. The distinction is one between a mistake in the delivery or communication of a verdict, and a verdict which accurately reflects the agreed position of the jury (even though that agreed position may be founded upon some misapprehension as to some matter of fact or law). While evidence as to the latter will generally, if not always, be precluded by the exclusionary rule, evidence as to the former is admissible. The policy rationale underpinning the exclusionary rule does not extend to the preclusion of evidence as to the former.

82. The appellant submits that evidence as to a discrepancy between the verdict agreed (or not agreed) and the verdict delivered does not intrude at all upon secrecy of the jury's deliberations. It reveals only the outcome or result of those deliberations - which is a matter which it is always intended will be communicated in open court.

83. The evidence admitted need not (and does not in this case) descend into the way in which individual jurors voted. As such, admission of the evidence does not give rise to any additional risk of harassment, pressure, censure or reprisals.

84. Permitting the correction of mistakes in the delivery of verdicts does not undermine public confidence in juries. It anything it serves to protect it. As to the interest in

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[52] *R v Emmett* (1988) 14 NSWLR 327
[53] (1933) LR 60 Ind App 354
[54] (1933) LR 60 Ind App 354 at 359
[55] (2014) 250 CLR 473 at [43]

finality, it has been recognised that on occasions this must yield to the interests of justice and fairness to the individual accused.[56]

85. The distinction between a mistake in the communication of a verdict, and a verdict which accurately reflects the agreed position of the jury (but which is founded upon a mistake or misunderstanding) is also supported by the quotation from *Wigmore on Evidence* contained in the reasons of the majority in this case.[57] As Kourakis CJ and the majority rightly observe, this case falls within the category of cases where the foreperson has delivered a verdict which did not represent the verdict agreed upon by the jury.[58]

86. Numerous authorities have recognised the permissibility of inquiring into a mistake in the delivery of a verdict (as opposed to the deliberations underpinning that verdict), in the context of the trial judge exercising his or her discretion to intervene prior to the jury becoming *functus officio*: *R v Cefia* (1979) 21 SASR 171 at 173, citing various examples of this occurring.

87. In *R v Cefia* itself, the foreperson delivered a verdict of not guilty; the jury was discharged; it was then brought to the trial judge's attention by a court officer that there had been a mistake; the jury were recalled to the courtroom, and upon inquiry by the trial judge it became apparent that the jury had agreed and intended to deliver a verdict of guilty; the trial judge then accepted this corrected verdict of guilty. The Full Court dismissed an appeal against the trial judge's decision to permit the jury to correct the foreman's error. In so doing, King CJ and Sangster J said:[59]

> "In our opinion the case is covered by the principle that where a jury has in fact agreed upon its verdict but by error has communicated not that verdict but something else, that jury - acting unanimously - may correct that error and correctly communicate the verdict actually agreed upon.
>
> Wigmore on *Evidence*, 3rd ed. vol. VIII par. 2355: see particularly sub-par. (2) at pp. 707-708:
>
> > 'It has occasionally been said that this correction must be claimed before the jury are discharged; but this seems unsound, because such errors are seldom ascertained until after the jury have separated and conversed out of court; and if the error is satisfactorily established, there can hardly be any fixed time to limit its correction. Subject to this qualification, it is universally conceded that a unanimous error of the jury in delivering the verdict as already unanimously agreed on in the jury-room may be shown for the purpose of correcting it to correspond, or, when this is not safely to be done, of ordering a new trial.'"

88. While there have been differing views expressed as to the "cut-off point" in the trial court exercising this jurisdiction to correct an erroneously delivered verdict, the authorities universally accept the permissibility of enquiry into the fact of, and the

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[56] *Ras Behari Lal v King-Emperor* (1933) LR 60 Ind App 354 at 361
[57] FC1 at [114]
[58] FC1 at [12] per Kourakis CJ, at [116] per Gray and Sulan JJ
[59] (1979) 21 SASR 171 at 173

admissibility of evidence of. an error in the delivery of a verdict in appropriate circumstances.

Biggs v DPP (1997) 17 WAR 534

89. A somewhat similar situation to the case at bar arose in *Biggs v DPP*. However, as the following argument demonstrates, the circumstances in *Biggs v DPP* are distinguishable from the case at bar.

10 90. The defendant was charged with seven offences. At the conclusion of the defendant's trial in the West Australian District Court, the foreperson communicated verdicts of not guilty to the first six charges, and guilty to the seventh. In respect of each verdict the foreperson was asked "Is that the unanimous verdict of you all?" and the forewoman confirmed this without any juror dissenting. The trial judge entered judgments of acquittal in respect of the first six charges and a judgment of conviction for the seventh and discharged the jury.

91. About 15 to 25 minutes later, the trial judge reconvened the court, as she had received information from a Sheriff's officer that the jury had not understood that a 'not guilty' 20 verdict had to be unanimous. Upon questioning by the trial judge, the foreperson stated that the verdict had not been unanimous, nor by a majority of ten. The trial judge set aside the six 'not guilty' verdicts and remanded the defendant for a retrial on those six offences.

92. The defendant applied to the Supreme Court of West Australia for declarations (i) that the trial judge's orders setting aside the 'not guilty' verdicts were invalid, (ii) that the initial verdicts of 'not guilty' and judgments of acquittals were valid, and (iii) that the defendant was entitled to a directed verdict of acquittal on his plea of *autrefois acquit* in respect of the first six charges upon which he had been remanded for retrial 30 in the District Court. The declarations were refused at first instance.

93. On appeal to the Full Court, the Court (Kennedy, Franklyn and Walsh JJ) allowed the appeal to the extent of making declarations of *autrefois acquit*, but otherwise refused the appeal (and hence declined to make the other declarations sought). While declining to make declarations as to the validity of the trial judge's orders, the Court's reasoning was to the effect that the trial judge should not have interfered with the jury's original verdicts (on the basis she was *functus officio* when she made the inquiries she did) and hence effect should be given to the original verdicts of acquittal through declarations of *autrefois acquit*.

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94. In declining to make declarations as to the validity of the trial judge's orders, the Court relied in part upon what it regarded as the inappropriateness of the Supreme Court ordering declaratory relief in respect of matters arising in the District Court's criminal jurisdiction.[60]

95. The Court also relied upon there being a presumption that a verdict given in the presence of the jury, in the absence of any dissent, is the verdict of the jury. The Court held that this presumption could not be rebutted by evidence that the jury

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[60] *Biggs v DPP* (1997) 17 WAR 534 at 541, 552-554

members had misapprehended the principles underlying their verdict (i.e. the need for a unanimous verdict). The Court also relied upon the exclusionary rule. However, the Court recognised there were limitations or exceptions to the conclusiveness of a jury's verdict. Kennedy J explained that:[61]

> "The exceptions identified by Mr Weinberg were, first, when not all members of the jury are present at the time when the foreman or forewoman delivered the verdict; secondly, when it is clear that not all members of the jury have heard the verdict pronounced; thirdly, when it is clear that not all members of the jury understood the proceedings; fourthly, under the general description of the slip rule, when the foreman or foreperson, by mistake, delivers what is not the true verdict of the jury, as in a case where the foreman or foreperson has not communicated to the court what the jury actually agreed upon as the verdict; and fifthly, where there is evidence of improper interference with the jury.
>
> I am generally in agreement with the analysis of Franklyn J of the cases in which it has been held that it was open to a trial judge to permit the jury to alter a verdict which they had earlier pronounced.
>
> The fact that a jury misapprehended the relevant legal principles underlying the pronouncement of their verdict has never, it would appear, justified the subsequent correction of the verdict, although it may be accepted that the list of exceptions is not closed. To do so would appear inevitably to involve going behind the verdict and making inquiries with respect to the nature of the deliberations." (emphasis added)

96. After referring to the fact that it was not known how the verdicts of not guilty were arrived at, that there was no evidence the jury had been kept together and apart from external influence when they were not in court, and that there was no protest from jurors at the time the verdicts were delivered, Kennedy J continued:[62]

> "I accept the proposition propounded by Mr Weinberg that a misapprehension as to the relevant legal principles underlying the delivery of a jury's verdicts cannot be used, after the jury has been discharged, as a basis for impugning a verdict once delivered, if there has been no mistake as to the intended verdict. Here, the jury had intimated that they had reached their verdicts and on the first six counts those verdicts as pronounced were 'not guilty'. What evidence there was did not, in my opinion, justify the resubmission to the jury of the questions as to whether their verdicts had been unanimous, and it would have been impermissible to go behind the verdicts and to make further inquiries with respect to the nature of the jury's deliberations." (emphasis added)

97. The reasons of Franklyn J (with whom Walsh J agreed) were to similar effect. His Honour considered that the trial judge was *functus officio* when she made further inquiries of the jury and so ought not to have done so.[63] However, Franklyn J went on to observe that even if it had not been too late to embark upon an enquiry, the trial judge's inquiry was misdirected because it overlooked the distinction between an agreed verdict based upon a misapprehension (e.g. as to the requirement of

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[61] *Biggs v DPP* (1997) 17 WAR 534 at 544
[62] *Biggs v DPP* (1997) 17 WAR 534 at 545
[63] *Biggs v DPP* (1997) 17 WAR 534 at 554-555

unanimity) and a mistake as to, or miscommunication of, the agreed verdict. Franklyn J explained:[64]

> "Even assuming the trial judge to have been entitled to enter upon her inquiry, those inquiries, in my opinion, were misdirected. The proper question was whether the not guilty verdicts were unanimously agreed upon as the verdicts to be given, even if the jury were under a misapprehension that such a verdict did not require unanimity. In my view, if that were the case, then the verdict delivered was the unanimous verdict in respect of each count. That inquiry, however, was never made." (emphasis added)

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98. Franklyn J highlighted the distinction between *Biggs v DPP* and the case at bar when he explained:[65]

> "In the present case the material available does not suggest any error in the delivery of the verdict, but rather a misapprehension on the part of at least some of the jurors as to the basis on which they might agree upon a verdict. It is not said that the verdict given was not that agreed upon. Such a misapprehension is not capable of rebutting the presumption of validity of the verdict ... In my opinion his Honour erred in concluding that the verdict given was, by mistake on the part of the foreman, 'in
20 communicating to the court the result of the jury's deliberations.' There was nothing in the material before the learned trial judge which led her to make a further inquiry of the jury which could properly lead to that conclusion. At best it identified a verdict agreed upon due to misapprehension. Further, on the facts outlined by the learned trial judge and her Honour, I would find that both she and the jury were *functus officio* at the time she set aside the verdicts." (emphasis added)

99. It is apparent from the above summary of the Court's reasoning in *Biggs v DPP* that the reason for holding that the trial judge should not have intervened to set aside the 'not guilty' verdicts was that the evidence did not establish that the jury had not in
30 fact agreed, and intended to return, the verdicts of not guilty. While there appears to have been a mistake in the jury's failure to appreciate the need for their decision to be unanimous, their mistake lay in this misapprehension as to the nature of their task, rather than in the foreperson's communication of the verdict agreed and intended by the jury.

100. The present case is thus readily distinguishable. The jury here did not ever agree verdicts of not guilty of murder for Zefi, Jakaj, the appellant and HN, and thus the foreperson misrepresented the jury's true verdicts. As Kourakis CJ stated:[66]

40 > "The drawing of the line in Biggs between an erroneous understanding of the preconditions to reaching a verdict and the miscommunication of a verdict is perhaps subtle but it is nonetheless sound."

Nanan v The State (Trinidad and Tobago) [1986] AC 860

101. *Nanan v The State (Trinidad and Tobago)* may also be readily distinguished from the case at bar. In *Nanan*, only some jurors gave evidence that the verdict had not been a unanimous one, unlike the present case in which the entire jury gave evidence

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[64] *Biggs v DPP* (1997) 17 WAR 534 at 555
[65] *Biggs v DPP* (1997) 17 WAR 534 at 558
[66] FC1 at [17]

that their verdicts on the charge of murder were miscommunicated, as they had not reached any agreement on them or to deliver a verdict on that charge at all.

102. Secondly, the evidence in *Nanan* did not prove that the verdict delivered had not been the verdict the jury agreed should be delivered. The evidence left open the possibility that the jury may have resolved to deliver a guilty verdict based on a mistaken understanding of what a unanimous verdict meant. If so, that did not make the verdicts invalid, just as the verdicts were held not to be invalid in *Biggs v DPP*.

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Part VII: Applicable statutory provisions

103. See Annexure A.

Part VIII: Orders sought

104. The appeal be allowed.

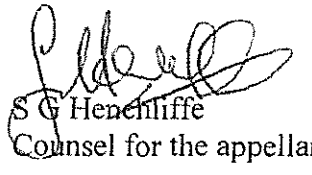
20 105. Orders 1, 2 and 4 of the Court below made on 25 September 2015 be set aside.

106. The matter be remitted to the Court below for further hearing and determination of the Appellant's appeal in Action No. 265 of 2014 in the Criminal Appeals Jurisdiction of the Supreme Court of South Australia

Part IX: Oral argument

107. The applicant estimates that the presentation of his oral argument will take 45
30 minutes.

20 April 2016



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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. of 2016

BETWEEN:

DARIO STAKAJ
Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS
Respondent

ANNEXURE A
Statutory Provisions

1. ***Criminal Law Consolidation Act* 1935 (SA)**

   Sections 331 to 337, 352, 353 - as at 7 August 2014 and as still in force

2. ***Supreme Court Act* 1935 (SA)**

   Section 17 - as at 7 August 2014 and as still in force

3. ***Juries Act* 1927 (SA)**

   Section 6 - as at 7 August 2014 and as still in force

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Part 10—Limitations on rules relating to double jeopardy

Division 1—Preliminary

331—Interpretation

(1) In this Part—

acquittal of an offence includes—

(a) acquittal in appellate proceedings relating to the offence; and

(b) acquittal at the direction or discretion of the court,

(whether in this State or in another jurisdiction);

administration of justice offence means any of the following offences:

(a) an offence of perjury or subornation of perjury;

(b) an offence against section 243, 244, 245 or 248;

(c) an offence against section 249 or 250 where the public officer is a judicial officer;

(d) an offence against section 256;

(e) a substantially similar offence against a previous enactment or the law of another jurisdiction corresponding to an offence referred to in a preceding paragraph;

Category A offence means any of the following offences:

(a) an offence of murder;

(b) manslaughter or attempted manslaughter;

(c) an aggravated offence of rape;

(d) an aggravated offence of robbery;

(e) an offence of trafficking in a commercial quantity, or large commercial quantity, of a controlled drug contrary to section 32(1) or (2) of the *Controlled Substances Act 1984*;

(f) an offence of manufacturing a commercial quantity, or large commercial quantity, of a controlled drug contrary to section 33(1) or (2) of the *Controlled Substances Act 1984*;

(g) an offence of selling a commercial quantity, or large commercial quantity, of a controlled precursor contrary to section 33A(1) or (2) of the *Controlled Substances Act 1984*;

(h) a substantially similar offence against a previous enactment or the law of another jurisdiction corresponding to an offence referred to in a preceding paragraph;

judicial body means a court or tribunal, body or person invested by law with judicial or quasi-judicial powers, or with authority to make an inquiry or to receive evidence;

judicial officer means a person who alone or with others constitutes a judicial body;

relevant offence means—

(a) a Category A offence; and

(b) any other offence for which the offender is liable to be imprisoned for life or for at least 15 years.

(2) For the purposes of this Part, a reference to an ***offence of murder*** includes—

(a) an offence of conspiracy to murder; and

(b) an offence of aiding, abetting, counselling or procuring the commission of murder.

332—Meaning of fresh and compelling evidence

(1) For the purposes of this Part, evidence relating to an offence of which a person is acquitted is—

(a) ***fresh*** if—

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

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

(b) ***compelling*** if—

(i) it is reliable; and

(ii) it is substantial; and

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

(2) Evidence that would be admissible on a retrial under this Part is not precluded from being fresh or compelling just because it would not have been admissible in the earlier trial of the offence resulting in the relevant acquittal.

333—Meaning of tainted acquittal

For the purposes of this Part, if at the trial of an offence a person is acquitted of the offence, the acquittal will be ***tainted*** if—

(a) the person or another person has been convicted (whether in this State or in another jurisdiction) of an administration of justice offence in connection with the trial resulting in the acquittal; and

(b) it is more likely than not that, had it not been for the commission of the administration of justice offence, the person would have been convicted of the offence at the trial.

334—Application of Part

(1) This Part applies whether the offence of which a person is acquitted is alleged to have occurred before or after the commencement of this Part.

(2) This Part does not apply if a person is acquitted of the offence with which the person is charged but is convicted of a lesser offence arising out of the same set of circumstances that gave rise to the charge.

(3) However, this Part does apply in the circumstances set out in subsection (2) if the acquittal was tainted.

Division 2—Circumstances in which police may investigate conduct relating to offence of which person previously acquitted

335—Circumstances in which police may investigate conduct relating to offence of which person previously acquitted

(1) A police officer may not carry out an investigation to which this section applies, or authorise the carrying out of an investigation to which this section applies, without the written authorisation of the Director of Public Prosecutions.

(2) However, a police officer may carry out, or authorise the carrying out of, such an investigation without the written authority of the Director of Public Prosecutions if the police officer reasonably believes that—

(a) urgent action is required in order to prevent the investigation being substantially and irrevocably prejudiced; and

(b) it is not reasonably practicable in the circumstances to obtain the consent of the Director of Public Prosecutions before taking the action.

(3) The Director of Public Prosecutions must be informed, as soon as practicable, of any action taken under subsection (2) and the investigation must not proceed further without the written authorisation of the Director of Public Prosecutions.

(4) The Director of Public Prosecutions must not authorise an investigation to which this section applies unless—

(a) the Director of Public Prosecutions is satisfied that—

(i) as a result of the investigation, the person under investigation is, or is likely, to be charged with—

(A) an offence of which the person has previously been acquitted; or

(B) an administration of justice offence that is related to the offence of which the person has previously been acquitted; and

(ii) it is in the public interest for the investigation to proceed; and

(b) in the opinion of the Director of Public Prosecutions, the previous acquittal would not be a bar to the trial of the person for an offence that may be charged as a result of the investigation.

(5) This section applies to an investigation in respect of a person's conduct in relation to an offence of which the person has previously been acquitted and includes—

(a) the questioning, search or arrest of the person;

(b) the issue of a warrant for the arrest of the person;

(c) a forensic procedure (within the meaning of the *Criminal Law (Forensic Procedures) Act 2007*) carried out on the person;

(d) the search or seizure of property or premises owned or occupied by the person.

(6) In subsection (5), a reference to ***an offence of which the person has previously been acquitted*** includes a reference—

(a) to any other offence with which the person was charged that was joined in the same information as that in which the offence of which the person was acquitted was charged; and

(b) to any other offence of which the person could have been convicted at the trial of the offence of which the person was acquitted.

Division 3—Circumstances in which trial or retrial of offence will not offend against rules of double jeopardy

336—Retrial of relevant offence of which person previously acquitted where acquittal tainted

(1) The Full Court may, on application by the Director of Public Prosecutions, order a person who has been acquitted of a relevant offence to be retried for the offence if the Court is satisfied that—

(a) the acquittal was tainted; and

(b) in the circumstances, it is likely that the new trial would be fair having regard to—

(i) the length of time since the relevant offence is alleged to have occurred; and

(ii) whether there has been any failure on the part of the police or prosecution to act with reasonable diligence or expedition with respect to the making of the application; and

(iii) any other matter that the Court considers relevant.

(2) An application under subsection (1) must be made within 28 days after—

(a) the person is charged with the relevant offence following the acquittal; or

(b) a warrant is issued for the person's arrest for the relevant offence following the acquittal.

(3) If the Full Court orders a person to be retried for an offence of which the person has been acquitted, the Court—

(a) must—

(i) quash the acquittal; or

(ii) remove the acquittal as a bar to the person being retried for the offence,

(as the case requires); and

(b) must make a suppression order under Part 8 of the *Evidence Act 1929* forbidding the publication of specified material or material of a specified class if satisfied that the order is necessary to prevent prejudice to the administration of justice; and

(c) may make any other order that the Court thinks fit in the circumstances.

(4) The Director of Public Prosecutions may not, without the permission of the Full Court, present an information for the retrial of a person in respect of whom the Court has made an order under this section more than 2 months after the Court made the order.

(5) The Full Court should not give permission for the late presentation of an information for a retrial unless the Court is satisfied that, despite the period of time that has passed since the Court made the order for the retrial—

(a) the Director of Public Prosecutions has acted with reasonable expedition; and

(b) there is good and sufficient reason why the late presentation of the information should be allowed.

(6) If, more than 2 months after an order for the retrial of a person for a relevant offence was made under this section, an information for the retrial of the person for the offence has not been presented or has been withdrawn or quashed, the person may apply to the Full Court to set aside the order for the retrial and—

(a) to restore the acquittal that was quashed; or

(b) to restore the acquittal as a bar to the person being retried for the offence,

(as the case requires).

(7) In this section—

acquitted person means a person who has been acquitted of a relevant offence (whether in this State or in another jurisdiction).

337—Retrial of Category A offence of which person previously acquitted where there is fresh and compelling evidence

(1) The Full Court may, on application by the Director of Public Prosecutions, order a person who has been acquitted of a Category A offence to be retried for the offence if the Court is satisfied that—

(a) there is fresh and compelling evidence against the acquitted person in relation to the offence; and

(b) in the circumstances, it is likely that the new trial would be fair having regard to—

(i) the length of time since the offence is alleged to have occurred; and

(ii) whether there has been any failure on the part of the police or prosecution to act with reasonable diligence or expedition with respect to the making of the application.

(2) An application under subsection (1)—

(a) must be made within 28 days after—

(i) the person is charged with the Category A offence following the acquittal; or

(ii) a warrant is issued for the person's arrest for the Category A offence following the acquittal; and

(b) may only be made once in respect of the person's acquittal of the Category A offence.

Note—

An application cannot be made under this section for a further retrial if the person is acquitted of the Category A offence on being retried for the offence (but an application may be made under section 336 if the acquittal resulting from the retrial is tainted).

(3) If the Full Court orders a person to be retried for an offence of which the person has been acquitted, the Court—

(a) must—

(i) quash the acquittal; or

(ii) remove the acquittal as a bar to the person being retried for the offence,

(as the case requires); and

(b) must make a suppression order under Part 8 of the *Evidence Act 1929* forbidding the publication of specified material or material of a specified class if satisfied that the order is necessary to prevent prejudice to the administration of justice; and

(c) may make any other order that the Court thinks fit in the circumstances.

(4) The Director of Public Prosecutions may not, without the permission of the Full Court, present an information for the retrial of a person in respect of whom the Court has made an order under this section more than 2 months after the Court made the order.

(5) The Full Court should not give permission for the late presentation of an information for a retrial unless the Court is satisfied that, despite the period of time that has passed since the Court made the order for the retrial—

(a) the Director of Public Prosecutions has acted with reasonable expedition; and

(b) there is good and sufficient reason why the late presentation of the information should be allowed.

(6) If, more than 2 months after an order for the retrial of a person for a Category A offence was made under this section, an information for the retrial of the person for the offence has not been presented or has been withdrawn or quashed, the person may apply to the Full Court to set aside the order for the retrial and—

(a) to restore the acquittal that was quashed; or

(b) to restore the acquittal as a bar to the person being retried for the offence,

(as the case requires).

(7) In this section—

acquitted person means a person who has been acquitted of a Category A offence (whether in this State or in another jurisdiction).

(c) any findings of fact necessary for the proper determination of the question reserved.

(2) The Full Court may, if it thinks necessary, refer the stated case back for amendment.

351A—Powers of Full Court on reservation of question

(1) The Full Court may determine a question reserved under this Part and make consequential orders and directions.

Examples—

The Full Court might, for example, quash an information or a count of an information or stay proceedings on an information or a count of an information if it decides that prosecution of the charge is an abuse of process.

The Full Court might, for example, set aside a conviction and order a new trial.

(2) However—

(a) a conviction must not be set aside on the ground of the improper admission of evidence if—

(i) the evidence is merely of a formal character and not material to the conviction; or

(ii) the evidence is adduced for the defence; and

(b) a conviction need not be set aside if the Full Court is satisfied that, even though the question reserved should be decided in favour of the defendant, no miscarriage of justice has actually occurred; and

(c) if the defendant has been acquitted by the court of trial, no determination or order of the Full Court can invalidate or otherwise affect the acquittal.

351B—Costs

(1) If a question is reserved on application by the Attorney-General or the Director of Public Prosecutions on an acquittal, the Crown is liable to pay the adjudicated costs of the defendant in proceedings for the reservation and determination of the question.

(2) If the defendant does not appear in the proceedings, the Crown must instruct counsel to present argument to the Court that might have been presented by counsel for the defendant.

Division 3—Appeals

352—Right of appeal in criminal cases

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

(a) if a person is convicted on information—

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

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

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

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

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

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

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

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

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

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

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

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

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

353—Determination of appeals in ordinary cases

(1) The Full Court on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal; but the Full Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

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

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

(a) it may dismiss the appeal;

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

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

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

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

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

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

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

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

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

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

(a) if it thinks that a different sentence should have been passed—

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

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

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

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

353A—Second or subsequent appeals

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

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

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

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

(6) This section shall not apply to a master who was, immediately before the commencement of the *Statutes Amendment (Administration of Courts and Tribunals) Act 1981*, the master or a deputy master of the court.

14—Certain interests not to disqualify

A judge or master of the court shall not be incapable of acting in his judicial office in any proceeding by reason of his being one of several ratepayers or taxpayers or one of any other class of persons liable in common with others to contribute to or to be benefited by any rate or tax which may be increased, diminished or in any way affected by that proceeding.

15—Seal of court

(1) The court shall continue to have and use a seal bearing a device or impression of the Royal Arms, within an exergue or label surrounding the same, and with the following inscription: "Supreme Court, South Australia"; and the said seal shall be kept in the custody of the registrar.

(2) There shall also be kept and used such other seals as are required for the business of the court, and such seals shall be in such form and kept in such custody as the Chief Justice directs.

(3) All documents and exemplifications and copies thereof purporting to be sealed with any such seal shall be receivable in evidence without further proof of the seal.

16—Councils of judges to consider procedure and administration of justice

The judges shall—

(a) assemble once at least in every year for the purpose of considering the operation of this Act and of the rules of court for the time being in force, and also the working of the several offices, and the arrangements relative to the duties of the officers of the court respectively, and of inquiring and examining into any defects which appear to exist in the system of procedure or the administration of the law in the said court; and

(b) report annually to the Attorney-General of the State what (if any) amendments it would, in their judgment, be expedient to make in this Act, or otherwise relating to the administration of justice, and what other provisions (if any) which cannot be carried into effect without the authority of Parliament, it would be expedient to make for the better administration of justice.

Part 2—Jurisdiction and powers of the court

Division 1—Jurisdiction

17—General jurisdiction

(1) The court shall be a court of law and equity.

(2) There shall be vested in the court—

(a) the like jurisdiction, in and for the State, as was formerly vested in, or capable of being exercised by, all or any of the courts in England, following:

(i) The High Court of Chancery, both as a common law court and as a court of equity:

(ii) The Court of Queen's Bench:

(iii) The Court of Common Pleas at Westminster:

(iv) The Court of Exchequer both as a court of revenue and as a court of common law:

(v) The courts created by commissions of assize:

(b) such other jurisdiction, whether original or appellate, as is vested in, or capable of being exercised by the court:

(c) such other jurisdiction as is in this Act conferred upon the court.

18—Probate jurisdiction

The court shall, in relation to probates and letters of administration, have the following jurisdiction, that is to say:

(a) The like voluntary and contentious jurisdiction and authority in and for the State in relation to the granting or revoking of probate of wills, and administration of the effects of deceased persons, as was vested in or exercisable by the Court of Probate established in England under the *Court of Probate Act 1857*, together with full authority to hear and determine all questions relating to testamentary causes and matters:

(b) The like jurisdiction and powers with respect to the real estate of deceased persons as it has with respect to the personal estate of deceased persons:

(c) All probate jurisdiction which, under or by virtue of any enactment not repealed by this Act, is vested in or capable of being exercised by the court.

19—Matrimonial jurisdiction

There shall be vested in the court—

(a) the like jurisdiction in relation to matrimonial causes and matters as was immediately before the commencement of the *Matrimonial Causes Act 1857* vested in or exercisable by any ecclesiastical court or person in England in respect of divorce *a mensa et thoro*, nullity of marriage, jactitation of marriage or restitution of conjugal rights, and in respect of any matrimonial cause or matter except marriage licences:

(b) all such jurisdiction in relation to matrimonial causes and matters as under or by virtue of any enactment not repealed by this Act, is vested in or capable of being exercised by the court.

Division 2—Law and equity

20—Concurrent administration of law and equity

In every civil cause or matter commenced in the court, law and equity shall be administered by the court according to the provisions of the seven sections of this Act next following.

The Parliament of South Australia enacts as follows:

Part A1—Preliminary

1—Short title

This Act may be cited as the *Juries Act 1927*.

3—Interpretation

(1) In this Act, unless inconsistent with the context or some other meaning is clearly intended—

civil trial means the trial of an action, or any issue arising in or in relation to an action, before a court exercising civil jurisdiction;

criminal trial means the trial of an indictable offence or of an issue arising in or in relation to the trial of an indictable offence before a court exercising criminal jurisdiction;

sheriff includes deputy sheriff and any other person for the time being performing the functions of the sheriff under this Act;

subdivision means subdivision of any electoral district for the purpose of electing members of the House of Assembly.

Part 1—General provisions as to trial by jury

5—Civil proceedings not to be tried before a jury

No civil trial is to be held before a jury.

6—Criminal trial to be by jury

(1) A criminal trial in the Supreme Court or the District Court is, subject to this Act, to be by jury.

(2) The jury is, subject to this Act, to consist of 12 persons qualified and liable to serve as jurors.

6A—Additional jurors

(1) If the court thinks there are good reasons for doing so, the court may order that an additional juror, or 2 or 3 additional jurors, be empanelled for a criminal trial.

(2) If an additional juror or additional jurors have been empanelled and, when the jury is about to retire to consider its verdict, or to consider whether to return a verdict without hearing further evidence, the jury consists of more than 12 jurors, a ballot will be held to exclude from the jury sufficient jurors to reduce the number of the jury to 12.

(3) If a juror or jurors are excluded from the jury under subsection (2), the court will either—

(a) discharge them from further service as jurors for the trial; or

(b) if a number of separate issues are to be decided separately by the jury—direct that they rejoin the jury when the issue in relation to which they have been excluded from the jury has been decided; or