IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A24 of 2016

BETWEEN:

TRISTAN KAY CASTLE
Appellant

and

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Filed by:
Director of Public Prosecutions
Level 7, 45 Pirie Street
ADELAIDE SA 5000

Telephone: (08) 8207 1760
Facsimile: (08) 8207 2013
E-mail: fiona.mcdonald3@sa.gov.au
Ref: Fiona McDonald

Part I: INTERNET PUBLICATION

1. This submission is in a form suitable for publication on the internet.

Part II: ISSUES ON APPEAL

2. The following issues are raised by the appeal:

   (i) Is extended joint enterprise properly a part of the common law of Australia?

   (ii) Where evidence of a co-accused's out of court statements are left to the jury as inculpating the co-accused and the co-accused's guilt is necessary to find that the accused is guilty, but no direction is given that the out of court statements are not admissible against the accused, is it open for an appellate court to reject oral evidence given by the accused in her defence based on the combined force of the objective evidence, and apply the proviso?

   (iii) Where an accused gives evidence in her defence, does it amount to a miscarriage of justice for the trial judge to refer to some, but not all salient aspects, of her evidence, where no complaint was made at trial?

   (iv) Is evidence of possession by a co-accused, three or four months before an offence, of firearms of the same character as that used in the offence, admissible as part of a circumstantial case against the accused where the accused does not dispute the admissibility of evidence of such possession two or three weeks before the shooting?

Part III: SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

3. Notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) need not be given.

Part IV: STATEMENT OF FACTS

4. To the summary of facts set out by the appellant, the respondent adds the following.

5. The appellant and the deceased (**McDonald**) were former de facto partners. In late 2012 their relationship came to an end. They had disputes over property and money.[1]

6. The telecommunication records were tendered without objection. To the Full Court's summary of their key aspects (appearing at [11]), the following may be added.

7. Text messages sent from McDonald to the appellant in the period between 10 January 2013 and 22 January 2013 suggest that McDonald was upset at their break-up.[2] In contrast, there was virtually no communication from the appellant to McDonald in the period between about 22 January 2013 and 2 February 2013.[3]

8. On 31 January 2013, someone broke into the house at 27 Sapphire Court Highbury and stole property. Bucca and Wesley Gange (**Gange**) were living there. The appellant believed McDonald was responsible for the break-in and theft. She discussed the matter with Bucca who tried to ring McDonald.[4] It provided a further motive for Bucca and the appellant to want to meet with McDonald as there was now both a dispute over a $1000 debt and the break-in.

---

[1] Katsos TX at 1493, 1508, 1510; Finn TX at 1520; Pocock TX at 1553; S Castle TX 1645; T Castle TX 2236.
[2] Exhibit P15, entries 46, 147, 164, 170, 175, 176, 181, 197.
[3] Exhibit P15, entries 175-312; Castle XXN TX at 2343.
[4] Castle TX at 2243-2244.

9. On 31 January 2013, the following messages were sent from a phone used by Bucca:

   - To Jim Bristow (**Bristow**): "*Hey let adrian no, he might of got the trailer back but he still owes me a 1ooo N I want it soon*"[5]
   - To McDonald: "*U steal my shit n cant ansa phone, u dog piece a shit*"[6]

   That latter text was forwarded by McDonald to the appellant 30 minutes later.[7]

10. At 00:23:13 on 1 February 2013, a phone used by Gange was used to send a text to McDonald that read "*I'm coming to get my stuff back Cunt n u can tell George that what ever u get he will be getting the same so that will make too dogs felt with*".[8]

11. The above texts make clear that both Gange and Bucca were angry with McDonald and he was aware of that fact. That is relevant to considering the likelihood of McDonald entering the appellant's car at the carwash if he had known that Gange or Bucca were inside the vehicle. It gave cause for Bucca to hide in the boot as alleged.

12. The appellant summarises some of the evidence given by M.[9] There were three important aspects to M's evidence. First, that Bucca had been in possession of a handgun two or three weeks before the shooting. Second, that at about 5.30-6.30pm on 2 February 2013 the appellant and Bucca were making plans to meet McDonald by lying to him about the purpose of a meeting. Third, that Gange had an alibi (he was with M). Each received significant support from objective or undisputed evidence.

13. As to the firearm possession, M's evidence received support from the evidence of Tamara Pascoe (**Pascoe**). That evidence is set out at [96] below.

14. As to the second, between 6.16pm and 6.25pm the appellant made a number of phone calls to friends of McDonald.[10] She spoke to George Katsos (**Katsos**) and asked Katsos to pass on a message to McDonald, requesting that he ring her.[11] At 6.31pm on 2 February 2013, he did. Over the following 12 hours, there were multiple communications between the two.[12] Initially McDonald expressed reluctance to meet, asking "*do ya think I'm that dumb*"[13] then later suggesting that he saw no reason to meet.[14] He queried the appellant's motivation, asking her "*how can I trust your not setting me up*".[15] At 8.07pm McDonald suggested they meet at the carwash at Bunnings.[16] After numerous texts, McDonald drove to the carwash at Parafield, arriving at about 1.50am, and waited for the appellant.[17] She did not arrive and McDonald left. His arrival and departure are captured by CCTV.[18]

15. Between 2.05am and 5.28am McDonald sent a series of messages to the appellant

---

[5] Exhibit P15, entry 226: 31 January 2013 at 19:09:50.
[6] Exhibit P15, entry 230: 31 January 2013 at 19:26:40.
[7] Exhibit P15, entry 237: 31 January 2013 at 19:58:57.
[8] Exhibit P15, entry 259.
[9] Appellant's Submissions (**AS**) at [15.7].
[10] See Exhibit P15, entries 320, 323.
[11] Katsos TX at 1494-1496.
[12] Exhibit P15 entries 330-502.
[13] Exhibit P15 entry 334.
[14] Exhibit P15 entries 350, 351.
[15] Exhibit P15 entry 363.
[16] Exhibit P15 entry 376.
[17] McDonald was accompanied by Katsos and Finn who were in a separate vehicle (Katsos TX at 1498, 1505; Finn TX at 1525).
[18] Exhibit P7.

questioning why she did not arrive as arranged.[19] Between 5.30am and 6.30am, the appellant resumed contact. Again, she made arrangements to meet him.[20] At 6.07am there was a 123 second call between them and the appellant agreed in evidence that it was during that call that arrangements were made to meet at the carwash. CCTV footage showed her arriving at 6.20am and McDonald at 6.30am.[21]

16. As to the third, that M was at the Gosfield Crescent house at the time of the shooting and Gange was with her was supported by the phone records. M's phone did not register any contact with towers outside the Klemzig, Hampstead and Greenacres areas between 9.15pm on 2 February 2013 and 2.18am on 3 February 2013. The next connection between that phone and any phone tower was not until 9.11am on 3 February. At that time, M's phone sent a signal to the Modbury tower, suggesting it was in the Modbury area shortly after 9.00am on the Sunday.[22] M said she did not leave the Gosfield Cres house until "somewhere around" 8.00am on the Sunday, at which time she and Gange went to Bristow's house at 2 Cadell Court, Hope Valley.[23]

17. As for Gange's phone, the CCTV footage and Bristow's evidence established that Bucca and Gange were in the Hope Valley area between 3.50am and 4.50am that morning. The phone tower evidence[24] confirmed this by establishing that their phones were in that same area at the corresponding time. This supported the inference that both men were in possession of their phones during that period. Both men left the house at 4:50am.[25] Gange's phone registered with the Hope Valley Reservoir tower at 8.47am on the Sunday morning.[26] The issue was where it (and, by extension, he – on the prosecution case) was between 4.50am and that time. From 5.14am until about 8.10am all calls made to and from Gange's phone were relayed through the Klemzig, Hampstead Gardens or Greenacres towers. This was consistent with his phone being at Gosfield Crescent and not consistent with it being at the carwash. These included calls to, and from, Bucca at 6.25am, to McDonald at 6.33am and to the appellant at 6.34am; all remarkable events if he was at the carwash. For the reasons set out by the Full Court,[27] this can be contrasted with the phones of both Bucca and the appellant, which were together and moving in a fashion consistent with them travelling to, and being at, the carwash at the relevant times.

Part V: APPLICABLE LEGISLATIVE PROVISIONS

18. In addition to those identified by the appellant, the provisions set out in Annexure A.

Part VI: RESPONDENT'S ARGUMENT

Extended Joint Enterprise (Ground 1)

19. The appellant invites this Court to overrule its decision in *McAuliffe v The Queen*[28] (***McAuliffe***), as well as *Gillard v The Queen*[29] and *Clayton v The Queen*[30] (***Clayton***), and hold that the common law of Australia does not recognise the doctrine of

---

[19] Exhibit P15, entries 425-427, 435, 438 and 455
[20] Exhibit P15 entries 455-504.
[21] Exhibit P7.
[22] Exhibit P20
[23] TX at 1328.
[24] Exhibits P15 and P20.
[25] Exhibit P12 - footage from 2 Cadell Court.
[26] Exhibit P20.
[27] CCA at [11].
[28] (1995) 183 CLR 108.
[29] (2003) 219 CLR 1.
[30] (2006) 81 ALJR 439.

extended joint criminal enterprise.[31] Leave to reopen *McAuliffe* should be refused.

20. The decision to depart from this Court's previous decisions is not made lightly.[32] *McAuliffe* is not only a unanimous decision of this Court, but it is a considered judgment which was delivered after full argument. It rests upon a principle established in a significant succession of previous cases.[33]

21. The principle of extended joint enterprise as stated in *McAuliffe*[34] is not novel.[35] As recognised in *McAuliffe*, it accords with the general principle of criminal law that a person who assists in the commission of a crime or encourages its commission may be convicted as a party to it. Contrary to the appellant's contention,[36] it is not premised on the decision in *Chan Wing-Siu v The Queen*[37] such that *R v Jogee* (***Jogee***)[38] undermines the jurisprudential basis underpinning it. In any event, the principle in *McAuliffe* is well established in Australian jurisprudence and is founded on valid policy considerations. Further, any alteration or abolition of the doctrine is properly a "task for legislatures and law reform commissions".[39]

22. In *Clayton*[40] a majority of this Court refused to review the principles of extended joint enterprise identified in *McAuliffe* and *Gillard*. The arguments now relied upon to contend that *McAuliffe* was wrongly decided[41] are the same as the underlying arguments relied upon, and rejected, in *Clayton*.[42] The circumstances which the appellant has identified[43] as relevantly different from when *Clayton* was decided are not a proper basis for this Court to depart from its previous decisions. Nothing in *Jogee*[44] affects the correctness of this Court's conclusions in *Clayton* regarding the criticisms of the doctrine there (and here) advanced, and the reasons in *Jogee* are themselves, with respect, unpersuasive.

23. The fact of the decision in *Jogee* does not of itself provide a reason for this Court to overturn its own decisions in *McAuliffe*, *Gillard* and *Clayton*. The respondent makes the following observations about the decision in *Jogee*.

---

[31] AS at [23] and footnote 18.
[32] *John v Commissioner of Tax* (1989) 166 CLR 417 at 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ); *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599 (Gibbs J), 602 (Stephen J), 620 (Aickin J); *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [65] (French CJ); see also *Alqudsi v The Queen* [2016] HCA 24 at [66] (French CJ).
[33] Cf AS at [24.1], [29].
[34] *McAuliffe* at 117-118 (the Court).
[35] See *Simplification of jury directions project report: A Report to the Jury Directions Advisory Group*, August 2012 at [2.171]-[2.172]; Foster, *Crown Law* (3rd ed, 1809) at 370; Stephen, *Digest of the Criminal Law* (4th ed, 1887), Art 41; Howard, *Criminal Law* (4th ed 1982) at 261; Glanville Williams, *Criminal Law* (2nd ed, 1961) at 398; Prof Smith, *Criminal Liability of Accessories: Law and Law Reform* (1997) 113 LQR 453 at 456-457. See also *Mills v The Queen* (1986) 61 ALJR 59 at 59 (Gibbs CJ); and the language used in *R v Smith* [1963] 1 WLR 1200 at 1206-1207; *R v Vandine* [1970] 1 NSWR 252 at 256; *Johns v The Queen* (1980) 143 CLR 108 at 118 (Stephens J).
[36] AS at [21]-[22], [29]-[31].
[37] [1985] AC 168.
[38] [2016] UKSC 8.
[39] *Clayton* at [19] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).
[40] (2006) 81 ALJR 439.
[41] See AS at [25], and in particular the appellant's adoptions at [25.2] and [25.3].
[42] *Clayton* at [15]-[21]; see also application for special leave: [2006] HCATrans 432 at 433. This reflects the breadth of the argument made including the criticisms of the doctrine and policy issues.
[43] Namely, the delivery of the decision in *Jogee* and that leave has been granted in *HKSAR v Chan Kam Shing* [2016] HKCFA 33; see AS at [25.5].
[44] [2016] 2 WLR 681.

24. First, the Court relates that Professor Smith states that the principle of extended joint enterprise was "laid down by the Privy Council in *Chan Wing-Siu v The Queen*".[45] In fact the article of Professor Smith referred to states the opposite.[46] The Court's analysis proceeds on an erroneous premise.

25. Second, the Court then examines the law on joint enterprise from the 19th century. With respect, little can be drawn from those cases, occurring as they did before the criminal law in the United Kingdom shifted from an objective to subjective focus.[47] In any event, the Court refers to the objective approach to the joint criminal enterprise stated by Foster[48] as "whether the events, although possibly falling out *beyond his original intention*, were in the ordinary course of things the *probable consequence* of what B did under the influence, at the instigation of A" (emphasis added), but then states that the proper subjective counterpart to this is one of intention.[49] This is, with respect, illogical, and is in tension with the passage from Foster.

26. Third, the primary decisions delivered before *Chan Wing-Sui* which the Court considers are *R v Smith*[50] and *R v Anderson*.[51] Those cases do not stand for the limited proposition identified in *Jogee*.[52] *Smith* applied a concept of individual "contemplation" of a possibility,[53] whilst the key passage in *Anderson* has been held to refer to "the test of foresight" and amount to an "alternative way of formulating the principle stated in *R v Smith*".[54]

27. Fourth, the Court gives no meaningful consideration to the important public policy justifications underlying the doctrine.[55] It simply asserts, without basis, that the principle in *Chan Wing-Siu* is grounded in "questionable public policy arguments".[56]

28. Fifth, the Court's "restatement" of principles is complex and, with respect, unclear. It appears to propose a change to "conditional intention",[57] a concept which has no place in the common law in Australia. Its meaning is not explained. That there would be difficulties with its application appears to be accepted by the Court.[58]

29. With respect, this is the very circumstance to which the doctrine is targeted and one of the reasons it should be maintained. The solution proffered by the Court was that the law of aiding and abetting could simply apply. However, accessorial liability does not readily accommodate those circumstances where the (inherent) unpredictability of

---

[45] The Court referred to Professor Smith's article *Criminal Liability of Accessories: Law and Law Reform* (1997) 113 LQR 453.
[46] *Criminal Liability of Accessories: Law and Law Reform* (1997) 113 LQR 453 at 456-457.
[47] This shift is explained by the Court at [73]: "There has indeed been a progressive move away from the historic tendency of the common law to presume as a matter of law that the "natural and probable consequences" of a man's act were intended, culminating in England and Wales in its statutory removal by section 8 of the Criminal Justice Act 1967."
[48] Foster, *Crown Law* (3rd ed. 1809).
[49] *Jogee* at [73].
[50] [1963] 1 WLR 1200.
[51] [1966] 2 QB 110.
[52] See *R v Powell* [1999] 1 AC 1 at 18-20 (Lord Hutton).
[53] See discussion of *R v Smith* [1963] 1 WLR 1200 in *Johns v The Queen* (1980) 143 CLR 108 at 130 (Mason, Murphy and Wilson JJ).
[54] *R v Powell* [1999] 1 AC 1 at 22 (Lord Hutton).
[55] Any discussion is in the context of the statements in *R v Powell,* e.g. *Jogee* at [74]-[75], [79].
[56] *Jogee* at [79].
[57] *Jogee* at [90]-[93].
[58] See *Jogee* at [95].

the actual consequences of a joint criminal enterprise come to fruition. Were the test in *Jogee* to be adopted, a lacuna would result.

30. If this Court holds that there is no doctrine of extended joint enterprise operable in the Australian common law, it would seem the appellant's appeal must be allowed.[59]

The Proviso (Ground 2)

31. The Full Court held that the trial judge erred in leaving to the jury as a possible admission by Bucca evidence of a statement made by him to the effect that "he" had killed McDonald.[60] The Full Court also concluded that a further error had occurred by the trial judge failing to direct the jury that another admission of Bucca's (that he "had spent 95% of the last 24 hours with [the appellant]") was not admissible in the case against the appellant. Both could be characterised as a wrong decision on a question of law or a basis on which there was a miscarriage of justice.[61] However, notwithstanding these findings, the Full Court was satisfied that no "substantial miscarriage of justice" had actually occurred.[62] This conclusion engaged the proviso in s 353(1) of the *Criminal Law Consolidation Act 1935* (SA) (**CLCA**), and the Court was required to dismiss the appeal.[63]

Applicable Principles

32. Some preliminary observations of principle bear repeating. First, questions as to the proper application of the proviso have at their root a task of statutory construction. "It is the words of the statute that ultimately govern".[64] Second, and related to the first, "it is neither right nor useful to attempt to lay down absolute rules or singular tests that are to be applied by an appellate court where it examines the record for itself".[65] Such an approach "invites error".[66]

33. Third, it is the appellate court itself which must determine whether a substantial miscarriage of justice has actually occurred.[67] This involves the making of judgment.[68]

34. Fourth, the court's consideration begins with identifying the error that was made at trial.[69] Any determination is to be performed having regard to the nature of the error within the context of the particular circumstances of the case and the issues at trial.[70]

---

[59] The Full Court having relied upon the doctrine in its application of the proviso: CCA at [129].
[60] CCA at [3], [21]; see also [24].
[61] CCA at [28].
[62] CCA at [3], [131].
[63] *Criminal Law Consolidation Act 1935* (SA), s 353(1); as to the *requirement* to dismiss the appeal, see *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 (***Baiada***) at [25]; *Lindsay v The Queen* (2015) 255 CLR 272 at [43]; *Filippou v The Queen* (2015) 89 ALJR 776 at [15].
[64] *Weiss v The Queen* (2005) 224 CLR 300 (***Weiss***) at [9] (the Court).
[65] *Weiss* at [42] (the Court).
[66] *Baiada* at [31] (French CJ, Gummow, Hayne and Crennan JJ).
[67] *Weiss* at [35], [39] (the Court); *Baiada* at [27] (French CJ, Gummow, Hayne and Crennan JJ); *Filippou v The Queen* (2015) 89 ALJR 776 at [15] (French CJ, Bell, Keane and Nettle JJ).
[68] *Baiada* at [25] (French CJ, Gummow, Hayne and Crennan JJ); see also *Baini v The Queen* (2012) 246 CLR 469 (***Baini***) at [26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) regarding s 274 of the *Criminal Procedure Act 2009* (Vic).
[69] *Baiada* at [30] (French CJ, Gummow, Hayne and Crennan JJ); see also *AK v Western Australia* (2008) 232 CLR 438 at [42] (Gummow and Hayne JJ).
[70] See, for example, *AK v Western Australia* (2008) 232 CLR 438 (***AK v WA***) at [42], [55] (Gummow and Hayne JJ); see also *Reeves v The Queen* (2013) 88 ALJR 215 (***Reeves***) at [51]-[58] (French CJ, Crennan, Bell and Keane JJ).

35. Fifth, the court's task is an objective one.[71] It is not an exercise in speculating or predicting what a jury – whether the jury at trial or some hypothetical future jury – would or might do.[72] In this connection, recognition of the possibility that the particular trial jury *might* have reasoned impermissibly to guilt because of the error identified does not of itself prevent the conclusion that no substantial miscarriage of justice has actually occurred.[73] "[I]t will almost always be possible to say that that evidence *might* have affected the jury's view of the accused, or the accused's evidence".[74]

36. Sixth, the appellate court's task must be undertaken on the whole of the record[75] and with due regard to the "natural limitations" that exist.[76]

37. Seventh, the standard of proof of criminal guilt is "beyond reasonable doubt".[77]

38. Bearing these principles in mind, the appellate court must make its own independent assessment of the evidence and determine whether, making due allowance for the 'natural limitations' that exist, guilt was proved beyond reasonable doubt.[78] There may be many cases where those natural limitations mean that the appellate court cannot reach the necessary degree of satisfaction. However, the mere fact that oral evidence was given on key issues which evidence was contested, or even contradicted by other oral evidence, does not of itself disable the appellate court from being capable of satisfaction that guilt has been established beyond reasonable doubt (or, subsequent to that, that no substantial miscarriage has actually occurred).[79]

39. Satisfaction on the part of the appellate court of the appellant's guilt beyond reasonable doubt is not a sufficient condition for the application of the proviso.[80] An appellate court will be unable to apply the proviso unless it is satisfied that the error "*in fact*" did not occasion a substantial miscarriage of justice.[81] This focuses attention upon the particular error, the issues at trial and the way in which the trial proceeded.[82]

40. In some cases, the nature of the error will be so fundamental, that there remains a

---

[71] *Cooper v The Queen* (2012) 87 ALJR 32 at [20] (French CJ, Hayne, Crennan and Kiefel JJ); *Weiss* at [39] (the Court).
[72] *Weiss* at [35], [39] (the Court); *Baini* at [33] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[73] *Weiss* at [36] (the Court).
[74] *Weiss* at [36] (the Court).
[75] *Weiss* at [43] (the Court); *Baiada* at [28] (French CJ, Gummow, Hayne and Crennan JJ); *Baini* at [32] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). This includes the fact of the jury's verdict, although the significance of the verdict in the present case must be assessed in light of the capacity of the errors in the trial judge's directions to have led the jury to wrongly reason to guilt: *Reeves* at [51]-[58] (French CJ, Crennan, Bell and Keane JJ).
[76] *Cesan v The Queen* (2008) 236 CLR 358 at [128] (Hayne, Crennan and Kiefel JJ); *Weiss* at [39]-[41] (the Court).
[77] *Cooper v The Queen* (2012) 87 ALJR 32 at [20] (French CJ, Hayne, Crennan and Kiefel JJ); *Weiss* at [39] (the Court).
[78] *Weiss* at [41] (the Court) (footnotes omitted); see also *Baini* at [32] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[79] *Reeves*. Cf AS at [61]-[62]; Bucca's Submissions at [72].
[80] *AK v WA* at [53], [59] (Gummow and Hayne JJ); *Baiada* at [29] (French CJ, Gummow, Hayne and Crennan JJ); *Cesan v The Queen* (2008) 236 CLR 358 at [124] (Hayne, Crennan and Kiefel JJ); *Reeves* at [50] (French CJ, Crennan, Bell and Keane JJ); *Gassy v The Queen* (2008) 236 CLR 293 at [18] (Gummow and Hayne JJ); *Weiss* at [44]-[45] (the Court).
[81] *Reeves* at [51] (French CJ, Crennan, Bell and Keane JJ).
[82] See *Reeves* at [51]-[58] (French CJ, Crennan, Bell and Keane JJ).

state of affairs properly characterised as a substantial miscarriage of justice.[83] Of course, often where there has been such a serious departure from the requirements of a fair trial, the appellate court will in any event – because of those departures – be incapable of reaching satisfaction beyond reasonable doubt of the appellant's guilt.[84] However, "it is neither possible nor useful to attempt to argue about the application of the proviso by reference to some supposed category of 'fundamental defects' in a trial."[85] Ultimately consideration is driven back to the language of the provision itself.

41. It has also variously been stated that the appellate court is to ask itself whether the accused's conviction was "inevitable", or whether the accused was deprived of a "real chance" of acquittal. Such expressions must not be taken as a substitute for the language of s 353(1) CLCA.[86]

42. On one view, questions as to "inevitability" or "fair chances of acquittal" will often (if not always) be resolved by virtue of the appellate court having itself come to satisfaction of guilt beyond reasonable doubt. Once an appellate court has determined, on the record, that there is no reasonable hypothesis consistent with innocence,[87] logic necessitates the conclusion that it was not open to a reasonable jury to *accept* any such hypothesis consistent with innocence.[88] Equally, where an appellate court concludes that the only reasonable verdict available on the evidence properly admissible at trial was a guilty one, then that court cannot itself fail to be satisfied of guilt beyond reasonable doubt.

43. In the event that determination of whether the error in the trial "in fact" occasioned a substantial miscarriage of justice gives work to the concepts of "inevitability" or "fair chances of acquittal" beyond merely emphasising the high standard of proof and natural limitations of the task,[89] and in fact poses questions that are not resolved by the appellate court's satisfaction of guilt beyond reasonable doubt, then the analysis which they invite is one concerned with the relationship between the particular error identified and the particular issues at trial. In essence, attention is directed to whether there is any real likelihood, in all the circumstances, of the particular trial jury having reasoned impermissibly to guilt as a result of the error.[90] It appears it was an analysis of this nature which was undertaken by the plurality in *Reeves v The Queen*.[91] It is also the approach reflected in the reasons of the Court below in this case.

The approach of the Court below

44. Before setting out why it found that in this case no substantial miscarriage of justice

---

[83] *Filippou v The Queen* (2015) 89 ALJR 776 at [15] (French CJ, Bell, Keane and Nettle JJ); *Baini* at [33] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); see *Weiss* at [44] (the Court); *AK v WA* at [59] (Gummow and Hayne JJ).
[84] *Evans v The Queen* (2007) 235 CKR 521 at [42] (Gummow and Hayne JJ).
[85] *Baiada* at [23] (French CJ, Gummow, Hayne and Crennan JJ).
[86] *Weiss* at [33] (the Court); see also *Baiada* at [31] (French CJ, Gummow, Hayne and Crennan JJ); *Reeves* at [51] (French CJ, Crennan, Bell and Keane JJ).
[87] Assuming it is capable of making that determination, noting that in many cases it will be incapable of doing so due to the "natural limitations" attending the appellate review.
[88] See *Baiada* at [35] (French CJ, Gummow, Hayne and Crennan JJ). See also *Baini* at [33] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *AK v WA* at [59] (Gummow and Hayne JJ).
[89] Cf *Weiss* at [40] (the Court).
[90] *Reeves* at [51]-[58] (French CJ, Crennan, Bell and Keane JJ), [65] (Gageler J).
[91] See *Reeves* at [51-[58] (French CJ, Crennan, Bell and Keane JJ). Justice Gageler left open the possibility that in a case of that nature either one of satisfaction of guilt beyond reasonable doubt, or exclusion of the possibility that there was any real likelihood that the trial jury had reasoned impermissibly to guilt, might be sufficient for the appellate court to apply the proviso; at [66].

had actually occurred, the Full Court expressly recognised the key principles,[92] including that, in the ordinary course, the proviso could not be applied in a case where guilt or innocence depended upon an assessment of oral evidence. To make a proper assessment of the Full Court's conclusion as to the proviso and the validity of their reasoning, it is necessary to understand not only the approach broadly taken by the Court to the issue, but to identify carefully the particular order in which essential findings were made (the steps), and the Court's reasons for those findings.

The first step: Rejection of Castle's evidence

45. The first step was to consider the appellant's evidence and for the Court to conclude whether its essential aspects were to be rejected (beyond reasonable doubt). As the only direct account of the events in question, rejection beyond reasonable doubt of its critical aspects was an essential precondition to the application of the proviso.[93]

46. The Court below held that, on the critical issues,[94] the appellant's evidence could be attributed no weight:

> Ms Castle's evidence is not just implausible and inconsistent with the objective evidence, it is on its face so obviously false that it carries no weight at all.[95]

47. It is necessary to examine closely the reasons of the Court, and to bear in mind that on a review of the evidence, an appellate court will sometimes be capable of rejecting oral evidence (including that of an accused) in light of the objective evidence.[96]

48. Whilst the Court was not required to make reference to every aspect of the evidence,[97] it did give particularly detailed reasons for finding that the appellant's evidence was "obviously false". In analysing those reasons, it is relevant to consider whether reliance upon any disputed oral evidence contrary to that of the appellant was necessary in order for the Court to reach its conclusion. None was. The Court was cognizant of the limitations attending its task. Its extensive, if not exclusive, reliance upon the objective evidence in its reasoning to this conclusion bespeaks that cognizance, as does its manner of expression of the conclusion itself.[98]

49. Eleven distinct reasons for the Court's conclusion may be identified.[99] The issue is not that other approaches might have been taken to one or more of the eleven reasons identified.[100] The issue is whether the cumulative force of those reasons safely allows the relevant conclusion to be reached: that her evidence on the critical issues could not be a reasonable possibility. The jury did have the advantage of seeing and hearing the appellant give her oral evidence. However, if the objective evidence, the inferences to be drawn from that objective evidence, and inherent improbabilities in her evidence (having regard to matters of common sense and experience) had the combined effect that the content of her evidence on the critical issues was necessarily

---

[92] CCA at [103]-[106].
[93] In respect of both the appellant and Bucca.
[94] Although the Court's conclusion that the appellant's evidence could be given "no weight" is not expressly limited to her evidence on the critical issues, so much is implicit. For example, there could be no doubt that her evidence that she had been the driver at the carwash was accurate.
[95] CCA at [106]. See also the conclusion at [127].
[96] Cf AS at [61]-[62]; *Reeves* at [45]-[46] (French CJ, Crennan, Bell and Keane JJ).
[97] *Reeves* at [46] (French CJ, Crennan, Bell and Keane JJ.
[98] CCA at [106]. Namely, that the appellant's evidence was "inconsistent with the objective evidence" and "on its face" obviously false.
[99] CCA at [107]-[126].
[100] For example, see *Reeves* at [45]-[46], [49] (French CJ, Crennan, Bell and Keane JJ).

false, then her particular presentation in the witness box assumes no significance.

50. The Court's first reason is set out at [107]-[108] of the judgment. It concerns the appellant's denial that her text messages to McDonald were designed to persuade him to meet with her in the hope of some reconciliation (part of the plan as overheard by M).[101] The Court gave several reasons for finding that aspect of her evidence to be false. None involved consideration of M's evidence:

    (i) The messages were expressed affectionately, in contrast with earlier messages.

    (ii) The messages recommenced just days after the alleged theft (which spoke against her expressing herself affectionately unless it was not genuine).

    (iii) The asserted purpose of the meeting (the return of personal items) was implausible having regard to the time of the meeting, the absence of any reference to that topic in the messages, the location from which the property was to be recovered and the absence of any past efforts to retrieve it.

    (iv) That she had accidently expressed herself in affectionate terms was not credible, leaving open only that it was deliberate, which, in light of the whole of the evidence (including the events at the carwash), left as the only explanation open that she was implementing a plan of the type about which M had given evidence.

51. The second reason is set out at [109] and relates to the appellant's explanation for the text sent to Bristow at 5.01am.[102] The Court's three bases[103] for finding that explanation fanciful relied only upon the objective evidence of the phone records, CCTV footage and evidence of distance between the relevant locations, in combination with matters of common sense.

52. The third reason appears at [110]. The appellant's evidence was that Gange was with her and Bucca at Sapphire Court between 5.00am and 6.00am and they were loading the car with Bucca's belongings.[104] This evidence was important. First, unless Gange was present then her evidence that, unexpectedly, he had left Sapphire Court with her and travelled to the carwash could not be true. Second, if this time was spent loading the car, then it could not have been spent "circling" the carwash as alleged by the prosecution and suggested by the phone records. Third, if items were being loaded into the boot, then Bucca could not have been secreted there immediately before the shooting. This aspect of the appellant's evidence was rejected as false, given the phone records showed Gange's phone to be elsewhere. Whilst the Full Court made reference to the evidence of M, it does not indicate that reliance on her evidence was essential to their conclusion on this topic. The Court's reasons are consistent with it finding on the phone records that the appellant had lied and observing that such a conclusion was consistent with M's evidence (i.e. M's evidence confirmed a conclusion already reached). In the alternative, the phone records offered such (objective) support of M that it was open to accept her evidence on that issue.[105]

---

[101] Exhibit P15; Castle TX at 2306-2309, 2315-2316, 2343-2344, 2349-2351, 2356-2359, 2361-2379, (and, regarding the text "running xox") 2309-2311.

[102] Castle TX at 2372-2376.

[103] First, the implausibility that the appellant would send a text to Bristow without first sending a text to the appellant or Gange, given they were the two people said to be keeping her waiting. Second, that there would have existed no reason for the appellant to think the appellant did not have his keys with him unless the appellant had told her as much. Third, the time at which the appellant left Cadell Court, coupled with the evidence of the distance between that location and the appellant's location, rendered it doubtful the appellant had not arrived by 5.01am.

[104] Castle TX at 2313-2315, 2317, 2375.

[105] *Reeves* at [45]-[46] (French CJ, Crennan, Bell and Keane JJ).

53. The fourth reason is set out at [111]-[113]. The appellant's evidence was that she did not leave Sapphire Crescent until after 6.00am.[106] That is, she was not "circling" the carwash. The phone records[107] showed that evidence to be false. As the Court considered,[108] the phone records could not be explained away by a technical error. It was not just one "glitch or erroneous computer record" that needed to be a reasonable possibility, but a multitude. The Court further observed that the pattern of movement revealed by the phone records was consistent with "a substantial body of circumstantial evidence from which the plan to entrap Mr McDonald [could] be inferred."[109] Again, the Court did not rely upon the direct evidence of that plan (i.e. the disputed evidence of M), instead basing its conclusion on the "circumstantial evidence", including the telecommunications evidence more broadly.[110]

54. The Court's fifth reason appears at [114]. The appellant's evidence was that while loading the car between 5.00am and 6.00am she was still planning to meet McDonald alone after leaving Bucca at her mother's.[111] The Court held that to be "improbable". That was open. For example, there is no reason why a last minute decision of Gange to come with her to meet McDonald, would cause the original plan to drop Bucca at her mother's to be abandoned. Further, and as the Full Court observed "more importantly", her account conflicts with the evidence of the location of Gange's phone.

55. The sixth reason is set out at [115]-[117]. The appellant gave more than one account for how she claimed Bucca's phone came to be in the car without him.[112] Each of the Full Court's reasons emanated from the phone records, which enabled the conclusion that the appellant's evidence on this topic was "implausible" and could be rejected.

56. The seventh reason is articulated at [118]-[119]. It relates to aspects of the appellant's account of the events at the carwash. That it was "relatively unusual" that Gange would move to the backseat in the way described was a matter of common sense, and an observation only reinforced by the undisputed evidence of his injuries. Similarly, common sense tends against the suggestion that a person would enter the vehicle despite the obvious presence of a person "whom he had reason to fear".

57. The eighth reason is identified in the first three sentences of [120]. It relates to the appellant's evidence that when she received a call from Gange's phone (an improbable event in itself given that she claimed Gange was in the car at the time), she allowed Gange to answer the call but did not thereafter speak to Gange about it.[113] It was open to find that aspect of her evidence "not credible".

58. The ninth reason, relating to the appellant's evidence of calls made to Bucca's phone from Gange's phone at 6.25.10am and 6.25.46am,[114] is set out in the final sentence of [120] and in [121]-[123]. It was open to conclude the appellant lied about the calls. Tuhukava's evidence was not disputed and was confirmed by the phone records.[115]

---

[106] Castle TX at 2398-2400, 2409-2413.
[107] Exhibit P15.
[108] CCA at [113].
[109] CCA at [113].
[110] And, no doubt, in light of the events which did in fact take place at the carwash.
[111] Castle TX at 2318, 2327, 2380-2381.
[112] Castle TX at 2319, 2442-2444.
[113] Castle TX at 2401-2403.
[114] Castle TX at 2423-2427.
[115] Exhibit P20.

59. The tenth reason appears at [124]. The Court found the appellant's explanation for driving off within 30 seconds of McDonald entering her car[116] to be "most improbable". The objective evidence was that McDonald was smoking when he arrived.[117] She could have asked him for a cigarette. Further, she claimed that she drove off for this purpose in the midst of Gange arguing with McDonald.[118] It was open to doubt the likelihood of such a course. Finally, such departure would seem unlikely if the purpose of the meeting was for the appellant to recover her property from McDonald.

60. The eleventh reason is explained at [125]-[126]. The appellant gave an "inherently unlikely" account of what occurred immediately after the shooting. She said that Gange had pointed the gun at her and threatened her life, then, while she was driving away, he had obtained her phone and used it to send a text (to McDonald and designed to give her an ailibi). She then dropped him in the street, but shortly thereafter went to his house (even though he may have been there).[119]

61. In light of the combined force of the reasons given, the Full Court did not err in concluding that the appellant's evidence was "so riddled with patent falsehoods that it [could] be given no weight at all".[120]

The next step: Satisfaction of Bucca's guilt beyond reasonable doubt

62. The Full Court was cognizant that rejection of the appellant's evidence did not prove guilt. Its next step was to consider its finding with respect to the guilt of Bucca.[121] The Court was satisfied beyond reasonable doubt that Bucca shot McDonald.

63. In considering the reasons given for this conclusion, it is important to note three particular matters:

    First, that the rejection of the appellant's evidence as a reasonable possibility was not used in a positive way against her or Bucca. It simply provided no impediment to a conclusion that Bucca was the shooter (or, indeed, the ultimate conclusion that no substantial miscarriage of justice had actually occurred).

    Second, the extent to which the reasoning of the Court relied upon evidence with respect to which the jury enjoyed a relevant advantage.

    Third, the extent to which the matters specifically set out at [128] properly drew upon the detailed consideration already given to the objective evidence, and conclusions already drawn.

64. The Court expressly identified six reasons for being satisfied beyond reasonable doubt that Bucca was the shooter (and, thus, necessarily, of his guilt beyond reasonable doubt). Taken together, the Full Court did not err in its conclusion.

65. As to the first (that the phones of Bucca and the appellant were circling the carwash early that morning and were in the car at the time of the shooting), two points may be made. First, that Bucca's phone was in the car at the time of the shooting was not disputed.[122] Second, the conclusion that the phones were "circling" the carwash at the

---

[116] Castle TX at 2335, 2405.
[117] CCTV footage from the carwash (Exhibit P7). See also the XXN of Castle at TX 2405.
[118] Castle at TX 2293, 2335, 2405.
[119] Castle at TX 2305, 2339, 2381-2385, 2391, 2393, 2398, 2417-2419.
[120] CCA at [127].
[121] CCA at [128].
[122] The appellant did not object to the tender of the charts or other phone records. This was also the appellant's evidence, and Bucca did not cross-examine her.

relevant time was the clear inference arising from the undisputed phone records and the conclusion that repeated error was not a reasonable possibility.[123]

66. As to the second (motive), the evidence giving rise to the relevant motive was not disputed, such that the Full Court was in the same position as the jury. Bristow gave undisputed evidence that Bucca spoke to him in the early hours of the morning and said that he wanted to catch up with McDonald about the $1000 that was owed, that he wanted it straightaway, and that in Bucca's presence the break-in had been mentioned by Gange.[124] Bucca had also sent a text message to the same effect.[125] Further, whilst the break-in and $1000 debt may not have provided much of a motive to plan to kill, the Full Court did not find that it had. Rather, the plan to which the motive was said to relate was one to "confront the deceased with a gun in order to detain him in the car until he could be confronted about the break-in".[126]

67. As to the third and fourth (the evidence of M that a plan was discussed by the appellant to lure McDonald and the text messages in apparent execution of that plan) it is appropriate to deal with these matters together. Whilst M's evidence was disputed, in the circumstances of this case the Full Court was not precluded from accepting her evidence on this topic, despite the natural limitations attending its task. By the time the Court was drawing its conclusion at [128], the appellant's evidence to the contrary had already been excluded as a reasonable possibility without any reliance upon M's evidence.[127] The appellant's explanations having been rejected, it remained for the Court to determine whether it accepted M's account as to a plan. Such conclusion may not have been appropriate without the Court having had the benefit of seeing and hearing M give her evidence, except that on the whole of the evidence – including the phone records and the undisputed aspects of the events at the carwash – no reasonable inference remained open other than that a plan in the nature of the one relayed by M was being executed.[128]

68. As to the fifth (regarding Gange's presence at the Gosfield Crescent house at the time of the shooting), there is again no difficulty with the Court's reference to M's evidence. The only direct evidence to the contrary had come from the appellant, and by this stage the Court had rejected her version beyond reasonable doubt without reliance upon M's evidence. In all the circumstances the only inference which remained a reasonable possibility was that Gange was with his phone and not in the car. Further, there was no dispute that someone was in the car with the appellant and that person was the shooter. Critically, the trial (quite properly) proceeded on the basis that if the shooter had not been Gange, then it was Bucca.[129] The cumulative effect of these matters is that acceptance of M's evidence – that Gange had been at Gosfield Crescent at the time of the shooting – was inevitable.

69. As to the sixth (the difficulty with which a man with Gange's injuries would have in hiding in the boot and moving into the compartment of the car), the evidence of

---

[123] See CCA at [113].
[124] Bristow TX at 1586, 1615. It was also the appellant's evidence that Bucca was "annoyed" about both the break-in and the $1000 debt not having been re-paid: Castle TX at 2366, 2416.
[125] Exhibit P15 entry 266.
[126] CCA at [129].
[127] CCA at [107]-[108]. See [48]-[60] above.
[128] Even if another inference might have otherwise remained open, M's version received such significant support the undisputed evidence that the Court could accept her account: see *Reeves* at [45]-[46] (French CJ, Crennan, Bell and Keane JJ).
[129] These were the terms in which the trial judge directed the jury (Summing Up at 29), and no complaint was made.

Gange's injuries and mobility had not been challenged,[130] nor was the evidence as to the dimensions of the boot and the opening into the back seat.[131] Once the appellant's evidence could be given no weight, the jury enjoyed no advantage over the Court below.

The next step: Satisfaction of Castle's guilt beyond reasonable doubt

70. The next step of the Court was to consider its finding with respect to the guilt of the appellant.[132] The Full Court was satisfied beyond reasonable doubt that the appellant knew Bucca was in the car, that he was armed and that he intended to confront McDonald with a gun in order to detain him and confront him about the break-in. The Court was also satisfied beyond reasonable doubt that the appellant foresaw that the gun might be used to kill McDonald, or cause him grievous bodily harm, in the execution of that plan. Those findings made, the Court was satisfied of guilt.

71. In coming to these findings two matters must be borne in mind:

First, by this stage, the Court had already rejected beyond reasonable doubt the appellant's evidence on the key issues. Whilst this rejection could not be used positively as evidence of her guilt, it did mean that her evidence was no impediment to satisfaction of guilt.

Second, by the stage of considering satisfaction of guilt beyond reasonable doubt, the Court had already concluded beyond reasonable doubt that Bucca was the shooter on evidence which was admissible against the appellant.

72. If those two conclusions were appropriate notwithstanding the limitations faced by the Full Court (and for the reasons set out above, they were), then in all of the circumstances they did not err in being satisfied beyond reasonable doubt of guilt.

73. It defied common sense that given Bucca's armed presence in the car the appellant was not part of a plan with him "to confront the deceased with a gun in order to detain him in the car until he could be confronted about the break in". There was no dispute that her relationship with Bucca existed before the incident.[133] The objective evidence showed that she had sent messages to McDonald to lure him to the carwash and that she had gone to the boot on two occasions while there. The CCTV footage and the phone records showed conclusively that she had refused to leave her car after McDonald arrived. The appellant knew that Bucca was displeased with McDonald about both the break-in and the $1000 owed[134] and had received a text from McDonald claiming that Bucca had threated to put a bullet in his head.[135] Both revealed matters about the appellant's state of knowledge and foresight. Bucca was armed. There was no reason to hide that from the appellant. The Full Court was not wrong to conclude that she foresaw that the gun might be used with the necessary intent to kill or to cause grievous bodily harm.

74. Her conduct in sending text messages and making phone calls after the shooting was properly part of the circumstantial case against her. First, her phone had sent a text to McDonald at 6:44 am *("had to leave kids got up I wil call you later on n we can meet up to talk")*. She had also called a person with whom McDonald might have been had

---

[130] M TX at 1294-1297, 1476, 1484-1487; Finn TX at 1522-1523; see also Castle TX at 2385-2388.
[131] Strange TX at 1749-1751.
[132] CCA at [129].
[133] Castle TX at 2225.
[134] Castle TX at 2366, 2416.
[135] Exhibit P15, entry 151.

he not been at the carwash (Finn). These matters were consistent with an effort to distance herself from the crime and circumstantial evidence of guilt.[136]

The penultimate step: Consideration of matters other than satisfaction of guilt

75. Having reached satisfaction that the appellant's (and Bucca's) guilt was established beyond reasonable doubt, the Court did not simply proceed to conclude that no substantial miscarriage of justice had actually occurred.[137] Having acknowledged that such satisfaction could not necessarily resolve that question,[138] the Court turned its attention back to the evidence to which the trial judge's errors had related, and their place within the context of the whole of the case at trial.

76. Attention was to be given to the nature and significance of the errors in the context of the issues and conduct of the trial.[139] The Court's conclusion appears at [130], and as the appellant accepts,[140] its effect must be understood in light of the test it identified at [22]: that is, whether the other evidence rendered the appellant's conviction "inevitable", or so overwhelmed the relevant admissions, that the jury "*would not* have relied on [them] in any material way".[141] In substance, this amounts to a conclusion that the errors in the trial did not "in fact" occasion a substantial miscarriage of justice[142] – or, put another way, that there is no real likelihood that the jury reasoned impermissibly to guilt as a result of the errors identified. For the reasons which follow, the Court was, with respect, correct so to conclude.

77. As to the first error, the jury were (improperly) left with a choice as to the effect of Bucca's out of court statement overheard by Pascoe (i.e. as being exculpatory or inculpatory). The trial judge then failed to direct the jury that if accepted as an admission it was not evidence which could be used against the appellant.

78. However, as the Full Court identified, consideration alone of the statement alleged to have been made by Bucca could not resolve the ambiguity as to whether it was inculpatory or exculpatory.[143] Thus, in order for the jury to determine whether the statement was to be viewed as exculpatory or inculpatory (if indeed they were to rely upon it at all) it necessarily had to do one of two things:

    (i) look to the entirety of Pascoe's evidence on the topic to resolve the ambiguity; or

    (ii) determine that the ambiguity could not be resolved by only considering Pascoe's evidence on the topic.

79. In the first circumstance, resolution of the ambiguity on the basis of Pascoe's evidence alone was only capable of being resolved as exculpatory. The Full Court identified as much in concluding that "Pascoe's answers in cross-examination and re-examination *unequivocally show*"[144] that her evidence was of an exculpatory

---

[136] See for example Castle TX at 2417-20.
[137] Cf AS at [67.2], [73].
[138] CCA at [103].
[139] *Reeves* at [51]-[58] (French CJ, Crennan, Bell and Keane JJ); see also *AK v WA*.
[140] AS at [57].
[141] CCA at [22] (emphasis added).
[142] See *Reeves* at [51] (French CJ, Crennan, Bell and Keane JJ).
[143] CCA at [12]-[22].
[144] CCA at [18] (emphasis added), see also at [12]-[22] generally.

statement.[145] In this postulated circumstance, there exists no risk that the jury relied impermissibly on the evidence in reasoning to the appellant's guilt, because it has not in this event been interpreted as an admission by Bucca.

80. In the second circumstance, the ambiguity was only capable of being resolved upon consideration of the balance of the evidence. The risk that the jury might incorrectly accept that evidence as inculpatory was only capable of occurring in circumstances where the remainder of the prosecution case had already satisfied the jury that Bucca was the shooter.[146] Once this was so, there was no further use to which the evidence of Bucca's statement could relevantly be put in the case against the appellant.

81. As to the second error, Bucca's potentially inculpatory statement – even if treated by the jury as admissible against the appellant – added nothing to the evidence properly admissible against the appellant. It related to the proportion of time the appellant and Bucca had spent together in the 24 hours preceding about 3.30pm on 3 February. However, on the appellant's own evidence, she had spent the overwhelming majority of that time with Bucca. She had picked up Bucca from work at about 5.00pm on 2 February[147] and travelled to Gange's house with him.[148] She left Bucca there at about 11.30pm to go to her mother's for a brief time and Bucca was still there when she returned.[149] They were apart for a period in the early hours[150] but she was back in his company between about 5.00am and 6.00am[151] before being apart from him at the time of the shooting but reuniting with him about 45 minutes later when she picked him up. She then travelled with him to her mother's home, arriving at about 8.30am,[152] and was with him for the whole day until shortly before her arrest at 3.20pm.[153] Other than the period of the shooting, none of this was disputed by the prosecution.

82. The Full Court was correct to conclude that the jury would not have relied upon on either statement in any material way, and was then properly in a position to conclude that no substantial miscarriage of justice had actually occurred.[154]

The final step: Conclusion as to substantial miscarriage of justice

83. It recorded that final necessary state of satisfaction at [131], at which point it was duty-bound to apply the proviso and dismiss the appeal.

Failure to Remind the Jury of Castle's Evidence (Grounds 3 and 4)

84. Given the issues at trial, the most critical aspect of the appellant's evidence was whether Gange was in the car and the gunman. If that was not excluded as a

---

[145] As an out of court statement of a purely self-serving or exculpatory nature (i.e. not mixed), it was in fact inadmissible for this purpose: *Barry v Police* (2009) 197 A Crim R 445 at [67] (Kourakis J); *Melbourne v The Queen* (1999) 198 CLR 1 at [13] (McHugh J).

[146] This is not a case where it is possible that the jury may have (wrongly) used the admission to allow it to reach satisfaction beyond reasonable doubt that Bucca was the shooter. Because the ambiguity of the evidence meant it was, at worst, equivocal, any reliance upon it as inculpatory can only have occurred in circumstances where the jury had, without reliance on that evidence, come to the view that Bucca was the shooter.

[147] Castle TX at 2248; Exhibit P15.

[148] Castle TX at 2250, 2253, 2260; Exhibit P15.

[149] Castle TX at 2269-2270.

[150] Castle TX at 2272-2273.

[151] Castle TX at 2275-2276.

[152] Castle TX at 2298-2301.

[153] Castle TX at 3293-3296.

[154] It is implicit in the Court's finding that the statement in question was a minor part of the evidence that the trial judge's misdirection could not be characterised as a fundamental flaw.

reasonable possibility then, as the jury were directed,[155] she could not be found guilty. If Gange was not in the car there was no dispute the gunman must have been Bucca.

The obligation

85. To ensure a fair trial it is not necessary for the trial judge to identify each piece of evidence or argument relevant to an accused.[156] As the plurality observed in *RPS v The Queen*:

> The fundamental task of a judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case. No doubt that will require instructions about the elements of the offence, the burden and standard of proof and the respective function of the judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues. It will require the judge to put fairly before the jury the case which the accused makes.[157] (footnotes omitted)

The obligation was met

86. The salient aspects of the appellant's evidence were referred to in the Summing Up. The appellant's complaint that it was not further detailed falls to be evaluated in light of the following. First, the issues in the trial. Second, the references that were made. Third, the references made to the appellant's evidence in the closing address of her counsel. Fourth, the absence of any complaint.

87. The fundamental issue upon which the evidence of the appellant could impact was the identity of the gunman. The Summing Up reminded the jury that it was the appellant's evidence that Gange was in the car.[158] As directed, if that person might have been Gange then she was to be found not guilty.[159]

88. If the possibility of Gange being in the car was rejected as a reasonable possibility then little else of the appellant's evidence mattered as it was silent as to the balance of the key issues: whether she was present as part of a plan with Bucca, the extent of that plan or that which she may have foreseen. The jury received appropriate assistance with these issues, but it could not come from reminding the jury of the appellant's evidence. Rather, it came from being reminded of her counsel's submissions.[160] This occurred in the context of the jury having been directed that not all of the evidence would be the subject of the Summing Up, full attention needed to be given to counsel's addresses and the jury were the ultimate arbiters of the facts.[161]

89. As to the references to her evidence that were made in the Summing Up, beyond those referred to immediately above, as the appellant sets out at [72] of her submissions references were made to other key aspects of her evidence. To those summarised by the appellant can be added references to threats having been made by Gange[162] and her evidence of what she had done after the shooting and why.[163]

---

[155] Summing Up at 29.
[156] *Domican v The Queen* (1992) 173 CLR 555 at 561 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[157] (2000) 199 CLR 62 at [41].
[158] Summing Up at 191-192, 202.
[159] Summing Up at 29.
[160] Summing Up at 55, 73, 82-84, 89, 127-128, 137, 140-144, 162, 179, 189-195, 199-203.
[161] Summing Up at 62, 112.
[162] Summing Up at 191.
[163] Summing Up at 203.

90. The appellant's complaint also falls to be evaluated in light of her approach in her own closing address and the extent to which the Summing Up brought home to the jury her approach to the case as a whole. After all, it is that address that (necessarily) sought to undermine the prosecution case more broadly than by simply asking the appellant's evidence to be considered as raising a reasonable doubt. The appellant's closing address itself made limited reference to her evidence. Reference was made to: her claim that Gange was the gunman, that she did not know what was to occur, that she did not know that Gange was armed, that Bucca had become separated from his mobile phone, why she had kept her foot on the brake, why she had gone to the boot, her conduct after the shooting and threats having been made by Gange.[164] All but one of these matters was the subject of specific reference in the Summing Up.[165]

91. In her submissions, the appellant now summarises at length her evidence of events prior to being at the scene. By contrast, in her address the appellant made no reference to these aspects. The approach of counsel at trial likely reflects that there was no dispute that the appellant sought to meet McDonald and admitted lying to achieve that goal.[166] Further, as counsel conceded, aspects of her evidence could not be reconciled with the objective facts other than by concluding that her evidence had been erroneous.[167] For the Summing Up to have referred to that evidence would have only emphasised that it could not be reconciled with the objective facts.

92. In light of the above, the approach of the learned trial judge to the appellant's case was necessarily broader than just referencing her evidence. The jury were reminded in an appropriate way of the key points the appellant's counsel made.[168]

93. Finally, no complaint was made at trial. The absence of complaint is a basis for concluding there was no relevant unfairness.[169] Whilst the above analysis may be explicated in greater detail, none is inconsistent with the approach of the Full Court.[170]

Pascoe's Evidence of Bucca's Firearm Possession (Additional Ground)

94. The evidence of Bucca's prior possession of handguns was part of the circumstantial case proving that he was the shooter. It was thus part of the case against the appellant: that Bucca was the shooter was essential to proof of her guilt.[171]

Pascoe's evidence and the trial judge's direction

95. M gave evidence that, about two or three weeks before the shooting, Bucca brought a handgun to her house.[172] The admissibility of this evidence was not disputed.[173] M

---

[164] Closing Address at 2570, 2578, 2591, 2593, 2594 2599-2600 and 2601. In addition reference was made to when the relationship with Bucca had begun (2585), why she had gone to the boot while at the carwash (2591), why she had kept her foot on the brake (2599-2600) and having been threatened (2600-2601).
[165] Summing Up at 67, 79, 116, 126-7, 189-91. The only matter not referenced was why she had gone to the boot while at the carwash.
[166] See, for example, Castle TX at 2305-2306, 2315-2316.
[167] Closing Address at 2609, 2611.
[168] Summing Up at 55, 73, 82-84, 89, 127-128, 137, 140-144, 162, 179, 189-195, 199-203.
[169] *R v Aziz* [1982] 2 NSWLR 322 at 331 (Nagle CJ at CL) quoting *R v Haeney* (New South Wales Court of Criminal Appeal, 13 June 1978, unreported).
[170] CCA at [66].
[171] Summing Up at 29.
[172] M TX at 1310-1313.
[173] Although it could not be conclusively demonstrated that the handgun M saw had been the firearm used, evidence of possession of an object which "*might*" have been used is admissible;

was asked to look at three photographs of firearms. One, KM-3, was "very close" to the firearm she had seen[174] and was a Glock 17. The Glock 17 was one of only a small number of firearms which left marks on a projectile the same as those fired at McDonald.[175]

96. Pascoe gave evidence that approximately three or four months before the shooting she was present when Bucca had three handguns.[176] Pascoe identified from photographs one as "similar" to one of the three handguns she had seen,[177] but it was accepted that that handgun could not have been the firearm used. Pascoe was unable to give much detail about the other two, other than that each was a handgun.

97. The direction given to the jury with respect to Pascoe's evidence invited the jury to consider whether one of the firearms she had seen was the Glock 17.[178]

The approach of the Court below

98. The Court below took the view that Pascoe's evidence was evidence of "discreditable conduct" on the part of Bucca, such that s 34P of the *Evidence Act 1929* (SA) governed its admissibility.[179] The Full Court identified Pascoe's evidence as relevant and admissible for two primary purposes.

(i) Evidence giving rise to the inference that one of the firearms Pascoe had seen Bucca produce was the *particular* firearm used.

(ii) Evidence tending to establish that Bucca had *access* to handguns.

Each of these primary purposes was also, in turn, accompanied by a further important purpose, relating to the credibility and reliability of the disputed evidence of M.

Possession of the Particular Firearm Used

99. M's evidence of Bucca's possession of a handgun was relevant and admissible because it was evidence of possession of an object which "*might*" have been used in the commission of the crime alleged.[180] Pascoe's evidence of Bucca's possession of three handguns three to four months before the offence was relevant and admissible on the same basis. One of the other two firearms not excluded *might* have been the particular handgun used to kill McDonald. The principle of completeness[181] necessitated the admission of Pascoe's evidence of all three handguns.

100. Pascoe's evidence was also relevant to the assessment of M's (disputed) evidence.

Access to an Item of the "Same Character"

101. Even if the view was taken[182] that, on the whole of the evidence it was not open to

---

Thompson and Wran v The Queen (1968) 117 CLR 313 at 316 (Barwick CJ and Menzies J), referred to with approval in *Festa v The Queen* (2001) 208 CLR 593 at [186] (Kirby J).

[174] M TX at 1318.

[175] De Laine TX at 1066-1067, 1070-1071, 2069.

[176] Pascoe TX at 1876-1881, 1907-1909, 1912.

[177] Pascoe TX at 1893-1897.

[178] Summing Up at 169.

[179] CCA at [89]-[90].

[180] *Thompson and Wran v The Queen* (1968) 117 CLR 313 at 316 (Barwick CJ and Menzies J); see also *Festa v The Queen* (2001) 208 CLR 593 at [186] (Kirby J).

[181] *Thompson and Wran v The Queen* (1968) 117 CLR 313 at 317 (Barwick CJ and Menzies J); *Driscoll v The Queen* (1977) 137 CLR 517 at 533 (Gibbs J); see also *Festa v The Queen* (2001) 208 CLR 593 at [186] (Kirby J).

[182] Contrary to the respondent's submissions.

conclude that one of the handguns seen by Pascoe had been used in the shooting, possession of an item "of the same character" as that used in the crime is admissible even if it is not possible that that item was used.[183] It was relevant whether Bucca had the means to acquire an item of "the same character" as that used. Handguns are not items readily accessed. This use also tended to support the (disputed) evidence of M.

Probative value "substantially outweighed" any prejudicial effect

102. Proceeding on the basis that the Court below did – that Pascoe's evidence was evidence of discreditable conduct on the part of Bucca – it was necessary that its probative value "substantially outweigh" any prejudicial effect.[184] The Full Court was, with respect, correct to conclude Pascoe's evidence was admissible for the purposes identified. The generality of the appellant's evidence does not weaken the probative value of her evidence insofar as it is demonstrable of Bucca having *access* to handguns. Further, any resultant reduction in the probative value of her evidence as regards whether she saw the *particular* firearm used does not have the consequence that the evidence "cannot rationally affect" the strength of that inference.[185]

103. In its submissions with respect to Bucca the respondent has addressed the risk of the evidence being put to an impermissible use, and the directions given.[186] It is difficult to see what the prejudicial effect of this evidence was in the case against the appellant.

Part VII: TIME ESTIMATE

104. The respondent estimates that 2.5 hours will be required for the presentation of its oral argument (with respect to the appellant and Bucca in total).

Dated: 20 July 2016

A P Kimber SC
Director of Public Prosecutions
T: 08 8207 1668
F: 08 8207 1799
E: adam.kimber@sa.gov.au

F J McDonald
Counsel
T: 08 8207 1760
F: 08 8207 2013
E: fiona.mcdonald3@sa.gov.au

[183] *Thompson and Wran v The Queen* (1968) 117 CLR 313 at 316 (Barwick CJ and Menzies J). Many of the examples given by Barwick CJ and Menzies J – "a supply of gelignite, detonators, wires and batteries" – are necessarily items that had not been used in the offence charged, but merely items of the same character as those used.
[184] *Evidence Act 1929* (SA), s 34P(2)(a).
[185] Cf Bucca's Submissions at [80], which the appellant adopts: AS at [81].
[186] See Respondent's Submissions in *Bucca v The Queen* (A26 of 2016) at [100]-[101].

ANNEXURE A

Further relevant statutory provisions

Evidence Act 1929 (SA)

34P—Evidence of discreditable conduct

(1) In the trial of a charge of an offence, evidence tending to suggest that a defendant has engaged in discreditable conduct, whether or not constituting an offence, other than conduct constituting the offence (***discreditable conduct evidence***)—

(a) cannot be used to suggest that the defendant is more likely to have committed the offence because he or she has engaged in discreditable conduct; and

(b) is inadmissible for that purpose (***impermissible use***); and

(c) subject to subsection (2), is inadmissible for any other purpose.

(2) Discreditable conduct evidence may be admitted for a use (the ***permissible use***) other than the impermissible use if, and only if—

(a) the judge is satisfied that the probative value of the evidence admitted for a permissible use substantially outweighs any prejudicial effect it may have on the defendant; and

(b) in the case of evidence admitted for a permissible use that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue—the evidence has strong probative value having regard to the particular issue or issues arising at trial.

(3) In the determination of the question in subsection (2)(a), the judge must have regard to whether the permissible use is, and can be kept, sufficiently separate and distinct from the impermissible use so as to remove any appreciable risk of the evidence being used for that purpose.

(4) Subject to subsection (5), a party seeking to adduce evidence that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue under this section must give reasonable notice in writing to each other party in the proceedings in accordance with the rules of court.

(5) The court may, if it thinks fit, dispense with the requirement in subsection (4).

34Q—Use of evidence for other purposes

Evidence that under this Division is not admissible for 1 use must not be used in that way even if it is relevant and admissible for another use.

34R—Trial directions

(1) If evidence is admitted under section 34P, the judge must (whether or not sitting with a jury) identify and explain the purpose for which the evidence may, and may not, be used.

(2) If evidence is admitted under section 34P and that evidence is essential to the process of reasoning leading to a finding of guilt, the evidence cannot be used unless on the whole of the evidence, the facts in proof of which the evidence was admitted are established beyond reasonable doubt, and the judge must (whether or not sitting with a jury) give a direction accordingly.