IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No A39 of 2016

BETWEEN:

PEDRO PERARA-CATHCART

Appellant

and

THE QUEEN

Respondent

APPELLANT'S SUBMISSIONS

PART I: Certification as to internet publication

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

PART II: Concise statement of the issues presented by the appeal

2 This appeal raises the following two issues concerning the application of "the proviso" found in the common form appeal provisions:

a. *First*, can the proviso properly be applied to dismiss an appeal in a case where only *one* of the judges constituting the Full Court — and thus *not* "the Full Court" — considers that, despite the failure of the trial judge to give the required direction, no substantial miscarriage of justice has actually occurred?

b. *Secondly*, if the answer to the first question is "yes", did Stanley J err in applying the proviso in this case, where:

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i. the trial judge failed to give a direction that was required by law (s 34R of the *Evidence Act 1929* (SA) to be given;

ii. the verdict of the jury depended upon the assessment of the testimony of prosecution witnesses whose credibility and reliability was in issue;

iii. the omitted direction related to the permissible and impermissible use of evidence which the jury could have accepted as tending to corroborate or bolster the testimony of those prosecution witnesses; and

iv. in applying the proviso, Stanley J gave weight to the fact that the jury "must have accepted" the evidence of the two key prosecution witnesses, despite the fact that the jury's reasoning to that conclusion may have been influenced by the failure to give the requisite direction?

PART III: Certification as to application of s 78B of the *Judiciary Act 1903* (Cth)

3 The Appellant has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth) and considers that no such notice need be given.

PART IV: Citations of the judgments below

4 The citation of the judgment of the Full Court is **[2015] SASCFC 103**. The decision has not been reported. There is no judgment of the primary court, the primary decision being a decision of the District Court of South Australia, constituted by a Judge and jury.

PART V: Narrative statement of the relevant facts

The charges and the trial

5 The Appellant, Mr Perara-Cathcart, was charged on information with having committed two offences against the same complainant, K, namely rape (contrary to s 48 of the *Criminal Law Consolidation Act 1935* (SA) ("**the CLC Act**")) and threatening to kill (contrary to s 19(1) of the CLC Act). Following a trial by jury in the District Court of South Australia, the Appellant was convicted of both offences.

6 At the trial, evidence was led by the prosecution from K and her boyfriend, J. As the trial judge pointed out in his summing up, the jury could not convict the Appellant unless they

were satisfied beyond reasonable doubt of the truthfulness, accuracy and reliability of K. K's evidence was to the following effect:

a. The Appellant had met K and J, and a friend of K's, R, at a bus stop. J and the Appellant started talking about methylamphetamine and the Appellant had some with him in a small container.

b. Each of K, J and R travelled back to the house in which K and J lived. On arrival at the house, the Appellant supplied methylamphetamine to each of K, J and R, free of charge. All four of them consumed the drug from late in the afternoon, throughout the night until J was picked up by his uncle at around 11:30am.

c. The Appellant left with R "a little while later" and then a short time later the Appellant returned alone. The Appellant entered the house, then the accused injected K used methylamphetamine twice more, once by injecting and once smoking.

d. After this, in the spare bedroom, the Appellant started to touch K's leg. K told the Appellant not to do so. The Appellant became aggressive. He said he would give K a large amount of methylamphetamine to have a shower with him. She walked out of the spare bedroom and went to the *en suite* bathroom adjoining her own bedroom. The Appellant entered that bathroom and turned the shower on. K told the Appellant she would not shower with him. The Appellant then raped K by putting his hand down the back of her tights and inserting two of his fingers into her vagina. She left the *en suite* and went to the other bathroom. After the alleged rape, the Appellant threatened K's life, saying "I'm going to kill you" and "I know people who can kill you".

e. A short time later, J returned to the house. K left the Appellant and J talking and retreated to her *en suite*, where she had a shower. She then cut herself repeatedly using a razor. J and the Appellant left the house. J later returned alone, at which time K made a complaint to him that the Appellant "had touched me and raped me".

f. K and J saw the Appellant on numerous occasions over the next week. They travelled with the Appellant in his ute. J "went off on a few occasions to do things for" the Appellant. K slept in the Appellant's presence.

g. Later in the week, J borrowed the Appellant's ute. J damaged the ute, which caused an argument between him and the Appellant. Police attended and arrested J for driving while disqualified. K was at the scene of J's arrest and was spoken to by police. At this point K told the police that the Appellant had inserted his fingers into her vagina.

7 J gave evidence that, in the bathroom, K had told him that the Appellant had "raped her" and "chased her around the house", that she had locked herself in the bathroom, and "she didn't tell me exactly what happened, but, yeah, I assumed". J gave evidence that he saw the Appellant "a few times" over the next week. He later asked the Appellant to provide him drugs on credit.

8 J's evidence was that his drug use — "being out of my mind on drugs" — had affected his memory of events. In evidence, K denied that her memory was affected at all by her drug use, but when explaining to the police why she was vague in her account, she had said that she was "off her face".

9 The Appellant elected not to give evidence. He answered questions in a video-recorded police interview, which was played to the jury. He accepted that he had used cannabis (which he gave them) and methylamphetamine with J and K, but denied dealing in either drug. He said that J had provided the methylamphetamine which they had used together. The Appellant admitted being at K and J's house, but denied ever being there alone with K. He denied the allegation that he had injected K with methylampthetamine. He denied that he had touched or threatened K.

10 During the cross-examination of K and J, counsel put to them differences and additions between what they had said to police originally, what they later said to police, and what they had said in their evidence. In his closing address to the jury, defence counsel pointed to inconsistencies that potentially bore on the reliability and truthfulness of the evidence given by K. He pointed out that K and J continued to socialise with the Appellant for the following week. He pointed to inconsistencies between K's evidence of the rape, her evidence of the report of the rape to J and his evidence of what she reported to him. It was submitted that the inconsistencies were significant, that both K and J were very unreliable witnesses.

11 In the course of the trial judge's Summing Up, only a limited direction was given on the topic of the use the jury could make of the Appellant's use and alleged dealing in drugs.[1] The direction is set out in full in [25] below and in the judgment of Gray J in the Full Court.[2]

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1 Summing Up, p 8.

2 *R v Perara-Cathcart* [2015] SASCFC 103 at [44].

The Appeal to the Full Court

12 The Appellant appealed against his conviction to the Full Court. The arguments advanced on behalf of the Appellant in the Full Court included arguments to the effect that:

a. evidence concerning the Appellant's possession and use of methylamphetamine and cannabis, and the evidence of K and J regarding the Appellant being a dealer in both methylamphetamine and cannabis, should not have been admitted; and

b. the trial judge's directions in relation to the ways in which the jury must not use, and might properly use, that evidence were inadequate having regard to the requirements of ss 34P and 34R of the *Evidence Act*.

13 All of the judges in the Full Court (Kourakis CJ, Gray and Stanley JJ) accepted that the evidence of the Appellant's possession and use of, and dealing in, drugs was admissible.[3] In Kourakis CJ's summary, the evidence was admissible to show:[4]

a. how the Appellant, who was previously unknown to K, came to be in her home;

b. why the Appellant was allowed the close contact with K which gave him the opportunity to commit the alleged rape;

c. why K and J continued to allow the Appellant access to their home after he had allegedly raped K; and

d. why neither K nor J called the police shortly after the commission of the alleged rape.

14 In relation to the argument concerning the directions to be given in respect of drugs, the reasoning of the three judges constituting the Full Court diverged.

15 Kourakis CJ observed that the trial judge had not given the jury:[5]

a. any directions on the proper use of the evidence of the Appellant's cannabis possession;

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3 *R v Perara-Cathcart* [2015] SASCFC 103 at [3]-[4] and [12]-[14] per Kourakis CJ, at [43] per Gray J and at [55] per Stanley J.

4 *R v Perara-Cathcart* [2015] SASCFC 103 at [3].

5 *R v Perara-Cathcart* [2015] SASCFC 103 at [16].

b. any directions on the proper use of K's testimony that the Appellant had spoken to her about delivering cannabis to others; or

c. any direction that the evidence of the possession of, or even trading in, cannabis could not be used as a basis from which to reason that the defendant trafficked or was more likely to trade in methylamphetamine.

16 Kourakis CJ held that the trial judge had erred in failing to give directions as required by s 34R of the *Evidence Act*:[6]

> The Judge was bound by s 34R of the *Evidence Act* to direct the jury that the only proper use of the evidence was in its consideration of whether the prosecution had excluded the possibility that the defendant's association with K and J was for the limited purpose of procuring cannabis from J.

17 The Chief Justice held that, because "[t]he prosecution case depend[ed] on the acceptance of the testimony of K and J" and "[t]his Court is not in a position to evaluate their credibility on the face of the transcript", the proviso could not be applied.[7] His Honour would have allowed the appeal, set aside the convictions and remitted the matter to the District Court for retrial.[8]

18 Gray J held that there had been no failure to give a direction as required by s 34R of the *Evidence Act*.[9] His Honour therefore supported an order that the Appellant's appeal be dismissed, without considering the application of the proviso. Gray J did not consider whether, assuming that the error of law identify by Kourakis CJ was established, it could nevertheless be concluded that no substantial miscarriage of justice had actually occurred.

19 Stanley J agreed with Kourakis CJ that the trial judge erred in failing to direct the jury as required by s 34R of the *Evidence Act*.[10] However, Stanley J found that his "own independent assessment of the whole of the evidence, *coupled with the fact that the jury in returning guilty verdicts must have accepted the evidence of K and J*", satisfied him that no substantial miscarriage of justice had actually occurred. Stanley J thought it "entirely implausible that K and J would concoct the allegations of rape and a threat to kill in order to conceal their drug use, J's negligent driving, the fact he was unlicensed at the time of the motor vehicle

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6 *R v Perara-Cathcart* [2015] SASCFC 103 at [17].
7 *R v Perara-Cathcart* [2015] SASCFC 103 at [18].
8 *R v Perara-Cathcart* [2015] SASCFC 103 at [18].
9 *R v Perara-Cathcart* [2015] SASCFC 103 at [47].
10 *R v Perara-Cathcart* [2015] SASCFC 103 at [56].

accident and the allegation that he trafficked in drugs", and that "[t]he record of their evidence, which was the subject of extensive cross-examination, [was] consistent and credible". His Honour concluded that "[t]he absence of the required direction as to the permissible use of the evidence of the appellant's drug use could not possibly have resulted in a substantial miscarriage of justice". On that basis, Stanley J supported an order that the appeal be dismissed.[11]

20 The Full Court made orders dismissing the Appellant's appeal. It did so on the basis that each of Gray J and Stanley J, for divergent reasons, had supported the making of that order.

21 Thus a majority of the Full Court (Kourakis CJ and Stanley J) held that the failure of the judge correctly to direct the jury with respect to the evidence of the Appellant's involvement with drugs constituted an error of law. The reasoning of Stanley J (and Stanley J alone) as to the application of the proviso was, effectively, the dispositive reasoning in the Full Court.

PART VI: Argument

Error of law in failure to direct in accordance with s 34R of the *Evidence Act* (notice of contention)

22 Sections 34O and 34P of the *Evidence Act* are a statutory modification of the common law with respect to the conditions for admissibility of "evidence tending to suggest that a defendant has engaged in discreditable conduct, whether or not constituting an offence". They permit certain evidence of discreditable conduct to be admitted, including in some circumstances where the common law would have required its exclusion.

23 Section 34R imposes a statutory duty upon a judge to give to give directions. Section 34R is imperative and applies whenever evidence is admitted under s 34P. The duty to give those directions was the condition upon which the legislature saw fit to soften the strict common law rules regarding the admission of such evidence.[12] Compliance with the requirement to give adequate directions in accordance with s 34R, both explaining the proper use(s) and warning against improper uses of the evidence of discreditable conduct, was both necessary as a matter of law and important as a matter of practicality in avoiding miscarriage of justice.

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[11] *R v Perara-Cathcart* [2015] SASCFC 103 at [65], [73]-[74].

[12] See, eg, *Hoch v The Queen* (1988) 165 CLR 292; *Pfennig v The Queen* (1995) 182 CLR 461; *Phillips v The Queen* (2006) 225 CLR 303.

24 The requirement of s 34R, that the trial judge both *identify* and *explain* "the purpose for which the evidence may, and may not, be used", required, at the very least:

a. a clear identification and explanation of the (or each) permissible use of the evidence;

b. a clear direction that the jury was *not* to use the evidence for *any purpose other than* the identified and explained permissible use(s); and

c. a clear direction that the jury not use the evidence for the "impermissible use" identified in s 34P(1), *viz*, "to suggest that the defendant is more likely to have committed the offence because he or she has engaged in discreditable conduct".

25 The whole of the direction given by the trial Judge as to the use that could properly be made of the evidence of the Appellant's drug use and drug dealing, and as to the impermissible uses of that evidence, was in the following terms:[13]

> I need to give you some warnings, members of the jury, there is a number of short separate topics under topic No.16. There are a number of warnings I need to give you arising from the evidence. Although I propose to deal with them under one heading, they are separate warnings on different but sometimes interrelated topics.
>
> The first is drug use by the accused. There is no shortage of evidence in this case to suggest that the accused was a drug user and some evidence, although contested, that he was a drug dealer. *Those particular topics have a relevance on the evidence because they were part of the unfolding of the prosecution case*, but I warn you against the misuse of that evidence. It would be quite wrong of you to say 'Well, the accused is a drug dealer, he must be guilty of these offences and we will find him guilty' or 'he is guilty because he is the sort of bloke who would commit these offences and we will find him guilty'. That is a completely wrong way to approach the case. *That topic has a particular relevance, it is intertwined with the events that occurred, but you must not reason in the way in which I have just suggested.*

26 The italicised portions of this passage represent the *only* directions given about the permissible use of the evidence. They offered virtually no guidance at all as to *how* the evidence could actually be used. The directions did not serve clearly to explain to a lay jury (or to anyone for that matter) what proper use *could* be made of the "topics" of the Appellant's drug use and alleged dealing. Directions which merely refer to "background" or "context" or "relationship" have consistently been deprecated as uninformative to a jury.[14]

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[13] Summing Up, p 8.

[14] See, eg, *Tully v The Queen* (2006) 230 CLR 234 at 277 [141]-[142] and 279 [147] per Callinan J (Heydon and Crennan JJ agreeing); *R v Nieterink* (1999) 76 SASR 56 at 66 [46] and 73 [84] per Doyle CJ (Perry and Mullighan

The general reference to the "topic" of "drug use by the accused" having "a relevance" as "part of the unfolding of the prosecution case" is of the same character.

27 More importantly, the negative aspect of the direction — the aspect concerning *impermissible* use — only served to exclude from the jury one extremely blunt, syllogistic, mode of propensity reasoning. There were three major deficiencies in that direction.

28 First, the jury was never explicitly told that they could use the evidence for a particular identified purpose *but for no other purpose*. Such a direction is required by the common law when evidence disclosing a criminal propensity is admitted for a reason other than reliance on propensity,[15] and is part of the exhaustive direction required by s 34R(1).

29 Secondly, the direction did not warn the jury against reasoning to the effect that because (if they so found) the accused was a drug dealer, it was *more likely* that he committed the offences (as opposed to "must be guilty of these offences") — it did not caution against reasoning *circumstantially* simply from the Appellant's bad character, only syllogistically. In other words, the direction given to the jury did not even warn the jury against *the very kind of reasoning* that is expressly prohibited by s 34P.

30 Nor did the direction that was given warn the jury against a line of reasoning to the effect that, if the jury was satisfied that the accused was a user of cannabis and methylamphetamine, and/or a dealer in cannabis, he was therefore more likely to have been a dealer in methylamphetamine. The directions plainly did *not exclude* a mode of reasoning whereby the jury might reason from the undisputed evidence of the Appellant's possession of cannabis and methylamphetamine (and the disputed evidence of his dealing in cannabis) to the greater likelihood that he was a dealer in methylamphetamine.[16] Whether the accused was a dealer in methylamphetamine was, of course, an important issue in the case and one that bore directly upon their acceptance of the testimony or K and J.

31 Gray J in dissent in the Full Court appeared to suggest that the directions were sufficient when read in the context of the summing up as a whole.[17] It is unclear to which aspects of the summing up his Honour was referring. The trial judge referred to aspects of the evidence relating to methylamphetamine use by the appellant and K,[18] and separately to an assertion

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JJ agreeing); *Maiolo v The Queen* (2013) 117 SASR 1 at 36-9 [107]-[113], [116] per Peek J (Kourakis CJ and Stanley J agreeing).

15 *BRS v The Queen* (1997) 191 CLR 275 at 305 per McHugh J.

16 *R v Perara-Cathcart* [2015] SASCFC 103 at [17] per Kourakis CJ.

17 [2015] SASCFC 103 at [46].

18 Summing Up, pp 16-18.

by K in evidence,[19] and a submission of the prosecutor,[20] that the appellant was as drug dealer. But none of those passages contained any reference to or warning against impermissible uses of evidence, and were not linked back to earlier direction. The later passages relied upon by Gray J did nothing to improve the position.

32 The Respondent's contention that the directions given by the trial judge satisfied the requirement in s 34R(1) of the *Evidence Act* should be rejected.

The "Full Court" did not hold that, given the error accepted by a majority of the Court, no miscarriage of justice had actually occurred, with the consequence that s 353(1) of the CLC Act required that the appeal be allowed (ground of appeal (b))

33 The common form criminal appeal provisions recognise that there may be cases where, despite an error of law or miscarriage of justice, a conviction may safely be permitted to stand. But this is the exception rather than the rule: the proviso is "a qualification to an otherwise generally expressed command to allow an appeal".[21]

34 The proviso is expressed, in terms, to apply only where "*the Full Court*" which "is of the opinion that the point raised in the appeal might be decided in favour of the appellant" nonetheless considers that "no substantial miscarriage of justice has actually occurred". Its operation is thus made to depend upon the state of mind of "the Full Court". The application of the proviso necessarily involves *an act of the Full Court*; it is *not* merely a matter of an individual judge forming his or her own opinion for the purposes of that particular judge deciding what orders to support.

35 Section 353(1) of the CLC Act is not expressed in terms that permit a single judge, sitting as a member of a Full Court, to dismiss an appeal (or to support orders of the Full Court dismissing an appeal) merely on the basis that *that particular judge* considers that no substantial miscarriage of justice has actually occurred.

36 "Full Court" in the CLC Act as has the same meaning as in the *Supreme Court Act 1935* (SA), namely "the Supreme Court consisting of … not less than three judges".[22] A state of

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[19] Summing Up, p 25.
[20] Summing Up, p 20.
[21] *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J; *Weiss v The Queen* (2005) 224 CLR 300 at 307 [15] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ; *AK v Western Australia* (2008) 232 CLR 438 at 456 [55]; *Gassy v The Queen* (2008) 236 CLR 293 at 301 [19].
[22] CLC Act, s 5(1); *Supreme Court Act*, s 5(1).

mind may be attributed to "the Full Court" if, but only if, it is formed unanimously or by a majority of the judges constituting the Full Court: s 349 of the CLC Act.

37 This Court in *Hepples v Federal Commissioner of Taxation* held that, in particular contexts, it may be appropriate to determine the orders to be made by the Court otherwise than merely by tallying up the number of judges who would support particular orders for varying reasons.[23] In that case, the Court considered "what order [it] should make when a majority would dismiss the appeal but for discrepant reasons and each of those reasons is rejected by a majority differently constituted".[24] The Court unanimously accepted that the appropriate order for the Court to make in the circumstances of that particular case (which involved an appeal against answers given to questions of law reserved) was to *allow* the appeal. The decision and reasoning in *Hepples* demonstrate that there is no universal rule that would preclude the application of the proviso strictly in accordance with its terms. And if there is no such rule, there is little reason to strain against the plain meaning of the language used in s 353(1) of the CLC Act.

38 Moreover, statutory provisions providing that, in particular circumstances, the orders to be made by a multi-member court are to be determined in a particular way are not uncommon.[25]

39 In most contexts, determinations of a Full Court are expressed through the making of orders. In most contexts, the Full Court may make orders which are supported by either all or a majority of the judges constituting the Full Court, but for varying reasons.[26] But s 353(1) of the CLC Act is logically anterior to the making of any orders by the Full Court: it operates so as to fix a *condition* for the power (and duty) to make particular orders. And s 353(1) attaches significance to what *the Full Court* considers.

40 On the proper construction of s 353(1) of the CLC Act, then, the proviso is to be applied if, but only if, *the Full Court* (ie, a majority of the judges constituting the Full Court) holds that:

a. "[a] point raised in the appeal might be decided in favour of the appellant"; and

b. despite that, it (ie, the Full Court) "considers that no substantial miscarriage of justice has actually occurred".

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[23] (1992) 173 CLR 492.

[24] (1992) 173 CLR 492 at 550 per curiam.

[25] See, eg, CLC Act, s 357(4); *Judiciary Act 1903* (Cth), s 23(2); *Federal Court of Australia Act 1976* (Cth), s 16; *Supreme Court Act 1970* (NSW), s 45(2).

[26] For examples, see S G Gageler and B K Lim, "Collective Irrationality and the Doctrine of Precedent" (2014) 38 *Melbourne University Law Review* 525 at 529-32.

41 In the present case:

a. a majority of the Full Court (Kourakis CJ and Stanley J) (Gray J dissenting on this point) held that there was an error of law and/or a miscarriage of justice in that the trial Judge had failed to direct the jury as required by law, such that "a point in the appeal [should] be decided in favour of the appellant"; but

b. only one judge (Stanley J), and not *the Full Court*, had held that he "considered that no substantial miscarriage of justice had actually occurred".

42 In circumstances where only *one* judge supports the application of the proviso, it cannot be said that *the Full Court* considers that (*given* that it was "of the opinion that the point raised in the appeal might be decided in favour of the appellant") "no substantial miscarriage of justice has actually occurred".

43 Thus, the conditions for the application of the proviso did not arise in the present case. The orders which the Full Court should properly have made in the circumstances were orders allowing the appeal, quashing the convictions and directing a new trial.[27]

44 It should not be thought especially surprising that the proviso operates in this way. It is an exceptional provision that allows an appeal to be dismissed in certain circumstances, even where an accused has not been tried in accordance with the requirements of law — in this case, a clear requirement imposed by statute. Indeed, it would be surprising if, a majority of the Full Court having held that the Appellant's convictions involved an error of law and thus a miscarriage of justice, his appeal should nevertheless be dismissed because just *one* of the judges constituting the Full Court considered that, *that being so*, nevertheless no substantial miscarriage of justice had actually occurred. Where there is a breach of a statutory requirement as to a direction, the trial is irregular and the accused has not had the trial to which he was entitled.[28]

45 Any suggestion that Gray J's judgment can be counted as a "vote" against the application of the proviso is untenable. Gray J held that there was no error of law and, *on that premise*, that there was no miscarriage of justice. But that was a dissenting view. His Honour was not obliged to consider — and *did not in fact decide* — whether, *given* the error of law which

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[27] CLC Act, s 353(2).

[28] See, eg, *R v RAQ* [2014] QCA 261 at [24]-[25] per Gotterson JA (Holmes JA and Mullins J agreeing); *Wilde v The Queen* (1988) 164 CLR 365 at 371-2 per Brennan, Dawson and Toohey JJ.

the Kourakis CJ and Stanley J held to have been established, it could nevertheless be said that no substantial miscarriage of justice had actually occurred.

The disposition of the appeal if the argument on ground (b) is accepted

46 The ground in respect of which submissions have been made above (ground (b)) raises a point of principle of general importance in relation to the application of the proviso by intermediate criminal appellate courts. It is respectfully submitted that this Court should determine that issue first.

47 If the above submissions regarding the orders to be made when there is no majority in favour of applying the proviso are accepted, it follows that the Full Court erred in the present case by making the orders which it did. The Full Court instead should have ordered that the appeal be allowed, quashed the appellant's convictions and ordered a retrial. This Court should substitute orders to that effect. In that event, it is submitted that it will be unnecessary to consider the Appellant's remaining ground of appeal, because his success on the remaining ground could not result in the making of any more favourable order.

48 On the other hand, if this Court determines that the Full Court was correct to dismiss the appeal on the basis that two of its members favoured that order, albeit for different reasons, then it will be necessary for this Court to consider the Appellant's remaining ground of appeal. That ground of appeal complains of error in Stanley J's reasoning, because there is a sense in which Stanley J's "vote" can be regarded as having been dispositive of the appeal to the Full Court. But it is important to bear in mind that Stanley J's reasons are not the reasons of the Full Court and his reasoning does not really stand as the reasoning for the order that was made by the Full Court. Stanley J's reasoning as to the application of the proviso did not attract the support of any other judge in the Full Court. It follows that, if this Court finds it necessary to address the question of whether as a matter of substantive reasoning the proviso should have been applied in this case, no deference is due to Stanley J's findings or conclusions in determining that question.

The proviso should not have been applied in this case (ground of appeal (a))

<u>The proviso is not to be applied by giving weight to a verdict of the jury which may have been affected by the erroneous failure to direct in accordance with law</u>

49 The resolution of the central issue in the case (whether the Appellant engaged in the charged conduct) depended upon the jury's assessment of the credibility and reliability of the

evidence of J and, especially, K. That assessment included considering the likelihood of the truth of K's evidence in the light of the other evidence admitted at the trial, including the evidence that the Appellant had engaged in discreditable conduct. Given the capacity of that evidence to affect the jury's assessment of the critical issue, it cannot be concluded that, despite the failure of the trial judge to give directions expressly required by law, no substantial miscarriage of justice has actually occurred.

50 The consequence of the failure to give the requisite direction was that impermissible modes of reasoning (those identified in [29] and [30] above) were not excluded from the jury and which was thus effectively left open to the jury.

51 As Kourakis CJ rightly pointed out:

> The Judge did not direct the jury that the evidence of the possession of, or even trading in, cannabis could not be used as a basis from which to reason that the defendant trafficked or was more likely to trade in methylamphetamine. ...

The Appellant's dealing in methylamphetamine was disputed. It was potentially important evidence precisely because it provided a context which made it plausible that the Appellant had the opportunity to commit the alleged offences, and tended to help explain why neither K nor J took steps to report them immediately. So, if the jury *did* reason in the impermissible way identified by Kourakis J, it had potent force as a means of supporting — that is, corroborating — a critical aspect of the evidence of K, and thus a critical aspect of the prosecution case.

52 Further, the trial judge's statement that the evidence concerning whether the Appellant was a drug dealer had "particular relevance" would naturally have been understood as an invitation to the jury to focus on that issue.

53 It could not, and cannot, be safely concluded that the jury *did not in fact* reason in the impermissible way identified by Kourakis CJ. Indeed, it is considerably *more* likely that the jury would have engaged in that particular mode of impermissible reasoning, than that they would have engaged in the extremely blunt form of propensity reasoning against which they were actually warned (ie, simply because the Appellant was a drug dealer, therefore he must have committed the charged acts).

54 The jury could quite easily have understood that the "purpose of the evidence" was to give a more complete contextual picture of the events described in the evidence of K (ie, the permissible use), without also realising that they *must not* reason that (for example) the

accused, being a person who possessed and dealt in cannabis, was *more likely* to have been a dealer in methylamphetamine. (That was, of course, important in any assessment of K's evidence because an important aspect of her account, which made more plausible her allegations as to the charged offences, was that the applicant was a methylamphetamine dealer.) In the absence of directions separating the two modes of reasoning and warning against employing the impermissible reasoning, the two modes of reasoning may not even have been separately identified by the jury, and may well have merged in their consideration of the evidence.[29]

55 Moreover, the trial judge's express warning against one particular mode of propensity reasoning (the syllogistic mode of reasoning identified at [29] above) was apt to convey to the jury an implication that the other mode of propensity reasoning expressly prohibited by s 34P(1) — reasoning that the Appellant was *more likely* to have committed the charged offences — *was* properly open to them. Nothing in the direction given by the trial judge would have conveyed to the jury that they *must not* reason that the accused, being a drug dealer, was *more likely* to have raped K. The jury was directed only that they must not use that *single* item of evidence, alone, to reach that conclusion.

Relevant recent authority in this Court concerning the application of the proviso

56 In *Baini v The Queen*, French CJ, Hayne, Crennan, Kiefel and Bell JJ said:[30]

> That the jury returned a guilty verdict may, in appropriate cases, bear upon the question. But, at least in cases like the present where evidence has wrongly been admitted at trial and cases where evidence has wrongly been excluded, the Court of Appeal could not fail to be satisfied that there has been a substantial miscarriage of justice unless it determines that it was not *open* to the jury to entertain a doubt as to guilt. Otherwise, there has been a substantial miscarriage of justice because the result of the trial *may* have been different (because the state of the evidence before the jury would have been different) had the error not been made.

57 In this case, the prosecution case turned ultimately upon the jury's assessment of the evidence of J and, especially, K. However, the jury necessarily made that assessment in the light of directions which a majority in the Full Court correctly held to be inadequate. It was not a case where "the state of the evidence before the jury would have been different", but it *was* a case where the *uses* of the evidence left open to the jury would have been different. It

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[29] Although it is not entirely clear, the third sentence of [47] of Gray J's reasons the second sentence of [67] of Stanley J's reasons might be read as suggesting that Gray and Stanley JJ in fact engaged in the impermissible line of reasoning identified by Kourakis CJ at [17].

[30] (2012) 246 CLR 469 at 481 [32]. (Emphasis in original.)

is simply impossible to be confident that the jury did not use the evidence in either or both of the impermissible ways that were left open to them.

58 In *Reeves v The Queen*, French CJ, Crennan, Bell and Keane JJ said:[31]

> The record of the trial, upon which the appellate court bases its conclusion of guilt, includes the fact of the verdict. Where, as here, the legal error at the trial was a wrong direction relating to an element of liability, *the significance of the verdict was to be assessed in light of the capacity of the misdirection to have led the jury to wrongly reason to guilt.*

59 Contrary to the reasoning apparently adopted by Stanley J,[32] there was no sensible basis for distinguishing between a "wrong direction" and a legal error consisting of a failure to give a direction that was required by law to be given, which left open impermissible reasoning and impermissible uses of evidence, or which left the jury without the directions concerning the use of evidence which was required by legislation.

60 In *Lindsay v The Queen*, Nettle J observed:[33]

> What was said in *Weiss* must now be understood in light of what has since been observed in *Baini*[34] (albeit in the context of the application of s 276 of the *Criminal Procedure Act 2009* (Vic)) and in *Pollock v The Queen*[35] (in relation to the common form proviso). That is to say, where there has been a miscarriage of justice the consequence of an error in the conduct of a criminal trial, a court of criminal appeal cannot fail to be satisfied that there has been a substantial miscarriage of justice unless it determines that, *in the absence of the error*, it would not have been open to the jury to entertain a reasonable doubt as to guilt. "Nothing short of satisfaction beyond reasonable doubt will do". *A court of criminal appeal "can only be satisfied, on the record of the trial, that an error of the kind which occurred in this case did not amount to a 'substantial miscarriage of justice' if the ... court concludes from its review of the record that conviction was inevitable"* [36]. And by "inevitable" what is meant is that, *assuming the error had not been made, the result was bound not to have been any different for the jury if acting reasonably on the evidence properly before them and applying the correct onus and standard of proof*[37].

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31 (2013) 304 ALR 251 at 261 [50] per French CJ, Crennan, Bell and Keane JJ.
32 Contra *R v Perara-Cathcart* [2015] SASCFC 103 at [66] per Stanley J.
33 (2015) 255 CLR 272 at 301-2 [86]. (Emphasis added; footnotes in original.)
34 (2012) 246 CLR 469 at 480-1 [28]-[32].
35 (2010) 242 CLR 233 at 252 [70].
36 *Baini v The Queen* (2012) 246 CLR 469 at 481 [33].
37 *Baini v The Queen* (2012) 246 CLR 469 at 481 [33].

61 Nettle J, when applying the proviso in *Lindsay*, then framed the question as being whether "on the view of the evidence most favourable to the appellant, the jury could not have been left with a reasonable doubt".[38]

62 Consistently with this, in *Filippou v The Queen*, French CJ, Bell, Keane and Nettle JJ said:[39]

> By "substantial miscarriage of justice" what is meant is that *the possibility cannot be excluded beyond reasonable doubt that the appellant has been denied a chance of acquittal which was fairly open to him or her*[40] or that there was some other departure from a trial according to law that warrants that description[41].

63 For the reasons that follow, it is respectfully submitted that when this approach is applied to the present case, it cannot be said that the possibility is excluded beyond reasonable doubt that the Appellant has been denied a chance of acquittal which was fairly open to him.

Errors in Stanley J's reasoning in applying the proviso

64 The basic steps in the reasoning of Stanley J in relation to the proviso are set out in [19] above. In the course of his reasoning on the proviso, Stanley J said:[42]

> The very fact that the jury did return guilty verdicts cannot be discarded from the appellate court's assessment of the whole record of trial. As the plurality in *Cesan* noted, in many cases where the proviso is to be considered, the fact that the jury returned a guilty verdict will indicate rejection of any explanation proffered by the accused in evidence.

65 In the second sentence of this passage, Stanley J identified one way in which the fact of a jury verdict of guilty itself may, in certain cases, properly be used in reasoning with respect to the proviso.[43] That is plainly right.[44] But in the present case, the Appellant did not give evidence, so the jury's verdict could not be used in that way.

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38 (2015) 255 CLR 272 at 229 [87].
39 (2015) 256 CLR 47 at 55 [15]. (Emphasis added; footnotes in original.)
40 *Pollock v The Queen* (2010) 242 CLR 233 at 252 [70].
41 *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 102-3 [22]-[23] per French CJ, Gummow, Hayne and Crennan JJ; see, eg, *AK v Western Australia* (2008) 232 CLR 438 at 456-7 [57]-[59] per Gummow and Hayne JJ and at 482 [109]-[110] per Heydon J.
42 *R v Perara-Cathcart* [2015] SASCFC 103 at [72].
43 Another example of such a case is that which was identified by the plurality in *Lindsay v The Queen* (2015) 255 CLR 272 at 290 [49], namely that, if provocation was left to the jury when the evidence did not raise provocation were correct, then the inadequacy of the directions on that topic would not occasion a miscarriage of justice.
44 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [43].

66 Although his Honour engaged in no further analysis of how "the fact that the jury returned a guilty verdict" might be used in the present case, Stanley J's reasons[45] make clear that he *did* have regard to "the fact that the jury in returning guilty verdicts must have accepted the evidence of K and J" as one of the principal matters supporting his application of the proviso.

67 Stanley J made no finding that the jury *could not in fact have* reasoned impermissibly in relation to the use of the evidence concerning drugs. Nor, for the reasons advanced in [49] to [55] above, could such a finding properly have been made.

68 It is of course true that the jury "must have"[46] accepted the evidence of K and J in order to deliver the verdicts of guilty. However, in reaching those verdicts, the jury might well have used the very improper reasoning that should have been the subject of the directions that were not given. To reason from the fact of the jury verdicts to the further conclusion that the failure to give the requisite directions had led to "no substantial miscarriage of justice" was therefore unsound.

69 Stanley J considered that the record (ie, the transcript) of the evidence of K and J "was consistent and credible". There are two deficiencies in this aspect of Stanley J's reasoning.

70 First, in making an assessment of the evidence of J and K, it was necessary to consider not only whether their evidence was "consistent and credible" but also whether it was *reliable*.[47] Stanley J did not address the distinct question of the reliability of K's evidence "in the sense of its capacity to establish the commission of the offence to the criminal standard".[48]

71 Secondly, the ultimate question was not merely whether K's evidence was "consistent and credible" (still less whether it appeared, from the face of the transcript alone, to be so) but whether, upon all the evidence, it was *inevitable* that the jury, *if properly instructed*, must have convicted the Appellant. The Full Court would have to be certain that the jury must reject the Appellant's statement in his recorded interview as a reasonable possibility but must also, even if that account were rejected, find that the evidence of K established the charge beyond reasonable doubt; that is, that K's evidence was both credible and reliable despite inconsistencies in her evidence, admitted drug use, the delay in reporting it to police, and

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[45] *R v Perara-Cathcart* [2015] SASCFC 103 at [73].
[46] *R v Perara-Cathcart* [2015] SASCFC 103 at [73]; see also at [71].
[47] The defence submission at trial was summarised by the Trial Judge as being that K was "either ... untruthful or ... simply not reliable, or both": see Summing Up, pp 21-2.
[48] *Douglass v The Queen* (2012) 86 ALJR 1086 at 1090 [15].

her continuing contact with the Appellant after it was said to have occurred. That conclusion could not safely be reached from a consideration of the record alone.

72 The only way the conclusion of guilt beyond reasonable doubt could be reached by an appellate court was by engaging in that form of circular reasoning involved in giving weight to findings actually made by a jury that was *not* properly instructed, in circumstances where it was simply impossible to know whether their reasoning and conclusion may have been affected had the required directions been given. Once it is accepted that the jury *might* have used the evidence concerning drugs impermissibly, any reasoning that relies upon the *actual* decision of the *improperly* instructed jury to make up the difference between evidence that was "consistent and credible" on the face of the transcript and evidence which inevitably proved the Appellant's guilt beyond reasonable doubt, is flawed.

73 Finally, as noted in [59] above, Stanley J appears to have drawn a critical distinction between a "wrong direction" given, on the one hand, and an unlawful *failure* to give a direction that was required by law, on the other.[49] The distinction is unsound in principle. The proviso depends not upon *a priori* characterisation of an error as a wrong direction or an omission to give a direction but on whether, in light of the error, the possibility cannot be excluded beyond reasonable doubt that the appellant has been denied a chance of acquittal which was fairly open to him or her, such that it cannot be said that "no substantial miscarriage of justice has actually occurred".

74 For these reasons, the approach of Stanley J involved error of principle in the application of the proviso. Kourakis CJ was correct to conclude:[50]

> The prosecution case depends on the acceptance of the testimony of K and J. This Court is not in a position to evaluate their credibility on the face of the transcript. The proviso cannot be applied.

75 It may of course be accepted that not every case of misdirection or non-direction will necessarily lead to the conclusion that the proviso cannot be applied. Whether it does "requires consideration of the issues at the trial".[51] The proviso can be applied whenever the misdirection or omitted direction relates to a matter that may reasonably be thought to have had no bearing upon the reasoning of the jury towards guilt.[52] That is not this case.

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[49] *R v Perara-Cathcart* [2015] SASCFC 103 at [66] per Stanley J.
[50] *R v Perara-Cathcart* [2015] SASCFC 103 at [18].
[51] *Reeves v The Queen* (2013) 304 ALR 251 at 262 [51] per French CJ, Crennan, Bell and Keane JJ.
[52] *Reeves v The Queen* (2013) 304 ALR 251 at 262-3 [52]-[58] per French CJ, Crennan, Bell and Keane JJ.

PART VII: Applicable legislative provisions

76 The following legislative provisions are relevant to the issues in the application:

- *Evidence Act 1929* (SA), ss 34O, 34P, 34R, 34S
- *Criminal Law Consolidation Act 1935* (SA), ss 5, 353
- *Supreme Court of South Australia Act 1935* (SA), s 5

77 Copies of the relevant provisions are included as an Appendix to these Submissions.

PART VIII: Orders sought

78 The Appellant seeks the following orders:

1. Appeal allowed.

2. Set aside the orders of the Full Court of the Supreme Court of South Australia made on 30 July 2015 and, in lieu thereof, order that:

   a. the appeal be allowed;
   b. the Appellant's convictions be quashed; and
   c. there be a new trial.

6 October 2016

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Hanson Chambers

Counsel for the Appellant

APPENDIX — Relevant statutory provisions

Evidence Act 1929 (SA), ss 34O 34P, 34R, 34S

Part 3—Miscellaneous rules of evidence

Division 3—Admissibility of evidence showing discreditable conduct or disposition

34O—Application of Division

(1) This Division applies to the trial of a charge of an offence and prevails over any relevant common law rule of admissibility of evidence to the extent of any inconsistency.

(2) This Division does not apply to—

(a) evidence adduced pursuant to section 18; or

(b) evidence of the character, reputation, conduct or disposition of a person as a fact in issue.

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).

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.

34S—Certain matters excluded from consideration of admissibility

Evidence may not be excluded under this Division if the only grounds for excluding the evidence would be either (or both) of the following:

(a) there is a reasonable explanation in relation to the evidence consistent with the innocence of the defendant;

(b) the evidence may be the result of collusion or concoction.

...

Criminal Law Consolidation Act 1935 (SA), ss 5 (extract), 349, 352 (extract), 353 (extract)

Part 1—Preliminary

...

5—Interpretation

(1) In this Act, unless the contrary intention appears—

...

Full Court has the same meaning as in the *Supreme Court Act 1935*;

...

Part 11—Appellate proceedings

...

Division 1—Preliminary

...

349—Court to decide according to opinion of majority

The determination of any question before the Full Court under this Act shall be according to the opinion of the majority of the members of the Court hearing the case.

...

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.

...

Supreme Court Act 1935 (SA), s 5 (extract)

Part A1—Preliminary

...

5—Interpretation

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

...

Full Court means the Supreme Court consisting of—

(a) not less than three judges; or

(b) not less than 2 judges if—

(i) 3 judges are not available to sit in the Full Court; or

(ii) the Chief Justice has made a determination under—

(A) section 357(3) of the *Criminal Law Consolidation Act 1935*; or

(B) section 42(2a) of the *Magistrates Court Act 1991*; or

(C) section 22(2a) of the *Youth Court Act 1993*;

...

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