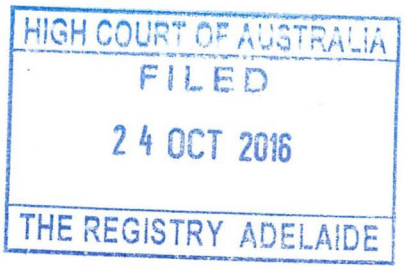
IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A39 of 2016

BETWEEN:



Pedro Perara-Cathcart
Appellant

and

10

The Queen
Respondent

RESPONDENT'S SUBMISSIONS

Part I: PUBLICATION CERTIFICATION

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

Part II: ISSUES

20 2. The respondent accepts the appellant has broadly defined the relevant issues however it is submitted the following more accurately reflects the specific issues:

(a) first, what is the level of abstraction at which agreement must be reached by the Full Court pursuant to sections 349 and 353 of the Criminal Law Consolidation Act 1953,

(b) second, if it is at a level below whether to allow or dismiss the appeal, must the agreement be expressly stated or in circumstances in which one Judge (Gray J) determines there has been no miscarriage of justice, is it, in any event, implicit in such a determination that no substantial miscarriage of justice has occurred, such that a majority were in agreement as to no substantial miscarriage of
30 justice occurring,

(c) third, in light of Stanley J's determination that "*the jury would not have been under any misunderstanding as to the purpose of that evidence*", was his Honour correct to characterize the lack of specificity in the direction as being an error of law and/or as having occasioned a miscarriage of justice,

(d) fourth, did Stanley J err in applying the proviso in the circumstances where the direction lacked specificity but his Honour determined there was no risk that the jury did not understand the purpose of the evidence.

3. The issues raised by the respondent's notice of contention are encapsulated in point (c).

Office of the Director of Public Prosecutions
Level 7, 45 Pirie Street
ADELAIDE SA 5000

Telephone: (08) 8207 1529
Fax: (08) 8207 1799
Email: ian.press@sa.gov.au
Ref: Ian Press SC & Darren Evans

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

4. It is certified that the respondent has considered whether any matters should be given in compliance with section 78B of the *Judiciary Act 1903* and considers that no such notice need be given.

Part IV: RESPONSE TO THE APPELLANT'S NARRATIVE

The Evidence

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

6. The appellant, a 31 year old male approached two 15-16 year old girls (the complainant K and her friend R) and a 19 year old male, J, at the bus stop. There was no dispute that the appellant approached them.

7. In the evidence of both K and J, there were references to the appellant supplying and/or dealing in drugs. This evidence was of both a general and specific nature.

8. In particular, K gave evidence that:

   (a) he had shown her a small container of methylamphetamine when they first met and had agreed to give them some and if they liked it they could buy some;[1]

   (b) he stated he would supply her with "*two 8-b*alls" of "*meth*" if she would have a shower with him;[2]

   (c) at the time she spurned his advances he complained to the effect "*he shouts all the crack and I won't do anything for him*";[3]

   (d) he had injected her with methylamphetamine and gave her a pipe of methylamphetamine;[4]

   (e) he "*needed to take some dope to someone*";[5]

   (f) she did not go to police immediately after the rape because she believed what the applicant had told them, namely that he was "*a very high up drug dealer*" and she was scared.[6]

9. In particular, J gave evidence that:

   (a) the appellant had discussed with him whether J used methylamphetamine when they first met;[7]

---

[1] Tx 43.
[2] Tx 51.
[3] Tx 51.
[4] Tx 50.
[5] Tx 48.
[6] Tx 56.
[7] Tx 153.

(b) the appellant had given him methylamphetamine after their first meeting upon their return to J's house, and had not asked for payment;[8]

(c) the appellant had injected K;[9]

(d) a man had come around uninvited and smoked drugs. J wasn't happy to, but did smoke drugs with the man before he left;[10]

(e) J had assumed that the appellant knew bikies as he had enough drugs to give away for free;[11]

(f) the appellant was giving drugs *"to me and* [K] *and everybody else"*;[12]

(g) he did not go to police because he was frightened.[13] The applicant had said a number of things to him, including "*he stabbed some dude in the city a couple of nights before, that he beats people up and shit, just like, I thought he was a bikie kind of dude, like the people that obviously knows somebody to get drugs and just give them away, so I thought he was like that.*"

10. In the prosecutor's address he invited the jury to consider the evidence of the appellant's possession of cannabis in two contexts:

a) when considering the version put forward by the appellant in his interview. The prosecutor rhetorically asked the jury why would the appellant be approaching J and K to buy cannabis if he had cannabis in his possession,[14] and

b) later the prosecutor referred to the appellant's possession of cannabis and invited the jury's attention to K's evidence that the appellant had stated to her that he was going to deliver some "*dope*" to someone in the context of inviting the jury to consider who was the drug dealer.[15]

11. In the appellant's address the cannabis in the appellant's possession was raised in the context of reminding the jury that it was in his possession seven days after he approached K and J and their friend R.[16]

12. Insofar as the appellant refers to the differences in the recollections of K and J as to the words spoken by K when she made her complaint to J, those differences, such as they were, occurred in circumstances in which K stated she had been raped, the appellant had threatened to kill her immediately after the rape, that her emotional state had led her to cut herself on both arms and that she was frightened of the

---

[8] Tx 153.
[9] Tx 171.
[10] Tx 177.
[11] Tx 180.
[12] Tx 188.
[13] Tx 159.
[14] Tx 213.
[15] Tx 225.
[16] Tx 237.

appellant. There was no dispute that the complainant had in fact cut herself on both arms.[17]

The Appeal to the Full Court

13. Contrary to the applicant's submission at [12] the arguments advanced on behalf of the applicant in the Full Court did not include any arguments about the admissibility of evidence as to the applicant's possession, use or supply of methylamphetamine.[18]

14. The ground of appeal before the Full Court complained that evidence that the applicant admitted being in possession of cannabis when spoken to by police one week after the alleged rape was inadmissible and that the direction as to the cannabis was inadequate. The Ground of Appeal specifically stated "*The jury should have been directed that they should use the ownership by Applicant(sic) of a quantity of cannabis a week after he claims he was seeking the same substance from [J] to assess both that claim and also the evidence of the Crown witnesses on the topic of who was selling drugs.*"

15. There were no arguments advanced that evidence regarding the applicant being a supplier of or dealer in methylamphetamine should not have been admitted.

16. All of the judges in the Full Court agreed that the possession by the applicant of the cannabis was admissible. In light of the reason the applicant gave for approaching them and in light of the evidence of K that the applicant stated he had to deliver cannabis to someone this was plainly correct.

17. It is correct that Kourakis CJ and Stanley J both determined there had been an error, it related to the direction on the topic of the appellant's possession of cannabis and the error occasioned a miscarriage of justice. It is there however, that their agreement ends. There was no agreement between Kourakis CJ and Stanley J as to:

    (a) the reason for the error,

    (b) why there had been a miscarriage of justice,

    (c) the risk of the jury misusing the evidence of his possession of cannabis, and

    (d) the directions that should have been given to the jury, apart from both agreeing there should have been a reference to the evidence being relevant to how the parties met.

18. Kourakis CJ separated the evidence as to dealing and providing methylamphetamine from the evidence that the appellant possessed cannabis and that he had informed K that he had to deliver cannabis to someone.

19. Kourakis CJ determined the directions as to the evidence relating to dealing and providing methylamphetamine and his admissions as to violence were relevant to:

---

[17] Tx 22.

[18] *R v Perara*-Cathcart [2015] SASCFC 103, [2].

(a) how the defendant, who was previously unknown to the complainant, came to be in her home;

(b) why the defendant was allowed the close contact with the complainant which gave him the opportunity to commit the alleged rape;

(c) why the complainant and J continued to allow the defendant to access to (sic) their home after he had raped the complainant;

(d) why neither the complainant nor J called the police shortly after the commission of the rape.

20. Whilst the Chief Justice implied more could have been said he determined there was no risk the jury would have misused this evidence. The uses were obvious and adequately explained by the direction given by the trial judge.

21. His Honour then considered whether a separate direction was required in relation to the possession of the cannabis and determined such a direction should have been given to ensure the jury knew it was relevant to the version he gave in the interview as to how they met and that the jury did not reason that his possession of or trading in cannabis meant he was more likely to have provided or traded methylamphetamine.[19] It was the absence of any direction as to use and the absence of a warning to not reason in a particular manner which occasioned the error.

22. His Honour did however then recognise that acceptance by the jury of the fact he was trading in cannabis did lend support to the evidence of K and J which of course did lend support to the truthfulness and reliability of their evidence- including their evidence as to the methylamphetamine.

23. Whilst Stanley J agreed with Kourakis CJ that the trial judge had erred, he did so for different reasons. Stanley J did not consider it was necessary to separate the evidence as to dealing and providing methylamphetamine from the evidence as to his possession of and dealing in cannabis. In light of the manner in which the evidence was presented and the fact drug dealing and drug use by the appellant explained the persona which the appellant presented to K and J, this was an understandable approach. It recognized that the evidence of J and K as to the appellant's drug dealing did not differentiate between cannabis dealing and methylamphetamine dealing. It also recognized that the type of sequential reasoning which the Chief Justice was concerned to avoid would not have arisen in this case. This was also the approach adopted by Gray J.[20]

24. Stanley J determined, contrary to Kourakis CJ, that the direction of the learned trial judge to the effect the evidence in relation to "drugs" and "drug dealing" was relevant as "*part of the unfolding prosecution case*" and because it was "*intertwined with the events that occurred*" was insufficient because it lacked specificity. It was not because the direction did not deal separately with cannabis and methylamphetamine. His Honour determined the jury had to be directed that this evidence "*explained the circumstances by which the appellant met K and J and*

[19] *R v Perara-Cathcart* [2015] SASCFC 103, [16-17].
[20] *R v Perara-Cathcart* [2015] SASCFC 103, [37].

further was evidence they could use to find he was providing drugs to K and using the provision of those drugs to pressure her for sex".[21] This direction related to both the methylamphetamine and the cannabis. The error was not that nothing was said- it was that the direction lacked sufficient specificity.

25. Significantly however, Stanley J, when considering the proviso, indicated that he agreed with Gray J that the jury would not have been under any misunderstanding as to the purpose of that evidence.[22] This factor was not however considered by Stanley J when determining whether the lack of specificity was in fact an error or a miscarriage of justice.

10 26. Gray J acknowledged the charged offence occurred in the context of drug dealings between the parties and that the statements made by the defendant to police about the cannabis and the locating of cannabis at his house was circumstantial evidence consistent with the evidence of J and in particular K. In circumstances in which both J and K indicated they had not gone to police immediately after the rape because they were scared of the appellant, Gray J determined the jury would not have been under any misunderstanding as to the purpose of the evidence. His Honour took into account the addresses of both counsel and determined the direction was sufficient. The evidence was part of the unfolding of the case and it enabled the jury to consider the evidence of J and K that the defendant was a dealer in drugs and that he made use
20 of his supply of drugs to influence and put pressure on the complainant.[23]

27. The majority (Gray and Stanley JJ) agreed that the evidence of his possession of cannabis shortly after the rapes would, in the context of the trial and the addresses, only have been used by the jury when assessing their respective versions as to how they met, the context in which the offending occurred and that part of their evidence which spoke of the influence and intimidation he brought to bear upon them, partly by reason of his involvement with drugs.

28. Whilst paragraph 21 of the appellant's outline is in general terms correct, it fails to acknowledge the substantial differences in approach between Kourakis CJ and Stanley J. The agreement they reached, such as it was, was of less significance than
30 the agreement of Stanley and Gray JJ as to the there being no risk of misuse by the jury and that the appeal should be dismissed.

Part V: APPLICABLE LEGISLATIVE PROVISIONS

29. In addition to the legislative provisions identified by the appellant, the respondent has referred to section 7 of the *Supreme Court Act 1935* and sections 348, 349 and 350 *Criminal Law Consolidation Act 1953.* Section 349 is included in the appendix attached to the appellant's submissions. The remaining sections are in the appendix to the respondent's outline.

---

[21] *R v Perara-Cathcart* [2015] SASCFC 103, [56].
[22] *R v Perara-Cathcart* [2015] SASCFC 103, [67].
[23] *R v Perara-Cathcart* [2015] SASCFC 103, [47].

Part VI: RESPONDENT'S ARGUMENT

30. The issues raised by the appellant will not require consideration if the respondent's contention is correct. The respondent's contention is that either:

    (a) a lack of specificity in a direction will amount to an error of law and a miscarriage of justice only if such specificity is required to prevent a jury misunderstanding the purpose of the evidence. Given his Honour's finding that there was no risk, there has been neither an error of law nor a miscarriage of justice, or

    (b) even if technically, the lack of specificity did amount to an error of law, this error did not occasion a miscarriage of justice.

31. The Court may therefore determine to consider the respondent's contention first.

32. As to the appellant's argument the respondent submits as follows.

Ground (ii)- Can a single Judge "apply" the proviso?

33. The appellant's argument is flawed for 2 reasons:

    (a) the appellant's interpretation of s353 invites consideration of the nature of any agreement at a time prior to the court deciding whether to allow or dismiss the appeal. Consistent with principle it is submitted that section 353 should be interpreted as providing for an outcome-based majority, and

    (b) if the appellant is in fact correct that a majority must find no substantial miscarriage of justice, the appellant has assumed that such a finding may only occur if a majority undertake the type of analysis of the evidence described by this Court in previous cases.[24] This assumption ignores the words of the section. The previous cases detailed what a court must consider when those considering the proviso have determined that there has been a miscarriage of justice. The section however only requires that there be "no substantial miscarriage of justice", it does not prescribe the steps that must be taken in every case.

<u>Re (a) the Full Court must be agreed upon the outcome</u>

34. The appellant submits s353 requires agreement, at least by majority, as to something other than whether to allow or dismiss the appeal.

35. In the course of making any decision, there will be numerous paths of reasoning. These paths may lead to the same ultimate conclusion. The more complex the decision and the more factors involved, the more paths of reasoning are likely to be available. It follows that there will frequently be appeals before the courts in which judicial minds will reasonably differ, notwithstanding there is agreement as to the ultimate disposition of the appeal.

---

[24] See for example *Weiss v The Queen* (2005) 224 CLR 300; *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92; *Filippou v The Queen* (2015) 256 CLR 47, 67.

36. The nature of the agreement required by a court comprised of multiple judges to dispose of a matter has arisen for consideration infrequently. In *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189, Kirby P (as his Honour then was) said that, where there is "*...no majority in the Court for any order or combination of orders*" there should be an attempt to find within the reasons and orders proposed by the judges, the highest common denominator.

37. It is submitted the outcome, rather than the reasoning, is the most significant denominator to the parties in any criminal matter.[25]

38. In courts of appeal, instances where a judge should be required to choose or adopt orders dealing with the final rights of the parties with which that judge disagrees should be minimized, or avoided altogether. Each judge should be left to apply the law as they find it to the facts as they find them. It is the duty of the appeal court judge to see justice done and to act on his or her own true view of each case before the court.[26]

39. Such an approach is consistent with previous authority of this court. The Full Court in the present case was not constituted to determine a question of law. It was constituted to determine with finality the rights of the parties. In *Hepples v Federal Commissioner of Taxation*[27] at 551, this Court drew a distinction between the approach of the Court in an appeal from a judgment which is intended to determine an issue of law arising out of proceedings pending in the Administrative Appeals Tribunal and an appeal from a final judgment which concludes the rights of the parties or an appeal which, if successful, would conclude the rights of the parties. In *Hepples* this Court was dealing with the former. In those matters, the purpose of the appellate court is to espouse the law and the judges must be in agreeance on the legal position. As to the latter the Court then stated: "*An appeal in proceedings of that latter kind has traditionally been determined according to the opinion of a majority as to the order which gives effect to the legal rights of the parties irrespective of the steps by which each of the justices in a majority reaches the conclusion.*" (Footnotes omitted)[28]

40. It is also appropriate to point to the consequences which will ensue if a particular statutory construction is adopted.[29]

41. The appellant's argument, if correct, would apply equally to that part of s353(1) which permits the Full Court to allow an appeal "*if it thinks*" the verdict of the jury should be set aside for a particular reason. The grounds or reasons stipulated in that section are that the verdict 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. If, consistently with

---

[25] The highest common denominator "approach" was taken in *R v Wilson* (2005) 153 A Crim R 257 when determining how a sentence appeal should be determined in circumstances in which there was no agreement as to the ultimate order.

[26] S Gageler, "Why Write Judgments?" (2014) 36 Sydney Law Review 189, 192 and 195, referring to views expressed by Sir Anthony Mason and Dyson Heydon, after their retirement.

[27] *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492, 550.

[28] *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492, 551.

[29] *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492, 525 per TooheyJ.

the appellant's argument that there must be agreement as to no substantial miscarriage having occurred, there must also be agreement as to the reasons for allowing the appeal in s353. The Full Court would be required to dismiss an appeal if, notwithstanding a majority were of the view the appeal should be allowed, there was no agreement between them as to "the miscarriage of justice" or which of the three grounds in the section have been satisfied. An interpretation of s353 which gives rise to such an outcome should be avoided.

42. The appellant's argument also relies on the identification of "the point raised in the appeal" which the Full Court is of the opinion might be decided in favour of the appellant. The appellant points to the agreement between Kourakis CJ and Stanley J that there has been an error of law and/or that a miscarriage of justice has occurred as the relevant question or "point".

43. As regards the agreements reached it can be said that:

(a) Kourakis CJ and Stanley J agreed there had been an error and that the error each identified occasioned a miscarriage of justice;

(b) Kourakis CJ and Stanley J agreed that a direction as to the cannabis being relevant to how the appellant met J and K should have been given although Stanley J considered it should have related to the methylamphetamine also;

(c) Kourakis CJ and Stanley J did not agree on the reasons for the error;

(d) Kourakis CJ and Stanley J did not agree as to the specific nature of the error. The former was concerned at the absence of any direction as to cannabis and the risk of impermissible reasoning whereas the latter determined a direction had been given but it required greater specificity although there was no risk of misuse;

(e) Kourakis CJ and Stanley J did not agree on the risk of misuse;

(f) Kourakis CJ and Stanley J did not agree on the totality of the direction required to rectify the error;

(g) Kourakis CJ and Gray J agreed that the direction as to methylamphetamine dealing and supply was adequate;

(h) Gray and Stanley JJ agreed that there was no risk that the jury would have misunderstood the purpose of the evidence as to his possession of cannabis;

(i) Gray J decided there was no miscarriage of justice and Stanley J decided there was no substantial miscarriage of justice;

(j) Gray and Stanley JJ agreed that the appeal should be dismissed.

44. It is immediately apparent that identification of "a point" will not always be straight-forward. If the court considers the point includes the reason for the error then there is no agreement between Kourakis CJ and Stanley J. It necessarily follows that there is no agreement as to the reason or nature of the miscarriage of justice. The question or

point identified by the appellant is an intermediate matter to be considered by a court when determining the appeal. Conclusions as to intermediate steps are not determinative of the party's rights. The selection of this point by the appellant is arbitrary. It is respectfully submitted there is no reason in logic or principle why this particular agreement should be determinative of the appeal.

45. It is important to note at this point what this Court said in *Weiss*: "[t]he fundamental task committed to the appellate court by the common form of criminal appeal statute is to decide the appeal."[30] In the present case, there were no on-going proceedings awaiting the answer to a specific legal question. The parties were awaiting an outcome. It is the agreed upon outcome which should decide the appeal.

46. The requirement in s349 of the CLCA that the "*.... determination of any question before the Full Court shall be according to the opinion of the majority...*" is therefore a reference to the order in s353 as to dismissing or allowing the appeal. It is the order allowing or dismissing the appeal which gives effect to the legal rights of the parties.

47. Section 353 requires the Full Court, or a majority thereof, to determine whether to allow the appeal or dismiss the appeal. The reference to "it" in the phrase "shall allow the appeal if *it* thinks..." and in the phrase" "dismiss the appeal if *it* considers that no substantial miscarriage of justice has actually occurred" is a reference to the court's constituent members, rather than a majority thereof. [31] It does not impose an obligation to agree on either the nature of the error which would enable the appeal to be allowed or the proviso.

48. If this Court determines, contrary to the respondent's submissions, that the agreement of the majority must extend to no substantial miscarriage of justice having occurred the next question must be considered.

Re (b)- has a majority determined there is no substantial miscarriage of justice if one of the majority is of the view no miscarriage of justice has occurred?

49. Gray J held that the learned trial Judge's directions were sufficient to satisfy s 34R of the *Evidence Act*. His Honour considered that the direction when considered in light of the summing up as a whole and in light of the addresses which it followed, was not erroneous. His Honour was satisfied the jury understood what the evidence was for and its use and there was no risk of it being misused. It therefore could have had no improper impact on the verdict.

50. Firstly it is necessary to consider the words of the section. 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, not the many subsequent judicial

---

[30] *Weiss v The Queen* (2005) 224 CLR 300 at [35] (the Court).

[31] Section 7(2) of the Supreme Court Ac t 1935 states: "Subject to any express provision in this or any other Act, all the judges shall have, in all respects, equal power, authority and jurisdiction and the masters shall have power, authority and jurisdiction to the extent authorised by this or any other Act or by rules of court made under this or any other Act.

expositions of that meaning which have sought to express the operation of the proviso to the common form criminal appeal provision by using other words."[32]

51. 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 ... It is not right to attempt to formulate other rules or tests in so far as they distract attention from the statutory test. It is not useful to attempt that task because to do so would likely fail to take proper account of the very wide diversity of circumstances in which the proviso falls for consideration."[33] Such an approach "invites error".[34]

52. And third, the court's consideration begins with identifying the error that was made at trial.[35] Any determination of whether or not a substantial miscarriage of justice has actually occurred is to be performed having regard to the nature of the error within the context of the particular circumstances of the case and the particular issues at trial.[36]

53. The consideration of the error 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.[37] In this connection, recognition of the possibility that the particular trial jury *might* have in fact 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.[38]

54. The respondent acknowledges that it has been determined that satisfaction of the appellant's guilt beyond reasonable doubt has been determined to be a necessary but not sufficient condition for the application of the proviso.[39] This requirement has however been made in the context of the relevant Judge considering the application of the proviso already being satisfied that a miscarriage of justice has in fact occurred.

55. In circumstances in which a judge determines that the direction was neither erroneous nor capable of impacting upon the jury's deliberations, it is submitted that judge need not then consider whether he or she is nonetheless satisfied of the appellant's guilt. Such a determination must only be required if the judge has in fact determined a miscarriage of justice has occurred. Given the jury is the body

---

[32] *Weiss v The Queen* (2005) 224 CLR 300 at [9] (the Court).
[33] *Weiss v The Queen* (2005) 224 CLR 300 at [42] (the Court).
[34] *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at [31] (French CJ, Gummow, Hayne and Crennan JJ).
[35] *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 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).
[36] See, for example, *AK v Western Australia* (2008) 232 CLR 438 at [42], [55] (Gummow and Hayne JJ); see *also Reeves v The Queen (2013) 304 ALR 251* at [51]-[58] (French CJ, Crennan, Bell and Keane JJ).
[37] *Weiss v The Queen* (2005) 224 CLR 300 at [35], [39] (the Court); *Baini v The Queen* (2012) 246 CLR 469 at [33] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[38] *Weiss v The Queen* (2005) 224 CLR 300 at [36] (the Court).
[39] *AK v Western Australia* (2008) 232 CLR 438 at [53], [59] (Gummow and Hayne JJ); *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 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 v The Queen (2013) 304 ALR 251* at [50] (French CJ, Crennan, Bell and Keane JJ); *Gassy v The Queen* (2008) 236 CLR 293 at [18] (Gummow and Hayne JJ); *Weiss v The Queen* (2005) 224 CLR 300 at [44]-[45] (the Court).

entrusted with the primary responsibility of determining guilt or innocence there is no justification for requiring an appeal judge to further examine the verdict in the absence of that judge having found a miscarriage of justice.[40] It is therefore submitted there was agreement as to no substantial miscarriage of justice having occurred. The conclusion of Gray J that no miscarriage of justice occurred implicitly included a determination that no substantial miscarriage of justice had occurred.

56. Further support for the respondent's submission is evidenced by the artificiality of the process the appellant states that Gray J should have undertaken. The appellant's argument would require Gray J, after determining there was no error, to consider the proviso on the basis that the direction, or lack thereof, was erroneous and that it occasioned a miscarriage of justice. In light of the need for the judge to consider the nature of the error when determining the application of the proviso and his Honour's view that no miscarriage of justice had occurred, such a process would be without meaning.

57. It is acknowledged that judges often apply principles of law with which they disagree. A judicial mind is capable of applying many and varied concepts to facts dispassionately. However, the appellant requires the appeal court judge to go further than that, and to consider the nature, extent and impact of an error which they positively found did not exist.

58. In *Riverina Transport v Victoria*[41], Dixon J, at 363, examined the cases which had held that the prohibition on transporting goods by motor vehicle across State borders without a licence was not a restriction on free trade. His Honour disagreed with that conclusion. His Honour then said *"...as a rule, it is neither safe nor useful for a mind that denies the correctness of reasoning to proceed to expound its meaning and implications."* Whilst his Honour did apply the principle espoused in the earlier cases to the facts it is implicit that his Honour drew a distinction between applying legal principles with which one disagrees, and the much more demanding task of assessing the meaning and implications of such an application.

59. To have any real meaning and value, any assessment by Gray J of the proviso would have to proceed upon the basis a miscarriage of justice had occurred and that the direction might have affected the deliberations of the jury. How the Judge would evaluate the nature of the risk to the jury's deliberations is difficult to imagine.

60. The respondent also notes the appellant does not attempt to indicate whether each judge must, when considering the proviso, do so in light of the specific error identified by the other Judges to ensure a majority examine the same assumed error and the same assumed impact on the jury.

61. It is therefore submitted, Gray and Stanley JJ comprised the majority and both were satisfied no substantial miscarriage of justice occurred.

---

[40] Albeit in the context of considering the principles upon which an appellate court should consider whether the verdict cannot be supported having regard to the evidence, this responsibility and the need to give effect to it was referred to in *M v The Queen* (1994) 101 CLR 487, 493 per Mason CJ, Deane, Dawson and Toohey JJ.

[41] *Riverina Transport v Victoria* (1937) 57 CLR 327.

Ground (i)- Did Stanley J err in his application of the proviso

62. In the case of a failure to direct, an appellate judge must read the whole of the transcript, including the evidence, the addresses and the directions, then add whatever direction was missing and consider whether they can be satisfied beyond reasonable doubt of the defendant's guilt. In doing so, they must take into account the 'natural limitations' of such a task. Where they can be satisfied, it will be less likely that there was a substantial miscarriage of justice. In the end, the ultimate consideration remains, whether there was a substantial miscarriage of justice.

63. The appellant seeks to introduce restrictions on this exercise by asking this Court to find that where a question of credit arises, the appellate judge is precluded from conducting the analysis. The respondent's position is that such a blanket limitation is not warranted and is in any event, contrary to the terms of the section and established authority.

64. The mere fact that oral evidence was given on contested topics does not, of itself, prevent the appellate judge from being satisfied that guilt has been established beyond reasonable doubt (or, subsequent to that, that no substantial miscarriage has actually occurred).[42]

65. Satisfaction of the appellant's guilt beyond reasonable doubt is a necessary but not sufficient condition for the application of the proviso, when a miscarriage of justice has been identified.[43] A further stage of analysis is required. Despite its own satisfaction as to guilt, an appellate judge will nevertheless be unable to apply the proviso unless he or she is satisfied that the error in the trial did not "*in fact*" occasion a substantial miscarriage of justice.[44] This analysis focuses attention upon the particular error identified, the particular issues at trial, and the particular manner in which the trial proceeded.[45] Stanley J considered these aspects.

66. Firstly, the appellant submits the fact the appellant did not give evidence deprives the verdict of any relevance and suggests Stanley J fell into error. The appellant's argument ignores that the appellant's version was before the jury in the record of interview. The verdict therefore indicated a rejection of the appellant's record of interview as a reasonable possibility. This was a relevant consideration.

67. Secondly, the appellant submits Stanley J erred because he took into account the verdict of the jury and the fact it indicated an acceptance by the jury of the evidence of K and J. If the failure to direct or erroneous direction may have affected the jury's deliberations then the appellant's point is well made. The Chief Justice determined the failure to direct as he indicated, did create a risk that the jury may reason in a manner the Chief Justice considered was impermissible. It is for this reason the proviso had no application.

---

[42] *Reeves v The Queen (2013) 304 ALR 251.*

[43] *AK v Western Australia* (2008) 232 CLR 438 at [53], [59] (Gummow and Hayne JJ); *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 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 v The Queen (2013) 304 ALR 251* at [50] (French CJ, Crennan, Bell and Keane JJ); Gassy v The Queen (2008) 236 CLR 293 at [18] (Gummow and Hayne JJ); *Weiss v The Queen* (2005) 224 CLR 300 at [44]-[45] (the Court).

[44] *Reeves v The Queen (2013) 304 ALR 251* at [51] (French CJ, Crennan, Bell and Keane JJ).

[45] See *Reeves v The Queen (2013) 304 ALR 251* at [51]-[58] (French CJ, Crennan, Bell and Keane JJ).

68. Attention must be 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. [46]

69. The appellant's submission however fails to take into account or acknowledge that Stanley J determined that "*The jury would not have been under any misunderstanding as to the purpose of that evidence*". The appellant's submission that his Honour did not find that the jury "could not in fact have reasoned impermissibly in relation to the use of the evidence of the drugs" does not sit comfortably with the aforementioned finding. The jury could not engage in both types of reasoning if they were "under no misunderstanding as to the proper use of that evidence."

70. His Honour determined that the jury were entitled to make use of his possession of cannabis when considering whether he was "a dealer in drugs". Given His Honour's determination that the error he identified had no impact upon the jury's deliberations, the respondent's contention is that Stanley J should have determined that the lack of specificity did not in fact give rise to a miscarriage of justice.[47] Alternatively it is submitted that in circumstances where the error creates no risk that the jury would have misused the evidence, there is no impediment to the jury's verdict being considered and taken into account when considering the proviso. As was stated in *Reeves v The Queen*:

> 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.[48]

71. Thirdly, the appellant submits it was necessary for his Honour to be satisfied of K's reliability. The allegations as to the rape did not allow for mistake or misunderstanding or faulty memory. Neither the nature of the allegation nor the level of detail provided by K indicated "reliability" had to be separately considered by his Honour. In any event his Honour's finding that their evidence was "consistent and credible"[49] reflected a proper consideration of the necessary issues.

72. A consideration of the proviso has also been said to involve asking 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.[50] They are apt to "mask" the nature of the statutory

---

[46] See *Reeves v The Queen (2013) 304 ALR 251* at [51-[58] (French CJ, Crennan, Bell and Keane JJ). It may be observed that Gageler J 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 as a result of the error, might have been sufficient in order for the appellate court to apply the proviso; at [66].

[47] *Arulthilikan v R; Mkoka v R* (2003) 203 ALR 259, [23]; [2003] HCA 74 per Gleeson CJ, Gummow, Hayne, Callinan, Haydon JJ; "*Technically, there was a misdirection, but it gave rise to no miscarriage of justice.*"

[48] *Reeves v The Queen* (2013) 304 ALR 251, 261, [50] per French CJ, Crennan, Bell and Keane JJ.

[49] *R v Perara-Cathcart* [2015] SASCFC 103,[73]

[50] *Weiss v The Queen* (2005) 224 CLR 300 at [33] (the Court); see also *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at [31] (French CJ, Gummow, Hayne and Crennan JJ); *Reeves v The Queen (2013) 304 ALR 251* at [51] (French CJ, Crennan, Bell and Keane JJ).

task[51] and are "liable to distract attention" from that task.[52] Stanley J correctly considered the nature of the error and the whole of the record before determining no substantial miscarriage occurred.

73. It appears that the essence of the appellant's argument is to the effect Stanley J was wrong to determine that there was no risk of the jury misusing the evidence. The respondent agrees that if his Honour was wrong as to the potential for misuse then the application of the proviso was a more difficult question.

74. Stanley J was however correct not to have regard to the type of risk identified by Kourakis CJ and relied upon by the appellant.

75. First, Kourakis CJ did not consider there was any risk of misuse in relation to the evidence of the dealing in and providing of methylamphetamine. The Chief Justice did not, for example, consider the jury may reason from this evidence that the appellant was a cannabis dealer notwithstanding His Honour considered there was a risk of the jury reasoning he was dealing in methylamphetamine from the appellant's possession of cannabis.

76. Second, in the context of the evidence in this trial there was no doubt that evidence of the appellant possessing and dealing cannabis was relevant to the credibility and reliability of both J and K. Evidence that he was in possession of cannabis was relevant to the overall assessment of the evidence of K and J and this included their evidence that he had been providing them with methylamphetamine. The Chief Justice acknowledged that the possession of cannabis was in that regard relevant to whether the evidence of K and J was credible.

77. The risk identified by the appellant is that the jury would have reasoned that because he was in possession of cannabis that he was therefore a trader and provider of methylamphetamine and therefore the evidence of K and J was credible and reliable. It is respectfully submitted that this type of sequential reasoning was neither obvious nor logical. In circumstances in which a jury have not been invited to reason in such a manner, no parties at the trial identified it as a possible risk and there is no obvious risk of a jury reasoning in that way, there is no reason to direct the jury as to that possible misuse.

78. Insofar as his possession of cannabis was consistent with the evidence of K it is submitted it could only have been used by the jury as evidence of consistency in the account given by K and J as to how they met the appellant and that that he presented himself as a drug dealer.

79. Stanley J considered all relevant aspects of the proviso. No error has been demonstrated.

---

[51] *Weiss v The Queen* (2005) 224 CLR 300 at [33] (the Court).
[52] *Weiss v The Queen* (2005) 224 CLR 300 at [40] (the Court).

Part VII: RESPONDENT'S ARGUMENT ON NOTICE OF CONTENTION

80. Section 34R of the *Evidence Act* does impose a statutory obligation upon a judge to give directions as to the purpose for which the evidence may, and may not, be used. The ground of appeal raised the inadequacy of the direction as to the appellant's possession of cannabis. This is not therefore an instance in which no direction was given. The question for the Court of Criminal Appeal was whether the direction was, in all the circumstances, adequate.

81. The learned trial judge referred to the evidence that suggested the appellant "was a drug user" and to the evidence "although contested, that he was a drug dealer".[53] The learned trial judge did not differentiate between the different types of drug dealing. There was no request by defence counsel for a direction in those terms.

82. The evidence of the complainant and her boyfriend was to the effect the appellant presented himself as a drug dealer and as a potentially dangerous person. There was, within the context of the trial, no relevant distinction between evidence of the applicant supplying cannabis and evidence of him supplying methylamphetamine. This supply of drugs, whichever drug it was, was part of the persona he presented. This persona influenced their behaviour toward him. An assessment of the evidence of K and J did not call for or suggest that the jury would consider the evidence that the appellant sold or provided methylamphetamine separately from the evidence he possessed cannabis and admitted to supplying cannabis to someone.

83. In the context of the complainant explaining why she was scared of him and his comment to the effect he had to deliver cannabis to someone, his possession of cannabis and the evidence suggesting he supplied cannabis to people was relevant to K's evidence that he was a "drug dealer" and that he had made comments to her to that effect. The only misuse the jury had to be warned about was not to reason that because of his drug use or supply he was therefore the type of person who would commit other offences. This direction was given. This was sufficient to ensure the evidence was not misused.

84. As to the risk of misuse of his possession of the cannabis it is relevant the jury were assessing the whole of the evidence of the complainant and her boyfriend in the context that he admitted he had access to both cannabis and methylamphetmaine and to supplying cannabis. Assuming such reasoning is impermissible there was no risk of the jury reasoning sequentially in the manner suggested by the appellant. His possession of cannabis was one aspect consistent with the evidence of K and J that he was a "drug dealer".

85. The need for specificity will depend on the potential risk that the evidence will be used impermissibly. The risks of misuse cannot be determined without reference to submissions by the prosecution in closing address and the issues at the trial. Section 34R does not impose an obligation on a judge to direct the jury as to every purpose for which the evidence may not be used, however fanciful and however remote from the issues at the trial. Such a submission is the antithesis of the obligation imposed

[53] The direction is reproduced at [44] in the judgment of Gray J.

on a trial judge when summing up to the jury, to identify the real issues in the case and to instruct the jury in so much of the law as is necessary to decide those issues.[54]

86. Stanley J correctly stated that the Court of Criminal Appeal in South Australia has emphasized the need for a degree of specificity with respect to the permissible uses of evidence of discreditable conduct.[55] It is accepted that such specificity will rarely fail to be of assistance to a jury. That is not to say however, that some uses are so obvious that the direction given by the trial judge in this case did not require elaboration. This was such a case. This was recognised by the appellant's counsel at the trial. He stated "*...circumstances of drug use and circumstances of counter-allegations of dealing, the jury can be directed on these two issues, it is just part of the milieu of this offending.*"[56]

87. As stated above, the use of the evidence of his possession of cannabis was sufficiently encapsulated by the direction given. These uses were referred to by the prosecutor in his closing address. The prosecutor invited the jury to consider his possession when considering the version put forward by the appellant in his interview[57] and when assessing the evidence of K when she said the appellant had told her that he was going to deliver some "*dope*" to someone.[58]

88. The only justification for greater specificity was therefore if there was a risk that the evidence may be misused by the jury. When considering this potential misuse it is relevant to note, such a use was not suggested to the jury, the possibility of the jury engaging in the sequential reasoning was not apparent to the Judge or either counsel and no further directions were sought on this topic.

89. The risk of the jury reasoning in the sequential manner suggested by the appellant was so negligible as to be no risk at all. For the same reason that it is not an error of law for a trial judge to omit to instruct a jury on all of the elements of liability for an offence when such element is not an issue at the trial, it is also not an error to fail to warn the jury not to reason in a particular manner that is not, in the circumstances of the trial, a manner in which any jury would reason.[59]

90. In circumstances in which there was no risk of misuse by the jury, the direction of the learned trial judge cannot be said to have been inadequate or an error of law. In the absence of a need for greater specificity the application of the proviso does not arise. Alternatively even if the failure to provide greater specificity did amount to an error of law, it did not give rise to a miscarriage of justice in light of his Honour's finding that there was no danger of it being misused by the jury.

---

[54] *Alford v Magee* (1952) 85 CLR 437, 466; [1952] HCA 3; albeit in the context of discussing the obligation to the alternative verdict French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ reiterated the necessity to have regard to the real issues at the trial and for instructions to the jury to be directed at only those issues. *Huynh v R* (2013) 228 A Crim R 306; (2013) 295 ALR 624; [2013] HCA 6, [31] per French CJ, Crennan, Kiefel, Bell and Gageler JJ.

[55] *R v Perara-Cathcart* [2015] SASCFC 103, [56] citing in particular *R v Nieterink* (1999) 76 SASR 56; [1999] SASC 560.

[56] Tx 5.

[57] Tx 213.

[58] Tx 225.

[59] *Huynh v R* (2013) 228 A Crim R 306; (2013) 295 ALR 624; [2013] HCA 6, [31] per French CJ, Crennan, Kiefel, Bell and Gageler JJ.

Part VIII: TIME ESTIMATE

91. The respondent estimates 1-1.5 hours for the respondent's oral submissions.

Dated 24th October 2016

.....
Ian Douglas Press SC
Senior legal practitioner

Telephone: (08) 8207 1529
Facsimile: (08) 8207 1799
Email: ian.press@sa.gov.au

.....24/10/16.....
Darren Phillip Evans
Solicitor

Telephone: (08) 8207 1529
Facsimile: (08) 8207 1799
Email: darren.evans@sa.gov.au

APPENDIX

Section 7(2) of the Supreme Court Act 1935

s7(2) Subject to any express provision in this or any other Act, all the judges shall have, in all respects, equal power, authority and jurisdiction and the masters shall have power, authority and jurisdiction to the extent authorised by this or any other Act or by rules of court made under this or any other Act.

Sections 348, 349 and 350 *Criminal Law Consolidation Act 1953*

Part 11—Appellate proceedings

Division 1—Preliminary

348—Interpretation

In this Part, unless inconsistent with the context or subject matter—

.....

issue antecedent to trial means a question (whether arising before or at trial) as to whether proceedings on an information or a count of an information should be stayed on the ground that the proceedings are an abuse of process of the court;

.....

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 2—Reference of questions of law

350—Reservation of relevant questions

(1) In this section—

relevant question means a question of law and includes a question about how a judicial discretion should be exercised or whether a judicial discretion has been properly exercised.

(2) A court by which a person has been, is being or is to be tried or sentenced for an indictable offence may reserve for consideration and determination by the Full Court a relevant question on an issue—

(a) antecedent to trial; or

(b) relevant to the trial or sentencing of the defendant,

and the court may (if necessary) stay the proceedings until the question has been determined by the Full Court.

(3) ……..

(4) A court before which a person has been tried and acquitted of an offence must, on application by the Attorney-General or the Director of Public Prosecutions, reserve a question antecedent to the trial, or arising in the course of the trial, for consideration and determination by the Full Court.

(5) The Full Court may, on application under subsection (6), require a court to refer a relevant question to it for consideration and determination.

10 ……