IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. M154 of 2011

ON APPEAL FROM THE COURT OF APPEAL, SUPREME COURT OF VICTORIA

Between:

**KHALID BAKER** **Appellant**

**and**

**THE QUEEN** **Respondent**

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# APPELLANT'S SUBMISSIONS

## PART I: SUITABILITY FOR PUBLICATION

1. The appellant certifies that this submission is in form suitable for publication on the Internet.

## PART II: CONCISE STATEMENT OF THE ISSUES PRESENTED

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2. At the joint trial of the appellant and his co-accused LM on a count of murder, the prosecution relied on admissions made by LM in proof of his guilt. In the circumstances of this case, those admissions tended to implicate LM and exculpate the appellant. Over objection by counsel for appellant, the trial judge directed the jury that LM's admissions were evidence in LM's trial but not in the appellant's trial. This appeal concerns the following related issues:

   a) Should this Court recognize an exception to the rule against hearsay of the kind considered, but not decided, in *Bannon v The Queen* (1995) 185 CLR 1? In particular, on a joint trial where the prosecution relies on admissions by an accused ("A") in
30 proof of guilt of that accused and those admissions also tend to exculpate the co-accused ("B"), should a trial judge be required (or have a discretion) to direct that the evidence of A's admissions is also evidence in the trial of B and that such evidence is to be considered in exculpation of B?

   b) In the present case, should the admissions by LM have been treated as admissible in exculpation of the appellant? If so, has there been a miscarriage of justice?



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## PART III: NOTICES UNDER S 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. The appellant certifies that the question whether any notice should be given under s 78B of the *Judiciary Act 1903* (Cth) has been considered. There is not thought to be a need for such a notice.

## PART IV: CITATION OF THE REASONS FOR JUDGMENT

4. The Court of Appeal's judgment is not contained in any authorized report. Its medium neutral citation is *Baker v The Queen* [2010] VSCA 226.

## PART V: NARRATIVE STATEMENT OF FACTS

5. **A man falls to his death at a party**: On 27 November 2005, Albert Snowball was at a party on the first floor of a converted warehouse in Brunswick, a suburb of Melbourne. Between 100 and 200 people attended the party. At about 3:00 a.m., following an altercation on a landing, Mr Snowball fell through a glass window to the footpath five metres below. Two days later, he died as a result of the injuries sustained in the fall.[1]

6. **Two young persons are charged**: The appellant (who was aged 18 at that time) and LM (aged 17) also attended the party. It was alleged that they were involved in the altercation that led to Mr Snowball's death. They were charged with murder.

7. **Crown case**: It was not alleged that the appellant and LM intended to kill Mr Snowball or that he should go through the window. Rather, the Crown case was that either the appellant or LM (or both) assaulted Mr Snowball with intent to cause him really serious injury and thereby caused him to fall through the window; and that one accused aided and abetted or was acting in concert with the other at that time.[2]

8. **Verdicts**: Following a joint trial in the Supreme Court of Victoria before Whelan J and a jury concluding in May 2008, the appellant was found guilty of murder and sentenced to a term of imprisonment. LM was acquitted of both murder and manslaughter.[3]

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[1] *Baker v The Queen* [2011] VSCA 226 at [1] & [3].
[2] *Baker v The Queen* [2011] VSCA 226 at [7]-[9].
[3] *Baker v The Queen* [2011] VSCA 226 at [1].

9. **Earlier assault in party area**: At trial, there was evidence that the appellant had arrived at the party at about midnight with four associates, including LM and Ali Faulkner. At about 3:00 a.m., the appellant and others in his group assaulted various partygoers in the party area, injuring a number of them.[4]

10. **Move to landing**: Following the assaults in the party area, the appellant, Mr Faulkner and LM went out onto a landing in the stairwell of the warehouse.[5] What occurred on the landing was described differently by the various witnesses. Five of those eyewitnesses gave evidence of particular importance:

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11. **Asher Doig**: Mr Doig gave evidence that five or six black men came out of the party and onto the landing. They started to push Mr Snowball and beat him up. The appellant kneed him in the ribs. As they went down to a lower landing, Mr Snowball said something like "You bastards", and the appellant ran back up the stairs and punched him. Another black man joined in. The appellant "king-hit" Mr Snowball. Then he tried to punch again, but missed; then he tried again and connected; and then he either pushed or punched him near the window and Mr Snowball "went flying through the window". Mr Doig denied that his recollection was shaky but conceded the possibility that he could be mistaken.[6]

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12. **Peter Arcaro**: Mr Arcaro was standing next to Mr Doig on the landing. A group of three or four African men walked past and down to the middle landing. One of them (the appellant) said something to Mr Snowball and ran back up to fight with him. It was a one-on-one fight; no-one else was involved. A few people tried to restrain the appellant, including Mr Doig. At one stage, the appellant picked up a chair and was ready to hit Mr Snowball with it, but the chair was taken off him. The fight moved towards the window and, with a right hand that was either a punch or a push, Mr Snowball went through the window. Mr Arcaro rejected the suggestion, put by counsel for the appellant, that a third person (LM) had come out onto the landing and taken up the fight. Mr Arcaro said he
30 was "very sure" that the appellant was the person he saw fighting with Mr Snowball.[7]

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[4] *Baker v The Queen* [2011] VSCA 226 at [4].
[5] *Baker v The Queen* [2011] VSCA 226 at [5].
[6] *Baker v The Queen* [2011] VSCA 226 at [19]-[21].
[7] *Baker v The Queen* [2011] VSCA 226 at [22]-[25].

13. **Earl Stuart**: Mr Stuart said he saw Mr Doig on the landing. Mr Stuart was about to go back into the party when the door opened and he saw the appellant ushered out, with two other African men, by a number of other people. They were ushered down the stairs and then came back up again, in a "fighting manner". The appellant was fighting quite a bit. One of the others tried to stop it. Mr Snowball was being struck by more than one person and he was "bumped back" by "the velocity of the activity". Whilst he accepted, in cross-examination, that the appellant was involved in a "quite severe fight", he maintained that Mr Snowball was not the target of the attack but rather was "pushed back by the force of what was occurring". In further cross-examination by the prosecutor, he said the appellant had his eyes fixed on Mr Snowball and was kicking him and that another African man also punched Mr Snowball but not at the same rate as the appellant. Under cross-examination by counsel for LM, Mr Stuart confirmed that the appellant appeared to be acting of his own accord and could not have been stopped by anyone else. Under cross-examination by counsel for the appellant, Mr Stuart said that the white male the appellant was hitting was not the person who went out the window.[8]

14. **Nassir Asfer**: Mr Asfer was on the landing with Mr Masonga and Mr Morgan when the appellant and Mr Faulkner came out of the party, looking upset, and walked downstairs. They said they had been involved in a fight inside. Mr Snowball then came out of the party and onto the landing and said to the appellant and Mr Faulkner, "Why did you hit me?" The appellant and Mr Faulkner started running back upstairs, at which time LM came out onto the landing. Mr Morgan then grabbed and restrained Mr Faulkner while Mr Asfer restrained the appellant. At that point, LM began fighting with Mr Snowball. The appellant was not fighting anyone. Mr Asfer did not see him make contact with Mr Snowball. Indeed, he could not have done so because Mr Asfer was holding him. At some point, the appellant picked up a chair and held it over his head but was forced to drop it because Mr Asfer was still holding him. LM continued to fight with Mr Snowball; they were punching each other, with LM facing the window and Mr Snowball facing the stairs. Mr Asfer heard the window break but did not see it because he was struggling with the appellant.[9]

15. **Eric Masonga**: Mr Masonga said he saw the appellant, LM and Mr Faulkner come out of the party and go down the stairs to the middle landing. After a pause, the appellant and

[8] *Baker v The Queen* [2011] VSCA 226 at [26]-[32].

LM came back up the stairs. The appellant approached a white male on the landing near the railing, and a fight broke out between them. LM came up the stairs and approached a different white male, Mr Snowball, also on the landing, and they started fighting. The appellant never fought Mr Snowball. Mr Masonga said in evidence-in-chief that he did not see anyone go through the window. However, in cross-examination, he said that Mr Snowball lost his balance during the fight with LM, took no more than two steps backwards to recover his footing and fell out the window. Mr Masonga was clear that LM was the one who had had the last physical contact with Mr Snowball before he went out the window.[10]

16. **Competing versions**: Thus, as the Court of Appeal recognized, on the eyewitness evidence, there were essentially two competing versions. On the first version (supported by Messrs Doig and Arcaro and in part Mr Stuart), it was the appellant's punching or pushing of Mr Snowball that resulted in his going through the window. This version implicated the appellant and effectively exonerated LM. On the second version (supported by Messrs Asfer and Masonga and in part Mr Stuart), the appellant could not have been responsible for forcing Mr Snowball through the glass, as he was being held by Mr Asfer or (alternatively) was fighting someone else. On that version, it was LM who was fighting Mr Snowball at the point of the fall and the appellant who was exonerated. Counsel for LM urged the jury to act on the first version and to reject the second version. LM was acquitted.[11]

17. **Admissions by LM in police interview**: In the case against LM, the Crown relied on evidence of admissions made by LM on two occasions. The first was an admission to police in a record of interview that he pushed Mr Snowball.[12] The Crown relied on that evidence as an admission that this was the push that caused Mr Snowball to go through the window.[13] LM's record of interview included the following exchanges:[14]

> Q 98 Okay. And what happened then?
> A ... I was pushin' my mate down the stairs. The other guy hit me from the side. I grabbed him and pushed him. I turned around and kept walking. By the time I got downstairs, the guy was on – on the pavement ... I – I think he fell through the window.
> ...

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[9] *Baker v The Queen* [2011] VSCA 226 at [34]-[36].
[10] *Baker v The Queen* [2011] VSCA 226 at [37]-[39].
[11] *Baker v The Queen* [2011] VSCA 226 at [40]-[41].
[12] See Transcript of Exhibit P10 (the DVD of LM's record of interview with police on 27 November 2005).
[13] See, e.g., Crown Final Address at T 1917; Charge at T 2155-2158, 2165 & 2409-2410.
[14] Transcript of Exhibit P10 (the DVD of LM's record of interview with police on 27 November 2005).

Q 179 Yep.
A … And then I said – I grabbed my mate, I pushed him down the stairs and he kept walkin'. Ant th-, as we were walkin', the guy hit me. So, I turned around, I pushed him. I said, "Piss off, mate," and pushed him and then kept on walkin'. And by the time I got downstairs, the guy was on the bottom of the pavement.
Q 180 Okay. Did your friend that was with you walking down punch the other white guy near the landing?
A No. Th-, the – they couldn't 'cos I was in the middle.
…
Q 198 Yeah.
A And the guy was standing here. And my friend was here. I was in the middle. You know, so I – I – I'm – I'm – I'm tryin' sort them 2 to stop fighting. Pushing my friend down the stairs, the guy from the side hits me.
Q 199 Yep.
A Then I turned around and I push him. I go, "Piss off, mate," and kept walkin'. And then I went downstairs, the guy is on the – on the pavement.
Q 200 Did you see him go out the window?
A No.
Q 201 So, you're at the top of the stairs. You've pushed him - - -?
A Mm.
Q 202 And then you've just turned and walked – walked - - - ?
A Yeah.
Q 203 Out?
A I pushed him and I turned and walked out.
Q 204 Did you hear anything?
A No. W-, when I went downstairs, when I seen this guy, I'm like, "Oh my God." I – I took off. I was – I was – I was shocked.
Q 205 How did you know that it was you that pushed him out the window in that case?
A 'Cos I – I'm – I knew the – I knew the face, the guy. I knew 'cos he had long hair.
Q 206 Okay. So, you're saying you were punched once?
A Yeah.
Q 207 Then you've pushed him?
A Yeah.
Q 208 And you didn't see him go out the window, you didn't hear anything and you've turned away and walked out?
A Yep.
…
Q 258 Okay. It's then alleged that you have gone to the male who was thrown out the window, punched him once in the face and then said something to him - - -?
A What? No.
Q 259 You've then punched him again in the face and then you've pushed him out the window?
A No. That is not – that's not how it happened at all.
…
Q 273 Okay. Did you think to hang around to tell police what had happened?
A No.
Q 274 Why didn't you do that?
A 'Cos it was something' terrible I did.
Q 275 Okay. We-, once again, I – I'm just a bit confused by this. You tell me you've done something terrible but then you say all you did was push a guy away who punched you.
A Well, I'm assuming that I did something terrible because at – at – as – I was the only person to have any contact with him at last, from – from – from what I've seen, so I'm only assuming that this guy is badly injured from me pushing him. And from what you – the information I've been told by you.
…
Q 307 Okay. When the guy hit you, as you said, how did that make you feel?
A Bit angry.
…
Q323 Okay. How did you push him?
A Like this. I had him in the chest like this and I pushed him like that.
…
Q 326 What did you see him do after you pushed him?
A I pushed him, he – he was stumbling backwards - - -

Q 327 Stumbling backwards?
A He ke-, he was stumbling backwards. I turned around and didn't get the chance – I just wanted to get out of there.
...
Q 333 And how – how far away from the window was he?
A When - - -
...
Q 335 When you pushed him?
A From here to where you are now, say. I don't know, about a metre – 2 metres. I don't know how far.
...
Q 348 Would you agree that it would take quite some force to push the man so that he f-, so that he fell backwards and – a metre and a half then through the window?
A Not re-, I don't know, 'cos th-, the – the wet was – floor, there was – there was bottles of drinks everywhere on the floor, too, so he could've slipped on the bottles. I dunno.
...
Q 351 ... Did you know at the time that you were pushing this man that there was a w-, a window behind him?
A Yeah, I seen the window but I didn't think he would go through it. I didn't think – I don't know.
...
Q 353 And after you pushed him, did you see him go through the window?
A No, I – I – I – seen him when I went downstairs.
Q 355 Did you hear him crash through the window?
A No. 'Cos we were li-, d-, downstairs. Well – well, I pushed him. I didn't stay there, so – just like went and I just pushed him, turned off and walked away. Straight away. I just pushed and turned and walked off.
Q 356 ... What I'm putting to you is that you must – you must have seen him fall through the window.
A I – I did not see him fall through the window. I – I pushed him away, just enough for him to get away from me. Next time I see him, he was downstairs on ... the pavement, next time I seen him. So I assumed – I assumed that the – the reason he fell downstairs was 'cos I – I would've pushed him or – that's what – that's the assumption that I've got – that I pushed him out the window. So I was – left.
...
Q 360 Well, at the very least, you must've heard him crash through the glass window.
A I didn't hear anything. 'Cos th-, there was – there was bottles everywhere there. The guy could've – he could've slipped and fell on – off the bottles. There was drinks everywhere at that stairwell.
...
Q 363 And was the guy that was pushed by you, was he fighting with Khalid [the appellant] at some stage, was he?
A I didn't see Khalid [the appellant] until I saw him downstairs.
Q 364 Mm. Well, which one of you mates was he fighting with?
A He's my .... – o-, one of my mates.
Q 365 Which one?
A The – I don't wish to state his name.
...
Q 371 Well, what would you say if I put to you that you deliberately pushed that person through the window?
A That's wrong. I would not do that.

18. **Implied admission by LM to Messrs Asfer and Morgan**: The other occasion arose when LM was in a car with Mr Faulkner and Mr Morgan after the party. Mr Asfer gave evidence that, when in a car after Mr Snowball had fallen, LM argued with Mr Faulkner

and said to him, "Look what you made me do".[15] In evidence-in-chief, Mr Morgan said that, when in a car after Mr Snowball had fallen, LM said to Mr Faulkner, "See what you've done" and "See what you've put us through". In cross-examination, Mr Morgan conceded that in his police statement he said that LM said, "See what you've done, look what you've made me do".[16] The Crown relied on that as further evidence that LM had acknowledged that he caused Mr Snowball to go through the window.[17]

19. **Neither accused gives evidence**: Neither the appellant nor LM gave evidence at trial.

10 20. **Trial judge invites submissions on *Bannon***: At the conclusion of the evidence and prior to the charge, the trial judge raised this Court's decision in *Bannon v The Queen* (1995) 185 CLR 1 ("*Bannon*") and indicated his view that "the law is that [LM's] admissions cannot inculpate and cannot exculpate [the appellant] because they are not evidence in his trial at all". His Honour invited submissions as to whether this was correct and as to what, if anything, he should say to the jury.[18]

21. **LM and prosecutor's submissions**: Counsel for LM submitted that he agreed with the trial judge and that the jury should be told that LM's admissions were evidence in his trial only.[19] The prosecutor also agreed with this stance.[20]

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22. **Appellant's submissions**: Counsel for the appellant, however, argued that he ought to be permitted to rely on LM's admissions in the appellant's defence.[21] He relied on the *dicta* of Deane J in *Bannon* and submitted that his Honour should take that course because the evidence was relevant to raising a reasonable doubt as to the appellant's guilt.[22] In relation to the admissions in LM's record of interview, counsel differentiated this case from *Bannon*, where the co-accused Calder's ex-curial statements were not contained in a record of interview, but were statements made to other persons some hours later. Here, the admissions of LM were made in a formal setting under police caution, placing the

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[15] See, e.g., Crown Final Address at T 1904-1905; Charge at T 2346 & 2347-2348.
[16] See, e.g., Crown Final Address at T 1903; Charge at T 2357 & 2363-2364.
[17] See, e.g., Crown Final Address at T 1917; Charge at T 2155-2158, 2165 & 2409-2410.
[18] T 1797.3-1798.29.
[19] T 1799.2-13 & 1801.29-1802.17.
[20] T 1806.28-30.
[21] T 1799.15-1810.
[22] T 1802.29-1803.5 & 1804.5-1804.27.

reliability of the statements in "a far higher position than Calder's statements".[23] Accordingly, counsel argued that it would not be inconsistent with this Court's decision in *Bannon* to allow him to rely on LM's admissions in his record of interview because those admissions were sufficiently reliable and of high probative value, as demonstrated by the fact that the Crown were relying on them against LM.[24] Counsel argued, in the alternative, that he should not be restricted in referring to the evidence of LM's admissions in his final address. He referred to the way he had opened the trial before the jury.[25]

23. **Ruling by the trial judge**: The trial judge refused the appellant's application.[26] His Honour considered he was bound to rule that the admissions of LM were not admissible in the appellant's trial in view of the ratio of this Court's decision in decision in *Bannon*.[27] Further, his Honour said that, while the issue had not been addressed in *Bannon* given the course the trial had taken in that matter, the appellant's counsel could not address on the inadmissible material other than referring, "perhaps", to the fact that it is inadmissible.[28] His Honour indicated that he was mindful of the observations of Deane J but held that those observations could not permit him to ignore the ratio in *Bannon*.[29]

24. **Counsel's lament**: Consistently with the judge's ruling, in his final address, counsel for the appellant lamented that the evidence of LM's admissions to the police about pushing Mr Snowball and his statements in the car were not admissible in the appellant's trial.[30]

25. **Impugned directions**: The trial judge gave conventional directions to the effect that the jury must consider the case against each accused only in light of the evidence that applies to the accused being considered; and that the evidence concerning alleged admissions by LM is evidence only in his case, is not evidence in the appellant's case and must be ignored when considering the appellant's case.[31]

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[23] T 1803.6-20.
[24] T 1803.21-1804.4.
[25] T 1804.20-1806.26.
[26] T 1812-1813.
[27] T 1812.10-12.
[28] T 1812.12-19.
[29] T 1812.20-26.
[30] T 2064-2065.
[31] T 2155.15-26.

26. **The application to the Court of Appeal**: On 9 September 2010, the Court of Appeal (Maxwell P, Buchanan and Bongiorno JJA) refused the appellant's application for leave to appeal against conviction. While the judge's ruling in relation to LM's admissions was the subject of a ground of appeal in the initial Notice of Application for Leave to Appeal Against Conviction,[32] that ground was not pursued. Instead, the sole ground of appeal was that the verdict was unreasonable and could not be supported having regard to the evidence.[33] Thus, whilst the point at issue on this appeal was not agitated in the Court of Appeal, with the result that this Court does not have the benefit of the Court of Appeal's opinion on the matter, had the point been taken, the Court of Appeal would have been bound to rule as the trial judge did. Only this Court can give authoritative guidance on a matter of this nature.

27. **Special leave to appeal**: On 28 October 2011, French CJ and Kiefel J granted the appellant's application for special leave to appeal to this Court.[34]

## PART VI: APPELLANT'S ARGUMENT

28. **The errors**: It is submitted that the Court of Appeal erred in failing to hold that the trial miscarried as a result of (a) the trial judge's directions to the effect that the evidence of LM's admissions could not be used in the appellant's case and (b) his Honour's failure to direct that those admissions could be used in exculpation of the appellant.

29. **Current law**: It is accepted that, as the common law of Australia is understood at present, there was no error in the approach of either the trial judge or the Court of Appeal. Currently, there is no exception to the hearsay rule which renders admissible either for or against an accused hearsay evidence of a confession or admission by a co-accused or a third party.[35] However, it is respectfully submitted that the law should be reconsidered by this Court.

30. ***Bannon* left the issue open**: In *Bannon*, this Court considered, but left for another day, the question whether evidence of ex-curial admissions made by one accused could be admissible in exculpation of a co-accused on a joint trial. Three bases of admissibility

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[32] See Ground 13 of the Notice of Application for Leave to Appeal Against Conviction (dated 6 October 2008).
[33] *Baker v The Queen* [2011] VSCA 226 at [2]; Appellant's Full Statement of Grounds (undated).
[34] Order granting special leave to appeal; *Baker v The Queen* [2011] HCATrans 304.
[35] *Bannon v The Queen* (1995) 185 CLR 1 at 22 per Dawson, Toohey and Gummow JJ.

were advanced on behalf of Mr Bannon: (i) the rule against admitting hearsay should be applied flexibly; (ii) there is an exception to the hearsay rule where the out-of-court statement is against the penal interest of the person making it and that person is unavailable to testify; and (iii) there is an alternative exception to the hearsay rule where the out-of-court statement is judged to be "reliable" and its admission is "necessary".[36] The appeal in *Bannon* was dismissed. Despite existing authority, trial counsel for Mr Bannon had relied on the co-accused's admissions to his client's advantage in his final address, an approach that was not corrected by the trial judge. Further, all members of the Court held that the co-accused's admissions were inadmissible in exculpation of Mr Bannon because they were insufficiently reliable and probative of his innocence to satisfy an exception to the hearsay rule even if such an exception were to be recognized. Thus, it was unnecessary to decide whether such an exception existed.[37] As subsequent decisions of this Court make clear, the question whether such an exception might be recognized has been left open.[38]

31. **Deane J's judgment in *Bannon***: In his judgment in *Bannon*, Deane J referred to a potentially different and more confined exception to the three bases described above. His Honour gave examples not far removed from the present case to illustrate the unfairness that can arise when the law, on the one hand, allows the Crown in a joint trial to lead evidence of admissions inculpating one accused but, on the other, precludes a co-accused from relying upon that evidence even though it supports his or her innocence or at least raises a doubt about his or her guilt.[39] Deane J put the issue in this way:[40]

> The point of the examples is simply to demonstrate that, in the circumstances where the Crown has seen fit to proceed against two accused persons jointly and to lead particular evidence on the joint trial against one only of them, a situation can arguably arise in which ordinary considerations of fairness would be affronted and the administration of criminal justice mocked if the other accused were precluded from relying upon that evidence if it supported his or her innocence ***or raised a doubt about his or her guilt***. (Emphasis added.)

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[36] *Bannon v The Queen* (1995) 185 CLR 1 at, e.g., 6-7 per Brennan CJ.
[37] *Bannon v The Queen* (1995) 185 CLR 1 at 12 per Brennan CJ and 28 per Dawson, Toohey and Gummow JJ. For a discussion of the case, see, e.g., C.R. Williams, "Implied Assertions in Criminal Cases", *Monash University Law Review* (Vol 32, No 1, 2006) 47, esp. at 62-64 & 70.
[38] *Jones v The Queen* (2009) 83 ALJR 671; 254 ALR 626 at [19]; *Nicholls v The Queen* (2005) 219 CLR 196 at [183].
[39] *Bannon v The Queen* (1995) 185 CLR 1 at 13-14.
[40] *Bannon v The Queen* (1995) 185 CLR 1 at 14.

32. His Honour directed attention to the centrality of the standard of proof in a criminal trial:[41]

> The central prescript of our criminal law is that no person should be convicted of a crime unless his or her guilt is established beyond reasonable doubt after a fair trial according to law. The specific content of the requirement of a fair trial may vary with changing circumstances, including contemporary standards and perceptions. When it appears that judge-made rules of evidence or procedure conflict, or are liable to conflict, with the basic requirements of fairness, it is a function of a final appellate court, such as this Court, to address the question whether those rules should be altered or adjusted to avoid such conflict. (Footnotes omitted.)

33. After referring to the possibility that the circumstances of a particular case may be such that a co-accused should only be permitted to rely on evidence not led against him or her if it is accepted that other material providing the context of that particular evidence, or evidence led in rebuttal of it, be also treated as evidence in his or her trial, Deane J said this:[42]

> Subject to that safeguard, however, it appears to me to be strongly arguable that the basic requirement of fairness dictates that, in circumstances where the Crown has seen fit to bring a person ("the first accused") to a joint trial with another accused and to place before the jury material which is tendered only against that other accused but which is supportive of the innocence of the first accused, the trial judge have a discretion to direct that that material, even though otherwise inadmissible in the trial of the first accused, be evidence in that trial at the instance of the first accused if, in all the circumstances of the case, the trial judge considers that fairness to the first accused and the interests of the administration of justice support the conclusion that such a direction be given. (Footnotes omitted.)

34. **Intermediate appellate courts following *Bannon***: Intermediate appellate courts in Western Australia,[43] South Australia[44] and the Northern Territory[45] have continued to apply *Bannon*.

35. **A different course taken in Queensland**: However, in Queensland, the Court of Appeal has decided that *Bannon* is not "necessarily inconsistent" with earlier authority in that State permitting evidence of out-of-court confessions by a third party or a co-accused.[46]

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[41] *Bannon v The Queen* (1995) 185 CLR 1 at 15.
[42] *Bannon v The Queen* (1995) 185 CLR 1 at 15.
[43] *Brown v State of Western Australia* [2011] WASCA 111 at [69]-[70]; *Etherton v State of Western Australia* (2005) 30 WAR 65 at [138].
[44] *Re Questions of Law Reserved (No 3 of 1997)* (1998) 70 SASR 555; *Re Kamleh* [2003] SASC 269 at [251].
[45] *Manufekai v R* (2006) 196 FLR 460 at [24].
[46] *R v Martin & Ors* (2002) 134 A Crim R 568 at [21]; *R v Zullo* [1993] 1 Qd R 572 at 574-575; *R v K; Ex parte Attorney-General (Qld)* (2002) 132 A Crim R 108 at [16].

36. **The proposed exception is sound in principle and accords with other developments in the law**: There are several reasons why Deane J's suggested exception in *Bannon* is sound in principle and accords with other developments in the law. First, as Gummow and Callinan JJ observed in *Nicholls v The Queen*, there is a simple rationale for the reception of evidence of admissions made by an accused as an exception to the rule against hearsay: "what a party himself admits to be true, may reasonably be presumed to be so".[47] The same rationale dictates that LM's admission that he pushed the deceased and caused him to fall, in circumstances where there are competing versions as to which of the two accused pushed the deceased, and the appellant disputes that he did so, may reasonably be presumed to be (or possibly be) a true statement that the appellant did not push the deceased.

37. Secondly, as Deane J observed in *Bannon*, fairness dictates that evidence on which the Crown relies to implicate one accused in a joint trial that also has a tendency to exculpate another accused should be allowed to be considered by the jury as exculpatory of that other accused.

38. Thirdly, again, as Deane J observed, the administration of criminal justice would be mocked if an accused were precluded from relying upon evidence of the co-accused's admissions that supported the accused's innocence or raised a doubt about his or her guilt.

39. Fourthly, in so far as Dawson, Toohey and Gummow JJ in *Bannon*[48] considered touchstones for admissibility relied on in other jurisdictions – such as "reliability", "immediate prejudice" and "corroboration" – for reasons that follow, such tests would be met in the present case: First, the Crown were relying on the admissions. Secondly, there was no objection by LM to the admissibility of the admissions in his trial. Thirdly, the admission as to pushing Mr Snowball was made to police. Fourthly, the admissions were corroborated by the evidence of Messrs Asfer and Masonga.

40. Fifthly, unlike what Lord Bridge of Harwich described in *R v Blastland* as the "very significant and, many might think, … dangerous new exception" suggested (but rejected)

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[47] *Nicholls v The Queen* (2005) 219 CLR 196 at [184] per Gummow and Callinan JJ, citing Parke B in *Slatterie v Pooley* [1840] EngR 227; (1840) 6 M & W 664 at 669; 151 ER 579 at 581.
[48] *Bannon v The Queen* (1995) 185 CLR 1 at 23-28.

in that case, which involved a so-called "third party confession",[49] the exception of the type suggested by Deane J in *Bannon* would not suffer from the same level of risk of unreliability. That the evidence is led by the Crown as inculpatory of an accused in circumstances where the Crown bears the onus of proof on the criminal standard tends to ensure a relatively high degree of reliability.

41. Sixthly, to recognize an exception of the type suggested in this appeal would be consistent with the development and implementation of the uniform Evidence Acts, which, since *Bannon* was decided, have been extended beyond the Commonwealth[50] and New South Wales[51] to Victoria[52] and Tasmania.[53] In *Bannon*, McHugh J referred to the fact that the then recently enacted s 65 of the *Evidence Act 1995* (Cth) enabled the admission of exculpatory third party confessions provided certain preconditions were met.[54] It appears that, were the appellant's trial being conducted in Victoria today, LM's admissions would be admissible under ss 65(1), (2)(b), (c) or (d) and/or (8) of the *Evidence Act 2008* (Vic). The rationale for the introduction of s 65(8) was to "to minimize the conviction of the innocent".[55] McHugh J also opined in *Bannon* that the fact that only the Commonwealth and New South Wales had adopted the uniform Evidence Acts was a reason for this Court proceeding cautiously when invited to alter the settled rule against hearsay. His Honour went on to say that, if any change were to come about as a result of judicial law-making, it should only occur after the Court has had the benefit of full argument from counsel representing the States and the Commonwealth. However, given that, today, four jurisdictions have the uniform Evidence Acts, there is now a consistent pattern of legislative policy to which the common law of Australia can adapt itself.[56]

42. Seventhly, to recognize an exception of the type suggested in this appeal would be consistent with the development of the common law in Queensland. Further, since "[t]here is but one common law of Australia which is declared by this Court as the final

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[49] *R v Blastland* [1986] 1 AC 41 at 52H-53A.
[50] *Evidence Act 1995* (Cth).
[51] *Evidence Act 1995* (NSW).
[52] *Evidence Act 2008* (Vic).
[53] *Evidence Act 2001* (Tas).
[54] *Bannon v The Queen* (1995) 185 CLR 1 at 41.
[55] When previously excluded hearsay evidence is adduced by an accused under s 65(8), the accused is not required to satisfy the conditions of admissibility which the prosecution must satisfy under s 65(2) and s 65(7). In its 1985 Interim Report on Uniform Evidence Law, the Australian Law Reform Commission stated that "[t]he distinction is warranted primarily by concern to minimize the conviction of the innocent" (ALRC 26, Vol 1, para 692), cited in Stephen Odgers, *Uniform Evidence Law in Victoria*, Lawbook Co, 2010 at [1.3.2140].
[56] *Cf Esso Australia Resources v FCT* (1999) 201 CLR 49 at 62[23].

court of appeal",[57] this Court should bring the common law in Victoria and the other common law States into line with both the common law in Queensland and the legislative policy evinced in the uniform Evidence Acts.

43. Eighthly, the legislative developments in Australia are broadly consistent with those in the United Kingdom. Subsequent to the House of Lords' decision in *R v Myers*[58] and the Law Commission's report entitled *Evidence in Criminal Proceedings: Hearsay and Related Topics*,[59] s 76A was inserted into the *Police and Criminal Evidence Act 1984* (UK) ("PACE"). Section 76A(1) provides that "[i]n any proceedings a confession made by an accused person may be given in evidence for another person charged in the same proceedings (a co-accused) in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section". A "confession" is defined widely in s 82(1) of PACE to include "any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise".

44. **The present case throws up the conflict between fairness and the rule against hearsay**: It is submitted that the present case illuminates the conflict, identified by Deane J in *Bannon*, between the strict application of the rule against hearsay and basic fairness, as well as the centrality of the burden and standard of proof in a criminal trial. As the Court of Appeal recognized, on the eyewitness evidence, there were essentially two competing versions – one which implicated the appellant (and exonerated LM) in causing Mr Snowball to fall through the window and another which implicated LM (and exonerated the appellant). That the jury acquitted LM and convicted the appellant suggests the jury preferred the version that had the appellant fighting with Mr Snowball and LM not involved. It also suggests the jury were not satisfied beyond reasonable doubt that LM's utterances amounted to admissions to causing Mr Snowball to fall to his death. However, had the jury been allowed to use the evidence of LM's admissions in the appellant's case generally and to support the version of Messrs Asfer, Masonga and Stuart in particular, given the onus and standard of proof, the jury may have had at least a

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[57] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 563.
[58] *R v Myers* [1998] AC 124.
[59] 1997, Cm 3670.

reasonable doubt about whether the appellant was responsible for causing Mr Snowball to go through the window.[60]

45. **The direction sought should have been given**: Thus, fairness to the appellant and the interests of the administration of justice dictated that the jury be directed that the evidence of LM's admissions could be used in exculpation of the appellant. That evidence was plainly relevant to facts in issue in the appellant's trial. While the trial judge was bound to direct as he did at the time, the trial miscarried as a result of (a) the directions to the effect that the evidence of LM's admissions could not be used in the appellant's case and (b) the failure to direct that those admissions could be used in exculpation of the appellant.

46. **Manifest miscarriage of justice; proviso in applicable**: It is submitted that it cannot be said that "no substantial miscarriage of justice has actually occurred" as a result of those errors within the meaning of the proviso to s 568(1) of the *Crimes Act 1958* (Vic). On the contrary, the miscarriage of justice is manifest as the errors went to the heart of the appellant's defence.

47. In fact, had the evidence of LM's admissions been admitted in the appellant's trial and had the jury been directed accordingly, it is submitted that it is likely that the appellant would have been acquitted. There are three reasons. First, given that it is likely that LM's acquittal means that the jury were not satisfied beyond reasonable doubt that LM was responsible for causing Mr Snowball to fall through the window, this Court can be confident that the jury did not convict the appellant on the basis that he was acting in concert with LM or that he was aiding and abetting LM. Rather, his conviction must have been on the basis that he was a principal directly responsible for Mr Snowball's death.

48. Secondly, the jury may well have thought it reasonably possible or even probable that LM's utterances to the police (whether or not combined with the utterances to others in the car) were true admissions as to pushing Mr Snowball and causing him to fall through the window. However, given the onus and standard of proof, such a state of satisfaction would be an insufficient basis for inculpation of LM in either murder or manslaughter – and therefore would explain his outright acquittal. But if that evidence had been admitted

[60] Similarly, in *R v Zullo* [1993] 2 Qd R 572 at 574, the Queensland Court of Appeal stated that the confession by Beard was "to be considered by the jury for what they thought it was worth, and may very well have inclined the jury towards a 'not guilty' verdict, even if they were by no means convinced that it was truthful".

in exculpation of the appellant, such a state of satisfaction would have compelled the jury to acquit the appellant as well because it would equate to a lack of satisfaction beyond reasonable doubt that the appellant was responsible for causing Mr Snowball to fall through the window.

49. Thirdly, despite the appellant's conviction, this was a weak case of murder. The Crown case was not – and could not have been – that there was an intention to kill; rather, the case was only ever that there was an intention to cause really serious injury. Nor was it put that there was an intention that Mr Snowball should go through the window. The Crown case bordered on an accidental killing in the course of a fight. Further, while Messrs Asfer, Masonga and Stuart were criticized, there evidence supported the appellant's innocence of homicide. But even if the jury were satisfied that the appellant was responsible for pushing or punching Mr Snowball and thereby causing him (accidentally) to fall through the window, a finding of an intention to cause really serious injury at that precise moment, which was necessary for a verdict of guilty of murder (as opposed to manslaughter), was surprising. Such a finding would have been far less likely had the jury been directed that they must consider LM's admission to pushing Mr Snowball in determining whether they were satisfied beyond reasonable doubt that the appellant caused Mr Snowball to fall and that he did so intending not to cause him to fall but to cause him really serious injury as a result of a push or a punch.

## PART VII: APPLICABLE LEGISLATION

50. **Section 65 of the *Evidence Act 2008* (Vic)**: At the time of the appellant's trial, while there was in force the *Evidence Act 1958* (Vic), the admissibility of LM's admissions in exculpation of the appellant was governed by the common law. Any retrial would be governed by the *Evidence Act 2008* (Vic), the key provision of which appears to be s 65, which, so far as is relevant, provides as follows:

> **65 Exception – criminal proceedings if maker not available**
>
> (1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.
>
> (2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation—
>
> (a) was made under a duty to make that representation or to make representations of that kind; or

(b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or

(c) was made in circumstances that make it highly probable that the representation is reliable; or

(d) was—

(i) against the interests of the person who made it at the time it was made; and

(ii) made in circumstances that make it likely that the representation is reliable.

**Note**

Section 67 imposes notice requirements relating to this subsection.

...

(7) Without limiting subsection (2)(d), a representation is taken for the purposes of that subsection to be against the interests of the person who made it if it tends—

(a) to damage the person's reputation; or

(b) to show that the person has committed an offence for which the person has not been convicted; or

(c) to show that the person is liable in an action for damages.

(8) The hearsay rule does not apply to—

(a) evidence of a previous representation adduced by an accused if the evidence is given by a person who saw, heard or otherwise perceived the representation being made; or

(b) a document tendered as evidence by an accused so far as it contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

**Note**

Section 67 imposes notice requirements relating to this subsection.

51. **Section 568 of the *Crimes Act 1958* (Vic)**: The determination of the appellant's application to the Court of Appeal was, and his appeal to this Court is, governed by s 568 of the *Crimes Act 1958* (Vic), which provided as follows:

(1) The Court of Appeal 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:
Provided that the Court of Appeal may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided n 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 Part the Court of Appeal shall, if it allows an appeal against conviction, quash the conviction and either direct a judgment and verdict of acquittal or direct a new trial to be had.

## PART VIII: ORDERS SOUGHT

52. The appellant seeks orders that:

a) the appeal be allowed and the orders of the Court of Appeal be set aside; and

b) in lieu thereof, the application for leave to appeal to the Court of Appeal be granted, the appeal be allowed, the conviction be set aside, the sentence be quashed, a retrial be directed and an indemnity certificate be granted to the applicant pursuant to s 14 of the *Appeal Costs Act 1998* (Vic).

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Dated this 25th day of November 2011.

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