HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, NETTLE AND GORDON JJ

Matter No A14/2016

NH — APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS — RESPONDENT

Matter No A15/2016

RROK JAKAJ — APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS — RESPONDENT

Matter No A16/2016

DAVID ZEFI — APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS — RESPONDENT

Matter No A19/2016

DARIO STAKAJ — APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS — RESPONDENT

NH v Director of Public Prosecutions
Jakaj v Director of Public Prosecutions
Zefi v Director of Public Prosecutions
Stakaj v Director of Public Prosecutions

[2016] HCA 33
31 August 2016
A14/2016, A15/2016, A16/2016 & A19/2016

ORDER

Matter No A14/2016

1. *Appeal allowed with costs.*

2. *Set aside orders 1 to 4 of the Full Court of the Supreme Court of South Australia made on 25 September 2015, and in their place order that:*

   (a) *the application of the Director of Public Prosecutions filed on 16 January 2015 be dismissed;*

   (b) *the application of the Director of Public Prosecutions filed on 5 March 2015 be dismissed; and*

   (c) *the Director of Public Prosecutions pay the appellant's costs of the two applications.*

3. *Remit the matter to the Full Court for further hearing on grounds 3 to 6 of the Notice of Appeal filed in that Court on 7 October 2014.*

Matters No A15/2016 and No A16/2016

1. *Appeal allowed with costs.*

2. *Set aside orders 1 to 4 of the Full Court of the Supreme Court of South Australia made on 25 September 2015, and in their place order that:*

   (a) *the application of the Director of Public Prosecutions filed on 16 January 2015 be dismissed;*

   (b) *the application of the Director of Public Prosecutions filed on 5 March 2015 be dismissed; and*

   (c) *the Director of Public Prosecutions pay the appellant's costs of the two applications.*

Matter No A19/2016

1. *Appeal allowed with costs.*

2. *Set aside orders 1 to 4 of the Full Court of the Supreme Court of South Australia made on 25 September 2015, and in their place order that:*

   (a) *the application of the Director of Public Prosecutions filed on 16 January 2015 be dismissed;*

   (b) *the application of the Director of Public Prosecutions filed on 5 March 2015 be dismissed; and*

   (c) *the Director of Public Prosecutions pay the appellant's costs of the two applications.*

3. *Remit the matter to the Full Court for further hearing on grounds 4 to 6 of the Substituted Grounds of Appeal filed in that Court on 21 November 2014.*

On appeal from the Supreme Court of South Australia

Representation

M L Abbott QC for the appellant in A14/2016 (instructed by Legal Services Commission of South Australia)

O P Holdenson QC with A M Dinelli for the appellant in A15/2016 (instructed by Ben Sale)

B W Walker SC with S A McDonald for the appellant in A16/2016 (instructed by Patsouris & Associates)

S G Henchliffe with S Georgiadis for the appellant in A19/2016 (instructed by Steven Georgiadis & Associates)

A P Kimber SC and C D Bleby SC with F J McDonald for the respondent in each matter (instructed by Director of Public Prosecutions (SA))

CATCHWORDS

NH v Director of Public Prosecutions
Jakaj v Director of Public Prosecutions
Zefi v Director of Public Prosecutions
Stakaj v Director of Public Prosecutions

Criminal law – Appeal – Verdict – Not guilty of murder but guilty of manslaughter – Alleged mistake by foreperson – Requisite majority for verdict of not guilty of murder allegedly not reached – Report of foreperson to court officer disclosing alleged error – Statements as affidavits from jurors – Full Court quashed jury verdicts and ordered new trials on count of murder – Whether presumption of correctness of jury verdicts rebuttable in circumstances – Whether Full Court could reconsider perfected orders in original jurisdiction – Whether alleged mistake was material irregularity leading to unlawful verdicts – Whether alleged mistake by foreperson and acquiescence of jury an abuse of process – Whether inherent power to correct perfected orders in circumstances – Admissibility of jury statements to impeach verdicts – Consideration of distinction between verdict and judgment.

Words and phrases – "abuse of process", "alternative offence", "functus officio", "inherent jurisdiction", "inherent power", "judgment", "majority verdict", "major offence", "material irregularity", "perfected", "unlawful verdict", "verdict".

Criminal Law Consolidation Act 1935 (SA), ss 350, 351A, 352, 353.
Juries Act 1927 (SA), s 57.
Supreme Court Act 1935 (SA), ss 17, 48, 49.

FRENCH CJ, KIEFEL AND BELL JJ.

Introduction

1 On 22 September 2014, after a trial before a judge and jury in the Supreme Court of South Australia, the four appellants were acquitted of the murder of Christopher Hatzis, but convicted of his manslaughter, for which they were sentenced to terms of imprisonment.

2 On one of two applications by the Director of Public Prosecutions ("the DPP") to the Supreme Court, which were heard concurrently by the Full Court, a majority of the Full Court made orders quashing the verdicts and directing new trials on the charge of murder. The Court held that the verdicts as recorded were reached in contravention of s 57 of the *Juries Act* 1927 (SA). That section provides that a jury who have found a person not guilty of an offence charged may find the person guilty of an alternative uncharged offence. In this case the charged offence was murder. The alternative uncharged offence was manslaughter.

3 On the basis of affidavit evidence obtained from the jurors by an officer of the Court, the Full Court found that the foreperson had erroneously told the Court that a majority of at least 10 of the jury had reached verdicts of not guilty of murder. Pursuant to s 57 of the *Juries Act* a verdict of not guilty required a majority of at least 10 of them. The Full Court found that majority had not been reached. The majority of the Court held that absent verdicts of not guilty of murder reached by the requisite majorities, the jury could not, consistently with s 57, have proceeded to consider verdicts of guilty of the alternative uncharged offence of manslaughter.

4 There was more than one difficulty with the reasoning of the Full Court. The Court would not reach the question whether there was a non-compliance with s 57 of the *Juries Act* unless it had the power to look behind the verdicts delivered by the foreperson. Those verdicts were delivered in open court in the sight and hearing of the other jurors, without any dissent or action by them, and were therefore presumed to be correctly communicated to the Court. There is no doubt that while still assembled the jury could have corrected the verdicts[1]. That is a proposition of long standing and not only in the United Kingdom and Australia[2]:

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1 *R v Parkin* (1824) 1 Mood 45 at 46 [168 ER 1179 at 1180].

2 *Smith v Massachusetts* 543 US 462 at 474 (2005).

> "Double-jeopardy principles have never been thought to bar the immediate repair of a genuine error in the announcement of an acquittal, even one rendered by a jury."

5 However, the only arguable source of power, in the original jurisdiction of the Court, to alter or set aside verdicts post-discharge, without recalling the jury, was the inherent power of the Court. Once the jury were discharged and beyond the control of the Court, they no longer existed as a decision-making organ of the Court with the capacity to correct their own verdict. The objections to the proposition that the inherent power extended to support the Full Court's orders were formidable — not least the presumed correctness of the verdicts and the finality of the perfected judgments of acquittal and conviction. Those objections could not be overcome by the Full Court's characterisation of the claimed error by the foreperson and acquiescence in it by the other jurors as an abuse of process attracting the protective application of the inherent power. The absence of inherent power to set aside the verdicts appears from a consideration of the court record and the allegations in the DPP's first application. There was no basis for receiving in evidence affidavits taken from the foreperson and the other jurors. The orders should not have been made. The appeals should be allowed with costs.

Procedural history

6 By an information dated 7 March 2014, the appellants were jointly charged in the Supreme Court of South Australia with the murder of Christopher Hatzis at Adelaide on 4 August 2012. The charges arose out of a fatal altercation between the appellants and the deceased in the early hours of 4 August 2012 in the vicinity of the Savvy nightclub in Light Square. The deceased was stabbed several times and died from his wounds. The prosecution case was that the appellant Zefi had inflicted the stab wounds with a knife and that the other appellants aided and abetted him in that murder.

7 The trial before Vanstone J and a jury commenced on 7 August 2014. The jury retired to consider their verdicts on 17 September 2014. In her summing up the trial judge directed the jury in the following terms:

> "In respect of each accused there are three possible verdicts open to you in this case depending on the view you take of the evidence. Those verdicts are guilty of murder, guilty of manslaughter or simply not guilty. There is no mention of manslaughter in the formal statement of the charge because it goes without saying that when a person is charged with murder the jury may always bring in a verdict of the alternative and lesser offence of manslaughter, and so there is no need to spell that out in the charge."

8 That direction did not indicate to the jury that they must return a verdict of not guilty of murder before they could return a verdict of guilty of manslaughter. Later in her summing up the trial judge directed the jury about their verdicts in the following terms:

> "Now, a verdict of guilty of murder must be unanimous. Any other verdict including not guilty of murder, can be by majority, that is, 10 or more of you after four hours of deliberation. But in a case of this nature it is plainly preferable that all verdicts be unanimous and I urge you to work towards that position."

It was open to the judge to give such a direction. It was not required by law[3]. Whether or not such a direction is desirable has been the subject of differing views in South Australia[4]. It was not suggested in the present case that the trial judge erred in that direction[5].

9 After a break from their deliberations over the weekend of 20 and 21 September 2014, the jury returned verdicts on Monday 22 September 2014 at 2.26pm. The foreperson, in answer to questions from the judge's associate, reported that the jury found each of the appellants not guilty of murder but guilty of manslaughter. Later that day, the foreperson reported to a court officer that he had mistakenly told the Court that at least 10 of the jury had agreed on a verdict of not guilty of murder. At the direction of the Chief Justice, a signed statement was taken from the foreperson by the Acting Sheriff. Statements in question and answer form were taken from the other members of the jury between 24 and 26 September 2014. Neither the DPP nor the appellants' legal representatives were aware of these steps until 30 September 2014 when they were provided with a memorandum by the Acting Sheriff and an affidavit by the trial judge's

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3 *Milgate v The Queen* (1964) 38 ALJR 162. See also *R v Tropeano* (2015) 122 SASR 298 at 318 [110] per Duggan AJ, Kourakis CJ agreeing.

4 See *R v Harrison* (1997) 68 SASR 304 at 306 per Cox J; cf *R v K* (1997) 68 SASR 405 at 413-414 per Doyle CJ.

5 As to the need to direct a jury regarding the alternative verdict of manslaughter, where there is a viable case of manslaughter, see *Gilbert v The Queen* (2000) 201 CLR 414 at 416-417 [1]-[2] per Gleeson CJ and Gummow J, 434 [70] per Callinan J; [2000] HCA 15; *Gillard v The Queen* (2003) 219 CLR 1 at 14 [26] per Gleeson CJ and Callinan J, 15 [32] per Gummow J, 30 [85] per Kirby J, 34-35 [106], 40 [129] per Hayne J; [2003] HCA 64; *R v Nguyen* (2010) 242 CLR 491 at 505 [50]; [2010] HCA 38; *Nguyen v The Queen* (2013) 87 ALJR 853 at 857 [23]; 298 ALR 649 at 653-654; [2013] HCA 32.

associate. Submissions on sentencing of the appellants proceeded on 2 October 2014 and sentencing on 7 October 2014. The judgments of acquittal and conviction based on the jury's verdicts were perfected, at the latest, at that time.

10 In two applications to the Supreme Court — one on 16 January 2015, invoking the "inherent jurisdiction" of the Court, and the other on 5 March 2015, invoking provisions of the *Criminal Law Consolidation Act* 1935 (SA) ("the CLC Act") — the DPP sought orders for the quashing of all of the verdicts and for a retrial of each of the appellants on the charge of murder. The Full Court heard the applications by the DPP concurrently with appeals and applications for permission to appeal against the convictions of two of the appellants, NH and Stakaj, filed on 7 and 13 October 2014 respectively. Those appeals were based in part upon the "invalidity" of the verdicts of not guilty of murder. NH and Stakaj also contended that the verdicts of guilty of manslaughter were unsafe and unsatisfactory and against the weight of the evidence, and that they did not have a case to answer on the charge of murder or the alternative of manslaughter.

11 On 18 September 2015, the Full Court by majority (Gray and Sulan JJ, Kourakis CJ dissenting) made the following orders on the DPP's first application:

> "1. That the Application of the Director of Public Prosecutions is granted.
>
> 2. That the Verdicts of not guilty of murder with respect to each respondent are quashed.
>
> 3. That the Verdicts of guilty of manslaughter with respect to each respondent are quashed.
>
> 4. That each respondent is to be retried on the charge of murder.
>
> 5. That the respondent's [sic] Zefi and Jakaj are remanded in custody on the information in the Supreme Court."

The orders did not in terms quash or set aside the judgments of acquittal and conviction which had been entered as a result of the verdicts.

12 After the delivery of the judgment of the Full Court, counsel for NH and Stakaj complained that they had not been heard on the common form grounds of their appeals against conviction. The Full Court recalled its orders of 18 September 2015 to allow the reasons to be amended to dispose of the common form grounds of NH and Stakaj's appeals. On 25 September 2015, the Full Court reconvened to deliver amended orders and reasons. The final orders did not differ from those quoted above. Before their delivery, counsel for NH and Stakaj orally applied to be heard on the common form grounds, and alternatively on

submissions that the Court should order an acquittal or a permanent stay on the DPP's first application. The Court refused that oral application and published its reasons on 23 February 2016[6]. Essentially the Court held that the jury verdicts had been quashed, thereby "extinguishing any right of appeal of the defendants and any entitlement to an acquittal."[7]

13 On 11 March 2016, this Court granted each of the appellants special leave to appeal against the judgment of the Full Court[8]. A further order was made in respect of the appellant Stakaj on 13 April 2016[9].

14 It is necessary now to review the record of what occurred when the verdicts were delivered.

The delivery of the verdicts

15 The transcript of proceedings before the trial judge, as reproduced in the joint judgment of Gray and Sulan JJ[10], recorded the following in relation to the delivery of verdicts:

"Trial Judge: [Foreperson], I understand you have verdicts?

Foreperson: Yes, I do.

Trial Judge: Are they unanimous, or at least any conviction for murder must be unanimous? You do know that, don't you?

Foreperson: Yes, but —

Trial Judge: But others are majority?

Foreperson: Can you please start that again?

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6 *R v Stakaj; R v NH* [2016] SASCFC 9.

7 [2016] SASCFC 9 at [21] per Gray J, with whom Sulan J agreed.

8 [2016] HCATrans 65.

9 [2016] HCATrans 84.

10 *Case Stated on Acquittal (No 1 of 2015); R v Stakaj* (2015) 123 SASR 523, commencing at 544 [62].

Trial Judge: Take your time. My associate will take them from you. I take it all the verdicts are not unanimous? Is there a majority verdict among the verdicts?

Foreperson: Yes, that is correct.

Trial Judge: My associate will need to know as you go through which are unanimous and which are majority.

Foreperson: Yes.

Trial Judge: Just listen carefully.

Foreperson: Sure.

Associate: As to the accused David Zefi, are you unanimously agreed upon your verdict as to the charge of murder?

Foreperson: No.

Associate: As to the charge of murder, and the accused David Zefi, are ten or more of you agreed upon your verdict for a majority verdict of 'not guilty'?

Foreperson: Yes.

Trial Judge: Not guilty of murder by majority.

Foreperson: Yes.

Associate: As to the charge of murder, do you find the accused David Zefi 'not guilty'?

Foreperson: Yes.

Associate: And that is the verdict of ten or more of you?

Foreperson: Yes.

Associate: Members of the jury, as to the alternative charge of manslaughter, do you find the accused David Zefi 'guilty' or 'not guilty'?

Foreperson: Guilty.

Associate: And is that the verdict of you all?

Foreperson: Yes."

16 The same series of questions and answers followed with respect to each of the other appellants save that the foreperson asked the associate to repeat the question whether 10 or more of the jury were agreed upon a verdict of not guilty of the charge of murder in relation to Jakaj. The trial judge interpolated:

"You're now being asked if it's 'not guilty' of murder for Jakaj."

The foreperson responded "Yes". The only other variation was that the foreperson advised that the jury were not unanimous on the verdict for the alternative of manslaughter against NH but that a majority of 10 or more of them were agreed on a verdict of guilty.

17 The traditional interrogation of the foreperson and jury by the Clerk of Arraigns in a case in which unanimity was required was "So says your foreman, so say you all?" Barwick CJ in *Milgate v The Queen* pointed to the need for great care in the manner in which the foreperson and jury were interrogated as to the verdict. Referring to provisions in State laws for majority verdicts, he said[11]:

> "the Clerk of Arraigns' formula on the taking of a verdict should not be expressed in a perfunctory way nor allowed to appear as a mere statement of an assumed or concluded state of affairs, but should be clearly interrogative of the members of the jury."

Gray and Sulan JJ observed in their majority judgment that it was the practice of the Court to interrogate the foreperson when the jury returned to deliver their verdict and thereby to superintend compliance with s 57[12].

18 The associate's questions were all directed to the foreperson in the presence and hearing of the other members of the jury. In each case the foreperson was asked whether the relevant verdict was unanimous or the verdict of 10 or more of the jury. There was no dissent from any of the other jurors to the verdicts communicated by the foreperson. It is not suggested that the questions put to the foreperson could be regarded as anything less than questions put to the jury as a whole. There was no attempt by the jury after the delivery of the verdicts but before they were discharged to seek their correction.

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11 (1964) 38 ALJR 162 at 162.

12 (2015) 123 SASR 523 at 552 [83].

19 The trial judge accepted the verdicts after they were delivered. The associate endorsed the information accordingly and the jury were discharged. The trial judge administered the allocutus, ie, her Honour asked each of the appellants why the court should not proceed to judgment against him. The proceedings were then adjourned to 2 October 2014 for submissions on sentence.

Presumption of correct verdict

20 It is a long-standing principle that where a verdict is delivered in open court by the foreperson in the sight and hearing of other members of the jury, without dissent from any of them, it is presumed that they assented to it[13]. That principle, developed in the context of the common law requirement for unanimous verdicts, is of equal application in the case of a verdict arrived at by a majority of 10 or more[14].

21 It may be that, for a variety of reasons, jurors do not speak out against a misstatement of their verdict at the time it is delivered[15]. There is authority for the proposition that a correction may be made by the trial judge even after the jury have been discharged[16]. The Court of Appeal of England and Wales in *Andrews*[17] said that the trial judge exercising that discretion, at the request of the jury, will take into account all the circumstances of the case and in particular the length of time elapsed between the original verdict and the jury's wish to alter it. The judge would also take into account the probable reasons for the initial mistake and the need to ensure that justice is done to both the defendant and the

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13 *Ellis v Deheer* [1922] 2 KB 113 at 118 per Bankes LJ, 120 per Atkin LJ; *Nanan v The State* [1986] AC 860 at 871; *R v Challinger* [1989] 2 Qd R 352 at 363-364 per Shepherdson J, Kelly SPJ agreeing at 355; *Matta v The Queen* (1995) 119 FLR 414 at 417 per Franklyn J, Pidgeon J and Steytler J agreeing at 415, 418; *Biggs v Director of Public Prosecutions* (1997) 17 WAR 534 at 544 per Kennedy J, 556 per Franklyn J, Walsh J agreeing at 558.

14 *Halsbury's Laws of England*, 4th ed (2006 reissue), vol 11(3) at [1344] and authorities there cited. See also *Biggs v Director of Public Prosecutions* (1997) 17 WAR 534 at 555-556 per Franklyn J citing *Andrews* (1986) 82 Cr App R 148.

15 *Smith v Western Australia* (2014) 250 CLR 473 at 484-485 [47]; [2014] HCA 3.

16 *R v Vodden* (1853) Dears 229 at 231 [169 ER 706 at 707]; *R v Cefia* (1979) 21 SASR 171 at 175 per King CJ and Sangster J, Hogarth J agreeing at 175; *Andrews* (1986) 82 Cr App R 148 at 154.

17 (1986) 82 Cr App R 148.

prosecution. Practical considerations impose limits on the exercise of that discretion in favour of alteration. As Simon Brown J, delivering the judgment of the Court of Appeal, said[18]:

> "If the jury have been discharged and *a fortiori* if they have dispersed, it might well be impossible for the judge to allow the verdict to be changed."

The exposition of the discretion in *Andrews* was followed in Western Australia in *Biggs v Director of Public Prosecutions*[19].

22 There is a distinction to be drawn between a correction of the verdict by jurors acting collectively as the jury before they are discharged and a correction made by the trial judge on the basis of a request or evidence from members of the jury after they have been discharged and have dispersed beyond the control of the court. The distinction is of importance. Before discharge the jurors are still a part of the court exercising jurisdiction in the case. After discharge they are no longer part of the court and unless recalled by the trial judge, following rescission of the discharge order, no longer act as a collective decision-making body. Any correction to the verdict taken by the trial judge without recalling the jury but acting on information supplied by the jurors can only be supported, absent any statutory authority, as the exercise of an inherent power. Whether or not the jury are recalled, the post-discharge power of the court to correct the verdict is narrowly confined.

23 In the context of civil proceedings before a jury in the United States, the Supreme Court of the United States has recently held that district courts have an inherent power to recall a discharged jury and re-empanel the jurors with curative instructions. In *Dietz v Bouldin*[20], the Court held, by majority, that there was no implicit limitation under the Federal Rules of Civil Procedure which would prohibit a court from rescinding its discharge order and reassembling the jury. Nevertheless, the Court saw the power as constrained[21]:

> "The inherent power to rescind a discharge order and recall a dismissed jury, therefore, must be carefully circumscribed, especially in light of the

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18 (1986) 82 Cr App R 148 at 154.

19 (1997) 17 WAR 534.

20 136 S Ct 1855 (2016).

21 136 S Ct 1855 at 1893 (2016).

guarantee of an impartial jury that is vital to the fair administration of justice."

The Supreme Court was particularly concerned with the effect of delay between discharge and recall on the likelihood of prejudice affecting members of the jury. In any event, its decision was limited to civil cases. Having regard to additional concerns in criminal cases such as attachment of a double-jeopardy bar, the Court did not address whether it would be appropriate to recall a jury after discharge in a criminal case[22]. The question of a power to recall a jury does not arise directly in these appeals. However, the considerations which constrain the exercise of that power are also relevant to the asserted inherent power to alter or set aside a verdict on the basis of evidence from members of the jury.

24 A post-discharge recall was considered by the Supreme Court of Canada in *R v Burke*[23]. The jury foreperson had cleared his throat while announcing the verdict, obscuring the jury's intended verdict of "guilty" and resulting in the erroneous recording of the verdict as "not guilty". Departing from its previous decision in *R v Head*[24], the Court held that a trial judge retains a narrow post-discharge jurisdiction for the purposes of enquiring into an alleged error in the verdict, limited to cases where there can be no reasonable apprehension of bias on the part of the jury when recalled[25]. The majority of the Court in *Burke* found that such an apprehension existed on the facts of the case because, among other factors, the jury had been dispersed for a day before they were recalled and the trial judge's post-discharge enquiry to the jury took place over a number of days during which news articles describing the incident were published[26]. That was not, however, a case like the present case in which the other members of the jury remained silent while a verdict clearly heard by all of them and by the court was delivered by the foreperson. And the present case was not a case in which the exposure of jurors to external influences after they had dispersed could be negatived, although no such exposure was suggested.

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22 136 S Ct 1855 at 1895 (2016).

23 [2002] 2 SCR 857.

24 [1986] 2 SCR 684.

25 [2002] 2 SCR 857 at 885 per Iacobucci, Major, Binnie and LeBel JJ, McLachlin CJ, L'Heureux-Dubé, Gonthier and Bastarache JJ agreeing at 863.

26 [2002] 2 SCR 857 at 897-899 per Iacobucci, Major, Binnie and LeBel JJ, Arbour J agreeing at 906.

25 In *R v Tawhiti*[27] the Court of Appeal of New Zealand, in circumstances which, it might be thought, presented a stronger case for intervention than the present, refused an application by an appellant for an order that jurors who had found him guilty of murder be interviewed about the verdict[28]. At the time the verdict was delivered the jurors were asked whether they were all agreed. The court records showed no dissent from any of them. After their discharge counsel for the appellant received, at his home, a telephone call from a juror which led to a meeting in which three jurors told him that the jury had been equally divided between verdicts of murder and manslaughter. Eichelbaum CJ, delivering the judgment of the Court, observed[29]:

> "The principle described as the finality of verdicts has several facets but one of particular significance here is that when a verdict is delivered in the sight and hearing of all the jury without protest, their assent to it is conclusively inferred. Subject to extraordinary exceptions, such as where jurors could not see or hear what was taking place when the verdict was announced, affidavits that jurors did not agree with the verdict will not be received."

26 What is "conclusively inferred", where there is no dissent and no timely correction, is that the verdict delivered by the foreperson is the verdict of the jury. The presumption that the verdict is correctly communicated is rebuttable when it is not delivered in the sight and hearing of all jurors or if it can be shown that one or more of the jurors was not competent to understand the proceedings[30]. As a general principle, the presumption will not be rebutted by evidence admitted simply to show that a juror did not agree with the verdict or that the juror's apparent agreement resulted from a misapprehension[31]. There is nothing to suggest that in this case, the foreperson's post-verdict communication to the court was done after any discussion with members of the jury. The jury had been discharged and were not recalled at the time of the communication. As appears below, when the matter was before the trial judge again on 2 October 2014, her Honour took the view that the question about the verdicts was out of her hands, a view which was evidently supported by the DPP. Within a few days, as appears

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27 [1994] 2 NZLR 696.

28 [1994] 2 NZLR 696 at 699-700.

29 [1994] 2 NZLR 696 at 699.

30 *Nanan v The State* [1986] AC 860 at 871-872.

31 [1986] AC 860 at 870.

in the next part of these reasons, sentencing was completed and the record of the verdicts and judgments formally entered without any dissent on the part of the DPP.

Perfecting the orders

27 When the matter came on for sentencing submissions on 2 October 2014, counsel for Jakaj, evidently reflecting the position of all counsel, requested the trial judge, in closed court, to defer hearing submissions on sentencing until the Crown had determined what, if any, course it intended to take about the verdicts. The trial judge said that the matter was out of her hands. Counsel for the DPP suggested that the jury were probably "functus officio" and that the trial judge no longer had a residual discretion to try and remedy any such defect. Notwithstanding that position, the DPP was later to invoke the original jurisdiction of the Court and its inherent power in support of his first application to quash the verdicts.

28 The trial judge proceeded, in open court, to hear sentencing submissions. After the submissions were completed, the hearing was adjourned to 7 October 2014 when her Honour sentenced each of the appellants. NH was sentenced to three years imprisonment to be served in a youth training centre subject to a non-parole period of one year and two months. Jakaj was sentenced to five years and three months imprisonment with a non-parole period of four years and one month. Zefi was sentenced to eight years and 10 months imprisonment with a non-parole period of six years and 10 months. Stakaj was sentenced to five years and five months imprisonment with a non-parole period of four years and three months.

29 Following sentencing, the verdicts delivered and sentences imposed with respect to each of the appellants were recorded in documents entitled "Report of Prisoner Tried at the Criminal Sessions of the Supreme Court of South Australia Held at Adelaide". In relation to each appellant, the "outcome details" were recorded as "acquitted" of murder and "convicted" of the alternative offence of manslaughter. It was separately recorded that the jury had returned a majority verdict of not guilty to murder. The details of the relevant appellant's sentence for manslaughter were also set out. Each report was signed by the judge's associate under the title Clerk of Arraigns and by the trial judge.

30 It was common ground in the Full Court that the judgments of acquittal and conviction, reflecting the trial court's acceptance of the verdicts of the jury, were perfected, at the latest, when each of the Reports was signed. That is a matter of substance and not just of form. Five Justices of this Court cautioned in

Burrell v The Queen[32] that the use of the term "perfected" must not be seen as giving form and procedure precedence over substance and principle. The real question is "What is to mark the point at which a court concludes its consideration of a controversy?" Their Honours said[33]:

> "Identifying the formal recording of the order of a superior court of record as the point at which that court's power to reconsider the matter is at an end provides a readily ascertainable and easily applied criterion. But more than that, identifying the formal recording of the order as the watershed both marks the end of the litigation in that court, and provides conclusive certainty about what was the end result in that court."

When the matter came before the Full Court of the Supreme Court of South Australia the exercise of the original jurisdiction of the Supreme Court initiated by the information against the appellants had been completed and exhausted subject to the outcome of statutory appellate processes. Those processes could not be invoked by the DPP because appeals against acquittal in South Australia are precluded save in circumstances not relevant to these proceedings[34].

The DPP's applications

31 On 16 January 2015, the DPP filed his first application, headed "In the Supreme Court of South Australia, Criminal Jurisdiction". He sought what amounted to an interlocutory direction that affidavits be taken from the foreperson and the other members of the jury in relation to the correctness of the answers of the foreperson when being asked whether the "not guilty" verdicts on a charge of murder were the verdicts of 10 or more of the jury. He sought final orders that the verdicts and the corresponding judgments of acquittal of murder and conviction of manslaughter be "expunged or quashed". The DPP also sought an order "in the exercise of the Court's inherent jurisdiction and in the interests of justice, [that] a new trial be ordered for each defendant on the charge of Murder." The stated grounds of the application included the following:

> "2. The Supreme Court has a duty to use the powers at its disposal to protect its processes from abuse.

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32 (2008) 238 CLR 218 at 224 [18] per Gummow ACJ, Hayne, Heydon, Crennan and Kiefel JJ; [2008] HCA 34.

33 (2008) 238 CLR 218 at 224 [20] per Gummow ACJ, Hayne, Heydon, Crennan and Kiefel JJ.

34 CLC Act, s 352(1)(ab).

3. The ability of the Court to protect its processes cannot be restricted to defined or closed categories. Considerations which bear on the public confidence in the administration of justice must reflect contemporary values and the circumstances of each case.

4. There is admissible evidence that the Court was misled into accepting the so called 'verdicts' of 'Not Guilty' and entering judgements of acquittal for each defendant on the charge of Murder. This evidence also proves the prosecution and each defendant were misled.

5. The incorrect or misleading statements by the foreperson were made in answer to questions designed to safeguard the Court's processes. Howsoever the false statements are described, the consequences and effects are the same. The Court's jurisdiction is not dependent upon a finding of criminal behaviour or malice.

6. The Court's retained inherent jurisdiction permits the Court to interfere with perfected judgments in the exercise of the Court's jurisdiction to protect its processes and when it is in the interests of justice to do so."

The DPP also sought an order that his application be referred to the Full Court for hearing and determination concurrently with the appeals and applications for permission to appeal lodged by NH and Stakaj. No statutory basis for the application was disclosed.

32 On 11 February 2015, Sulan J gave a direction that the Registrar obtain affidavits from each of the jurors. Pursuant to that direction, affidavits were obtained from each juror, who all adopted the answers given to the written questions put to them between 24 and 26 September 2014.

33 On 3 March 2015, the DPP wrote to the associate to Vanstone J advising that he intended to apply to her Honour to reserve questions for consideration and determination by the Full Court pursuant to s 350 of the CLC Act. The DPP also attached a document outlining relevant facts and questions which had been served on the appellants. He requested that the application to reserve questions for consideration and determination by the Full Court be listed before her Honour at the earliest convenient time. Vanstone J responded, via her associate, on 4 March 2015 doubting that she had authority under s 350(4) of the CLC Act, or otherwise, to reserve a question of law. She proposed to await directions from the Full Court.

34 A further application was filed by the DPP on 5 March 2015, purportedly pursuant to s 350(6) of the CLC Act. He sought an order that Vanstone J refer to the Full Court five questions of law for its consideration and determination — first as to the admissibility of the affidavits of the jurors, second and third as to whether the not guilty verdicts in relation to murder and the guilty verdicts in relation to manslaughter were unlawful verdicts and fourth, whether, if so, the judgments of acquittal and conviction were also unlawful. The fifth question was whether the Court had power, pursuant to s 351A of the CLC Act, to set aside the judgments of acquittal and of conviction and to order a new trial. That application was referred for hearing by the Full Court concurrently with the hearing of the DPP's application filed on 16 January 2015 and with the appeals of NH and Stakaj. The time at which the application was so referred and the means by which it was referred do not appear from the record.

35 Following the hearing of the applications and appeals, the Full Court reserved its decision and on 25 September 2015 delivered judgment and made the orders on the DPP's first application which were set out earlier in these reasons. No orders were made on the DPP's second application.

The appeals by NH and Stakaj

36 Reference should be made to the appeals lodged by NH and Stakaj. On 7 and 13 October 2014 respectively, they appealed and sought permission to appeal to the Full Court against their convictions for manslaughter on a number of grounds[35]. The first ground was that the jury had failed to first deliberate and return a true verdict of not guilty of murder before proceeding to consider and deliver a majority verdict on the alternative of manslaughter[36]. The second ground was that such a verdict involved a substantial miscarriage of justice as it was not available until the jury had first reached a verdict of not guilty on the charge of murder. In the alternative, if the verdicts of guilty of manslaughter had been validly returned, each of NH and Stakaj contended that the verdicts were

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35 Substituted Grounds of Appeal filed by Stakaj on 21 November 2014 closely mirrored those of NH. In addition to the grounds raised by NH, Stakaj contended that the trial judge had erred in not directing, or not adequately directing, the jury to the effect that they were required to reach a majority verdict of not guilty of murder before delivering a verdict on the alternative of manslaughter. He also raised as a ground of appeal the trial judge's failure to adequately direct the jury in relation to the fact that he had not given evidence at the trial.

36 As noted earlier in these reasons at [16], the verdict of guilty of manslaughter in relation to Stakaj was unanimous. It was not suggested by the Full Court nor in this Court that this error in Stakaj's grounds of appeal was material.

against the weight of the evidence and were unsafe and unsatisfactory. Their final ground was that the trial judge had erred in finding that each appellant had a case to answer on the charge of murder or on the alternative of manslaughter.

The evidence before the Full Court

37 The Full Court received evidence of the foreperson's affidavit and all but the final paragraph of his statement exhibited to that affidavit, which together set out his view as to whether the verdicts delivered reflected the view of the jury. The Court also received the other jurors' affidavits exhibiting their respective statements in answer to written questions from the Court, but limited to the part of the response to Question 5 which asked whether the verdict of not guilty of murder by majority was correct for each appellant[37].

38 In the foreperson's statement, he said that when asked by the associate if the jury were unanimously agreed on a verdict for the charge of murder for each appellant, he had answered "No". He was then asked by the associate if the jury had reached a majority verdict of "not guilty" for the charge of murder, to which he had responded "Yes" for each appellant. A verdict of guilty on the alternative charge of manslaughter was given for each appellant. The foreperson then said:

> "Immediately after leaving the court room I began to feel unsure about the accuracy of the majority not guilty verdicts given and after arriving home I phoned the Sheriff's Office and asked to come in and speak to the Jury manager to express those concerns.
>
> I met with the Jury Manager at approximately 4.50pm on that same day and stated that it was correct that the Jury could not agree on a unanimous verdict of guilty for the charge of murder, however we did not have a majority verdict of *not* guilty.
>
> Upon reflection, when asked if the jury had a majority not guilty verdict for the charge of murder, I should have answered 'No'."

39 Question 5 set out in the remaining jurors' statements, exhibited to their affidavits, was in the following terms:

> "Please advise whether each verdict rendered was correct:
>
> Zefi Not guilty murder — by majority (10 or more)

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37 (2015) 123 SASR 523 at 547-548 [71]-[73], 561 [121].

	Guilty manslaughter — unanimous
Jakaj	Not guilty murder — by majority (10 or more)
	Guilty manslaughter — unanimous
Stakaj	Not guilty murder — by majority (10 or more)
	Guilty manslaughter — unanimous
[NH]	Not guilty murder — by majority (10 or more)
	Guilty manslaughter — by majority (10 or more)."

40 Each of the jurors responded to Question 5 to the effect that there had not been a majority of 10 or more in favour of a verdict of not guilty of murder in relation to any of the appellants. Each agreed, however, that there were unanimous verdicts of guilty of manslaughter in relation to Zefi, Jakaj and Stakaj and a majority of 10 or more in favour of a verdict of guilty of manslaughter in relation to NH.

The requirement for a verdict of "not guilty" of the charged offence — *Juries Act*, s 57(3)

41 The DPP relied upon s 57 of the *Juries Act* to impugn the "validity" of the verdicts. That argument rested upon the premise that the Court could look behind the verdicts as delivered by the foreperson for the purpose of determining whether they complied with s 57. As explained in these reasons, that premise was wrong. Nevertheless, reference should be made to the terms and operation of s 57.

42 Section 57 provides for majority and alternative verdicts in the following terms:

> "(1) Subject to subsection (2), where a jury, having retired to consider its verdict, has remained in deliberation for at least 4 hours and the jurors have not then reached a unanimous verdict—
>
> (a) if a sufficient number agrees to enable the jury to return a majority verdict—a majority verdict will be returned; but
>
> (b) otherwise—the jury may be discharged from giving a verdict.

(2) No verdict that an accused person is guilty of murder or treason can be returned by majority.

(3) Where an accused person is charged with a particular offence (the ***major offence***) and it is possible for a jury to return a verdict of not guilty of the offence charged but guilty of some other offence for which the person has not been charged (the ***alternative offence***)—

(a) the jury must consider whether the accused is guilty of the major offence before considering whether he or she is guilty of the alternative offence; and

(b) if the jury reaches a verdict (either unanimously or by majority) that the accused is not guilty of the major offence but then, having been in deliberation for at least 4 hours, is unable to reach a verdict on the question of whether the accused is guilty of the alternative offence—

(i) the accused must be acquitted of the major offence; and

(ii) the jury may be discharged from giving a verdict in respect of the alternative offence; and

(iii) fresh proceedings may be taken against the accused on a charge of the alternative offence."

The term "majority verdict" is defined in s 57(4) and, as in this case, where the jury at the time of returning their verdict consists of 12 jurors, a majority verdict is a verdict in which 10 or 11 jurors concur.

43 South Australia was the first Australian State to introduce a provision for jury verdicts by majority. Section 57(1) as it appeared in the *Juries Act* as enacted in 1927 provided for majority verdicts of at least 10 in non-capital offences when the jury had been deliberating for at least four hours and were unable to agree upon their verdict. Section 57(2), as originally enacted, was the precursor of s 57(3) as it stands today. When a jury had been unable to reach agreement on a verdict for a capital offence after four hours of deliberation they could be discharged. A proviso followed:

> "Provided that where in any inquest for a capital offence in which it is competent for the jury to bring in a verdict of manslaughter, the jury has remained in deliberation for four hours and ten of the jurors agree that the accused is guilty of manslaughter, the verdict of such ten jurors that the accused is guilty of manslaughter shall be taken as the verdict of all."

The majority verdict in each case was deemed to be "the verdict of all". That is to say that term may be understood as a direction that the majority verdict was to be treated as the collective decision of the jury notwithstanding one or two dissenters. The provision for an alternative verdict in s 57(2) was not conditioned upon the verdict of not guilty of the capital offence. That was, however, the position at common law as appears below.

44 Section 57 was amended in 1976 by the substitution of "murder or treason" for "a capital offence"[38] and amended to substantially its current form in 1984[39]. Minor amendments were made in 1994 making the language gender neutral and substituting the word "must" for "shall"[40]. In the Second Reading Speech for the Bill which enacted the current form of s 57(3) in 1984, it was said[41]:

> "New section 57(3) has the effect of overcoming two problems perceived in the operation of section 57 as it presently stands. The first problem is that it is unclear whether a jury must first decide on the question of guilty or not guilty of murder before proceeding to consider the question of guilty or not guilty of manslaughter. The position is made clear by new section 57(3)(a). The second problem is that it is unclear whether a unanimous or majority verdict of not guilty of murder is required before the jury can proceed to consider manslaughter. The amendment provides that the verdict of not guilty of a major offence can be reached by either a unanimous or majority verdict. The only verdict which requires a unanimous verdict is the verdict of guilty of murder or treason."

45 There has been little judicial exegesis of s 57 or its analogues in other States relevant to the present appeals. They were important departures from the common law requirement for unanimity in verdicts and were treated as requiring a strict construction favourable to the accused[42]. In *Cheatle v The Queen*[43] this

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38 *Statutes Amendment (Capital Punishment Abolition) Act* 1976 (SA), s 16.

39 *Juries Act Amendment Act* 1984 (SA), s 26.

40 *Juries (Jurors in Remote Areas) Amendment Act* 1994 (SA), s 11 and Sched.

41 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 14 August 1984 at 201.

42 *Newell v The King* (1936) 55 CLR 707 at 712 per Latham CJ, 712-713 per Dixon J, 713 per Evatt J; [1936] HCA 50.

43 (1993) 177 CLR 541; [1993] HCA 44.

Court held that s 57 could not be applied, by virtue of s 68 of the *Judiciary Act* 1903 (Cth) or otherwise, to a trial on indictment for an offence against a law of the Commonwealth because s 80 of the Constitution, which mandated trial by jury in such cases, imported the common law requirement of unanimity[44]. The Court drew a distinction between the decision-making process required for unanimity and that required for a specified numerical majority. Unanimity ensured that the representative character and the collective role of the jury were carried forward into any ultimate verdict[45]:

> "A majority verdict, on the other hand, is analogous to an electoral process in that jurors cast their votes relying on their individual convictions."

46 The majority of the Full Court in the present case took the view that s 57 was to be strictly construed, as its provision for verdict by majority was an abridgement of the fundamental common law right to trial by jury, which imported the requirement of unanimity[46]. The Chief Justice, on the other hand, did not accept that a jury would be precluded, by s 57(3), from returning a verdict of guilty of an alternative offence if they had not first returned a verdict of not guilty of the major offence. It was the sequential interrogation which was a practice of the Court based on the common law which precluded the return of a verdict of guilty of an alternative offence without the jury first returning a verdict of not guilty of the primary offence[47]. The Chief Justice said[48]:

> "The manifest purpose of s 57(3) of the *Juries Act* is to allow a verdict of not guilty of the major offence to be returned, if such a verdict is reached, before the discharge of the jury if it cannot reach a verdict on the alternative offence. In that way a defendant is not placed in jeopardy of conviction of the major offence on his subsequent trial if the jury on the first trial would have acquitted him of that offence. Section 57(3)(a) of the *Juries Act* requires only that the jury must first consider whether the accused is guilty of the major offence before considering his or her guilt of the alternative offence. There is no evidence to suggest, nor could there

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44 (1993) 177 CLR 541 at 552.

45 (1993) 177 CLR 541 at 553.

46 (2015) 123 SASR 523 at 550 [80].

47 (2015) 123 SASR 523 at 541 [46].

48 (2015) 123 SASR 523 at 541 [47].

> ever be because it goes to the deliberations of the jury, that that requirement was breached."

In this Court, the DPP did not seek to support the reasoning of the majority in the Full Court by reference to its construction of s 57(3). Rather, he founded his case upon the proposition that the foreperson miscommunicated the jury's verdicts with respect to murder to the trial judge.

47 The appellant Zefi adopted the reasoning of Kourakis CJ that s 57(3) was facultative, allowing a verdict of not guilty of the major offence to be returned if the jury could not reach a verdict on the alternative offence. The appellant NH submitted, inter alia, that s 57(3)(a) required no more than consideration of whether the accused was guilty of the major offence and did not require a verdict of not guilty of the major offence before proceeding to determine guilt of the alternative offence. Counsel for NH accepted that his construction of s 57 implied a displacement of the common law, where a verdict of not guilty of the major offence was put before proceeding to the alternative.

48 The common law position, stated in *Gammage v The Queen*[49] by Kitto J and quoted with approval by this Court in *Stanton v The Queen*[50], was that:

> "The common law, authorizing as it did a verdict of guilty of manslaughter on an indictment for murder, always made it a condition of the validity of that verdict that the jury should first have returned a verdict of not guilty of murder."

49 The Second Reading Speech indicated that it was a purpose of s 57(3)(a) that the jury decide on the question whether the accused was not guilty of the major offence before proceeding to the question whether the accused was guilty or not guilty of the alternative offence. The text of s 57(3)(a) is open to that construction. That construction being open, and according with the common law and with the statutory purpose, it is the preferred construction. That conclusion, although it played an important part in the reasoning of the Full Court, is peripheral to the real issue in this case. The real issue is whether the Court was empowered to look behind the verdicts as communicated in open court by the foreperson.

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49 (1969) 122 CLR 444 at 453; [1969] HCA 68.

50 (2003) 77 ALJR 1151 at 1155 [23]; 198 ALR 41 at 47; [2003] HCA 29.

50 Unless the verdicts of not guilty which led to the judgments of acquittal can be impugned, no question of non-compliance with s 57(3) or the common law requirement for a verdict of not guilty of murder arises. The Court was required to act upon that verdict in entering, as it did in this case for each appellant, a judgment of acquittal of murder.

Jurisdiction of the Supreme Court — *Supreme Court Act* 1935 (SA)

51 It is necessary to identify statutory provisions relevant to the jurisdiction and powers of the Supreme Court of South Australia which were in question in the appeals to this Court.

52 Section 6 of the *Supreme Court Act* 1935 (SA) continued the existence of the Supreme Court of South Australia as:

> "the superior court of record, in which has been vested all such jurisdiction (whether original or appellate) as is at the passing of this Act vested in, or capable of being exercised by that court."

53 Section 17(1) provided that the Court shall be a court of law and equity. Section 17(2) vested in the Court:

> "(a) the like jurisdiction, in and for the State, as was formerly vested in, or capable of being exercised by, all or any of the courts in England, following:
>
> (i) The High Court of Chancery, both as a common law court and as a court of equity:
>
> (ii) The Court of Queen's Bench:
>
> (iii) The Court of Common Pleas at Westminster:
>
> (iv) The Court of Exchequer both as a court of revenue and as a court of common law:
>
> (v) The courts created by commissions of assize:
>
> (b) such other jurisdiction, whether original or appellate, as is vested in, or capable of being exercised by the court:
>
> (c) such other jurisdiction as is in this Act conferred upon the court."

Section 17 conferred general civil jurisdiction on the Supreme Court and, by virtue of s 17(2)(a)(ii), jurisdiction over all indictable criminal offences[51].

54 The *Supreme Court Act*, importing, by reference, the jurisdiction of the English common law courts, did not thereby confer appellate jurisdiction on the Supreme Court in respect of convictions on information. Appellate jurisdiction generally was not a common law creation but a creation of statute. Criminal appeals were not provided for in the United Kingdom until the establishment of the Court of Criminal Appeal by the *Criminal Appeal Act* 1907 (UK)[52]. Jurisdiction to hear appeals against conviction and sentence was conferred upon the courts of the Australian States thereafter[53]. As appears below, the source of the jurisdiction of the Supreme Court of South Australia to entertain appeals against conviction is to be found in the CLC Act. There is no provision in the CLC Act for an appeal by the Crown against a verdict of acquittal by a jury unless that verdict was directed by the trial judge[54].

55 Pursuant to s 48 of the *Supreme Court Act*, and subject to any express enactment and the rules of court, the jurisdiction vested in the Supreme Court shall be exercised either by the Full Court or by a single judge sitting in court[55]. The Full Court is the Supreme Court consisting of not less than three judges[56]. It is to hear and determine all applications for new trials and all questions of law referred to or reserved for the consideration of, or directed to be argued before, the Full Court[57]. Questions of law may be reserved by a judge or master for the consideration of the Full

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51 Selway, *The Constitution of South Australia*, (1997) at 113 [8.3.2].

52 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 578-579 [8]-[9] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 10.

53 *Criminal Code Amendment Act* 1911 (WA), s 10; *Criminal Appeal Act* 1912 (NSW), s 5(1); *Criminal Code Amendment Act* 1913 (Q), ss 3, 8; *Criminal Appeal Act* 1914 (Vic), s 3; *Criminal Appeals Act* 1924 (SA), s 5; *Criminal Code* (Tas), s 401(1) as enacted by the *Criminal Code Act* 1924 (Tas).

54 CLC Act, s 352(1)(ab)(ii).

55 *Supreme Court Act*, s 48(1).

56 *Supreme Court Act*, s 5(1) definition of "Full Court". The Full Court may comprise two judges in circumstances not material for present purposes.

57 *Supreme Court Act*, s 48(2)(a)(i) and (iv).

Court[58]. Its jurisdiction in such a case is the original jurisdiction of the Supreme Court invoked in the matter before the single judge or master.

Appellate proceedings in the Supreme Court — CLC Act

56 The CLC Act is the only source of the Supreme Court's jurisdiction to entertain appeals against conviction on information.

57 Part 11 of the CLC Act is entitled "Appellate proceedings". Appeals against conviction and sentence are provided for in Div 3 of Pt 11. Section 352 provides for appeals to the Full Court by persons convicted on information. The appeals are as of right on any ground that involves a question of law alone. Otherwise they require the permission of the Full Court or the certificate of the trial court[59]. In the case in which a person is tried on information and acquitted, there is no circumstance relevant to these proceedings in which the DPP can appeal against the acquittal. An appeal against an acquittal lies only if the trial is by judge alone or if the trial was by jury and the judge directed the jury to acquit the person[60]. The powers of the Full Court on an appeal against conviction are set out in common form terms in s 353. Subject to special provisions of the CLC Act, the Full Court shall, if it allows an appeal against conviction, quash the conviction and either direct a judgment and verdict of acquittal to be entered or direct a new trial[61].

58 Section 350, which appears in Div 2 of Pt 11 under the heading "Reference of questions of law", provides for the reservation of "relevant questions". A relevant question is defined in that section as "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."[62] 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

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58 *Supreme Court Act*, s 49(1).

59 CLC Act, s 352(1)(a).

60 CLC Act, s 352(1)(ab).

61 CLC Act, s 353(2).

62 CLC Act, s 350(1).

question on an issue antecedent to trial or relevant to the trial or sentencing of the defendant[63]. Section 350(4) provides:

> "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."

The provisions evidently relied upon in the DPP's second application were s 350(5) and (6), which respectively provide:

> "(5) The Full Court may, on application under subsection (6), require a court to refer a relevant question to it for consideration and determination.
>
> (6) An application for an order under subsection (5) may be made by—
>
> (a) ... the Director of Public Prosecutions".

There is also a requirement that when a court reserves a question for the consideration and determination of the Full Court, the presiding judge must state a case setting out the question reserved, the circumstances out of which the reservation arises and any findings of fact necessary for the proper determination of the question reserved[64]. No case was stated for the Full Court.

59 The Full Court in considering a question reserved under s 350 is not exercising appellate jurisdiction. Its powers on such a reservation are set out in s 351A, which provides that the Full Court may determine a question reserved under Pt 11 and make consequential orders and directions[65]. There are limits on those powers, including that set out in s 351A(2)(c):

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

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63 CLC Act, s 350(2).

64 CLC Act, s 351(1).

65 CLC Act, s 351A(1).

60 In this case, the Full Court, having made the orders it did on the DPP's application of 16 January 2015, did not deal with his application purporting to be made pursuant to s 350(6). In that respect Gray and Sulan JJ said[66]:

> "For completeness, we note that it is unnecessary to decide the Director's application pursuant to s 351A of the *Criminal Law Consolidation Act* as we have found that the Court does have an inherent power, within its inherent jurisdiction, to overturn the verdicts of acquittal and order a retrial. We note, however, that it is unlikely that Parliament wished to confer such a power on the Court by virtue of that legislation."

That last sentence could well have raised the obvious question whether, given the statutory provisions referred to, there could be any inherent power in the original jurisdiction of the Court to overturn verdicts of acquittal and order a retrial. In this case, the inherent power as defined and applied by the majority in the Full Court depended upon identification of an abuse of the Court's process residing in an innocent error by the foreperson and other members of the jury in responding to the associate's question in relation to the verdict of not guilty of murder.

The jurisdiction and powers of the Court invoked by the DPP's application

61 It is necessary, in considering these appeals, to identify the jurisdiction of the Supreme Court which the DPP invoked in his application of 16 January 2015. It was clearly not the appellate jurisdiction conferred by the CLC Act. The application was headed "In the Supreme Court of South Australia, Criminal Jurisdiction". It was brought in the original jurisdiction of the Court. The only relevant original jurisdiction was that which the DPP had invoked when filing the information charging the appellants which led to their trial and the verdicts and orders which followed. Assuming, for the sake of argument, that that jurisdiction was not exhausted when the verdicts and sentences were formally recorded, the referral of questions to the Full Court on the first application did not change its nature. As appears below, the "inherent jurisdiction" relied upon by the DPP and the Full Court to authorise the orders made on the application is not an additional head of jurisdiction. It is a collection of powers in aid of jurisdiction.

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66 (2015) 123 SASR 523 at 571 [165].

The decision of the Full Court

62 In their joint judgment, the majority reasoned as follows:

1. Courts have admitted evidence of material irregularity in proceedings and, if a miscarriage of justice has occurred, overturned the conviction[67].

2. The foreperson's response indicating that each of the "not guilty" verdicts on the charge of murder in relation to each defendant was the verdict of 10 or more of the jury when the correct response was "No" was a material irregularity. It resulted in unlawful verdicts pursuant to s 57 of the *Juries Act*[68].

This step in the reasons, preceding the finding as to admissibility of the affidavit evidence, should be read as a statement about the content of the proffered evidence, not as a finding of fact.

3. The public pronouncement by the foreperson of the results of the jury's deliberations was not part of those deliberations. If it did not reflect the true verdicts then the Court could have regard to evidence which established that fact[69].

4. The Supreme Court has inherent jurisdiction to prevent the abuse of its processes. The abuse of process arose from the Court's acceptance of the unlawful verdicts on the premise that the answers given by the foreperson were true and accurate[70].

5. If it was necessary to point to some conduct in the proceedings giving rise to the abuse, the relevant abuse of process arose out of the foreperson's mistake in the responses to the questions of the associate and the

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67 (2015) 123 SASR 523 at 558 [111].

68 (2015) 123 SASR 523 at 559 [113].

69 (2015) 123 SASR 523 at 561 [119].

70 (2015) 123 SASR 523 at 564 [133], 565 [139]. The latter proposition is involved in the acceptance by the Court of the submissions made by the Solicitor-General which were set out in the joint reasons for judgment.

unanimous mistake made by the other members of the jury in acquiescing to those responses at the time of the delivery of the verdicts[71].

6. The relief sought was not precluded by the finality rule in relation to the jury's verdicts because the requirements of s 57 had not been met. No valid verdicts had been made. The Court, prima facie, had an inherent power to recall the order[72].

7. It was unnecessary to decide the DPP's application dated 5 March 2015. The Court had an inherent power within its inherent jurisdiction to overturn the verdicts of acquittal and order a retrial[73].

63 The Chief Justice was not persuaded that the Court had any power on application by the DPP to set aside the verdicts of not guilty of murder and, as a necessary consequence, the convictions of manslaughter[74]. The Court, he said, should not abrogate the common law principle of inviolability of judgments of acquittal based on jury verdicts[75].

64 The Chief Justice, as earlier explained, took the view that the evidence did not establish a contravention of s 57(3) of the *Juries Act*. The case before the Court did not concern a failure to require the jury to decide. It was a case of the foreperson allegedly returning a "false" verdict of not guilty of the major offence when the jury had not resolved to return that verdict[76]. The Chief Justice would have dismissed the DPP's application to set aside the judgments of acquittal of murder, and would not have set aside the convictions of manslaughter on the part of Zefi and Jakaj. He would have dismissed the DPP's application made pursuant to s 350 of the CLC Act[77].

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71 (2015) 123 SASR 523 at 565 [140].

72 (2015) 123 SASR 523 at 570 [159].

73 (2015) 123 SASR 523 at 571 [165].

74 (2015) 123 SASR 523 at 540 [42].

75 (2015) 123 SASR 523 at 541 [45].

76 (2015) 123 SASR 523 at 541-542 [47]-[48].

77 (2015) 123 SASR 523 at 542 [49].

65 In the appeals against conviction by NH and Stakaj, Kourakis CJ held that the evidence tendered by the DPP was admissible to the extent that it showed that the foreperson delivered verdicts of not guilty of murder which the jury had not resolved to return and that, by reason of that miscommunication, there had been a miscarriage of justice in the convictions of NH and Stakaj. The Chief Justice would have set aside the convictions of manslaughter and would have listed the appeals of NH and Stakaj for argument on the unsafe verdict ground. However, because of the conclusion reached by the majority on the DPP's first application, there were no convictions against which an appeal could be brought pursuant to s 353 (scil: s 352) of the CLC Act. There was therefore no utility in hearing from NH and Stakaj on their unsafe verdict grounds[78].

66 The reasoning of the Full Court requires a consideration of the inherent jurisdiction of the Supreme Court in relation to a perfected order of the Court, specifically, as in this case, a judgment of acquittal resting upon a jury verdict of not guilty.

The inherent jurisdiction of the Supreme Court

67 The statute which vested in the Supreme Court the like jurisdiction of the courts of common law and chancery conveyed with that vesting "inherent jurisdiction". As this Court said in *Keramianakis v Regional Publishers Pty Ltd*, the inherent jurisdiction is a power described generically as "the inherent power necessary to the effective exercise of the jurisdiction granted"[79]. It is a power or collection of powers that comes with the status of the Supreme Court of a State as a superior court of record[80]. Contrary to the submissions of the DPP, and the findings of the majority of the Full Court[81], inherent jurisdiction is not a "separate head of jurisdiction". Reliance for that proposition was placed upon the observations of Dawson J in *Grassby v The Queen*[82]. His Honour there spoke of the exercise by a superior court of inherent power in the discharge of its general

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78 (2015) 123 SASR 523 at 533-534 [20].

79 (2009) 237 CLR 268 at 280 [36]; [2009] HCA 18.

80 *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 7 per Menzies J, Barwick CJ, Walsh J and Stephen J agreeing at 5, 9, 10; *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 89 ALJR 975 at 982 [37] per French CJ, Kiefel, Bell, Gageler and Gordon JJ; 325 ALR 168 at 177; [2015] HCA 36.

81 (2015) 123 SASR 523 at 562 [125].

82 (1989) 168 CLR 1; [1989] HCA 45.

responsibility for the administration of justice[83]. He did not draw a relevant distinction between inherent jurisdiction and inherent power. However, the distinction between jurisdiction and power is of importance. As five Justices of this Court observed in *PT Bayan Resources TBK v BCBC Singapore Pte Ltd*[84]:

> "Jurisdiction' is a word of many meanings. The term 'inherent jurisdiction' has been described as 'elusive', 'uncertain' and 'slippery'. The difficulty is minimised if the term is confined to its primary signification: to refer to the power inhering in a superior court of record administering law and equity to make orders of a particular description. For present purposes, inherent jurisdiction can be used interchangeably with 'inherent power'." (footnotes omitted)

68 Inherent jurisdiction understood not as authority to adjudicate, but as inherent power, may be deployed in the exercise of federal jurisdiction conferred on Supreme Courts pursuant to s 39(2) of the *Judiciary Act* or some other Commonwealth law[85]. As Toohey J said in *Harris v Caladine*[86] in a passage repeatedly quoted in this Court:

> "The distinction between jurisdiction and power is often blurred, particularly in the context of 'inherent jurisdiction'. But the distinction may at times be important. Jurisdiction is the authority which a court has to decide the range of matters that can be litigated before it; in the exercise of that jurisdiction a court has powers expressly or impliedly conferred by the legislation governing the court and 'such powers as are incidental and necessary to the exercise of the jurisdiction or the powers so conferred'." (citations omitted)

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83 (1989) 168 CLR 1 at 16.

84 (2015) 89 ALJR 975 at 982 [38] per French CJ, Kiefel, Bell, Gageler and Gordon JJ; 325 ALR 168 at 177. See also *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 59-61 [39]-[42] per French CJ; [2013] HCA 7.

85 *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 89 ALJR 975 at 982 [39] per French CJ, Kiefel, Bell, Gageler and Gordon JJ; 325 ALR 168 at 177-178.

86 (1991) 172 CLR 84 at 136; [1991] HCA 9. Quoted in eg *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 590 [64] per Gleeson CJ, Gaudron and Gummow JJ; [2001] HCA 1 and *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 263 [5] per Gleeson CJ, Gummow, Hayne and Crennan JJ; [2006] HCA 27.

69 The species of the genus of the inherent power of the Supreme Court of South Australia were aptly described by the late Bradley Selway, a former Solicitor-General for South Australia and Justice of the Federal Court, in his book on the Constitution of South Australia[87]. They are to be found in all superior courts. They include the powers to punish contempt, to grant injunctions, to protect the subject matter of the litigation, to correct accidental slips and omissions in court records, including in orders of the court, and to stay proceedings in order to prevent the abuse of the processes of the court. The last mentioned is an aspect of the inherent power described by Master Jacob in 1970, in a much cited article, as the power to maintain the authority of the court and to prevent its processes from being obstructed and abused[88].

70 The inherent power is limited by the general principle of the finality of litigation which has repeatedly been affirmed by this Court[89]:

> "A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances."

That principle informs the scope of the Supreme Court's power to correct a judgment or order. There is an inherent power to correct errors before orders are formally recorded[90]. That is not applicable in this case. It was common ground that the judgments of acquittal and conviction were perfected at the latest after sentencing when the Reports of Prisoners were completed and signed.

71 The inherent power to correct an order after it is perfected by being drawn up as a record of the court is very limited. In such a case the proceeding, apart from any statutory power to the contrary, is at an end in that court and is in

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87 Selway, *The Constitution of South Australia*, (1997) at 114-116 [8.3.5].

88 Jacob, "The Inherent Jurisdiction of the Court", (1970) 23 *Current Legal Problems* 23 at 27.

89 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 17 [34]; [2005] HCA 12. See also *Burrell v The Queen* (2008) 238 CLR 218 at 223 [15] per Gummow ACJ, Hayne, Heydon, Crennan and Kiefel JJ; *Achurch v The Queen* (2014) 253 CLR 141 at 152 [14] per French CJ, Crennan, Kiefel and Bell JJ; [2014] HCA 10.

90 *Smith v NSW Bar Association* (1992) 176 CLR 256 at 265 per Brennan, Dawson, Toohey and Gaudron JJ; [1992] HCA 36; *Achurch v The Queen* (2014) 253 CLR 141 at 153 [17] per French CJ, Crennan, Kiefel and Bell JJ.

substance beyond its recall[91]. That does not prevent limited correction of an order after final entry so that the record represents what the court pronounced or intended to pronounce. That aspect of the power is called the "slip rule". However, it does not permit reconsideration or alteration of the substance of the result that was reached and recorded[92]. The present case was not one in which the record did not represent what the Court pronounced or intended to pronounce as its order. The judgments of acquittal and conviction were made by the trial judge acting upon the verdicts of the jury. The slip rule was simply not engaged in this case.

72 The majority in the Full Court characterised the foreperson's error and the other jurors' acquiescence in it as an abuse of process. Kourakis CJ in dissent observed that[93]:

> "A decision made by a constituent part of a court may be right or wrong in law but it is not possible to characterise it as an abuse of itself."

The DPP, supporting the majority's reasoning on the issue of abuse of process, submitted that the concept did not require the agency of an "abuser". The question was whether there was an unacceptable threat to the institutional integrity of the Court. Such a threat, it was said, could arise from an agency within the Court's own processes.

73 The wide concept of abuse of process adopted by the majority and propounded by the DPP in this Court should be rejected. It seems to have few if any limits. As was submitted for the appellant Zefi, if the power to prevent abuse of process extended as far as suggested by the majority in the Full Court, and by the DPP, appellate and supervisory judicial review jurisdiction would be virtually redundant.

74 The concept of abuse of process is a broad one, as it must be, to cover the variety of means which human ingenuity can devise to misuse the processes of the court. As has been said repeatedly in this and other courts, its categories are

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91 *Achurch v The Queen* (2014) 253 CLR 141 at 153-154 [17] per French CJ, Crennan, Kiefel and Bell JJ citing *Bailey v Marinoff* (1971) 125 CLR 529 at 530 per Barwick CJ; [1971] HCA 49.

92 *Burrell v The Queen* (2008) 238 CLR 218 at 224-225 [21] per Gummow ACJ, Hayne, Heydon, Crennan and Kiefel JJ.

93 (2015) 123 SASR 523 at 538 [34].

not closed[94]. Whatever their limits, however, those categories do not extend to cover innocent error by a jury foreperson in delivering a verdict, nor acquiescence by other members of the jury in that delivery. That being so, a major premise of the Full Court's intervention, which would have impermissibly expanded the inherent power of the Court, is falsified. There were, in any event, barriers to any such operation of the inherent power. For reasons already explained, the verdicts delivered by the foreperson, without dissent or correction by the jury, translated by the trial judge into perfected judgments of acquittal and conviction, were beyond the power of the Court to amend or set aside in the exercise of inherent power. The statutory appellate and reference provisions expressly precluded appeals against acquittals and orders effecting acquittals in the circumstances relevant to this case. Absent inherent power to intervene, there was no warrant for the Full Court to admit affidavit evidence from members of the jury.

75 The conclusions reached thus far are sufficient to support orders that the appeals should be allowed. It is, however, desirable to add something about the relationship between verdict and judgment.

Verdict and judgment

76 The verdict of a jury in a criminal case is not the judgment of the court. The judgment of the court is that of conviction or acquittal entered upon acceptance of the verdict. When the Full Court hears an appeal against conviction it is hearing an appeal against a judgment of the court at first instance. It must allow the appeal if it thinks that the verdict of the jury should be set aside on the grounds set out in s 353(1) of the CLC Act. It is not required by the statute to make an order in those terms, although the power of courts to make such orders in criminal appeals is well established[95]. Section 353(2) provides that the Court *must*, if it allows the appeal, "quash the conviction and either direct a judgment and verdict of acquittal to be entered or direct a new trial."

77 On the reservation of a question under s 350, the Full Court may, under s 351A, determine the question and make consequential orders and directions. Examples attached to the text of s 351A include setting aside a conviction and ordering a new trial. They do not extend to setting aside an acquittal.

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94 *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75 at 93-94 [28] per French CJ, Gummow, Hayne and Crennan JJ; [2009] HCA 43.

95 *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 530-532 per Gibbs CJ and Mason J; [1984] HCA 7.

78 The juristic character of a verdict is a collective act of the jury as a decision-making body even when their decision is not unanimous but by majority. It can only be done by the jury assembled as such. A guilty verdict reflects a collective finding that all the facts necessary to establish the guilt of the accused, according to the law as directed by the trial judge, have been proven beyond reasonable doubt. Taken by itself, the verdict imposes no liability. It has, however, a legal consequence, which is a judgment of conviction. That is the legally effective act of the trial judge. A verdict of not guilty reflects the decision of the jury that not all of the factual elements necessary to establish the guilt of the accused, according to the law as directed by the trial judge, have been proven beyond reasonable doubt. It is a collective act which can accommodate an individual diversity of opinion among members of the jury as to which elements the prosecution has failed to establish to the requisite standard of proof. The verdict has the legal consequence that a judgment of acquittal is entered by the trial judge. Unless the jury are able to be recalled post-discharge, any subsequent correction to the verdict or setting aside of the verdict by the trial judge or the court on the basis of evidence from the jurors, other than in the exercise of the statutory referral or appellate powers, would require the exercise of the inherent power subject to the narrow constraints already discussed.

79 The majority in the Full Court held that the process in which it was engaged did not involve reviewing a decision in which orders had been finalised and perfected. No valid verdict had been reached. There had been no valid verdict of acquittal. The majority did not go so far as to say that the consequential judgments of acquittal and conviction were invalid, but rather that the public interest in finality, informing the finality principle, was overtaken by the public interest in reaching a fair result[96]. The DPP took a similar position in his submissions.

80 It is not clear what the Full Court intended by its orders "quashing" the various verdicts. Assuming that those orders should be construed as quashing the judgments of acquittal and conviction, the Court was quashing perfected orders. It did so outside any specific statutory authority and relied entirely upon a broad reading of the inherent power which depended critically upon the Court's erroneous characterisation of the asserted error of the foreperson and the other jurors as an abuse of process. In any event, the verdicts, for the reasons already explained, must be taken to have been the majority verdicts stated by the foreperson. There was debate in this Court about the admissibility of the affidavit evidence from the foreperson and the other jurors to prove the

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96 (2015) 123 SASR 523 at 570 [158].

foreperson's mistake. That debate cannot be disentangled from the anterior question of the Court's power to set aside the verdicts.

81 There is a very long-standing rule that evidence of a jury's decision-making processes cannot be received to impeach their verdict. The rule dates back to Lord Mansfield's judgment in *Vaise v Delaval*[97]. In that case, in civil proceedings before a jury, one of the jurors deposed on affidavit that the jury having been divided, the other jurors had "tossed up" and the plaintiff won. The affidavit was rejected. Lord Mansfield said[98]:

> "The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanour: but in every such case the Court must derive their knowledge from some other source: such as from some person having seen the transaction through a window, or by some such other means."

It has been said that this was the true beginning of the rule because prior to *Vaise v Delaval* the practice in England had been to receive a juror's testimony in such cases[99].

82 The general rule against admissibility of affidavit evidence from jurors to impeach a verdict feeds back into the question of power. It supports the principle that a verdict declared by the foreperson in the sight and hearing of the other jurors and without their dissent is taken to be their true verdict. Therefore, where the verdict was not delivered in the sight and hearing of one or more of the jurors, evidence may be adduced from them that they did not agree with it[100]. That is because the court has power to correct a verdict in such a case. So too in cases of fraud or subornation or intimidation, or where a juror or jurors lacks the capacity to understand the proceedings, the court has the requisite power to intervene, and may take evidence in the exercise of that power. That was not this case.

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97 (1785) 1 TR 11 [99 ER 944].

98 (1785) 1 TR 11 at 11 [99 ER 944 at 944] (footnotes omitted).

99 Rosshirt, "Admissibility of Jurors' Affidavits to Impeach Jury Verdict", (1956) 31 *Notre Dame Lawyer* 484 at 484.

100 *Nanan v The State* [1986] AC 860 at 871.

Conclusion

83 It is not in dispute that the members of the jury could not reach a unanimous verdict of guilty of murder in respect of any of the appellants. It may be that some or all of them thought that because they could not reach unanimity on guilt, a verdict of not guilty of murder must follow. Whether that is right or not, it is not suggested that any of them disagreed with the verdicts that were delivered with respect to manslaughter.

84 The question remains — what is to be done with respect to the appeals of NH and Stakaj against their convictions for manslaughter? Counsel for NH made it clear that his client would not be relying upon the first two grounds in the Notice of Appeal filed in the Full Court, which were based upon the absence of a true verdict of acquittal of murder as vitiating the verdict of guilty of manslaughter. NH would pursue his appeal in the Full Court only on the ground that the verdict of guilty of manslaughter was unsafe and unsatisfactory.

85 Counsel for Stakaj took a different position, wishing to maintain before the Full Court the argument that the affidavit evidence from the jurors was admissible to show that his conviction for manslaughter was vitiated by the failure of the jury to first reach a majority verdict of not guilty of murder. In taking such a position before the Full Court Stakaj would have relied upon the affidavit evidence of the jury to support an order quashing the judgment, in his favour, of acquittal of murder. That raises the question whether, in the exercise of the jurisdiction and powers conferred upon it by the CLC Act, the Full Court could quash a judgment of acquittal on the application of the beneficiary of that judgment. Not surprisingly, the CLC Act is silent on the matter. The powers of the Supreme Court in the exercise of its criminal appellate jurisdiction are statutory. There is no common law power to quash a judgment of acquittal and none is conferred by the CLC Act. In the circumstances, the appropriate disposition in relation to the appeals by both NH and Stakaj is that the Full Court should deal with them but only in relation to the common form grounds.

86 So far as the application of the DPP dated 5 March 2015 is concerned, that application, relying upon statutory power, could not extend to allow the Court to make any order affecting the judgments of acquittal in favour of the appellants.

87 In respect of each of the appellants, the following orders are appropriate:

1. Appeal allowed with costs.

2. Set aside orders 1 to 4 of the Full Court of the Supreme Court of South Australia made on 25 September 2015, and in their place order that:

(a) the application of the Director of Public Prosecutions filed on 16 January 2015 be dismissed;

(b) the application of the Director of Public Prosecutions filed on 5 March 2015 be dismissed; and

(c) the Director of Public Prosecutions pay the appellant's costs of the two applications.

88 In relation to the appellant NH, the following additional order should be made:

3. Remit the matter to the Full Court for further hearing on grounds 3 to 6 of the Notice of Appeal filed in that Court on 7 October 2014.

89 In relation to the appellant Stakaj, the following additional order should be made:

3. Remit the matter to the Full Court for further hearing on grounds 4 to 6 of the Substituted Grounds of Appeal filed in that Court on 21 November 2014.

90 NETTLE AND GORDON JJ. After a trial by judge and jury in the Supreme Court of South Australia, the foreperson, in answer to questions from the judge's associate, told the Court that the jury found each appellant not guilty of murder but guilty of manslaughter. The questions were asked, and the answers were given, in the presence of all members of the jury and without dissent from any juror. After the verdicts were given, the jury was discharged and separated.

91 Later the same day, the foreperson told a court officer he had mistakenly told the Court that at least ten of the jurors had agreed on a not guilty verdict of murder for each appellant. The Court had no contact from the other jurors. At the direction of the Chief Justice, a signed statement was taken from the foreperson by the Acting Sheriff and, over subsequent days, from each of the other jurors. The signed statements, together with a memorandum by the Acting Sheriff and an affidavit from the judge's associate, were provided to the parties.

92 Sentencing hearings were then held and the appellants were sentenced. Judgments of acquittal and conviction, consistent with the jury's verdict, were entered. The respondent ("the DPP") applied to the Full Court of the Supreme Court of South Australia seeking to quash the verdicts of not guilty of murder and guilty of manslaughter, along with the corresponding judgments of acquittal and conviction, and seeking a new trial of each appellant on the charge of murder. The DPP also sought to have certain questions of law referred to the Full Court[101]. Two of the appellants (Stakaj and NH) appealed their convictions for manslaughter. Both the DPP and those two appellants sought to rely on the statements made by the jurors to have the relevant judgments set aside.

93 Can a verdict of not guilty on a charge of murder, upon which a judgment of acquittal has been entered and perfected, be set aside after the jury is discharged and has separated and the trial judge is functus officio, on the ground that at least some members of the jury were under a misapprehension as to the need for a verdict, by majority, on the charge of murder? In the circumstances of the present matters, the answer is "No".

Applicable principles

Acquittal by jury

94 There is no right of appeal at common law. Any rights of appeal are statutory[102]. Except where provided by statute, the prosecution has no right of

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101 s 350(6) of the *Criminal Law Consolidation Act* 1935 (SA).

102 *South Australian Land Mortgage and Agency Co Ltd v The King* (1922) 30 CLR 523 at 552-553; [1922] HCA 17; *Grierson v The King* (1938) 60 CLR 431 at

(Footnote continues on next page)

appeal against a verdict of not guilty. In South Australia, there is no statutory right of appeal or any other grant of jurisdiction or power to set aside a perfected judgment of acquittal discharging an accused after a verdict of not guilty is returned by a jury. Verdicts of not guilty are inviolable except in the most limited of circumstances.

Inviolability of a jury verdict

95 Where a trial is completed, the verdict is given and the jury intentionally discharged, the jury is no longer under the charge of the court officer. The jury is free to separate and is separated. The trial judge is functus officio[103].

96 A verdict given on behalf of and in the presence of all members of the jury, without dissent, is the verdict of the jury. The act of each juror is judged and determined by the polling of the jury in open court, irrespective of motives or beliefs which may have led to the verdict and irrespective of the deliberations during retirement. The assent to a verdict by a juror is constituted by the express answer, here to the judge's associate, at polling in open court or by the silence that implies assent. The outward act is final[104], subject only, in the case of error, to correction before the jury separates[105]. The purpose of formally polling the jury is to afford an opportunity of free expression by all jurors unhampered by fears or errors in private[106]. That is the opportunity for jurors, or the jury as a whole, to correct the verdict of the jury before it separates[107].

97 Accordingly, the fact that the verdict as delivered was later said, by one or more jurors, to not have been assented to by one or more jurors, or is said to be different from the one informally assented to by one or some of them in the jury

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435-436; [1938] HCA 45; *Da Costa v Cockburn Salvage & Trading Pty Ltd* (1970) 124 CLR 192 at 201-202; [1970] HCA 43.

103 *R v Vodden* (1853) Dears 229 [169 ER 706]; *R v Hodgkinson* [1954] VLR 140 at 146-147; *R v Gough* [1993] AC 646 at 658.

104 Wigmore, *Evidence in Trials at Common Law*, McNaughton rev (1961), vol 8 at 717.

105 See, eg, *R v Cefia* (1979) 21 SASR 171; *R v Loumoli* [1995] 2 NZLR 656; *Aylott* [1996] 2 Cr App R 169; *R v Ciantar* (2006) 16 VR 26.

106 *Nanan v The State* [1986] AC 860 at 871.

107 See *R v Parkin* (1824) 1 Mood 45 at 46-47 [168 ER 1179 at 1180]; *R v Vodden* (1853) Dears 229 at 230-231 [169 ER 706 at 707].

room, is no ground for later correcting or setting aside the verdict. Moreover, even if a juror were mistaken or unwilling in the assent given in the jury room it would be no ground for later setting aside the verdict if, when the verdict was given without dissent, the juror committed themselves to the verdict as delivered.

98 If not all members of the jury were present when the foreperson delivered the verdict, a new trial may be granted in certain circumstances[108]. An exception of that kind is unsurprising because there would have been no poll. It is also unlikely in accordance with modern jury practice. Further, a venire de novo may be awarded where evidence is given and accepted that a juror was not competent to understand the proceedings[109]. Neither of those exceptions arises here and neither needs to be explored further.

99 It is also important to keep in mind the distinction between the verdict of the jury and the judgment entered by the court upon acceptance of that verdict. The above exceptions relate only to the former. Once judgment has been entered and thus perfected, a different principle is engaged – the finality of perfected judgments[110]. A perfected judgment is final and, subject to its own limited set of exceptions, cannot be set aside. For example, if a jury verdict were obtained by fraud of the accused, a new trial might be granted.

The present matters – verdicts entered and judgments perfected

100 For each appellant, a judgment was entered upon the verdicts and that judgment was subsequently perfected. Before a court could exercise any power it might have to set aside a perfected judgment because the underlying verdict is allegedly incorrect, it would first have to be established that the underlying jury verdict fell within one of the limited exceptions to the principle that a jury verdict is inviolable.

101 The DPP and the two appellants who appealed their convictions had to demonstrate that the verdicts could be impugned. Only if that premise were established would the question of power to set aside those perfected judgments, based on those verdicts, arise.

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108 *Nanan* [1986] AC 860 at 871-872.

109 A writ for summoning a new jury panel, or venire, "because of some impropriety or irregularity in the original jury's return or verdict such that a judgment cannot be entered on it": *Black's Law Dictionary*, 10th ed (2014) at 1789, "venire facias". This results in a trial de novo. See also *Nanan* [1986] AC 860 at 872.

110 See *Burrell v The Queen* (2008) 238 CLR 218 at 224 [18]-[20]; [2008] HCA 34.

102 In the present matters, the premise was not and could not be established. The verdicts could not be impugned. As will become apparent, the statements said to have been made by the jurors, which were relied upon to demonstrate the alleged error in the verdicts, were inadmissible because each statement fell within the prohibition of the general rule that evidence about jury deliberations is inadmissible to impugn the jury's verdict. Therefore, the further question of what power a court has to set aside a perfected judgment because the underlying verdict is allegedly incorrect is not reached.

Jurors' statements inadmissible

General rule

103 Evidence from a juror as to what took place in the jury room, either by explanation of the grounds on which the verdict was given or by way of statement as to what the juror believed the effect of the verdict to be, is generally inadmissible[111]. The same rule applies to discussions between jurors in the jury room[112]. As this Court recently stated in *Smith v Western Australia*[113]:

> "It is a general rule of the administration of criminal justice under the common law that once a trial has been determined by an acquittal or conviction upon the verdict of a jury, and the jury discharged, evidence of a juror or jurors as to the deliberations of the jury is not admissible to impugn the verdict."

104 So, for example, as Lord Goff of Chieveley summarised in *Nanan v The State*[114], courts have refused to receive evidence from a juror that they did not understand the effect of an answer given by the foreperson to a question from the judge[115], or that the juror did not in fact agree with the verdict that was

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111 *Ellis v Deheer* [1922] 2 KB 113 at 121; *Nanan* [1986] AC 860 at 870.

112 *Nanan* [1986] AC 860 at 871. See also *Smith v The Queen* (2015) 255 CLR 161 at 171 [32]; [2015] HCA 27.

113 (2014) 250 CLR 473 at 476 [1]; [2014] HCA 3.

114 [1986] AC 860 at 871.

115 *Raphael v Governor and Company of the Bank of England* (1855) 17 CB 161 [139 ER 1030].

announced[116], or that the juror disagreed with the verdict but was too frightened to stand up and say so[117].

105 The general rule has limits. Those limits are ascertained by reference to the rationale for the rule: to preserve the confidentiality of jury deliberations. That confidentiality needs to be preserved for two purposes. The first is to enable "jurors to approach their task through frank and open discussion knowing that what is said in the jury room remains in that room"[118]. Open discussion is necessary to ensure the verdict of the jury "is a true one"[119]. The second is to protect "the finality of the verdict"[120]. What the DPP and the two appellants who challenged their convictions seek to do in the present matters is inconsistent with the rule and its rationale.

The jurors' statements

106 All the jurors were interviewed and provided a statement that was said to suggest that the verdicts of not guilty of murder were incorrect because the prescribed majority for that verdict was never obtained.

107 That emerges most clearly in the statement of the foreperson, who stated that "[u]pon reflection, when asked if the jury had a majority not guilty verdict for the charge of murder, I should have answered 'No'". The other jurors' statements were in the form of answers to questions drafted by the trial judge. The questions posed to each juror were identical. Question 5 was:

"Please advise whether each verdict rendered was correct:

Zefi	Not guilty murder – by majority (10 or more)
	Guilty manslaughter – unanimous
Jakaj	Not guilty murder – by majority (10 or more)
	Guilty manslaughter – unanimous

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116 *Nesbitt v Parrett* (1902) 18 TLR 510.

117 *R v Roads* [1967] 2 QB 108. See also *Nanan* [1986] AC 860 at 871.

118 *Smith v The Queen* (2015) 255 CLR 161 at 171 [33].

119 See *Smith v Western Australia* (2014) 250 CLR 473 at 481 [31].

120 *Smith v The Queen* (2015) 255 CLR 161 at 172 [35].

Stakaj	Not guilty murder – by majority (10 or more)
	Guilty manslaughter – unanimous
[NH]	Not guilty murder – by majority (10 or more)
	Guilty manslaughter – by majority (10 or more)."

108 The Court below did not admit the entirety of each juror's statement, as some portions obviously went to the deliberations of the jury. For example, one question asked about each juror's "own vote in respect of each accused and each charge". Most of the foreperson's initial statement was admitted, but, for the other jurors, only the answers to question 5 in so far as they related to the murder charge were admitted.

109 Read in isolation, the answers to question 5, together with the admitted part of the foreperson's statement, might be read as indicating that the answers given by the foreperson in court to the judge's associate were not correct. That was the construction adopted by the Court below.

110 However, it is artificial to divorce the answers given to question 5 from the remainder of the jurors' statements. Doing so obscures what the statements actually disclose – that at least some jurors may have been under a misapprehension about the relevant law. Taken as a whole, the statements of several of the jurors, including the foreperson, indicate that they personally may not have appreciated that, before the jury could consider the offence of manslaughter for an appellant, the jury had to reach a not guilty verdict (whether unanimously or by majority) on that appellant's murder charge. This emerges from several of the answers to a question directed to that very issue (question 3), as well as the final discursive section of some of the affidavits.

111 But not every juror's statement disclosed a misapprehension of the law. The content of the statements was not consistent and the parties did not agree what the statements disclosed. Not only do not all of the jurors' statements disclose the same misapprehension or mistake, some jurors' answers to question 3 indicate that they did understand the relevant law. Even taken at their highest, all that the statements show is that some of the jurors may not have understood the law properly but that all jurors agreed in the verdicts that were given in open court and to which there was no dissent.

112 Thus, the general rule about the admissibility of jurors' evidence applied. The jurors' statements were inadmissible. An alleged misapprehension by some jurors in agreeing to a verdict is a misapprehension of a fundamental kind. But the same may be said of other misapprehensions by the jury – as to the facts

of the case or the applicable law – which can lead to an erroneous verdict. In each of those cases, evidence of misapprehension is inadmissible[121]. The evidence is inadmissible because it offends the inviolability of the finality of the jury verdict and thus falls within the scope of the exclusionary rule. Importantly, the statutory provisions for appeal by an accused, not the DPP – in particular on the ground that the jury's verdict is unreasonable or cannot be supported having regard to the evidence[122] – mark the relevant extent to which the jury's verdict can be challenged.

Conclusion

113 The DPP's contention that the verdict of not guilty of the charge of murder for each appellant, which had been perfected, could be set aside after the jury separated and the trial judge was functus officio because each verdict allegedly inaccurately reflected the jury's vote should be rejected.

114 The circumstances in which the verdicts in the present matters were obtained do not fall within any of the narrow exceptions to the rule that a verdict of a jury, especially an acquittal verdict, is inviolable. And none of the statements raised, let alone established, any fact or matter which even suggested that the verdicts were erroneous because of one or more of the established limited exceptions. The statements were inadmissible.

115 For the same reasons, Stakaj and NH's challenge to their convictions on the basis of the jurors' statements fails.

116 For these reasons, we agree with the orders proposed by French CJ, Kiefel and Bell JJ.

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121 *Nanan* [1986] AC 860 at 872; *Biggs v Director of Public Prosecutions* (1997) 17 WAR 534 at 544, 558.

122 See, eg, s 353(1) of the *Criminal Law Consolidation Act* 1935 (SA).