HIGH COURT OF AUSTRALIA

KIEFEL, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

PEDRO PERARA-CATHCART APPELLANT

AND

THE QUEEN RESPONDENT

Perara-Cathcart v The Queen
[2017] HCA 9
1 March 2017
A39/2016

ORDER

Appeal dismissed.

On appeal from the Supreme Court of South Australia

Representation

M E Shaw QC with S A McDonald for the appellant (instructed by Ben Sale)

I D Press SC with D P Evans for the respondent (instructed by Director of Public Prosecutions (SA))

CATCHWORDS

Perara-Cathcart v The Queen

Criminal law – Appeal against conviction – Directions to jury – Where discreditable conduct evidence admitted under s 34P of *Evidence Act* 1929 (SA) – Relevance of discreditable conduct evidence – Whether trial judge adequately directed jury as to permissible and impermissible uses of discreditable conduct evidence in accordance with s 34R.

Criminal law – Appeal against conviction – Application of proviso – *Criminal Law Consolidation Act* 1935 (SA), s 353(1) – Where majority of Full Court found miscarriage of justice occasioned by misdirection to jury – Where majority of Full Court divided as to whether misdirection occasioned substantial miscarriage of justice for purposes of applying proviso – Whether appeal could be dismissed pursuant to proviso.

Words and phrases – "discreditable conduct evidence", "error of law", "opinion of majority", "permissible and impermissible use", "proviso", "substantial miscarriage of justice", "sufficiency of direction".

Criminal Law Consolidation Act 1935 (SA), ss 349, 353(1).
Evidence Act 1929 (SA), ss 34P, 34R.

1 KIEFEL, BELL AND KEANE JJ. The appellant was charged with the offence of rape, contrary to s 48 of the *Criminal Law Consolidation Act* 1935 (SA) ("the CLC Act"), and with the offence of threaten to kill, contrary to s 19(1) of the CLC Act[1]. Following a trial by jury in the District Court of South Australia, the appellant was convicted of both offences.

2 On appeal, the appellant contended that the trial judge's refusal to exclude a passage from his record of interview with the police, in which he admitted to possessing an amount of cannabis that had been found during a search of his home, was an error of law. It was further contended that the trial judge failed sufficiently to direct the jury as to the permissible and impermissible uses of this evidence, in accordance with the requirements of s 34R(1) of the *Evidence Act* 1929 (SA) ("the Evidence Act").

3 The Full Court of the Supreme Court of South Australia (Kourakis CJ, Gray and Stanley JJ)[2] held unanimously that evidence of the appellant's possession of cannabis was admissible pursuant to s 34P of the Evidence Act[3]. That conclusion was not in dispute in this Court.

4 As to the sufficiency of the trial judge's directions to the jury, Kourakis CJ concluded that the trial judge's directions did not comply with s 34R(1)[4], and that the verdict was attended by an error of law. His Honour went on to hold[5] that because he was not satisfied that no substantial miscarriage of justice had actually occurred, the appeal should be allowed.

5 Gray J considered[6] that the directions of the trial judge were sufficient to comply with s 34R(1) of the Evidence Act. Accordingly, his Honour would have ordered that the appeal be dismissed.

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1 The appellant was also charged with unlawful sexual intercourse, contrary to s 49(3) of the CLC Act, as an alternative to the count of rape. Because no verdict was taken on this alternative count, it is not discussed further.

2 Sitting as the Court of Criminal Appeal.

3 *R v Perara-Cathcart* [2015] SASCFC 103 at [14], [37], [55].

4 *R v Perara-Cathcart* [2015] SASCFC 103 at [15].

5 *R v Perara-Cathcart* [2015] SASCFC 103 at [18].

6 *R v Perara-Cathcart* [2015] SASCFC 103 at [47].

Kiefel J
Bell J
Keane J

6 Stanley J held that the directions given by the trial judge did not meet the requirements of s 34R(1)[7], but was satisfied that no substantial miscarriage of justice had actually occurred[8], and so would also have ordered that the appeal be dismissed.

7 In the result, the appeal to the Full Court was dismissed. Special leave to appeal to this Court was granted on the ground that the order dismissing the appeal could not be sustained by s 353 of the CLC Act, given the conclusion of a majority of the judges of the Full Court that the verdict was attended by an error of law and the absence of a conclusion by a majority of the Court that no substantial miscarriage of justice had occurred. The difficulty raised by the ground of appeal was not adverted to by the Full Court. Were it not for the contention referred to in the next paragraph, the appeal to this Court on this ground would have been allowed.

8 In this Court, the respondent argued, pursuant to a notice of contention, that the trial judge's directions to the jury met the requirements of s 34R(1) of the Evidence Act. On that footing, it was said, the appeal was rightly dismissed by the Full Court. The respondent's contention should be upheld for the reasons which follow.

The case at trial

The prosecution case

9 The prosecution case was that in September 2013, the complainant ("K"), then aged 16 years, and her boyfriend ("J"), then aged 18 years, were at the Marion Shopping Centre, accompanied by a 16 year old friend ("R"). They were approached by the appellant, who was, the prosecution contended, a drug dealer[9]. The appellant, then in his early 30s, was previously unknown to K, J and R. The appellant asked J whether he used methylamphetamine, at the same time showing him some methylamphetamine in a container. They all agreed to go to the house where K and J lived, where they smoked methylamphetamine supplied by the appellant. That evening, K saw the appellant injecting R[10]. K and J also gave

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7 *R v Perara-Cathcart* [2015] SASCFC 103 at [55].

8 *R v Perara-Cathcart* [2015] SASCFC 103 at [65].

9 *R v Perara-Cathcart* [2015] SASCFC 103 at [23].

10 *R v Perara-Cathcart* [2015] SASCFC 103 at [23].

evidence that, during the night, the appellant said that he had to "take some dope" to another person.

10 The prosecution contended that, on the following day, the appellant and K used methylamphetamine, and at some point the appellant injected methylamphetamine into K's right arm[11]. Later that afternoon, the appellant touched K's legs and propositioned her for sex. She refused and the appellant became angry. K went to the bathroom and was followed by the appellant. He placed one arm around her neck, placed the other hand inside her pants and inserted his fingers into her vagina. Immediately before this incident, the appellant said to K, "you don't get something for nothing", in reference to the drugs he had supplied[12]. Following the incident, while K was trying to avoid the appellant, he threatened to kill her[13].

11 When J returned home later that day, K told him that she had been raped. J gave evidence of the complaint. Both K and J were afraid of the appellant, who had suggested to them that he had been violent to others, and had stabbed someone in the city[14]. The appellant visited K and J at their home several times during the following week, and supplied them with drugs. They saw the appellant for the last time about a week after they first met[15].

12 During that week, J crashed a motor vehicle that belonged to a friend of the appellant. As a result, the appellant threatened J with violence, and there ensued a disturbance which led to the police attending the house[16]. An attending police officer described both K and J as nervous and scared. K complained to the police officer that the appellant had raped her[17]. The appellant was interviewed by the police on 15 September 2013 and the record of interview was tendered in evidence.

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11 *R v Perara-Cathcart* [2015] SASCFC 103 at [24].

12 *R v Perara-Cathcart* [2015] SASCFC 103 at [28].

13 *R v Perara-Cathcart* [2015] SASCFC 103 at [24].

14 *R v Perara-Cathcart* [2015] SASCFC 103 at [28].

15 *R v Perara-Cathcart* [2015] SASCFC 103 at [26].

16 *R v Perara-Cathcart* [2015] SASCFC 103 at [27].

17 *R v Perara-Cathcart* [2015] SASCFC 103 at [27].

Kiefel J
Bell J
Keane J

13 The appellant did not challenge the admissibility of the testimony of K and J that he was a dealer in methylamphetamine, that he had injected K and R with methylamphetamine, and that he told them that he used violence against others[18].

14 The appellant did, however, object to the admissibility of that part of the record of the police interview during which he admitted possession of a quarter of an ounce of cannabis, which police had found whilst searching his home after K's complaint. In the argument on the voir dire as to the admissibility of his admission, the prosecution contended that whether the appellant had approached J with a view to obtaining cannabis was an issue in the trial. The appellant, in his record of interview, challenged the account given by K and J that he had approached them with an offer to supply methylamphetamine. The trial judge ruled that the appellant's admission was admissible in evidence[19]. As noted earlier, that ruling is not in dispute in this Court.

The defence case

15 The appellant did not give evidence and called no other evidence. The defence case was that the appellant met K, J and R while he was looking to purchase some cannabis for his own personal use[20]. In his record of interview, the appellant said that he approached J, who was selling drugs at the Marion Shopping Centre, because he "wanted to buy a bag of dope", but that J had said that he did not have any, although he did have ecstasy tablets. According to the defence, that meeting led to the appellant's going with the others to the home of K and J, where J supplied "ice", which was consumed by the appellant and the others.

16 On the defence case, the allegations of rape and threatening to kill were fabricated by K and J as a result of a fear on their part that the police might consider that J was a drug dealer. It was said that K's allegations of rape, and of the threat to kill her, were made up in an attempt to distract attention from K and J's drug use and the fact that J was trafficking in drugs[21].

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18 *R v Perara-Cathcart* [2015] SASCFC 103 at [2]-[4].

19 *R v Perara-Cathcart* [2015] SASCFC 103 at [32]-[36].

20 *R v Perara-Cathcart* [2015] SASCFC 103 at [29].

21 *R v Perara-Cathcart* [2015] SASCFC 103 at [30].

17 In relation to the appellant's assertion that he had sought to acquire cannabis from J at their first meeting at the Marion Shopping Centre, the appellant's admitted possession at his home of an amount of cannabis – which he had not sourced from J – tended to show that the appellant had no need to approach J to obtain cannabis. His admission was, therefore, apt to cast doubt on his assertion that he had, in fact, done so. On that basis, any weight which might otherwise have been given to the appellant's attack on the reliability of the evidence of K and J was likely to be diminished.

The Evidence Act

18 Section 34P of the Evidence Act relevantly provides:

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

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

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

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

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

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

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

19 Section 34R(1) of the Evidence Act provides:

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

The trial judge's directions to the jury

20 The trial judge directed the jury on the topic of the appellant's use of, and dealing in, illicit drugs as follows:

> "There is no shortage of evidence in this case to suggest that [the appellant] was a drug user and some evidence, although contested, that he was a drug dealer. Those particular topics have a relevance on the evidence because they were part of the unfolding of the prosecution case, but I warn you against the misuse of that evidence. It would be quite wrong of you to say 'Well, [the appellant] is a drug dealer, he must be guilty of these offences and we will find him guilty' or 'he is guilty because he is the sort of bloke who would commit these offences and we will find him guilty'. That is a completely wrong way to approach the case. That topic has a particular relevance, it is intertwined with the events that occurred, but you must not reason in the way in which I have just suggested."

21 Later in his summing-up, the trial judge referred to the prosecution's contention as to "the core allegation" made in this case, and to the question which "arose on the evidence as to basically who had the drugs after their initial meeting at the bus stop at the Marion Shopping Centre." His Honour observed that the prosecution case was that "it makes sense for [the appellant] to have been the one that had the drugs".

22 His Honour went on to refer to the prosecution's contention that the appellant's:

> "interview with the police just simply did not hang together. [The prosecutor] said that when viewed overall, it just simply did not make sense. He said that what really made sense, despite what [the appellant] might have said, was that if anyone was a drug provider, it was [the appellant]. He was much older than the other two and, indeed, [the prosecutor] remarked upon the fact that, at one stage, [the appellant] gave them money for breakfast, which is hardly suggestive that they were involved in drug dealing."

23 The trial judge, in summing-up the defence case to the jury, referred to the submission by counsel for the appellant that "in reality, proof in this case of any of the offences rests upon you being satisfied as to the truthfulness and accuracy of the evidence of [K]."

24 His Honour went on to remind the jury of the various attacks made by the appellant's counsel upon the truthfulness and accuracy of K's evidence. In

particular, his Honour reminded the jury of the contention advanced by counsel for the appellant that it was not credible for K to allege that she had been raped by the appellant while continuing to associate with him. In relation to the testimony of K and J that they were intimidated by the appellant because he was a drug dealer, the trial judge warned the jury:

> "[Y]ou cannot use the faulty line of reasoning that merely because he may have done those things on other occasions, that he is the sort of person who would commit this offence and, therefore, find him guilty where proof is lacking."

The Full Court

25 Kourakis CJ rightly observed that, by pursuing a defence based on the alternative explanation for being in K and J's company, namely his attempt to source cannabis, the appellant made his independent possession of cannabis a real forensic issue[22]. His Honour held that the evidence was admissible[23], but concluded[24] that the trial miscarried because of the trial judge's failure properly to direct the jury in accordance with s 34R(1). His Honour considered[25] that the trial judge did not:

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

26 Kourakis CJ went on to conclude[26], in relation to the application of the proviso, that because the prosecution case depended upon the credibility of the testimony of K and J, and because the Court was not in a position to evaluate their credibility from the transcript of the evidence, the proviso could not be applied, and the appeal should be allowed.

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22 *R v Perara-Cathcart* [2015] SASCFC 103 at [10].

23 *R v Perara-Cathcart* [2015] SASCFC 103 at [14].

24 *R v Perara-Cathcart* [2015] SASCFC 103 at [15].

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

26 *R v Perara-Cathcart* [2015] SASCFC 103 at [18].

Kiefel J
Bell J
Keane J

27 Gray J held that the evidence of possession of cannabis in the appellant's home was admissible[27] because the offences charged were alleged to have occurred in the context of drug dealings between the appellant, K, J and R. His Honour observed[28] that the trial judge explained to the jury that the evidence "provided the context in which the alleged offending occurred … [as] part of the unfolding prosecution case." Gray J did not consider that the jury would have been "under any misunderstanding as to the purpose of the evidence of discreditable conduct" but would have understood it as:

> "an item of circumstantial evidence … from which [with other evidence] the jury would be entitled to reach the conclusion that [the appellant] was a dealer in drugs and made use of his supply of drugs to influence and put pressure on [K]."[29]

28 Unlike Kourakis CJ, Stanley J considered[30] that the direction given by the trial judge was adequate to explain the impermissible use of the evidence of the appellant's drug use. His Honour considered that it was sufficient that the trial judge's directions made it clear that the jury could not use the evidence to reason that the appellant was the kind of person who might be likely to commit the offences charged. On the other hand, Stanley J was not persuaded that the direction adequately explained the permissible use of that evidence.

29 In this regard, Stanley J observed[31] that the extent of the direction given was confined to "telling the jury that the evidence of the appellant's drug use is relevant as it is intertwined with the events that occurred and was part of the unfolding of the prosecution case." Stanley J held that the trial judge was required to direct the jury that the permissible use of the appellant's admission was to explain the circumstances by which the appellant met K and J, and "further [it] was evidence they could use to find he was providing drugs to K and using the provision of those drugs to pressure her for sex."[32] Stanley J held[33] that

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27 *R v Perara-Cathcart* [2015] SASCFC 103 at [43].

28 *R v Perara-Cathcart* [2015] SASCFC 103 at [46].

29 *R v Perara-Cathcart* [2015] SASCFC 103 at [47].

30 *R v Perara-Cathcart* [2015] SASCFC 103 at [56].

31 *R v Perara-Cathcart* [2015] SASCFC 103 at [56].

32 *R v Perara-Cathcart* [2015] SASCFC 103 at [56], [66].

33 *R v Perara-Cathcart* [2015] SASCFC 103 at [57].

the failure of the trial judge to direct the jury in this way constituted an error of law in failing to comply with s 34R(1) of the Evidence Act. To the extent that Stanley J seems to have considered that the trial judge was *obliged* to direct the jury that they might properly use the appellant's admission that he was in possession of a quarter of an ounce of cannabis as tending to show that he supplied K, J and R with methylamphetamine, this was precisely the use which Kourakis CJ regarded as something against which the jury were required to be warned.

30 It may also be noted that Stanley J reached this conclusion even though he agreed with Gray J that "the jury would not have been under any misunderstanding as to the purpose of that evidence."[34]

31 Before addressing the issue raised by the respondent's notice of contention, it is desirable to explain why, given their Honours' discrepant reasons, s 353(1) of the CLC Act did not support the order of the Full Court dismissing the appeal to that Court.

The application of the proviso

32 Section 353(1) of the CLC Act contains the common form of the proviso whereby courts of criminal appeal are required to dismiss an appeal against conviction, notwithstanding that a ground of appeal is made out.

33 Section 353 relevantly provides:

> "(1) The Full Court on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal; but the Full Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.
>
> (2) Subject to the special provisions of this Act, the Full Court shall, if it allows an appeal against conviction, quash the conviction and

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34 *R v Perara-Cathcart* [2015] SASCFC 103 at [67].

> either direct a judgment and verdict of acquittal to be entered or direct a new trial."

34 In the CLC Act[35], the expression "Full Court" has the same meaning as in the *Supreme Court Act* 1935 (SA), which is relevantly "the Supreme Court consisting of ... not less than three judges"[36].

35 Section 349 of the CLC Act provides:

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

36 The appellant submitted that, on the proper construction of s 353(1), where one of the three broad grounds on which it contemplates that an appeal must be allowed is made out, the proviso may be applied to sustain a conviction only if a majority of the judges constituting the Full Court considers that no substantial miscarriage of justice has occurred. A majority of the Full Court, Kourakis CJ and Stanley J, concluded that the trial judge had failed to direct the jury as required by law; but only one judge, Stanley J, and not a majority of the Full Court, held that "no substantial miscarriage of justice ha[d] actually occurred."

37 The appellant also submitted that, while Gray J held that the trial judge's direction to the jury did not involve an error of law, it did not follow that a majority of the Court had determined that no substantial miscarriage of justice had actually occurred. On the view that Gray J took of the sufficiency of the trial judge's direction, his Honour was not obliged to consider – and did not consider or decide – whether, given the error of law which Kourakis CJ and Stanley J held to have been established, it was nevertheless the case that, having regard to all of the evidence, no substantial miscarriage of justice had actually occurred.

38 The appellant's submissions in relation to the application of the proviso must be accepted. Under s 353(1), two questions arose for determination before the Full Court: the first was whether the Full Court "thinks that the verdict of the jury should be set aside" on any one or more of the three grounds there stated; and the second was whether the Full Court "considers that no substantial miscarriage of justice has actually occurred." By virtue of s 349, each of these questions was to be determined according to the opinion or opinions of the

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35 Section 5(1).

36 Section 5(1).

majority of the members of the Court hearing the case. That did not occur in relation to the question whether, given that a majority of the Court found an error of law in the trial judge's direction to the jury, no substantial miscarriage of justice had actually occurred.

39 The conclusion that the Full Court's dismissal of the appeal cannot be sustained by the application of the proviso by Stanley J accords with the language of s 353(1), understood in the light of s 349. This conclusion gives effect to the language of s 353(1), which authorises the application of the proviso if "it", meaning the Full Court, "considers that no substantial miscarriage of justice has actually occurred."

40 Section 349 of the CLC Act applies both to an appeal against conviction or sentence and to a case stated by a trial judge reserving a question of law. Because s 349 does apply in relation to an appeal against conviction or sentence, the determination which is required, in that case, is of "any question" before the Full Court in the appeal. To argue that, in the case of an appeal, "any question" before the Full Court is, always and only, the single question whether the appeal should or should not be allowed is to assume that the provisions which regulate appeals do not throw up more than one question for the purposes of s 349. Whether that assumption is justified depends on the language of those provisions, and of s 353 in particular. It is important to bear in mind that appeals are creatures of statute. One must therefore look to the statute in order to determine what question or questions are required to be answered, rather than proceed on a priori assumptions. While it is usually the case that a statute will require only the question whether an appeal should be allowed or dismissed to be addressed, the legislature may require more. It has done so in the special circumstances in which the proviso operates. In our view s 353(1) makes provision for two questions to be answered. The answers are provided by reference to the opinion of a majority of the Full Court with respect to the questions there stated.

41 Our conclusion on this point also accords with the approach suggested by this Court in *Hepples v Federal Commissioner of Taxation*[37] to the appropriate course when a majority of a multi-member court "would dismiss [an] appeal but for discrepant reasons and each of those reasons is rejected by a majority differently constituted." In *Hepples*, the Court referred[38] to an appeal which, if successful, would conclude the rights of the parties as having:

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37 (1992) 173 CLR 492 at 550; [1992] HCA 3.

38 (1992) 173 CLR 492 at 550-551.

"traditionally been determined according to the opinion of a majority as to the order which gives effect to the legal rights of the parties irrespective of the steps by which each of the Justices in the majority reaches the conclusion[39]."

42 The Court went on to say:

"But when an issue of law is determined for the purposes of proceedings pending in a court or tribunal, an order on appeal must declare the majority opinion as to the issue of law, irrespective of any conclusion as to the ultimate rights of the parties to which the reasons of the respective Justices would lead."

43 Their Honours held that the case before them was in this latter category. They did so in deference to the circumstance that the source of their authority to decide the case was s 45(2) of the *Administrative Appeals Tribunal Act* 1975 (Cth), pursuant to which a case was stated and a question of law referred for decision by the Full Court of the Federal Court[40]. So in this case the questions for determination by the Full Court posed by s 353 of the CLC Act were whether the Full Court "thinks" that the verdict of the jury should be set aside, and whether the Full Court "considers" that no substantial miscarriage of justice has actually occurred.

44 Finally, our conclusion on this point accords with the evident purpose of the proviso, which is to ensure that a conviction affected by error should not stand unless at least a majority of the judges of the court sitting on appeal from the verdict have turned their minds to the question of whether no substantial injustice has actually occurred, and satisfied themselves that no such miscarriage has actually occurred[41].

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39 See, eg, the orders made in *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204; [1946] HCA 46. See also the notes in (1949) 23 *Australian Law Journal* 355 and (1950) 66 *Law Quarterly Review* 298 and *The Commonwealth v Verwayen* (1990) 170 CLR 394; [1990] HCA 39.

40 See (1992) 173 CLR 492 at 499.

41 Cf *Mraz v The Queen* (1955) 93 CLR 493 at 514; [1955] HCA 59; *Weiss v The Queen* (2005) 224 CLR 300 at 307 [15]; [2005] HCA 81; *AK v Western Australia* (2008) 232 CLR 438 at 456 [55]; [2008] HCA 8; *Gassy v The Queen* (2008) 236 CLR 293 at 301 [19]; [2008] HCA 18; *Baini v The Queen* (2012) 246 CLR 469 at 481-482 [33]; [2012] HCA 59.

45 The appellant sought to rely upon some observations by Barwick CJ in *R v Ireland*[42]. His Honour was concerned to address a submission by the Crown that an appeal against conviction should have been dismissed by the Supreme Court because there was no majority of judges in favour of upholding any single ground of appeal. It was argued that each ground advanced on the appeal in the Supreme Court raised a separate question within the meaning of the then s 349(1) of the CLC Act. It was further argued that the only order which the judgments delivered would support would be an order dismissing the appeal, because no ground of appeal was upheld by a majority of the judges who constituted the Court.

46 In rejecting this submission, Barwick CJ, with whom McTiernan, Windeyer, Owen and Walsh JJ agreed, said[43]:

> "The question in an appeal is whether or not it should be allowed, or, expressed more precisely, whether an order should be made dismissing it or an order allowing it, and in that event making appropriate consequential provision. In a proper use of terms, the only judgment given by a court is the order it makes. The reasons for judgment are not themselves judgments though they may furnish the Court's reason for decision and thus form a precedent. …
>
> The Full Court, sitting as a Court of Criminal Appeal, not only hears appeals but determines questions of law upon a case stated pursuant to s 350. Consequently, s 349 is expressed to cover both occasions; hence the use of the word 'question' in s 349(1). In relation to the determination of a question submitted by case stated, no difficulty arises under sub-s (2) though, if the whole section were confined to such a determination, there would not be any need there to qualify the question as a question of law; only such questions can arise for determination on a case stated. But the section clearly embraces appeals pursuant to s 352. … In my opinion, the order of the Supreme Court allowing the appeal was not in disconformity with the opinion of the majority of the Court. The question before it, namely, the fate of the appeal and the proper order to be made, was determined in accordance with the opinion of the majority of the members of the Court hearing the case."

47 Barwick CJ was concerned with whether an appeal should be allowed where different grounds for doing so were upheld in separate judgments by the

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42 (1970) 126 CLR 321 at 329-331; [1970] HCA 21.

43 (1970) 126 CLR 321 at 330-331.

members of the majority of the Court. His Honour's observations were thus concerned with what has been described above as the first question posed by s 353(1) of the CLC Act; they were not concerned with the operation of the proviso or the relationship between that question and the question posed by the proviso. His Honour did not consider whether only one question was involved in a determination that an appeal should be allowed under the first limb of s 353(1), but should be dismissed under the proviso.

48 It may be accepted that the observations of Barwick CJ support the proposition that, in general, only one question is involved in determining whether to order that an appeal be allowed or dismissed; and that that proposition applies to the first limb of s 353(1) even though each of the judges constituting the majority may justify his or her decision on a different one of the three grounds identified in that provision. But Barwick CJ's observations that the question in an appeal is whether an order should be made dismissing it, or an order should be made allowing it, did not address the specific language of s 353(1), and do not deny that a second question is posed by s 353(1). Under the proviso the Full Court is authorised to dismiss an appeal which it would otherwise be obliged to allow only if "it" (that is, a majority of the Full Court) considers that no substantial miscarriage of justice has actually occurred. To say that an appeal under s 353(1) of the CLC Act gives rise to only one question – namely whether the appeal should be allowed or dismissed – because only one order will be made to dispose of the appeal, is to fail to give effect to the text of s 353(1) and to the evident purpose of the proviso that, where a majority has concluded that an appeal should be allowed for one or more of the grounds mentioned in the first limb of s 353(1), it will be dismissed only where a majority of the Full Court has concluded upon a review of the whole record that no substantial miscarriage of justice has actually occurred.

49 For these reasons, we would have allowed the appeal but for the issue raised by the respondent's notice of contention.

The notice of contention

The appellant's submissions

50 When evidence is admitted under s 34P, s 34R(1) obliges a trial judge to give directions to the jury to "identify and explain the purpose for which the evidence may, and may not, be used." The appellant submitted that the directions given by the trial judge offered only limited direction as to how the evidence of the appellant's admission might not properly be used, and no guidance as to how it could properly be used. It was also submitted that the trial judge erred in that he did not explicitly state that the jury could use the evidence for a particular identified purpose, but for no other purpose.

The requirements of s 34R(1)

51 A sufficient direction under s 34R(1) must identify the purpose for which the evidence may be used and the purpose for which it may not be used. Compliance with s 34R is mandatory. Whether there has been compliance with s 34R(1) will depend upon the circumstances of the case[44].

52 In relation to the appellant's last submission, it may be said that s 34R does not require the trial judge to instruct the jury using the precise language of s 34P. That is unsurprising, given that s 34P is directed to the determination by the trial judge of questions of admissibility of evidence, not the use of the evidence by the jury. It was, therefore, not a deficiency in the trial judge's directions that he did not append to his directions the phrase from s 34P(1)(c) "for any other purpose".

53 The question is whether the trial judge's directions were sufficient to identify the permissible and impermissible uses of the appellant's admission that the cannabis found at his house belonged to him. Whether those directions conform to the requirements of s 34R(1) can only be determined having regard to the real issues in the case. In *Huynh v The Queen*[45], French CJ, Crennan, Kiefel, Bell and Gageler JJ reiterated that the general responsibility of the trial judge to direct the jury on matters of law is as stated in *Alford v Magee*[46]; that is, the trial judge is obliged:

> "to decide what the real issues in the case are and to direct the jury on only so much of the law as they need to know to guide them to a decision on those issues."

54 The sufficiency of a direction to satisfy the requirements of s 34R(1) must be determined in the light of this fundamental responsibility of the trial judge. In *R v Getachew*[47], a case in which the governing statute provided for mandatory directions to a jury in relation to a case of alleged rape, French CJ, Hayne, Crennan, Kiefel and Bell JJ said:

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44 *Pemble v The Queen* (1971) 124 CLR 107 at 117-118; [1971] HCA 20. See also *R v Nieterink* (1999) 76 SASR 56.

45 (2013) 87 ALJR 434 at 441 [31]; 295 ALR 624 at 631-632; [2013] HCA 6.

46 (1952) 85 CLR 437 at 466; [1952] HCA 3.

47 (2012) 248 CLR 22 at 34-35 [29]; [2012] HCA 10.

> "The directions to be given to a jury on a trial for rape are to be moulded in the light of the proper construction of the relevant provisions of the [*Crimes Act* 1958 (Vic)] and, no less importantly, having regard to the real issues in the trial. As this Court has repeatedly pointed out, the judge in a criminal trial must accept the responsibility of deciding what are the real issues in the case, must tell the jury what those issues are, and must instruct the jury on so much of the law as the jury need to know to decide those issues." (footnote omitted)

55 In the present case, the real issue was whether the testimony of K and J was reliable, and, in particular, whether the appellant's assertion that J was the source of the drugs consumed by the appellant and others was apt to create reasonable doubt as to the reliability of their testimony. The appellant's admission that he had subsequently been found in possession of cannabis tended to dispel the doubt which the defence case sought to raise in relation to the case for the prosecution. No one who participated in the trial raised any concern that it might be used in some way other than as support for the prosecution case against the appellant's attack upon it.

56 Given the real issue in the case, the proper use by the jury of the appellant's admission was neither subtle nor elusive. It did not require an elaborate explanation to ensure that the jury appreciated what use of the admission was permissible and what use was not.

Permissible use

57 The prosecutor, during his closing address to the jury, invited the jury to consider the appellant's admission of his possession of cannabis only when considering the version put forward by the appellant in his interview, and when assessing the evidence of K when she said the appellant had told her that he was going to deliver some "dope" to someone. In this context, s 34R(1) required directions sufficient to ensure that the jury understood that they could properly use the appellant's admission for the purpose of determining whether the case for the prosecution was reliable, notwithstanding the appellant's attack upon it.

58 The issue in relation to which the appellant's admission was relevant was important, but, in truth, simple. The appellant's admission suggested that the appellant's challenge to the reliability of K and J did not "hang together" with the other evidence. The use of the evidence in relation to that issue was readily understandable. As a result, the direction given by the trial judge did not require further elaboration in order to comply with the requirement of s 34R(1).

59 Stanley J erred in taking the view that s 34R(1) required the trial judge to instruct the jury that the appellant's admission could be used to reason to a

conclusion that the appellant was a dealer in methylamphetamine. The trial judge did not err in law by not directing the jury to engage in such faulty reasoning. The possession of a quarter of an ounce of cannabis by the appellant could not reasonably be used to suggest that the appellant was a dealer in methylamphetamine. Kourakis CJ was of that opinion. His Honour went on to conclude that the jury had to be directed to that effect. As will be explained, Kourakis CJ erred in concluding that such a direction was necessary to comply with s 34R(1); but the point to be made here is that the course taken by the trial judge avoided both Scylla and Charybdis.

60 It is also to be noted that the defence did not seek a direction from the trial judge in the terms said to be necessary by Stanley J. Of course, the trial judge was not relieved of the duty cast upon him by s 34R(1) by the manner in which the case was conducted for the defence; but the absence of an application by counsel for the defence for a further direction affords some practical indication that the trial judge, whose task was to direct the jury only as to so much of the law as they needed to know to resolve the real issues in the case, succeeded in that task.

61 For the sake of completeness, it may be noted that the respondent argued that, given the view of Stanley J that the error had no impact on the jury's deliberations, his Honour should have determined that the lack of specificity in the trial judge's directions to the jury did not give rise to a miscarriage of justice. This submission cannot be accepted in the terms in which it was put. Section 34R(1) must be complied with. The possibility that a jury may come to a correct understanding of the use which may be made of evidence of discreditable conduct, despite the fact that the mandatory terms of s 34R(1) have not been complied with, is not a basis on which compliance with s 34R(1) may be dispensed with. But the circumstance that an appeal court is left in no doubt that the jury did not misunderstand the permissible use of the evidence in question may provide some level of practical confirmation that the direction that has been given was adequate in the circumstances of the case. That circumstance may not be determinative, but it need not be ignored.

Impermissible use

62 The trial judge directed the jury against reasoning to the effect that, because there was evidence which suggested that the appellant was a drug dealer, it was more likely that he committed the offences. That direction was sufficient for the purposes of s 34R(1). The real issue in the case was not such as to require a more specific direction than that given by the trial judge as to how the jury might not use the appellant's admission.

Kiefel J
Bell J
Keane J

63 Relying on the reasoning of Kourakis CJ[48], the appellant submitted that the jury should have been, but were not, warned against reasoning that, because the appellant had possession of some cannabis, they could use that evidence to conclude that it was more likely that he provided methylamphetamine to K and J, as alleged by them.

64 It is true that the trial judge did not differentiate between different types of drug dealing. That is understandable given that there was no issue in the case as to whether the appellant or J trafficked in one kind of illicit drug rather than another. The real issue was simply whether the appellant's assertion that J was the drug dealer was, in light of the appellant's admission, apt to cast reasonable doubt on the case for the prosecution.

65 As the case was fought, there was no occasion for the jury to be distracted by a suggestion from the trial judge that the appellant's admitted possession of cannabis should not be used as tending to prove that the appellant was a dealer in methylamphetamine. There was direct, but contested, evidence that the appellant supplied K, J and R with methylamphetamine, the supply of which gave rise to the occasion on which the appellant was alleged to have raped and threatened K. The real issue was whether that evidence was reliable. The resolution of that issue did not need to be complicated by raising a separate issue as to whether the appellant was otherwise in the business of dealing in methylamphetamine, or by a direction that the appellant's admission that he possessed a quarter of an ounce of cannabis could not be used as a basis for resolving that issue in the affirmative.

66 It is neither necessary under s 34R(1) of the Evidence Act, nor desirable generally, for a trial judge to instruct the jury about the law in relation to matters about which no issue arises in the trial. The heavy responsibility of a trial judge does not extend to imagining possible issues which the parties have not raised – much less to formulating directions designed to instruct the jury in relation to the resolution of such non-issues. In the circumstances of the present case, there was no occasion for concern that the jury might use the appellant's admission for the impermissible purpose that troubled Kourakis CJ. It is apparent that no one participating in the trial, and focused upon the real issue, apprehended that the admission might be misused in that way.

67 There is an air of unreality in the argument that the jury, who were directed that the issue for their determination was whether they accepted the account given by K and J as reliable, might have digressed in their deliberation

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

upon this uncomplicated issue to use the evidence of the appellant's admitted possession of a small quantity of cannabis to conclude that he was a dealer in methylamphetamine. It is to do scant justice to the jury as "the constitutional tribunal for deciding issues of fact"[49] to suggest that the directions the jury had been given left them at risk of taking a detour from the simple and obvious path on which they had been set to reason that, because the appellant possessed a small quantity of cannabis, he was therefore more likely to be a dealer in methylamphetamine. The direct path of reasoning which was properly, and clearly, open to the jury avoided this detour into gratuitous illogicality.

Conclusion and orders

68 The issue raised by the respondent's notice of contention must be decided against the appellant.

69 The appeal should be dismissed.

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49 *Hocking v Bell* (1945) 71 CLR 430 at 440; [1945] HCA 16; *MFA v The Queen* (2002) 213 CLR 606 at 621 [48]; [2002] HCA 53; *R v Baden-Clay* (2016) 90 ALJR 1013 at 1023-1024 [65]; 334 ALR 234 at 246; [2016] HCA 35.

70 GAGELER J. The individual conclusions of the three members of the Full Court of the Supreme Court of South Australia on the two issues on which they were divided and on the outcome of the appeal against conviction, together with the result at which the majority of the Full Court arrived in dismissing the appeal, can be depicted as follows:

	Inadequate direction?	Proviso applicable?	Appeal allowed?
Kourakis CJ	Yes	No	Yes
Gray J	No	-	No
Stanley J	Yes	Yes	No
Majority	Yes	-	No

71 The argument for the appellant on the principal ground of the appeal to this Court is that the conclusions of the members of the Full Court on the two issues on which they were divided ought to have resulted in the ultimate question of whether the appeal should be allowed being answered "Yes". Where a majority of the Full Court concludes that the trial judge's direction to the jury was inadequate (whether as an error of law or as a miscarriage of justice), the appellant argues, s 349 operates on s 353(1) of the CLC Act to require that the appeal against conviction be allowed unless that majority also concludes that the proviso is applicable.

72 That argument of statutory construction raises an important question about decision-making by a multi-member court.

73 The institutional responsibility of a court is to produce an order that resolves the justiciable controversy before it. That is the court's "unique and essential function"[50]. In the performance of that function by a multi-member court, each member of the court has an individual duty to give effect to his or her own true view of the law and of the application of the law to the facts of the case[51].

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50 *Fencott v Muller* (1983) 152 CLR 570 at 608; [1983] HCA 12.

51 Mason, "Reflections on the High Court: Its Judges and Judgments", (2013) 37 *Australian Bar Review* 102 at 110.

74 The individual members of a multi-member court will sometimes disagree. Sometimes disagreements will be resolved by dialogue, one member ending up convinced by another to take a different view; sometimes not. Where disagreements are not resolved, the law supplies a decision-making rule which allows the court to produce the order that is necessary for its institutional duty to be fulfilled.

75 The decision-making rule applied to produce the order of a multi-member court in a case in which there is disagreement between its members is different in timing, concept and purpose from the principle applied in an attempt to extract a *ratio decidendi* from the reasons for decision of the members of that court in that case. The decision-making rule is applied at the time of decision. The rule is directed to ensuring an outcome in the case. When triggered by disagreement, the rule applies to produce a result. The principle is applied subsequently and in retrospect. The principle is directed to the ideal of ensuring that cases are decided consistently through time. The principle cannot be expected always to achieve that ideal. Every case must have an outcome, but not every case need have a *ratio decidendi*.

76 When members of a Full Court of the High Court are "divided in opinion as to the decision to be given on any question", the decision-making rule is supplied by s 23(2) of the *Judiciary Act* 1903 (Cth). If the case is in the High Court's appellate jurisdiction and there is an equal division of opinion, the decision appealed from is left to stand[52]. If there is an equal division in the High Court's original jurisdiction, the opinion of the Chief Justice or Senior Justice prevails[53]. In each of those circumstances of equally divided opinion, the applicable decision-making rule produces a resolution of the case at hand. In neither of those circumstances does application of the rule produce a decision which necessarily constitutes a binding precedent[54]. When the division in opinion in the High Court is not equal, the decision-making rule is that "the question shall be decided according to the decision of the majority"[55]. That decision-making rule produces a resolution of the case at hand notwithstanding

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52 Section 23(2)(a) of the *Judiciary Act* 1903 (Cth).

53 Section 23(2)(b) of the *Judiciary Act* 1903 (Cth).

54 *Tasmania v Victoria* (1935) 52 CLR 157 at 183-185; [1935] HCA 4; *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd* (1981) 146 CLR 336 at 430-432; [1981] HCA 4; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 540 [1], 570-571 [100]; [1999] HCA 27.

55 Section 23(2) of the *Judiciary Act* 1903 (Cth).

that aggregation of the reasons for decision of members of the majority can sometimes fail to yield a *ratio decidendi*[56].

77 Considering "[w]hat order should [it] make when a majority would dismiss the appeal but for discrepant reasons and each of those reasons is rejected by a majority differently constituted?", the High Court noted in *Hepples v Federal Commissioner of Taxation*[57] that, when the division of opinion amongst its members has not been equal, an appeal to it from a final judgment which concludes the legal rights of the parties "has traditionally been determined according to the opinion of a majority as to the order which gives effect to the legal rights of the parties irrespective of the steps by which each of the Justices in the majority reaches the conclusion". Within the meaning of s 23(2) of the *Judiciary Act*, the "question" to be decided according to the decision of the majority has implicitly been treated as the ultimate question of what order the Court is to make in the disposition of the appeal. That is to say, the "question" which s 23(2) says is to be decided according to the decision of the majority has been treated as the "judgment of the High Court", which s 73 of the Constitution says "shall be final and conclusive".

78 The holding in *Hepples*[58] was that "when an issue of law is determined for the purposes of proceedings pending in a court or tribunal, an order on appeal must declare the majority opinion as to the issue of law, irrespective of any conclusion as to the ultimate rights of the parties to which the reasons of the respective Justices would lead". That holding was an application of the same underlying decision-making rule as informs the disposition of an appeal from a final judgment which concludes the legal rights of the parties. The decision-making rule implicitly treats the "question" to be decided according to the decision of the majority as the ultimate question of what order the Court is to make in the disposition of the appeal. In *Hepples*, it required particular attention to the substance of the question reserved which gave rise to the appeal. The question was identified as containing "not a single discrete question of law but (at least) two questions of law", each of which was answered in the order which the Court made disposing of the appeal[59].

79 When the division of opinion amongst its members is not equal, the majoritarian decision-making rule set out in s 23(2) of the *Judiciary Act* is accordingly in each case applied in respect of the opinion of each member of the

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56 Cf *Jones v Bartlett* (2000) 205 CLR 166 at 223-225 [202]-[207]; [2000] HCA 56.

57 (1992) 173 CLR 492 at 550-551; [1992] HCA 3.

58 (1992) 173 CLR 492 at 551.

59 (1992) 173 CLR 492 at 552-553.

Full Court of the High Court as to the order that should be made by the Court. The majoritarian rule is not applied in respect of conclusions which each member has reached on issues arising in the process of reasoning to that opinion. The "question", in short, is as to the order not the reasons.

80 Section 349 of the CLC Act derives from s 1(4) of the *Criminal Appeal Act* 1907 (UK). Section 1(4) prescribed for the Court of Criminal Appeal (constituted always by an uneven number of judges being not less than three), in the determination of appeals against conviction and sentence under s 3 of that Act, a decision-making rule applicable in the event of a difference of opinion amongst the members of that Court which differed from the approach previously adopted in practice by the Court for Crown Cases Reserved (constituted by all of the common law judges, of which a quorum was five)[60].

81 Despite its different provenance, s 349 of the CLC Act uses language strikingly similar to s 23(2) of the *Judiciary Act* in providing that "[t]he determination of any question before the Full Court under [the CLC] Act shall be according to the opinion of the majority of the members of the Court hearing the case". The critical question in the application of s 349 is: what is the "question"?

82 In the answer lies the answer to a more specific question about whether, within the meaning of s 349, s 353(1) involves the Full Court asking and answering one question or two questions. Is there one big question as to whether the appeal against conviction should be allowed or dismissed under s 353(1) and, if allowed, as to what consequential direction should be made under s 353(2)? Or do two questions arise sequentially under s 353(1): the first as to whether the Full Court thinks that the verdict of the jury should be set aside on one or more of the three identified grounds, and the second question as to whether the Full Court considers that no substantial miscarriage of justice has actually occurred?

83 The answer to the critical question, in my opinion, is that the "question" to which s 349 of the CLC Act refers, like the "question" to which s 23(2) of the *Judiciary Act* refers, is the question as to what order the Full Court should make. The "determination of any question before the Full Court" occurs through the making of an order by the Full Court. It follows that, within the meaning of s 349, s 353 involves the Full Court hearing an appeal against conviction asking and answering a single question as to whether the appeal should be allowed or dismissed and, if allowed, as to whether what should be directed is a judgment and verdict of acquittal or a new trial.

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60 *Crown Cases Act* 1848 (UK) (11 & 12 Vict c 78); see *Conway v The Queen* (2002) 209 CLR 203 at 210 [10]; [2002] HCA 2.

84 That answer fits best with the legislative context. Section 349 is located in Div 1 of Pt 11 of the CLC Act. Plainly, the decision-making rule it lays down is applicable to how the Full Court is to determine any "question" that might arise in any of the proceedings before the Full Court referred to in each of the subsequent divisions of Pt 11. Encompassed within those proceedings is not only an appeal against a conviction or a sentence under Div 3 but also a case stated by a trial judge reserving a question of law under Div 2. The latter form of proceeding, no less than the former, relates to a justiciable controversy that is determined[61] in whole or in part by an order made by the Full Court in the exercise of judicial power[62]. That usage is made tolerably clear by the distinction drawn in Div 5 between different powers given to the Attorney-General on the consideration of a petition for exercise of the prerogative of mercy. The Attorney-General can "refer the whole case to the Full Court, and the case shall then be heard and determined by that Court as in the case of an appeal by a person convicted"[63]. Alternatively, the Attorney-General can "if he desires the assistance of the judges of the Supreme Court on any point arising in the case with a view to the determination of the petition, refer that point to those judges for their opinion and those judges, or any three of them, shall consider the point so referred and furnish the Attorney-General with their opinion accordingly"[64]. The furnishing of an opinion by judges of the Supreme Court is in that way treated as something quite distinct from the "determination" of a "question" by the Full Court.

85 The answer, moreover, accords with the construction given to s 349 of the CLC Act in an earlier but materially identical form in *R v Ireland*[65]. "The question in an appeal", Barwick CJ, with whom McTiernan, Windeyer, Owen and Walsh JJ agreed, there said, "is whether or not it should be allowed, or, expressed more precisely, whether an order should be made dismissing it or an order allowing it, and in that event making appropriate consequential provision."[66] Although expressed in the context of dismissing an application for special leave to appeal, that view of five members of the High Court is of

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61 Section 351A of the CLC Act.

62 Cf *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289; [1991] HCA 53, overruling *Saffron v The Queen* (1953) 88 CLR 523; [1953] HCA 51; *Director of Public Prosecutions (SA) v B* (1998) 194 CLR 566; [1998] HCA 45.

63 Section 369(1)(a) of the CLC Act.

64 Section 369(1)(b) of the CLC Act.

65 (1970) 126 CLR 321; [1970] HCA 21.

66 (1970) 126 CLR 321 at 330.

persuasive value and may be inferred to have been implicitly accepted by the Parliament of South Australia in subsequently amending s 349 in a manner which left its current language intact[67].

86 The answer results in s 349 conforming to the decision-making rule which multi-member courts routinely apply in Australia when there is an uneven division of opinion amongst their members. That decision-making rule is that the order of the court is made in accordance with the opinion of the majority of the members as to the order that should be made by the court. The rule is not always given statutory expression. Where the rule is given statutory expression, it is most often expressed in terms that the "decision"[68] or "judgment"[69] of the court is to be in accordance with the opinion of the majority. But, as s 23(2) of the *Judiciary Act* illustrates, other linguistic variations can occur[70].

87 Section 353(1) prescribes a two-stage process of reasoning to be undertaken by the Full Court hearing an appeal against conviction. The Full Court must consider whether a point raised in the appeal has the result that the verdict of the jury should be set aside on one or more of the identified grounds. The Full Court might then, in the application of the proviso, consider that no substantial miscarriage of justice has actually occurred. The process of reasoning leads to a binary outcome, to be reflected in the order of the Full Court that the appeal be either allowed or dismissed.

88 Performing his or her individual duty, each member of the Full Court must form an opinion as to what order the Full Court should make and must for that purpose engage in the process of reasoning set out in s 353(1). In the event of a difference of opinion as to what order the Full Court should make, s 349 operates to produce the order of the Full Court by reference to the opinion of the majority of the members as to the end-point of that reasoning, not by reference to the opinion of the majority as to an intermediate stage.

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67 *Criminal Law Consolidation Act Amendment Act* 1974 (SA), s 2. Cf *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 at 502-503 [15]-[16]; [2015] HCA 10.

68 For example s 21A(1) of the *Criminal Appeal Act* 1912 (NSW); s 45(1) of the *Supreme Court Act* 1970 (NSW); s 42 of the *Supreme Court of Queensland Act* 1991 (Q); s 37K of the *Supreme Court Act* 1933 (ACT).

69 For example s 16 of the *Federal Court of Australia Act* 1976 (Cth); s 30 of the *Family Law Act* 1975 (Cth); s 59 of the *Supreme Court Act* (NT).

70 See also s 62 of the *Supreme Court Act* 1935 (WA); s 15(9) of the *Supreme Court Civil Procedure Act* 1932 (Tas); s 14 of the *Supreme Court Act* 1933 (ACT); s 407(2) of the *Criminal Code* (NT); s 23 of the *Supreme Court Act* (NT).

89 In its application to a division of opinion among the members of a Full Court hearing an appeal against conviction in accordance with s 353(1), s 349 operates in that way to produce the sensible and workable result that the appeal is to be dismissed and the conviction is to stand unless a majority of the Full Court is of the opinion that the appeal should be allowed.

90 The order of the Full Court dismissing the appeal in the present case, in my opinion, correctly reflected the operation of s 349. There was, in terms of s 349, but a single question: what order should the Full Court make in the determination of the appeal? The order made was in accordance with the opinion of the majority as to the answer to that question. The appellant's principal ground of appeal to this Court for that reason fails.

91 The notice of contention must, in my opinion, be upheld for the reasons given by Kiefel, Bell and Keane JJ. The appeal must be dismissed.

92 NETTLE J. Following a trial in the District Court of South Australia, the appellant was convicted of one count of rape[71] and one count of threaten to kill[72]. He appealed against the convictions to the Court of Criminal Appeal of the Supreme Court of South Australia on grounds including that the trial judge erred in directing the jury under s 34R(1) of the *Evidence Act* 1929 (SA) as to the permissible and impermissible uses of discreditable conduct evidence admitted under s 34P of the *Evidence Act*. The discreditable conduct evidence was that the appellant had admitted to possessing an amount of cannabis, less than one ounce, which the police found at his home some seven days after the alleged offending ("the cannabis evidence"). The appeal was dismissed by a majority of the Court of Criminal Appeal (Gray and Stanley JJ, Kourakis CJ dissenting). By grant of special leave, the appellant appeals to this Court.

The facts

93 The Crown case at trial was that, in September 2013, the complainant ("K"), then aged 16 years, and her boyfriend ("J"), then aged 18 years, had been living together for about six weeks. Both of them had been using methylamphetamine; in K's case, at least once per week for about three and a half months. During September 2013, K, J and a female friend ("R"), then also aged 16 years, were together at a local shopping centre when they were approached by the appellant in the vicinity of a bus stop. At that time, the appellant was aged in his early thirties and was previously unknown to K, J or R. The Crown alleged that the appellant was a dealer in methylamphetamine and that he asked J whether he used methylamphetamine and showed him some of the drug in a container. It was further alleged that the appellant then suggested that they should try the methylamphetamine, and perhaps buy some, for which purpose they all agreed to go to K and J's house. Once there, they smoked methylamphetamine provided by the appellant and remained in each other's company that night. K gave evidence that during the evening she saw the appellant injecting R with methylamphetamine.

94 The following day, the appellant, J and R left the house while K remained behind. The Crown alleged that, some time later, the appellant returned to the house alone and attempted to inject K with methylamphetamine, initially in her left arm and then in her right arm, but on each occasion without success. He then attempted to inject her right foot but that was also unsuccessful. Finally, he once more attempted to inject her right arm and that was successful. According to K, they later smoked some methylamphetamine in a spare bedroom. The appellant then touched her leg. K told him not to do so. He became aggressive and said

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71 *Criminal Law Consolidation Act* 1935 (SA), s 48.

72 *Criminal Law Consolidation Act*, s 19(1).

that he would give her a large amount of methylamphetamine if she would have a shower with him. K walked out of the spare bedroom and went to the en suite bathroom adjoining her own bedroom. According to K, the appellant entered the bathroom and turned on the shower. K told the appellant that she would not shower with him. The appellant was said to have responded by putting one hand around her neck, the other down the back of her pants and inserting two fingers into her vagina. K testified that she "got free", left the en suite bathroom and returned to the other bathroom. K described the appellant as "ranting, yelling 'I'm going to kill you' or 'I know people who can kill you.'"

95 It was said that, some time after, J returned to the house. K said that she heard J talking to the appellant and that she then went to her en suite bathroom, where she showered. She also cut herself repeatedly with a razor. J and the appellant next left the house and, subsequently, J returned alone. It was alleged that, at that point, K complained to J that the appellant "had touched me and raped me". Nonetheless, over the course of the next week, K and J saw the appellant on numerous occasions and travelled with the appellant in his utility vehicle. While K, J and the appellant were at another house for "[a] while", J "went off on a few different occasions to do things for [the appellant]" and K slept at the house. Around that time, J borrowed and damaged the car that the appellant was driving at the time, which resulted in an argument. Police attended and arrested J for driving while unlicensed. K was at the scene of the arrest and was spoken to by police. She later gave an account to the police of what had happened between her and the appellant in her bathroom a week earlier.

96 The appellant did not give evidence at trial but the jury were shown a video recording of him being interviewed by police. In the course of that interview, the appellant said that he had approached J to buy cannabis. Later in the interview, however, he accepted that the cannabis which police had found at his home was his and that he had given some cannabis to K and J. He also admitted to using methylamphetamine but said that J had provided it. The appellant denied dealing in cannabis or methylamphetamine. He admitted being at K and J's house but denied that he had ever been with K alone. He denied that he had injected her with methylamphetamine, had inserted his fingers into her vagina or had threatened to kill her.

97 The defence case was based on significant inconsistencies between the several versions of events given by K and J, and the unreliability of K and J's testimony due to their heavy and sustained use of drugs. The defence contended that J was the dealer in methylamphetamine and that K had fabricated the allegations against the appellant to divert police attention away from J.

Relevant statutory provisions

98 So far as is relevant, s 34P of the *Evidence Act* provides that:

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

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

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

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

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

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

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

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

99 Section 34R of the *Evidence Act* provides that:

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

(2) If evidence is admitted under section 34P and that evidence is essential to the process of reasoning leading to a finding of guilt, the evidence cannot be used unless on the whole of the evidence, the facts in proof of which the evidence was admitted are

> established beyond reasonable doubt, and the judge must (whether or not sitting with a jury) give a direction accordingly."

100 Section 353 of the *Criminal Law Consolidation Act* 1935 (SA) ("the CLC Act") governs the determination of appeals against conviction. Sub-section (1) provides that the Full Court:

> "shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal; but the Full Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

101 The final aspect of that provision, which allows a Full Court to dismiss an appeal if it considers that no substantial miscarriage of justice has actually occurred, reflects the common form proviso[73].

Trial judge's directions as to the cannabis evidence

102 Over objection, the trial judge admitted the record of the appellant's interview with police, including his admissions that the cannabis found at his home was his. The trial judge ruled as follows:

> "As far as the record of interview is concerned, in my view the objective portion may remain. There is some prejudice that attaches to them but in my view that can be accommodated with a warning. They are relevant to certain portions of the complaint and, I think, [J's] account, and as such tend to confirm a portion of what he said. For that reason I admit them."

103 In summing up, the trial judge directed the jury as to the use which could and could not be made of the evidence thus:

> "I need to give you some warnings, members of the jury, there is a number of short separate topics under topic No 16. There are a number of warnings I need to give you arising from the evidence. Although I propose to deal with them under one heading, they are separate warnings on different but sometimes interrelated topics.

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73 See *Weiss v The Queen* (2005) 224 CLR 300 at 307 [15], 309 [21]; [2005] HCA 81.

> The first is drug use by the accused. There is no shortage of evidence in this case to suggest that the accused was a drug user and some evidence, although contested, that he was a drug dealer. *Those particular topics have a relevance on the evidence because they were part of the unfolding of the prosecution case*, but I warn you against the misuse of that evidence. It would be quite wrong of you to say 'Well, the accused is a drug dealer, he must be guilty of these offences and we will find him guilty' or 'he is guilty because he is the sort of bloke who would commit these offences and we will find him guilty'. That is a completely wrong way to approach the case. *That topic has a particular relevance, it is intertwined with the events that occurred*, but you must not reason in the way in which I have just suggested." (emphasis added)

Proceedings before the Court of Criminal Appeal

104 Before the Court of Criminal Appeal, the appellant contended that the cannabis evidence should not have been admitted under s 34P and, in the alternative, that the trial judge's directions failed to comply with s 34R(1). All three members of the Court held that the evidence was admissible, but each for different reasons. Kourakis CJ held[74] that the probative value of the evidence was that the appellant's:

> "possession of a substantial amount of cannabis, which he had not sourced from J, ... renders his claim that he approached J to obtain cannabis less probable than it might otherwise have appeared to be. ... [B]y pursuing at trial a defence based on the alternative explanation for being in J's and K's company, namely his attempt to source cannabis, the [appellant] made his independent possession of cannabis a real forensic issue."

105 Gray J considered[75] that the evidence was admissible because:

> "The fact that the police discovered quantities of cannabis at the [appellant's] home, together with other evidence in the trial about conversations concerning drugs and the supply of drugs by the [appellant], if accepted by the jury, would allow the conclusion that the [appellant] was a dealer in drugs.
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> ...
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> The statements made by the [appellant] to police formed an item of circumstantial evidence, which, when considered with other items of

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74 *R v Perara-Cathcart* [2015] SASCFC 103 at [10].

75 *Perara-Cathcart* [2015] SASCFC 103 at [37], [43].

> circumstantial evidence, would allow the conclusion that the [appellant] was a drug dealer or, at the very least, a user of drugs. This body of evidence then provided support for the prosecution case and, in particular, the circumstances in which the offending was said to have occurred."

106 Stanley J was of the view[76] that the evidence of the appellant's drug use was properly admissible having regard to the provisions of s 34P. His Honour did not state what he considered the relevance of the evidence to be but expressed agreement with the reasons of Gray J in that respect.

107 Kourakis CJ and Stanley J both considered that the trial judge's directions as to the cannabis evidence did not comply with the requirements of s 34R(1), but, again, for different reasons. Kourakis CJ held[77] that the directions were inadequate because they failed sufficiently to identify and explain the purpose for which the evidence could be used and the purposes for which it could not be used. Stanley J held[78] that the directions were inadequate to explain the purpose for which the evidence could be used, but were adequate to identify and explain the purpose or purposes for which the evidence could not be used. Gray J considered[79] that the directions were adequate.

108 Kourakis CJ held[80] that the proviso could not be applied because the Crown case depended on the credibility and reliability of K and J and the Court could not assess their credibility on the basis of the transcript alone. In contrast, Stanley J held[81] that the proviso could be applied because "[i]n this case the absence of the requisite directions would have had no significance in determining the jury's verdict". His Honour concluded[82] that:

> "my own independent assessment of the whole of the evidence coupled with the fact that the jury in returning guilty verdicts must have accepted the evidence of K and J, satisfies me that no substantial miscarriage of justice has actually occurred in this case."

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76 *Perara-Cathcart* [2015] SASCFC 103 at [55].

77 *Perara-Cathcart* [2015] SASCFC 103 at [16].

78 *Perara-Cathcart* [2015] SASCFC 103 at [56].

79 *Perara-Cathcart* [2015] SASCFC 103 at [47].

80 *Perara-Cathcart* [2015] SASCFC 103 at [18].

81 *Perara-Cathcart* [2015] SASCFC 103 at [66].

82 *Perara-Cathcart* [2015] SASCFC 103 at [73].

Gray J did not consider the application of the proviso.

109 In the result, two members of the Court of Criminal Appeal (Kourakis CJ and Stanley J) concluded that an error of law had occurred in the course of the appellant's trial but two members of the Court (Gray and Stanley JJ), only one having applied the proviso, dismissed the appellant's appeal against conviction.

The appellant's contentions

110 The appellant embraced the reasoning of Kourakis CJ as to the inadequacy of the directions given pursuant to s 34R(1) in respect of the cannabis evidence. In the appellant's submission, the directions were inadequate because, contrary to s 34R(1), the jury were not told the purpose for which the evidence could be used, were not warned that it could not be used for any other purpose and, in particular, were not warned that they were not to reason that because the appellant was in possession of cannabis it was more likely that he was a dealer in methylamphetamine. The appellant further contended that Kourakis CJ was right to hold that in a case of this kind it was not open to apply the proviso. It followed, in the appellant's submission, that the appeal should have been allowed. In the alternative, the appellant argued that, given that two members of the Court of Criminal Appeal concluded that the trial judge made an error when directing the jury under s 34R(1), and only one had considered that the proviso could be applied, the only order which the Court could properly have made was that the appeal be allowed, the convictions be quashed and a new trial be had.

The Crown's contentions

111 Under cover of notice of contention, the Crown contended that the trial judge's directions as to the cannabis evidence were adequate for the purposes of s 34R(1) and that the orders of the Court of Criminal Appeal should be upheld on that basis. Alternatively, the Crown submitted that, assuming Stanley J were correct in holding that the directions under s 34R(1) were inadequate, his Honour was correct in his application of the proviso and in holding that there was no substantial miscarriage of justice. It followed, in the Crown's submission, that, because two members of the Court of Criminal Appeal (Gray and Stanley JJ) found that there was no substantial miscarriage of justice, albeit for different reasons, the Court was right to dismiss the appeal.

The relevance of the cannabis evidence

112 Kourakis CJ was correct to hold that the relevance of the cannabis evidence was that it threw doubt on the appellant's statement to police that he had approached J at the shopping centre in order to source cannabis from J. More precisely, assuming that possession of cannabis seven days after the commission of the alleged offences implied that the appellant had been in possession of cannabis at the time of the alleged offences, the jury could legitimately have

reasoned that, because the appellant was already in possession of cannabis, it was less likely that the appellant would have approached J to buy cannabis as the appellant alleged and, if the appellant did not approach J to buy cannabis, it was more likely that he approached J to sell methylamphetamine as J alleged. In this Court, both the appellant and the Crown accepted that the cannabis evidence was relevant on that basis.

113 As Kourakis CJ went on to observe[83], however, evidence of the appellant's possession of cannabis was not in itself probative of whether the appellant was a dealer of methylamphetamine: "[i]t could not be reasoned soundly, if at all, that a person who possesses cannabis is more likely to trade in methylamphetamine than one who does not." For that reason, the Crown's submission before this Court, that "there was no reason to differentiate between these two aspects of drug dealing", is misplaced. There was nothing in the evidence or in the logic of the cases presented at trial which supported the idea that dealing in cannabis made it more likely that there was dealing in methylamphetamine. Nor is it within the realm of ordinary experience that a person who possesses an amount less than an ounce of cannabis is more likely than a person who does not to be a dealer in methylamphetamine.

Directions required under s 34R(1)

114 The potential undue adverse impact on an accused of evidence of the accused's discreditable conduct is firmly established by previous decisions of this Court[84]. It is for that reason that s 34R(1) is directed to ensuring that, where discreditable conduct evidence is admitted under s 34P, the jury are adequately instructed as to "the purpose for which the evidence may, and may not, be used." The sub-section demands that a trial judge identify and adequately explain those permissible and impermissible purposes. Otherwise, the constraints on admissibility imposed by ss 34P and 34Q would be pointless.

115 Failure adequately to direct a jury as to the permissible use that may be made of discreditable conduct evidence renders it more likely that the jury will use it impermissibly[85]. So much is acknowledged by the wording of s 34P(3), which emphasises the importance of the prerequisite of admission that "the

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83 *Perara-Cathcart* [2015] SASCFC 103 at [10].

84 See, for example, *Pfennig v The Queen* (1995) 182 CLR 461 at 487-488 per Mason CJ, Deane and Dawson JJ; [1995] HCA 7; *HML v The Queen* (2008) 235 CLR 334 at 370 [60] per Kirby J, 382-383 [105], 398 [170] per Hayne J (Gummow J agreeing at 362 [41]); [2008] HCA 16.

85 *R v Forrest* (2016) 125 SASR 319 at 328 [47] per Kourakis CJ (Kelly J and Lovell J agreeing at 339 [109], 340 [110]).

permissible use is, and can be kept, sufficiently *separate and distinct* from the impermissible use so as to remove any appreciable risk of the evidence being used for that purpose" (emphasis added).

116 For that reason, as Kourakis CJ concluded, it was incumbent on the trial judge under s 34R(1) to explain to the jury that the only use which could be made of the cannabis evidence was that it could be regarded as rendering the appellant's statement to police that he had approached J to buy cannabis less probable than it might otherwise have appeared. It was not enough to instruct the jury in the facile and enigmatic terms that were employed that the evidence formed "part of the unfolding of the prosecution case" or was "intertwined with the events that occurred"[86]. That fell well short of the particularity which is vital in relation to discreditable conduct evidence[87]. The high degree of particularity which is required is apparent from the fact that s 34R(1) imposes an obligation on the trial judge to both *identify* and *explain* the permissible and impermissible uses of the evidence.

117 The point was emphasised in the second reading speech pertaining to the introduction of Pt 3, Div 3 of the *Evidence Act* as follows[88]:

> "The Bill confirms the established judicial practice set out in *Nieterink* and many other cases that, if the evidence of past discreditable conduct is admitted for a *specific and limited purpose*, such as background or relationship that does not involve a propensity or similar fact line of reasoning, then it is incumbent on the trial judge to warn the jury to this effect.
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> The effect of *Nieterink* is that the jury should be told how they should use the evidence and how they should not use the evidence. The jury has to be told the *particular* manner in which the evidence could be used. It is contemplated that this can be done relatively briefly. *Usually, it will not be enough for the trial judge to speak generally to the jury of the evidence establishing 'background', 'context' or 'relationship' matters.*

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86 See and compare *Kelleher v The Queen* (1974) 131 CLR 534 at 551 per Gibbs J; [1974] HCA 48; *Domican v The Queen* (1992) 173 CLR 555 at 561-562 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1992] HCA 13.

87 See *R v Nieterink* (1999) 76 SASR 56 at 73 [84]-[88] per Doyle CJ (Perry J and Mullighan J agreeing at 75 [103]-[104], [107]); *R v MJJ; R v CJN* (2013) 117 SASR 81 at 89 [19] per Kourakis CJ.

88 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 6 April 2011 at 3293; South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 26 July 2011 at 3507.

> *It will be preferable for the trial judge to be quite specific about the proper use of the evidence, both to help the jury to approach the evidence in the correct manner and to reduce the risk of an incorrect approach.* The jury should be told that the evidence, if accepted, is evidence of the *limited and specific purpose* for which the evidence was specifically admitted. Even if the evidence is capable of being used for propensity or similar fact purposes, as will often be the case in practice, the jury must be warned they cannot use the evidence for such wider purposes.
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> ...
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> The Bill recognises, as was observed by the Chief Justice in *Nieterink*, that it is very important that these warnings and directions are given in an appropriate case because of the potential for prejudicial misuse of evidence of uncharged acts of discreditable conduct. The Bill further recognises that it is important for the trial judge to emphasise both the correct and incorrect use of the evidence. *If both aspects are not present in any summing up, there is a real risk that the jury will misunderstand their task.*" (emphasis added)

118 As Kourakis CJ recognised, it was also incumbent on the trial judge under s 34R(1) to explain to the jury that the cannabis evidence could not be used for any other purpose than that identified above; and, in particular, that it was not open to reason that a person who possesses cannabis is more likely to be a dealer in methylamphetamine than a person who is not in possession of cannabis. The direction which was given – "It would be quite wrong of you to say 'Well, the accused is a drug dealer, he must be guilty of these offences'" – was pitched at too high a level of generality[89]. It may have identified one impermissible reasoning process (namely, to infer that a person who deals drugs is more likely to commit other criminal offences, including rape), but it failed to bring home to the jury that the hypothetical premise (namely, that "the accused is a drug dealer", relevantly in methylamphetamine) was itself contested and that it was not permissible to reason to that conclusion by way of propensity reasoning based on the cannabis evidence.

119 Contrary to the conclusions reached by Gray and Stanley JJ, a specific direction against engaging in the latter process of reasoning was necessary because it amounts to reasoning that, because the appellant was sufficiently criminally disposed to be in possession of one kind of illicit substance (cannabis), he was more likely to be sufficiently criminally disposed to deal in another kind of illicit substance (methylamphetamine). So to reason is logically no different

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89 See and compare *R v Coutts* [2013] SASCFC 143 at [47]-[50] per Vanstone J (Sulan and Blue JJ agreeing at [1]).

from, and no less impermissible than, reasoning that because a person is sufficiently criminally disposed to carry a knife he or she is more likely to be sufficiently criminally disposed to carry a pistol[90].

120 The Crown contended that non-compliance with s 34R(1) may be excused in circumstances where no miscarriage of justice is occasioned by the non-compliance, and that here there was no miscarriage of justice because, in the way the trial was conducted, the jury would have understood the purport and significance of the observation that the cannabis evidence was admitted as "part of the context".

121 That submission should be rejected. On any view, there was a real risk that, absent a specific direction to the contrary, the jury would reason impermissibly to the conclusion that the appellant was a dealer in methylamphetamine. As it was put, the fact of the appellant being a dealer in methylamphetamine was an important aspect of the Crown case. In the course of final address, the prosecutor expressly put to the jury that it was the fact of the appellant being a dealer in methylamphetamine that allowed him to use K, J and R "to his advantage". On K's contested evidence, the appellant offered her a large amount of methylamphetamine "to have a shower with him" and told her that he "wanted something" for having supplied methylamphetamine to her previously. In the Crown's submission to the jury, the likelihood that the appellant was a dealer in methylamphetamine, and thus was able to offer a large amount of methylamphetamine to K, also explained, or helped to explain, why, if the appellant had committed the alleged offences, K and J continued to associate with the appellant on an apparently regular basis for the better part of the week following the alleged offences, without complaining to the police.

122 Apart from the evidence of K and J, however, there was no direct evidence and little inferential evidence that the appellant was a dealer in methylamphetamine. As was earlier observed, the evidence of what the appellant told police in the course of interview was that J supplied the methylamphetamine. Taken by itself, that was not an unrealistic possibility. K and J had been using methylamphetamine for more than three months before first coming into contact with the appellant. As far as the evidence went, they had had no difficulty in sourcing the drug throughout that time. Why then should it be supposed that they were so dependent on the appellant for supply of that drug that they would delay complaining to police of the alleged rape for a week after the event and then

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90 See *Thompson and Wran v The Queen* (1968) 117 CLR 313 at 316-317 per Barwick CJ and Menzies J; [1968] HCA 21; *Driscoll v The Queen* (1977) 137 CLR 517 at 533 per Gibbs J (Mason J and Jacobs J agreeing at 543); [1977] HCA 43; *Festa v The Queen* (2001) 208 CLR 593 at 620-622 [86]-[92] per McHugh J; [2001] HCA 72.

mention the subject only when J was detained on other charges? Doubts had also been raised as to K and J's credibility by the allegation of fabrication, and as to the reliability of their evidence on account of their drug use. If, however, the jury considered that it was permissible to reason that the evidence of the appellant's possession of cannabis made it more likely that he was a dealer in methylamphetamine – and, in the absence of a contrary direction, that is not unlikely – there is a real possibility that the jury would have treated the evidence of the appellant's possession of cannabis as overcoming doubts they might otherwise have had about the credibility and reliability of K and J's evidence. Indeed, the fact that the trial judge directed as he did in effect gave authority to the prosecutor's erroneous suggestion to the jury that it was open to infer on the basis of the appellant's possession of the cannabis that he was a dealer in methylamphetamine[91].

123 The Crown contended that the obligation of the trial judge under s 34R(1) was, in effect, lessened in this case because of what defence counsel submitted to the jury in final address, to the effect that the cannabis evidence did not support an inference that the appellant was a dealer in methylamphetamine as K and J alleged; and because, in those circumstances, a direction by the trial judge as to the impermissibility of using the cannabis evidence as a basis from which to infer that the appellant was a dealer in methylamphetamine would not have assisted the appellant. That contention must also be rejected. The law is clear that no matter how comprehensive defence counsel's final address may be, it remains incumbent on a trial judge to give such directions as the law requires[92]. Here, as in England, counsel's speeches may not be substituted for the performance of the trial judge's statutory duty[93].

124 Finally, the Crown contended that it was significant that, although defence counsel had objected to the admissibility of the cannabis evidence, he did not take exception to the trial judge's directions. But, in this case, that contention cannot be accepted either. For, regardless of defence counsel's response to the directions, s 34R(1) required the trial judge to instruct the jury as to the use which could be made of the cannabis evidence and the uses which could not be made of it. Counsel cannot concede a matter of law disadvantageous to the

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91 See and compare *Fingleton v The Queen* (2005) 227 CLR 166 at 205-206 [102]-[103] per McHugh J; [2005] HCA 34.

92 *Domican* (1992) 173 CLR 555 at 562 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

93 *Subramaniam v The Queen* (2004) 79 ALJR 116 at 124 [38]-[39], 125-126 [41]-[42]; 211 ALR 1 at 11, 13; [2004] HCA 51; *Amado-Taylor* [2000] 2 Cr App R 189 at 191 per Henry LJ.

accused[94]. Accordingly, as McHugh J observed in *BRS v The Queen*[95], trial judges have no authority to dispense with directions that the law requires them to give in criminal trials, even if defence counsel are content that they not be given. Nor is it to the point that the trial judge's summing up may have followed "the conceptual structure" of the case advanced by the prosecutor, to which defence counsel did not object[96]. If the failure to give a direction which is required by law to be given may have resulted in the conviction of the accused, the trial has not been conducted according to law and the conviction constitutes a miscarriage of justice[97].

125 It follows, as Kourakis CJ held, that the trial judge's failure to give the directions required by s 34R(1) was productive of a miscarriage of justice.

The proviso – a *substantial* miscarriage of justice?

126 Kourakis CJ was also correct in holding that, because the Crown case depended on the acceptance of K and J's testimony, it was not open to apply the proviso. It was impossible for the Court of Criminal Appeal to evaluate K and J's credibility on the face of the transcript. That was especially so in light of the challenges to their evidence on the basis that they had reason to lie and that their recollections were affected by their drug use. In this case, the natural limitations of proceeding on the record of trial precluded a conclusion that guilt was proved beyond reasonable doubt[98]. It is impossible to gainsay that, if the jury had been

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94 *Stokes & Difford* (1990) 51 A Crim R 25 at 32 per Hunt J (Wood and McInerney JJ agreeing at 45). See and compare, in a different context, *KBT v The Queen* (1997) 191 CLR 417 at 423-424 per Brennan CJ, Toohey, Gaudron and Gummow JJ; [1997] HCA 54.

95 (1997) 191 CLR 275 at 305; [1997] HCA 47.

96 *Fingleton* (2005) 227 CLR 166 at 198-199 [81]-[83] per McHugh J.

97 *KBT* (1997) 191 CLR 417 at 424 per Brennan CJ, Toohey, Gaudron and Gummow JJ.

98 See and compare *Weiss* (2005) 224 CLR 300 at 316 [41], referring to *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23] per Gleeson CJ, Gummow and Kirby JJ; [2003] HCA 22. See also *Gassy v The Queen* (2008) 236 CLR 293 at 308 [36]-[37] per Gummow and Hayne JJ, 323-324 [100] per Kirby J; [2008] HCA 18; *Baini v The Queen* (2012) 246 CLR 469 at 480 [29] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; [2012] HCA 59; *Castle v The Queen* (2016) 91 ALJR 93 at 104 [68] per Kiefel, Bell, Keane and Nettle JJ; [2016] HCA 46.

directed in accordance with s 34R(1), they may have entertained a reasonable doubt as to K and J's credibility[99].

Majority judgment

127 It will be recalled that, in the Court of Criminal Appeal, Gray J held there was no error in the trial judge's directions to the jury, and thus no miscarriage of justice, and Stanley J held that, although there was a misdirection amounting to a miscarriage of justice, there was no *substantial* miscarriage of justice. A significant part of the argument before this Court was devoted to the question of whether there could be said to be a majority, comprised of those judgments in aggregate, holding that there was not a substantial miscarriage of justice for the purposes of the proviso and therefore that the appeal should be dismissed.

128 The short answer is that, for the reasons already given, Kourakis CJ was correct in holding that there was a miscarriage of justice to which the proviso could not be applied. More generally, however, it is to be observed that it would not be permissible to aggregate the conclusions of Gray and Stanley JJ in the manner suggested.

129 As has been seen, s 353(1) of the CLC Act requires that if on an appeal against conviction the Full Court thinks that the conviction should be set aside on the ground that there has been a miscarriage of justice, it must allow the appeal unless the Full Court further "considers that no substantial miscarriage of justice has actually occurred". Section 349 of the CLC Act provides that any question before the Full Court under the Act shall be determined according to the opinion of the majority of the members of the Court hearing the case. Here, as matters stood before the appeal to this Court, a majority of two judges of the Court of Criminal Appeal (Kourakis CJ and Stanley J) were of the opinion that the inadequacy of the directions given in purported compliance with s 34R(1) was productive of a miscarriage of justice; one judge (Kourakis CJ) was of the opinion that the proviso could not be applied; one judge (Stanley J) was of the opinion that the proviso could be applied; and one judge (Gray J) had not considered the application of the proviso. It follows that a majority of two judges were of opinion that there had been a miscarriage of justice and there was an absence of a majority in favour of the view that the proviso could be applied. Accordingly, the appeal should have been allowed.

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99 *Wilde v The Queen* (1988) 164 CLR 365 at 371-372 per Brennan, Dawson and Toohey JJ; [1988] HCA 6; *Baini* (2012) 246 CLR 469 at 480 [30] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; *Lindsay v The Queen* (2015) 255 CLR 272 at 301-302 [86] per Nettle J; [2015] HCA 16.

130 The Crown contended to the contrary that it is apparent from Barwick CJ's reasoning in *R v Ireland*[100] that the requirement in s 349 that any question before the Full Court under the CLC Act be determined according to the opinion of the majority of the members of the Court applies only to the ultimate question of "whether or not [the appeal] should be allowed", and, hence, has no separate application to the anterior question of whether the Full Court considers that there has been a miscarriage of justice to which the proviso could be applied.

131 *Ireland* does not support that conclusion. It establishes that the expression "any question" in s 349 does not mean the individual grounds of appeal, or individual questions of law raised in an appeal, but rather whether a majority of the Full Court thinks that there has been a miscarriage of justice. Accordingly, as was held in *Ireland*, if a majority of the Full Court, albeit each member of the majority for different reasons and on different grounds, concludes that there has been a miscarriage of justice, the appeal must be allowed[101]. It is true that in the course of reasoning to that conclusion, Barwick CJ observed[102] that:

> "The question in an appeal is whether or not it should be allowed, or, expressed more precisely, whether an order should be made dismissing it or an order allowing it".

132 But that part of his Honour's reasoning is to be understood as addressing a context in which the application of the proviso was not in issue. No issue arose in *Ireland* as to the application of the proviso and no consideration was given to the application of s 349 to a provision in the form of s 353(1).

133 Consistently with the historical context in which it was enacted[103], s 353(1) mandates that the Full Court proceed first to decide the question of whether it thinks that the conviction should be set aside; and, secondly, and only if the Full Court has decided that there are grounds to set aside the conviction, whether "it considers that no substantial miscarriage of justice has actually occurred". As the provision is structured, the Full Court is not authorised to proceed to the second question until and unless it has answered the first question affirmatively. And, as Barwick CJ noted of the common form proviso in

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100 (1970) 126 CLR 321 at 329-331 (McTiernan, Windeyer, Owen and Walsh JJ agreeing at 336); [1970] HCA 21.

101 *Ireland* (1970) 126 CLR 321 at 330-331 per Barwick CJ (McTiernan, Windeyer, Owen and Walsh JJ agreeing at 336).

102 *Ireland* (1970) 126 CLR 321 at 330 (McTiernan, Windeyer, Owen and Walsh JJ agreeing at 336).

103 *Weiss* (2005) 224 CLR 300 at 306-308 [13], [16]-[18].

Driscoll v The Queen[104], the burden of persuasion in relation to each question is different:

> "[I]t must rest upon the appellant in the first instance to raise in the mind of the Court of Criminal Appeal a reasonable doubt as to whether in all the circumstances a miscarriage may not have occurred. It then must rest upon the Crown, if an order for a new trial is not to be made, to remove any such doubt from the mind of the court so that it is not satisfied that a miscarriage has occurred."

134 Authority makes plain that it is not permissible to construct a ratio decidendi by the aggregation of various elements of separate reasons, still less to extract an element from a dissenting judgment and combine it with an element from a majority judgment in an attempt to create a majority in favour of that element[105]. Parity of reasoning dictates that, where a majority of the Court of Criminal Appeal has decided that there has been a miscarriage of justice, it is not permissible to construct a further decision by a majority of that Court that there has been "no substantial miscarriage of justice" by aggregating the decision of one member of the Court to that effect with the decision of another member of the Court who was not persuaded, at the point of the anterior question, that there had been a miscarriage of justice. In such circumstances, a majority of the Court has decided that there has been a miscarriage of justice, and it follows that the appeal to that Court must be allowed.

Conclusion and orders

135 In the result, the appeal to this Court should be allowed. The orders of the Court of Criminal Appeal should be set aside. In lieu of those orders, it should be ordered that the appeal to the Court of Criminal Appeal be allowed, the convictions be quashed and a new trial be had.

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104 (1977) 137 CLR 517 at 526 (considering the *Criminal Appeal Act* 1912 (NSW)).

105 *Victoria v The Commonwealth* (1971) 122 CLR 353 at 382 per Barwick CJ; [1971] HCA 16; *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303 at 314 per Mason CJ, Wilson, Dawson and Toohey JJ; [1987] HCA 34; *Great Western Railway Co v Owners of SS Mostyn* [1928] AC 57 at 73-74 per Viscount Dunedin.

136 GORDON J. The facts and circumstances are set out in the reasons of other members of the Court. The reasons of Kiefel, Bell and Keane JJ, and the separate reasons of Nettle J, adopt a construction of common form criminal appeal provisions, such as s 353 of the *Criminal Law Consolidation Act* 1935 (SA) ("the CLC Act"), that I do not accept.

137 The construction that a majority of the Court now adopts is contrary to the unanimous considered opinion of the Court in *R v Ireland*[106], which has stood unchallenged for more than 45 years. The construction that a majority of the Court now adopts, if literally available, yields impractical results, for it would have a judge who has decided that there was no miscarriage of justice then go on and consider separately whether there has been any substantial miscarriage of justice. To put it another way, the judge who concludes that there has been no miscarriage of justice would have to consider the reliability of the verdict of a jury that that judge has concluded was reached following a trial properly conducted according to law. It treats the reasons of appellate judges as legally more significant than the order to which those reasons are directed. It is a construction that elevates judicial reasons over orders. Orders, not reasons, are the focus of an appeal.

138 However, for the reasons stated by Kiefel, Bell and Keane JJ, I agree that the respondent's notice of contention should be upheld. On that basis, the appeal should be dismissed.

Orders not reasons

139 An appeal is a statutory process directed to the correction of orders[107].

140 Section 353 of the CLC Act provides for the determination of criminal appeals in ordinary cases in South Australia. Section 353(1) relevantly provides that "[t]he Full Court[108] on any such appeal *against conviction* shall allow the appeal if it thinks that the verdict of the jury should be set aside" on one of a

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106 (1970) 126 CLR 321; [1970] HCA 21.

107 See, eg, *Grierson v The King* (1938) 60 CLR 431 at 435-436; [1938] HCA 45; *Eastman v The Queen* (2000) 203 CLR 1 at 11-12 [14]; [2000] HCA 29; *Burrell v The Queen* (2008) 238 CLR 218 at 225 [22]-[24], 242 [97]; [2008] HCA 34; *NH v Director of Public Prosecutions (SA)* (2016) 90 ALJR 978 at 999 [94]; 334 ALR 191 at 217; [2016] HCA 33.

108 "Full Court" is defined in s 5(1) of the CLC Act to have the same meaning as in the *Supreme Court Act* 1935 (SA). Section 5(1) of the *Supreme Court Act* relevantly defines "Full Court" to mean the Supreme Court consisting of not less than three judges.

number of stated grounds, "and in any other case shall dismiss the appeal" (emphasis added). It goes on to provide that "the Full Court *may*, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred" (emphasis added).

141 That s 353 is a provision directed at the determination of an appeal against orders, not reasons, is made plain by s 352(1)(a) of the CLC Act: the appeal is against *conviction* (which is to say, the order)[109]. The orders made by the court below (the conviction and the sentence) stand unaltered if the appeal is dismissed, or, if the appeal is allowed, the orders are corrected by the Full Court "quash[ing] the conviction and either direct[ing] a judgment and verdict of acquittal to be entered or direct[ing] a new trial"[110].

142 And so too in this Court, an appeal is directed to orders, not reasons. Section 73 of the Constitution gives this Court jurisdiction "to hear and determine appeals from all judgments, decrees, orders, and sentences" (which is to say, orders made in the court below[111]). The jurisdiction of this Court is to make such order as the court below – here, the Full Court – should have made[112]. There is nothing in s 352 of the CLC Act, or s 73 of the Constitution, about appeals against reasoning or steps in reasoning towards an order[113].

"Question" before the Full Court

143 Section 349 of the CLC Act, headed "Court to decide according to opinion of majority", provides that "[t]he determination of *any question* before the Full Court under this Act shall be according to the opinion of the majority of the

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109 See also ss 348 (definition of "conviction") and 356A of the CLC Act; *Burrell* (2008) 238 CLR 218 at 224 [18]-[20]; *NH* (2016) 90 ALJR 978 at 1000 [99]; 334 ALR 191 at 218.

110 s 353(2) of the CLC Act.

111 See *Burrell* (2008) 238 CLR 218 at 235 [69].

112 s 37 of the *Judiciary Act* 1903 (Cth). See also *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 109; [1931] HCA 34; *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 312; [1991] HCA 53; *Keramianakis v Regional Publishers Pty Ltd* (2009) 237 CLR 268 at 281-282 [38]-[39]; [2009] HCA 18; *New South Wales v Kable* (2013) 252 CLR 118 at 145 [71]; [2013] HCA 26.

113 *Dignan* (1931) 46 CLR 73 at 107, 109. See also *Burrell* (2008) 238 CLR 218 at 235 [69].

members of the Court hearing the case" (emphasis added)[114]. The word "question" is used because s 349 applies not only to appeals but also to questions of law referred to the Full Court[115].

144 In the determination of a criminal appeal under s 353 of the CLC Act, the "question" before the Full Court of the Supreme Court of South Australia, for the purposes of s 349 of the CLC Act, is whether to allow or to dismiss the appeal against conviction and what orders should be made[116].

145 This Court considered the meaning of "question" in s 349 in *Ireland*[117]. In that case, the Full Court of the Supreme Court of South Australia had allowed an appeal against conviction by majority, but each member of the majority had upheld a different ground of appeal[118]. In seeking special leave to appeal, the Attorney-General for South Australia made the "somewhat *novel* submission" that each ground of appeal before the Full Court raised a "question" within the meaning of s 349, and as there was no majority opinion on any "question", the appeal should have been dismissed (emphasis added)[119].

146 Special leave was refused. Referring to s 349, Barwick CJ (with whom McTiernan J, Windeyer J, Owen J and Walsh J agreed) explained[120]:

> "The question in an appeal is whether or not it should be allowed, or, expressed more precisely, whether an order should be made dismissing it or an order allowing it, and in that event making appropriate consequential provision."

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114 See also s 6 of the *Court of Appeal Act* 1862 (NZ); s 28 of the *Justices Act* 1886 (Q); s 23(2) of the *Judiciary Act* 1903 (Cth); s 1(4) of the *Criminal Appeal Act* 1907 (UK).

115 See Div 2 of Pt 11 of the CLC Act. See also *Ireland* (1970) 126 CLR 321 at 330.

116 ss 349, 352(1)(a) and 353 of the CLC Act. See *Ireland* (1970) 126 CLR 321 at 330.

117 (1970) 126 CLR 321.

118 (1970) 126 CLR 321 at 328-329.

119 (1970) 126 CLR 321 at 329-330.

120 *Ireland* (1970) 126 CLR 321 at 330; see also at 331.

147 In civil proceedings, reasons given in the course of refusing special leave are not binding[121]. The position in relation to criminal matters heard before 1991[122] may be different if only because the hearing of the application for special leave was treated as the hearing of the appeal. And, of course, in *Ireland*[123], the Court took time to consider its decision and delivered considered written reasons. At the time that those reasons were given, s 349 took a different form. It contained two sub-sections: sub-s (1) reflected the provision as it now stands, while sub-s (2) in essence allowed for separate judgments to be delivered and provided that the Chief Justice or the senior member of the court was to pronounce the judgment that determined the question. In *Ireland*, the Attorney-General relied on sub-s (2) and it was important to the dispositive reasoning of the Court on this issue. Nevertheless, the absence of that sub-section from s 349 in its current form does not provide any basis for now adopting some construction of s 349 different from what was held in *Ireland*.

148 Not only was the argument advanced in *Ireland* novel, but the Court's construction of s 349 accorded, and still accords, with the ordinary understanding of the role of an appellate court in determining an appeal.

149 As this Court explained in *Hepples v Federal Commissioner of Taxation*, "[a]n appeal in proceedings of [a kind that conclude the rights of the parties] has traditionally been determined according to the opinion of a majority as to the *order* which gives effect to the legal rights of the parties irrespective of the steps by which each of the Justices in the majority reaches the conclusion" (emphasis

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121 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 117 [52], 133 [112], 134 [119]; [2015] HCA 37.

122 See High Court of Australia, Practice Direction No 1 of 1991, entitled "Criminal Special Leave Applications".

123 (1970) 126 CLR 321.

added)[124]. The approach in Australia[125] is not unique. It is an approach to appeals adopted in at least England[126] and the United States[127].

150 The appellant contends, and a majority of this Court holds, that the proviso in s 353(1) can only be applied by an act of the "Full Court", and cannot be applied where it is the opinion of only a single member of the Full Court that its application is appropriate. In the appellant's contention it follows that there was no basis upon which the order dismissing the appeal could be made. The appellant is correct that there was no majority opinion in respect of the proviso. Two judges considered that issue and divided in opinion; there was no occasion for the third member of the Full Court to consider the issue.

151 The appellant's contention that the order dismissing the appeal could not be made should be rejected. Neither the terms of s 353(1), nor the CLC Act as a whole, provide any reason why the application of the proviso in s 353(1) would, or should, be treated differently from any other appeal that is to be determined by the Full Court.

152 Sections 349 and 353 of the CLC Act are based on equivalent provisions of the *Criminal Appeal Act* 1907 (UK)[128], which, as is well known, is the origin

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124 (1992) 173 CLR 492 at 551; [1992] HCA 3.

125 See s 23(2) of the *Judiciary Act* 1903 (Cth); *The Commonwealth v Verwayen* (1990) 170 CLR 394, compare 417 (Mason CJ), 427-428, 430 (Brennan J), 499, 504 (McHugh J) with 446 (Deane J), 462 (Dawson J) and 475 (Toohey J), 487 (Gaudron J); [1990] HCA 39. Compare also *Perpetual Trustee Co (Ltd) v Tindal* (1940) 63 CLR 232 at 250; [1940] HCA 14.

126 See, eg, *The Commonwealth v Bank of New South Wales* (1949) 79 CLR 497 at 624-628; [1950] AC 235 at 294-297. See also *Hongkong and Shanghai Banking Corpn v Chan Yiu-wah* [1988] 1 HKLR 457 at 515-516.

127 See, eg, *National Mutual Insurance Co v Tidewater Transfer Co Inc* 337 US 582 (1949); *Pennsylvania v Union Gas Co* 491 US 1 (1989); *Arizona v Fulminante* 499 US 279 (1991), as discussed in Kornhauser and Sager, "The One and the Many: Adjudication in Collegial Courts", (1993) 81 *California Law Review* 1 at 18-21.

128 See ss 4 and 6 of the *Criminal Appeals Act* 1924 (SA); South Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 2 October 1924 at 904; *Ireland* (1970) 126 CLR 321 at 329. See also s 6 of the *Court of Appeal Act* 1882 (NZ); s 415(1) of the *Criminal Code Act* 1893 (NZ).

of the common form criminal appeal statutes[129]. So far as my research reveals, the construction of ss 349 and 353 adopted by a majority in this case has not been suggested or adopted in any jurisdiction where the common form statutes contain equivalent provisions.

153 The issue concerning the appropriate orders to be made where judges are in disagreement is separate from the question of application of the proviso. In an appeal where judges' reasons are divided, an expedient must be adopted by the court to dispose of the case and give effect to, and conclude, the parties' legal rights[130].

Application to this appeal

154 The appeal to the Full Court concluded the rights of the parties by the Court making orders under s 353 of the CLC Act. It was not an appeal from a judgment intended to determine an issue of law where the order on appeal must declare the majority opinion as to the issue of law, irrespective of any conclusion as to the ultimate rights of the parties, as may be the case when an issue of law is determined for the purposes of proceedings pending in a court or tribunal[131].

155 There were two issues before the Full Court. The decision on those issues would answer the only "question" before the Full Court – which was whether the appeal against conviction should be allowed or dismissed. The issues were, first, whether the direction to the jury satisfied s 34R of the *Evidence Act* 1929 (SA), and second, if not, whether no substantial miscarriage of justice had actually occurred such that the proviso in s 353(1) of the CLC Act could be applied. The answers of Kourakis CJ, Gray J and Stanley J to the first issue were respectively "no", "yes" and "no". For the second issue, Kourakis CJ found the proviso could not be applied, Gray J did not reach that issue and did not consider it, and Stanley J found that no substantial miscarriage of justice actually occurred and applied the proviso. In the result, Kourakis CJ would have allowed the appeal, set aside the convictions and remitted the matter for retrial. Each of Gray J and Stanley J would have dismissed the appeal.

156 Gray J and Stanley J agreed about the ultimate effect that the directions had on the jury – that the jury would not have been under any misunderstanding

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129 See, eg, *Hembury v Chief of General Staff* (1998) 193 CLR 641 at 648 [15]; [1998] HCA 47; *Conway v The Queen* (2002) 209 CLR 203 at 228 [68]-[69]; [2002] HCA 2.

130 See s 23(2) of the *Judiciary Act* 1903 (Cth). See also *Tasmania v Victoria* (1935) 52 CLR 157 at 183; [1935] HCA 4.

131 See *Hepples* (1992) 173 CLR 492 at 550-551; Div 2 of Pt 11 of the CLC Act.

as to the purpose of the evidence of discreditable conduct – albeit that their Honours arrived at that conclusion via different paths[132]. Because of this conclusion, each was of the opinion that the appeal should be dismissed. The Full Court was able, and required, to make an order that disposed of the appeal in accordance with the "opinion of the majority". In this case, that was an order dismissing the appeal.

157 The matter may be tested this way. The proviso may be considered when it is established that there has been a miscarriage of justice. As the Court in *Weiss v The Queen* noted, "miscarriage" has long meant any departure from the proper application of the law[133]. The proviso asks whether, despite that departure, the result should be held to stand.

158 In the present case, one judge (Gray J) held there was no departure from trial according to law; there was no miscarriage of justice. One judge (Stanley J) held there was a departure from trial according to law, but the result should stand. If the ratio decidendi were relevant to the appropriate orders to be made under s 353(1) (and it is not), how would the members of the Full Court be expected to address the divergence? Would it require Gray J to go on to say that the jury was right? Or would it require Gray J to consider the proviso, despite his Honour's conclusions as to the directions?

159 The same problem would arise in the appeal to this Court. But for the respondent's successful contention, what order would this Court make? A disagreement in reasoning should not and cannot render a court unable to make an order. A single judge does not need support from other members of the court to reach a conclusion that an appeal should be allowed or dismissed.

160 That conclusion does not give Gray J and Stanley J's opinions any special status[134]. As this Court has said of its own decisions in which there was a division of opinion, the fact that an expedient[135] is applied does not mean that those reasons constitute a binding authority[136]. Courts are not bound by orders

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132 See *R v Perara-Cathcart* [2015] SASCFC 103 at [47], [67].

133 (2005) 224 CLR 300 at 308 [18]; [2005] HCA 81.

134 See *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 571 [101]; [1999] HCA 27.

135 See s 23(2) of the *Judiciary Act* 1903 (Cth).

136 *Tasmania v Victoria* (1935) 52 CLR 157 at 183; *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd* (1981) 146 CLR 336 at 348, 432; [1981] HCA 4; *Re Wakim* (1999) 198 CLR 511 at 571 [101].

made to dispose of the proceeding; it is the principles of law that are binding on courts[137].

161 It is therefore not relevant to talk about the reasoning of the individual members of a Full Court in an appeal against conviction when considering what orders could and should have been made by the Full Court. An analysis or description of that kind stops short of the final step – how the appeal against conviction is to be determined; namely, whether to allow or to dismiss the appeal, and what orders should follow.

Notice of contention and order

162 I agree with Kiefel, Bell and Keane JJ that the respondent's notice of contention should be upheld, and that, on that basis, the appeal should be dismissed.

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137 *Re Wakim* (1999) 198 CLR 511 at 571 [101].