

# HIGH COURT OF AUSTRALIA

KIEFEL, BELL, GAGELER, KEANE AND NETTLE JJ

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**Matter No A24/2016**

TRISTAN KAY CASTLE

APPELLANT

AND

THE QUEEN

RESPONDENT

**Matter No A26/2016**

JASON LUKE BUCCA

APPELLANT

AND

THE QUEEN

RESPONDENT

*Castle v The Queen*  
*Bucca v The Queen*  
[2016] HCA 46  
16 November 2016  
A24/2016 & A26/2016

**ORDER**

**Matter No A24/2016**

1. *Appeal allowed.*
2. *Set aside the order of the Court of Criminal Appeal of the Supreme Court of South Australia made on 3 December 2015, and in its place order that:*
  - (a) *the appeal be allowed;*
  - (b) *the appellant's conviction be quashed; and*
  - (c) *a new trial be had.*



2.

**Matter No A26/2016**

1. *Appeal allowed.*
2. *Set aside the order of the Court of Criminal Appeal of the Supreme Court of South Australia made on 3 December 2015, and in its place order that:*
  - (a) *the appeal be allowed;*
  - (b) *the appellant's conviction be quashed; and*
  - (c) *a new trial be had.*

On appeal from the Supreme Court of South Australia

**Representation**

G O'L Reynolds SC with S G Henchcliffe for the appellant in A24/2016 (instructed by Mangan Ey & Associates)

M E Shaw QC with B J Doyle for the appellant in A26/2016 (instructed by North East Lawyers)

A P Kimber SC with F J McDonald for the respondent in both matters (instructed by Director of Public Prosecutions (SA))

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## CATCHWORDS

### **Castle v The Queen** **Bucca v The Queen**

Criminal law – Appeal against conviction – Application of proviso – Where appellants convicted of murder arising out of joint criminal enterprise – Where evidence of exculpatory statement by one appellant wrongly left to jury as evidence of admission – Where remaining evidence circumstantial – Whether no substantial miscarriage of justice occurred.

Criminal law – Summing-up – Where one appellant gave evidence – Where trial judge referred jury to aspects of appellant's evidence but did not summarise it – Whether appellant's case fairly left to jury.

Criminal law – Admissibility of evidence – Where evidence that one appellant possessed handguns months prior to shooting – Whether evidence "discreditable conduct evidence" within meaning of s 34P(1) of *Evidence Act 1929 (SA)* – Whether open to conclude probative value of evidence substantially outweighed prejudicial effect.

Words and phrases – "admissibility", "discreditable conduct evidence", "exculpatory assertion", "proviso", "substantial miscarriage of justice", "summing-up".

*Criminal Law Consolidation Act 1935 (SA)*, s 353(1).  
*Evidence Act 1929 (SA)*, s 34P.



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1 KIEFEL, BELL, KEANE AND NETTLE JJ. The appellants were convicted of the murder of Adrian McDonald following a trial in the Supreme Court of South Australia (Peek J and a jury). The deceased was shot at 6:36am at the "Big Bucket Car Wash" in Parafield, a northern suburb of Adelaide. Closed-circuit television camera (CCTV) footage recorded the deceased getting into the front passenger seat of a Ford Futura sedan ("the Ford"). The deceased's former partner, the first appellant, Tristan Castle, was the driver of the vehicle. A few moments later, a shot was fired as the deceased attempted to get out of the vehicle. Two more shots were fired in quick succession. The third shot was fatal.

2 It was an admitted fact that the Ford belonged to Castle's mother and that Castle was driving it at the time of the shooting. It was the prosecution case that Castle lured the deceased to the car wash on the pretext of renewing their sexual relationship and that the second appellant, Jason Bucca, was lying in wait in the boot armed with a handgun. The prosecution argued that Bucca had crawled through to the interior of the Ford by folding down a back seat and then shot the deceased. Castle's liability for the murder was put to the jury on alternative bases: either she was a party to a joint criminal enterprise with Bucca to kill or to inflict grievous bodily harm or she was a party with Bucca to a joint criminal enterprise to assault and detain the deceased and she foresaw that in carrying out that scheme Bucca might shoot the deceased with murderous intention.

3 Bucca did not give evidence. It was his case that he was not the shooter. Castle gave evidence that a man called Wesley Gange was the shooter and that she had not known that Gange was armed or that he planned to harm the deceased. Gange died before the trial.

4 Castle's relationship with the deceased had ended shortly before these events and she had commenced a sexual relationship with Bucca. Bucca and Gange were associates and each entertained hostile feelings towards the deceased arising from the belief that he had broken into the premises in which they had been living and stolen some of their belongings. A matter of hours before the shooting Bucca and Gange were looking for the deceased together.

5 The prosecution case against each appellant was largely circumstantial. The central issue at the trial was whether the prosecution had excluded the reasonable possibility that Gange was the shooter. In the event that it had, a further issue in Castle's case was the capacity of the evidence to prove her agreement to the intentional killing or infliction of grievous bodily harm on the deceased or, at the least, her contemplation that Bucca might do so in carrying out an agreement to assault and detain the deceased. The prosecution case

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against Castle, in either of the ways it was put to the jury, depended upon proof that she knew Bucca was armed with a handgun.

6 In evidence were charts containing telecommunications data, which showed the probable location of the mobile telephones known to be used by the appellants and by Gange ("the telephone records"). A mobile telephone with the number 0407114911, which was known to be used by Gange ("the 911 telephone"), was not in the vicinity of the Big Bucket Car Wash at the time the deceased was killed. At that time the 911 telephone was in a location that was consistent with it being in the premises at which Gange was staying. Those premises were 12.4 kilometres away from the Big Bucket Car Wash.

7 Proof that the 911 telephone was not at the scene of the killing could not, without more, support a finding that Gange was not there. Proof that Gange was not there depended upon inferences from the probable location of the 911 telephone and Gange's known movements in the hours before and after the killing. It also depended on the evidence of Gange's partner, M, that Gange was at home with her at the time of the shooting.

#### The procedural history

8 M's and Castle's evidence could not stand together. In summing-up, the trial judge reminded the jury of M's evidence in terms which were said by Bucca and Castle to be unduly favourable to the prosecution. His Honour did not remind the jury of any of the salient parts of Castle's evidence.

9 The appellants appealed against their convictions to the Court of Criminal Appeal of the Supreme Court of South Australia (Kourakis CJ, Parker and Lovell JJ) on a variety of grounds. In each appeal, several grounds were particulars of the ground which contended that the summing-up lacked balance. Complaint was also made of the admission of evidence that Bucca was in possession of three handguns some months before the shooting. This evidence was given by Tamara Pascoe, the 18 year old daughter of one of the deceased's associates. Separate complaint was made about the trial judge's directions concerning Pascoe's evidence of a statement made by Bucca shortly after the shooting, which the prosecution relied on as an admission.

10 The Court of Criminal Appeal upheld the trial judge's decision to admit Pascoe's evidence of Bucca's possession of handguns. The Court of Criminal Appeal dismissed, or refused permission to appeal on, the remaining grounds, save in Bucca's case for the ground that complained of the directions concerning Pascoe's evidence of the "admission". The Court of Criminal Appeal held that Pascoe's evidence was not capable of being treated as an admission and it was an

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error not to have so directed the jury. The Court of Criminal Appeal upheld Castle's related ground that the trial judge erred by failing to direct the jury that Bucca's "admission" to Pascoe was not evidence in her trial<sup>1</sup>. Nonetheless, the Court of Criminal Appeal dismissed the appeals under the proviso.

11 On 25 May 2016 Nettle and Gordon JJ granted Bucca and Castle special leave to appeal on grounds that challenge the exercise of the proviso and the admission of Pascoe's evidence of Bucca's possession of handguns. The challenge to dismissal under the proviso is put in two ways. Each appellant contends that the Court of Criminal Appeal erred in concluding that his or her guilt was proved beyond reasonable doubt. In the alternative, each appellant contends that satisfaction that his or her guilt was proved to that standard does not mean that the error did not occasion a substantial miscarriage of justice. Castle maintains her ground that her trial miscarried because of the failure to fairly put her case and to remind the jury of the salient parts of her evidence<sup>2</sup>.

#### The evidence at trial

12 In considering the first way in which the appellants challenge the dismissal of their appeals under the proviso, it is necessary to refer to the evidence in more detail.

#### *The relationships*

13 The relationship between Castle and the deceased ended in late 2012 or early 2013, not long after the bank entered into possession of the premises in which they had been living. The deceased moved into premises in Cadell Court, Hope Valley. These premises were occupied by his friend Jim Bristow. Castle and her two youngest children moved to her mother's home in Elizabeth Park. The break-up, which was not of the deceased's choosing, proved to be acrimonious. The deceased became aware that Castle was in a sexual relationship with Bucca not later than 26 January 2013.

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1 The error in Castle's case included the failure to direct the jury that a statement made by Bucca to Detective Georg at 3:30pm on 3 February 2013, that he had spent 95 per cent of the preceding 24 hours with Castle, was not evidence in Castle's trial.

2 Castle's first ground of appeal (related to extended joint criminal enterprise) was not pressed in light of the decision in *Miller v The Queen* (2016) 90 ALJR 918; 334 ALR 1; [2016] HCA 30.

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14 Bucca and Gange shared rented premises in Sapphire Crescent, Highbury during 2012. The lease on these premises expired in February 2013 and they were in the process of moving out at the date of the shooting. On 31 January 2013, the Sapphire Crescent premises were broken into and a fridge, laptop, boxing bag and weights were stolen. Shortly before the discovery of the break-in, Castle had seen the deceased driving in the vicinity of Sapphire Crescent towing a trailer. She told Bucca of this sighting. Bucca and Gange each believed the deceased was responsible for the break-in. In the 48 hours before the shooting, each sent the deceased abusive text messages about the theft of their property.

15 Bucca, Castle, Gange and M were all regular users of methamphetamine in the form colloquially known as "ice". M and Gange were using between \$2,000 and \$5,000 worth of "ice" each week. Gange was a supplier of the drug. By February 2013, Gange and M had moved into Matthew Grace's premises in Gosfield Crescent, Hampstead Gardens where Grace, who was an associate of Gange, his partner, Tammy, and her children were living.

16 Gange was easily roused to anger, particularly when using "ice". He was familiar with handguns. He had traded handguns for drugs, although the evidence did not establish whether this had taken place before or after the shooting. In 2009, Gange suffered severe burns in an accident. As a result his right arm was fused at the elbow at an angle of 90 degrees. On some days his pain restricted his mobility and on other days it did not.

*M's evidence*

17 M gave evidence of a conversation between Castle and Bucca that took place on the evening of Saturday 2 February 2013. She and Gange had been present but neither of them had taken part in the conversation. Bucca had referred to the deceased as a "dog" and Castle had spoken of arranging a baby-sitter so that she and Bucca could meet him. M's understanding of the plan was that Castle "was going to pretend like she wanted to get back with him" and that Bucca was going to be there.

18 According to M, Gange left Gosfield Crescent between midnight and 2:00am on 3 February 2013 and returned between 5:30 and 6:30am. At the date of giving evidence M was unable to remember the exact time. She disagreed with the suggestion that he might have returned as late as 7:00am because she remembered that Tammy's children were up and getting ready for school. In cross-examination she acknowledged that her evidence in this respect could not have been correct because 3 February was a Sunday. M gave another reason for knowing that Gange had returned home before the shooting: when she learned of

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the time of the killing she remembered saying to Gange "thank fuck you were home by that time".

19 M's veracity and reliability were both the subject of challenge. She acknowledged that she had been drinking heavily on the evening of 2 February and that she may have consumed drugs. She acknowledged that her drug and alcohol abuse had resulted in psychotic episodes and auditory hallucinations, and more generally impaired her ability to reason.

*The telephone records*

20 The telephone records contained data relating to the mobile telephones used by Castle, Bucca, Gange, M and the deceased in the period between 7 January and 3 February 2013. They included the content of text messages, the duration of telephone calls, the identity of the assumed recipient of the call and the telephone tower through which the caller's signal was relayed. The Klemzig, Greenacres and Hampstead Gardens telephone towers were roughly equidistant from the Gosfield Crescent premises, at which Gange and M were staying, and calls made from those premises would be expected to be relayed by one of these towers. Mobile telephone calls made from the Cadell Court premises, at which the deceased was staying, were likely to be relayed through the Hope Valley, Hope Valley East or Hope Valley Reservoir towers. The Sapphire Crescent premises, from which Gange and Bucca were moving out, is close to Cadell Court and calls made from the Sapphire Crescent premises were also likely to be relayed through one of those towers. Mobile telephone calls made from the Big Bucket Car Wash were likely to be relayed through the Modbury, Para Vista South or Para Hills West towers.

21 The prosecution sought to demonstrate that, on the morning of 3 February, the 911 telephone, known to be used by Gange, was at a location consistent with it being at the Gosfield Crescent premises at 2:42am. At this time, a message was transmitted from Bucca's telephone to the 911 telephone reading "[s]weet cu soon bro". At 3:30am, a call made on the 911 telephone was relayed through the Hope Valley tower. This was consistent with the 911 telephone having moved to the vicinity of the Cadell Court premises. At 3:33am, a call from Bucca's telephone was relayed through the Hope Valley tower, which was consistent with that telephone being in the vicinity of the Cadell Court premises. The presence of Bucca and Gange at the Cadell Court premises was recorded by CCTV at 3:50am. The two men were seen leaving those premises at 4:50am.

22 At 5:05am on 3 February, the 911 telephone was still relaying calls through the Hope Valley tower. By 5:14 that morning, the 911 telephone was relaying calls through the Klemzig tower. This was consistent with the 911

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telephone having been taken from the Cadell Court premises to the Gosfield Crescent premises. Between that time and 8:10 that morning, the 911 telephone relayed calls through the Klemzig, Greenacres and Hampstead Gardens towers, consistent with it being located at the Gosfield Crescent premises.

23 M said that she and Gange had gone to the Cadell Court premises some time after 8:00am on Sunday 3 February. Consistent with that account, at 8:47am a call from the 911 telephone was relayed through the Hope Valley Reservoir tower.

24 Calls made from Castle's telephone between 5:21am and 6:00am on 3 February were relayed through towers which were consistent with the prosecution case that she was in the vicinity of the Big Bucket Car Wash. Calls made by Bucca's telephone at 5:34am and at 5:49am were relayed through towers which were consistent with the prosecution case that he was with her.

25 CCTV footage recorded at the Big Bucket Car Wash showed the Ford parked in a bay at 6:20am. The driver alighted from it on three occasions. Twice the driver moved to the boot area of the vehicle. On at least one occasion the driver opened the boot.

26 At 6:25am, two short calls were made from Bucca's telephone to the 911 telephone. These were relayed through the Para Hills West tower, which was consistent with Bucca's telephone being at the Big Bucket Car Wash.

27 At 6:30am, the deceased's vehicle arrived at the car wash. At 6:32am, the deceased sent Castle a text reading "I'm next to you". Castle replied, "Im not getting out [of] the car its cold". At 6:33am, a call was made from the 911 telephone to the deceased. CCTV footage showed the deceased's phone light up but the deceased did not answer the call. At 6:34am, a call was made from the 911 telephone to the Castle telephone. In each case the call was relayed through the Klemzig tower, consistent with the 911 telephone being at the Gosfield Crescent premises.

28 The deceased walked to the front of the Ford and looked through the windows. At 6:36am, he got into the front passenger side of the car. He was in the car for 30 seconds before it drove off, stopped and the three shots were fired.

29 At 6:40am, a phone call was made from Castle's telephone. At 6:44am, a text message was sent from Castle's telephone to the deceased's telephone reading "[h]ad to leave the kids got up i wil call you later on n we can meet up to talk".

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30 The prosecution relied on the pattern of calls and probable location of the telephones as powerful support for its case that Bucca was with Castle at the Big Bucket Car Wash and Gange was at home in Gosfield Crescent. The prosecution argued that Castle's text message to the deceased that said she was not getting out of the car because it was too cold, was a device to have him get into the Ford – she had not been reluctant to get out of the Ford before the deceased arrived. Her trips to the boot were suggested to be to check on Bucca. Other evidence to which it is not necessary to refer pointed to the deceased being wary of an encounter with either Bucca or Gange. His conduct in examining the interior of the Ford before getting into it was said to be consistent with the shooter being concealed in the boot and inconsistent with Gange being seated inside the vehicle. Castle's 6:44am text message was said to be an evident attempt to set up an alibi. On any view, at 6:44am Castle well knew the deceased had been shot.

#### *Castle's evidence*

31 Castle said that, on the evening of 2 February, Gange had asked her to contact the deceased and to act as a mediator to assist him in recovering his property. She denied that Bucca or anyone else had referred to the deceased as a "dog" or that she had said anything to suggest that she was going to arrange a meeting with the deceased on the pretext of resuming their sexual relationship. She arranged to meet the deceased to sort out their furniture, which included arranging for him to collect a lounge and other belongings from her mother's house.

32 She had borrowed the Ford to collect the last of Bucca's belongings from the Sapphire Crescent house as her own car was already full. She arrived at Sapphire Crescent some time before 4:37am. She sat waiting for just over half an hour until Bucca and Gange turned up. The three went inside and collected Bucca's belongings and put them in the boot of the Ford. While loading the car she told Bucca and Gange about her arrangement to meet the deceased. She had spoken to the deceased shortly after 6:00am and arranged to meet him at the Big Bucket Car Wash. She did not ask either Bucca or Gange to accompany her. Castle said that Gange had wanted to come with her because he wanted to get back his computer, fridge and the other things that the deceased had taken.

33 Castle said that she drove the Ford to the Big Bucket Car Wash with Gange in the front passenger seat. She had got out of the car and opened the boot to look for cigarettes. When the deceased arrived, Gange climbed over the centre console into the back seat and the deceased got into the front passenger seat. The three of them started talking and Gange brought up the subject of the break-in. The deceased denied any part in it. Gange got angry and started yelling. Castle said that she was going to drive to a nearby service station to buy some

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cigarettes. As the car started to move, the deceased went to open the door. She slammed on the brakes and the first shot was fired. The deceased was partly out of the door at this time. Then two more shots were fired. She looked over her shoulder and saw a gun in Gange's hand. She yelled at him that they needed to call an ambulance and she went to pick up her telephone. Gange took the telephone off her, pointed the gun at her and told her to drive. He had sent the text message to the deceased's telephone.

34 Castle said that she had not known that Gange had a gun until the first shot was fired. She had not intended any harm to the deceased. She said that her mobile telephone was with her at all times. Bucca's mobile telephone was also in the Ford with her. Initially she said that Bucca had left it there. Later she said that Bucca had not been inside the Ford and that she had picked up her own and Bucca's telephones before driving to the car wash. She had no explanation for calls from these telephones being relayed through towers that suggested both telephones were in the vicinity of the Big Bucket Car Wash at a time when she said that she and Bucca were at the Sapphire Crescent premises.

*Pascoe's evidence of the "admission"*

35 Tamara Pascoe and her father had stayed at the deceased's house at a time when the deceased and Castle were living together. They had come to know Bristow and Bucca through their association with the deceased. Pascoe learned of the murder of the deceased from a report on the television that was broadcast a few days after the event. She and her father went to Bristow's house, where the deceased had been living, to pay their condolences. Bucca arrived while they were there and she observed him having a conversation with her father. In evidence in chief she said that she heard Bucca "say that he didn't mean to do it, and everything went sour and he started, was crying". She described Bucca as "distraught" and "devastated".

36 In cross-examination Pascoe twice agreed that Bucca's exact words were "he didn't mean to do it". In an endeavour to resolve any ambiguity, the trial judge asked whether Pascoe heard Bucca say anything about who it was that "didn't mean to do it". Pascoe replied that she had not. His Honour then asked "from what you heard did you form any view as to ...", and Pascoe interrupted saying "no, I didn't form any view. I didn't know who did it until I saw on the newspaper".

37 In re-examination the prosecutor reminded Pascoe of her evidence that Bucca had told her father "he didn't mean to do it", and he asked:

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"Q. When you gave that answer before lunch, when you spoke about 'he' didn't mean to do it, who were you speaking about.

A. That's just what Jason said, I don't know who he was speaking about, but he said that he didn't mean to do it to dad."

38 In his closing address the prosecutor invited the jury to consider that Pascoe had been confused and that it was open to treat Bucca's statement as an admission that he, Bucca, had not meant to do it. Bucca's counsel submitted that it was clear from Pascoe's answers in cross-examination and in re-examination that the statement was exculpatory and consistent with finding that Gange was the shooter.

39 In summing-up, the trial judge reminded the jury of Pascoe's evidence in chief and re-examination on this topic, commenting:

"Ladies and gentlemen, that's the state of the evidence on that matter. Obviously [counsel for Bucca] submits that you should take the view that Pascoe was saying, and meant to say, that Bucca was referring to some other person here. It is a matter for you."

40 At the first opportunity Bucca's counsel raised the treatment of Pascoe's evidence of the purported "admission". Counsel submitted that the evidence was of "clear denials", and given the importance of the evidence and "for the sake of balance" he asked the judge to remind the jury of Pascoe's answers in cross-examination. The trial judge declined to do so. Bucca's eighth ground of appeal in the Court of Criminal Appeal complained of the trial judge's failure to remind the jury of Pascoe's answers in cross-examination, and to direct that, contrary to the prosecutor's submission, Pascoe's evidence was not capable of being understood as an admission.

41 Castle particularised a number of features of the summing-up in support of her ground that it was lacking in balance. It is unnecessary to refer to all of them since in this Court her challenge is confined to the asserted failure to fairly put her case by reminding the jury of the salient aspects of her evidence. In order to understand the way the ground is developed it is necessary to refer to some of the respects in which the trial judge dealt with M's evidence in the course of summing-up.

#### The summing-up

42 The trial judge reminded the jury of M's evidence that she remembered saying "[t]hank fuck that you were home before that shooting occurred". His Honour commented:

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"You see, *she has been criticised uphill and down dale*, ... but if you think that is the genuine expression of the feeling of relief that she had that 'At least I haven't got this problem and I have got plenty of problems with Gange', *because she seems a fairly decent woman on the outset*, but that is a matter for you, 'But at least I haven't got this problem, I know you were home at the time of the shooting', so there you have it." (emphasis added)

43 After summarising the prosecutor's submissions concerning the telephone records and the CCTV footage, his Honour rhetorically asked "what is the answer that the respective accused's make to this fairly detailed analysis". Shortly afterwards, his Honour repeated the question, asking "[w]hat answer from counsel for the defence to this apparently cogent analysis". His Honour contrasted the "skilful" and "cogent" arguments made by Castle's counsel concerning the scope of any joint criminal agreement with counsel's answer to the question of whether it could be shown that Gange was not the shooter. The latter was, his Honour said, "a very brief answer with all respect".

44 Counsel for Bucca applied for the jury to be discharged, submitting that the effect of the trial judge's rhetorical question was to reverse the onus of proof. Counsel raised a number of other matters in support of his application, including that his Honour had endorsed M as a "decent girl" when on the defence case M was a witness whose evidence was to be approached with the utmost caution. Counsel for Castle also expressed concern that his Honour's rhetorical question carried the implicit danger that the jury might consider that there was an onus on her to provide an answer. Counsel asked his Honour to deal with this concern in the balance of the summing-up. He did not join in the application to discharge the jury, which was refused.

45 When the jury returned to court, the trial judge explained that he had been reminding it of the prosecutor's submissions and he directed, "if you were to think that I had some sort of view about it, do not let that influence you at all". Later, his Honour referred to his observation that M seemed to be a "fairly decent woman", and said:

"I obviously meant going on initial impressions and subject to deeper consideration, but in fact it probably would be better if I hadn't said anything about my view as to her because, after all, it's entirely for you to form impressions of witnesses and not for me, so just put that to one side. We are all experienced in summing up people. That's your task, not mine."

46 In summing-up Bucca's case, his Honour reminded the jury that it had been submitted that the only concessions that M made were those that she could

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not escape and that the rest of her evidence was a construct. His Honour commented "[w]ell, ladies and gentlemen, you take into account what [counsel for Bucca] says. That is a big allegation to make of a witness on oath". And his Honour reminded the jury:

"You had the chance of seeing her give lengthy evidence and being cross-examined at length by two counsel, not just one. ... Despite some difficulties with memory and so forth, is she trying to tell the truth and then if she is, what allowances do we have to make for difficulties that might impinge upon reliability?"

47 In summarising the prosecution case the trial judge referred to Castle's evidence that Gange climbed from the front seat over the console to the back seat when the deceased arrived; that she had given two differing accounts of how Bucca's telephone came to be in the Ford; and that after the shooting she had collected Bucca but not told him what had happened. In each case his Honour reminded the jury of the prosecutor's criticisms of the evidence.

48 The only other references that the trial judge made to Castle's evidence were in the course of giving general directions of law. His Honour instructed the jury that her evidence was to be assessed in the same way as the evidence of other witnesses. The direction was completed by stating "[w]hether, of course, you believe it is entirely a different matter". When it came to Castle's case, his Honour directed that if the jury found Castle had lied, as the prosecutor submitted, it did not mean that without more she should be found guilty.

### The Court of Criminal Appeal

49 The Court of Criminal Appeal rejected the appellants' grounds which challenged the balance of the summing-up. Their Honours concluded<sup>3</sup>:

"Many complaints are made about aspects of the summing up which are claimed to result, cumulatively, in a lack of balance. We have considered those complaints individually and overall. In our view the Judge's observations reflected the strength of the prosecution evidence. The defence case, including Ms Castle's evidence, was little more than a bare denial of that evidence which failed to engage with the probative force of the prosecution case in any meaningful way. The observations of the Judge on the evidence were well within the discretion of a trial judge."

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3 *R v Castle* [2015] SASFC 180 at [70].

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50 Their Honours said that greater reference to Castle's evidence would have served only to remind the jury of its improbability because it failed to logically address the Crown case. In the circumstances, the failure to remind the jury of her evidence when "so much of it was inconsistent with the objective and reliable evidence"<sup>4</sup> did not occasion a miscarriage of justice.

51 As earlier explained, Bucca's eighth ground and Castle's related ground were upheld. The Court of Criminal Appeal considered that the trial judge's summary of Pascoe's evidence was incomplete: the jury had not been reminded that on three occasions in cross-examination (once in answer to a question by the trial judge) Pascoe agreed that Bucca's statement related to a third person<sup>5</sup>. These answers and her answer in re-examination "unequivocally" established that Bucca was referring to a third person<sup>6</sup>. The Court of Criminal Appeal said that the evidence was incapable of being viewed as an admission; its only use was exculpatory and it was an error to fail to so direct the jury<sup>7</sup>.

52 The Court of Criminal Appeal acknowledged that where an appeal turns on oral evidence ordinarily it will not be appropriate to dismiss the appeal under the proviso. Their Honours considered that these appeals were exceptional because Castle's evidence was not just implausible and inconsistent with the objective evidence, it was "so obviously false that it carries no weight at all"<sup>8</sup>.

53 The Court of Criminal Appeal was satisfied beyond reasonable doubt that the evidence proved that Bucca shot the deceased. This conclusion was based on six strands of evidence<sup>9</sup>:

[1] The records showing that Bucca's and Castle's mobile telephones were circling the Big Bucket Car Wash early on the morning of 3 February and were in the Ford at the time of the shooting.

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4 *R v Castle* [2015] SASCFC 180 at [66].

5 *R v Castle* [2015] SASCFC 180 at [20].

6 *R v Castle* [2015] SASCFC 180 at [18].

7 *R v Castle* [2015] SASCFC 180 at [18], [21].

8 *R v Castle* [2015] SASCFC 180 at [106].

9 *R v Castle* [2015] SASCFC 180 at [128].

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- [2] The evidence of motive.
- [3] M's evidence of the plan that Castle was to lure the deceased to a confrontation with Bucca.
- [4] Castle's text messages to the deceased in apparent execution of that plan.
- [5] The telephone records and M's evidence which placed Gange at the Gosfield Crescent premises at the time of the shooting.
- [6] The difficulty that a man with Gange's injuries would have in hiding in the boot of the Ford and moving from that position into the back seat of the car.

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The Court of Criminal Appeal was satisfied beyond reasonable doubt that the evidence proved that Castle was a party to an agreement with Bucca to detain the deceased at gunpoint and confront him about the break-in and that she foresaw the possibility that in carrying out this agreement Bucca might kill or inflict grievous bodily harm with murderous intent. This conclusion was based on<sup>10</sup>:

- [1] The evidence which proved Bucca was the shooter.
- [2] The inference that Castle either saw the gun or was told of it in the time she and Bucca spent before arriving at the car wash and in light of her movements towards the boot of the car while waiting for the deceased.
- [3] Her refusal to meet the deceased in his car.
- [4] The phone call made by Castle after the shooting and the text sent to the deceased's telephone.

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The Court of Criminal Appeal considered that Pascoe's evidence of the "admission" was "a minor part of the evidence" and was so overwhelmed by the circumstantial case against each appellant that it was unlikely that it had any influence on the verdicts<sup>11</sup>. It concluded that no substantial miscarriage of justice

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<sup>10</sup> *R v Castle* [2015] SASFC 180 at [129].

<sup>11</sup> *R v Castle* [2015] SASFC 180 at [130].

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had been occasioned by the way Pascoe's evidence had been left in each case and it dismissed the appeals<sup>12</sup>.

### The submissions

56 Bucca submits that the Court of Criminal Appeal erred by approaching the determination of his appeal by asking whether his guilt had been proved when the admitted error went to the central issue in the trial. The directions left open that his statement to Pascoe's father was a confession that he was the killer. The correct direction would have required the jury to exclude the reasonable possibility that the statement – he (the unnamed third person) didn't mean to do it – was true before it could find him guilty. Regardless of the Court of Criminal Appeal's conclusion that Bucca's guilt was proved beyond reasonable doubt, in his submission the error had occasioned a substantial miscarriage of justice. In the alternative, Bucca submits that the Court of Criminal Appeal's analysis failed to establish his guilt.

57 Castle contests the Court of Criminal Appeal's conclusions that Bucca's "admission" was unlikely to have affected the verdicts and that her guilt was proved beyond reasonable doubt. In the latter respect, she submits that the inference that she knew Bucca was armed did not rise above speculation. Her starting point, as earlier explained, is that her defence was not fairly left for the jury's consideration. The respondent accepts that if Castle succeeds on the last-mentioned ground the irregularity would have occasioned a substantial miscarriage of justice requiring the verdict to be set aside.

### The fairness of the summing-up of Castle's case

58 The complaint that Castle's case was not fairly left for the jury's consideration was not answered by concluding that the trial judge's observations reflected the strength of the prosecution evidence or that Castle's evidence failed to logically address the prosecution case<sup>13</sup>. Whatever the shortcomings of Castle's evidence, she was entitled to have the case that she presented fairly put to the jury together with any other matter upon which the jury might properly have returned a verdict in her favour.

59 This is not to say that the omission of a summary of the salient parts of Castle's evidence in summing-up her case to the jury necessarily caused the trial

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12 *R v Castle* [2015] SASFC 180 at [131].

13 *R v Castle* [2015] SASFC 180 at [66], [70].

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to miscarry. How the judge structures the summing-up and the extent to which the judge reminds the jury of the evidence is a matter for individual judgment and will reflect the complexity of the issues, and the length and conduct of the case<sup>14</sup>. The essential requirements of the summing-up in a criminal trial were stated in *RPS v The Queen* and do not need to be restated<sup>15</sup>. Needless to say, they include that the judge must fairly put the accused's case, an obligation which extends to explaining any basis upon which the jury might properly return a verdict in the accused's favour<sup>16</sup>. Where, as here, the jury is supplied with a transcript of the evidence the judge may consider that reference to those parts of the evidence that bear on the determination of particular issues does not require reading passages from the transcript or summarising it.

60 Castle's complaint is with the contrast between his Honour's treatment of her evidence and the treatment of the oral evidence in the prosecution case, which was summarised in some detail. This and his Honour's favourable observations with respect to the reliability of M's evidence are said to have conveyed to the jury that Castle's evidence was not worthy of consideration and should be summarily rejected.

61 A trial judge may comment on the evidence provided he or she makes clear that the determination of the facts is entirely within the jury's province. However, unless there is a need for comment – as, for example, in dealing with an extravagant submission by counsel – the wise course will often be not to do so<sup>17</sup>. Where the judge chooses to comment, the following statement of Brennan J in *B v The Queen* is to be kept in mind<sup>18</sup>:

"[The comment] must exhibit a judicial balance so that the jury is not deprived 'of an adequate opportunity of understanding and giving effect to

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14 *Huynh v The Queen* (2013) 87 ALJR 434; 295 ALR 624; [2013] HCA 6.

15 (2000) 199 CLR 620 at 637 [41] per Gaudron ACJ, Gummow, Kirby and Hayne JJ; [2000] HCA 3 and see *Courtney-Smith (No 2)* (1990) 48 A Crim R 49 at 55-56 per Gleeson CJ, Kirby P and Lusher AJ.

16 *Pemble v The Queen* (1971) 124 CLR 107; [1971] HCA 20.

17 *RPS v The Queen* (2000) 199 CLR 620 at 637 [42] per Gaudron ACJ, Gummow, Kirby and Hayne JJ.

18 (1992) 175 CLR 599 at 605; [1992] HCA 68.

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the defence and the matters relied upon in support of the defence.'" (footnotes omitted)

62 There were critical differences between M's and Castle's evidence. Regardless of the favourable view his Honour had formed of M's veracity and reliability, her alcohol and drug abuse and her history of mental health difficulties were matters which the defence were entitled to have fairly left for the jury's consideration. So, too, was the circumstance that M's initial account of how she knew that Gange was at home at the time of the shooting was one that could not be true. It would have been preferable for his Honour not to have expressed the view that M was a "fairly decent woman".

63 The submission that the jury would have taken from the tenor of the summing-up that Castle's evidence should be summarily rejected is to be assessed taking into account the summing-up as a whole and the conduct of the parties. Castle was competently represented by counsel. The trial judge reminded the jury of Castle's case by reference to the submissions put by her counsel. The focus of those submissions was not the detail of Castle's evidence but the suggested improbability of features of the prosecution case and the unreliability of M's evidence. His Honour's summary of those submissions was comprehensive. Counsel did not submit that her case had not been fairly left for the jury's consideration or ask the trial judge to remind the jury of any part of her evidence. In the circumstances the Court of Criminal Appeal did not err in holding that Castle's defence was fairly left for the jury's consideration.

#### The proviso

64 The error which the Court of Criminal Appeal identified, that Pascoe's evidence of Bucca's statement was left as an admission when it was in fact exculpatory, gave rise in each case to a perceptible risk of a miscarriage of justice. This required the verdict to be set aside unless the Court of Criminal Appeal was satisfied that no substantial miscarriage of justice actually occurred<sup>19</sup>. As the Court of Criminal Appeal recognised, in making this determination it was necessary to consider the possible effect of the error on the outcome of the trial<sup>20</sup>.

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19 *Criminal Law Consolidation Act 1935 (SA)*, s 353(1); *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44]; [2005] HCA 81.

20 *R v Castle* [2015] SASFC 180 at [103]-[105] citing *Gassy v The Queen* (2008) 236 CLR 293 at 301 [18] per Gummow and Hayne JJ, 314-315 [60], [62]-[63] per Kirby J; [2008] HCA 18 and *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR (Footnote continues on next page)

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As the Court of Criminal Appeal also recognised, satisfaction that guilt was proved to the criminal standard did not require the conclusion that there had not been a substantial miscarriage of justice<sup>21</sup>. The Court of Criminal Appeal's conclusion that there was no substantial miscarriage of justice depended upon satisfaction that guilt was established beyond reasonable doubt and that the "admission" was unlikely to have had any influence on the verdicts<sup>22</sup>.

65 It is a large step to conclude that a confession is unlikely to have influenced a jury's verdict notwithstanding that, apart from the admission, the prosecution presented a powerful circumstantial case. Here, the jury might have convicted on the strength of the admission alone in Bucca's case and largely on the strength of the admission in Castle's case<sup>23</sup>. The Court of Criminal Appeal's view that the admission was "overwhelmed" by the circumstantial case may be understood as reflecting a conclusion that apart from the admission the other evidence was of such strength that a reasonable jury properly instructed would inevitably have convicted the appellants and accordingly that no substantial miscarriage of justice actually occurred<sup>24</sup>. But what was left to the jury as an admission was, unequivocally, an exculpatory statement. The question was not whether the circumstantial case was so strong as to overwhelm the weight of an admission, but whether the jury might regard the exculpatory assertion as itself a sufficient basis to entertain a doubt as to the strength of the circumstantial case.

66 The Court of Criminal Appeal considered that the natural limitations that apply to reasoning to guilt on the record in a case which turns on the assessment of oral evidence did not apply here because of the obvious falsity of Castle's evidence<sup>25</sup>. The Court of Criminal Appeal's view – that Castle's evidence was, in

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92 at 104 [27]-[29] per French CJ, Gummow, Hayne and Crennan JJ; [2012] HCA 14.

21 *R v Castle* [2015] SASFC 180 at [105] citing *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 104 [27]-[29].

22 *R v Castle* [2015] SASFC 180 at [130].

23 *Domican v The Queen* (1992) 173 CLR 555 at 565-566 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1992] HCA 13.

24 *Weiss v The Queen* (2005) 224 CLR 300 at 315 [37] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

25 *R v Castle* [2015] SASFC 180 at [106].

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light of the objective evidence, glaringly improbable – was open<sup>26</sup>. However, proof of guilt did not turn on the rejection of Castle's oral evidence alone. Proof of guilt, in the Court of Criminal Appeal's analysis at [3] and [5] in Bucca's case and at [1] in Castle's case, relied on M's disputed oral evidence.

67 The telephone records and the CCTV footage from the Cadell Court premises provided a basis for concluding that the 911 telephone was with Gange throughout the course of the morning of 3 February, but they did not compel that conclusion. Gange had access to more than one mobile telephone and on occasions he used prepaid mobile telephones. The inference was open that he had used a telephone other than the 911 telephone to arrange the meeting acknowledged by Bucca in the text that read "[s]weet cu soon bro". Gange was involved in the illegal drug milieu and it was open to consider that he might be astute to ensure that he did not have with him, when engaging in criminal activity, any mobile telephone traceable to him. The reasonable possibility that Gange was the shooter was not excluded by the telephone records alone. It depended upon acceptance of M's evidence. So, too, did proof of Castle's liability on the extended joint criminal enterprise basis, as the Court of Criminal Appeal found, depend on acceptance of M's evidence of the discussion between Castle and Bucca on the evening preceding the killing.

68 Notwithstanding the strength of the prosecution case, the Court of Criminal Appeal erred in determining that, despite the way Pascoe's evidence was left for the jury's consideration, in each case no substantial miscarriage of justice actually occurred. The natural limitations of proceeding on the record precluded a conclusion that guilt was proved beyond reasonable doubt<sup>27</sup>. The appeals must be allowed and an order for a new trial made. The prospect of a new trial makes it necessary to address Bucca's first ground, which contends that Pascoe's evidence of his possession of handguns was inadmissible.

#### Pascoe's evidence of Bucca's possession of firearms

69 Only a small number of firearms leave rifling marks consistent with those found on the bullets fired at the deceased. These include a Glock 17. M gave evidence, to which there was no objection, that two to three weeks before the shooting, Bucca had shown her and Gange a handgun, which each of them had

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26 *R v Castle* [2015] SASFC 180 at [107]-[126].

27 *Weiss v The Queen* (2005) 224 CLR 300 at 316 [41]; *Baini v The Queen* (2012) 246 CLR 469 at 480 [29] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; [2012] HCA 59.

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handled. She drew a sketch of the firearm and she identified a photograph of a Glock 17 as depicting a firearm that was "very close" to the one that Bucca showed her. The gun that she described was black with a silver top.

70 Pascoe's firearms evidence concerned an incident which occurred some months before the shooting. She was present on an occasion when Bucca showed her father three handguns. One handgun had a "long extension". The only description Pascoe gave of the other two handguns was that they were approximately the same size and black. In November 2014, Pascoe was shown photographs of a number of handguns. She identified one photograph as "similar" to the handgun with the long extension. This make of weapon could not have been the murder weapon. Nor was this weapon consistent with the weapon that M described. Pascoe did not identify any of the other handguns depicted in the photographs as being similar to the other two handguns that Bucca had shown to her father. Among the photographs that she was shown was a photograph of a Glock 17.

71 Bucca objected to Pascoe's evidence, submitting that the occasion she described might have been seven or eight months before the shooting. Trial counsel conceded that either of the two handguns that did not have a long extension could not be excluded as the murder weapon. The trial judge was not asked, and did not give, reasons for admitting the evidence. His Honour merely recorded that he was "very firmly of the view that [Pascoe's evidence of the three handguns] is admissible" and that he did not propose to exclude the evidence in the exercise of discretion.

72 The Court of Criminal Appeal considered that Pascoe's evidence of Bucca's possession of the handguns was "discreditable conduct evidence" within the meaning of s 34P(1) of the *Evidence Act* 1929 (SA). Evidence tending to suggest that a defendant has engaged in discreditable conduct, whether or not constituting an offence, other than the conduct constituting the offence 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 (the "impermissible use"). Discreditable conduct evidence is inadmissible for that purpose and for any purpose other than a permissible use under s 34P(2), which provides:

"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

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- (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."

73 The Court of Criminal Appeal said the evidence was adduced to prove Bucca's access to handguns, one of which might have been the murder weapon<sup>28</sup>. Its admission was subject to s 34P(2)(a), which required that its probative value for this use substantially outweigh any prejudicial effect it may have on Bucca's case<sup>29</sup>. In determining whether the evidence should be admitted under sub-s (2)(a) it was necessary to have regard to whether the permissible use could be kept sufficiently separate and distinct from the impermissible use, so as to remove any appreciable risk of it being used for the impermissible use<sup>30</sup>.

74 The Court of Criminal Appeal considered that in the context of the issues at the trial the possession of a handgun or handguns by either Bucca or Gange was highly relevant<sup>31</sup>. It considered that Bucca's access to weapons of the same character as the murder weapon some months before the killing had probative value which substantially outweighed any prejudicial effect and it followed that the evidence had been rightly admitted.

75 Bucca submits that the Court of Criminal Appeal erred in its estimate of the probative value of the evidence. The only weapon of which Pascoe was able to give any detail could not have been the murder weapon. Her description of the other two weapons was in such general terms as to be incapable of rationally affecting the probability of the existence of the fact in issue. Bucca also submits that the evidence was adduced to show "a propensity or tendency of some sort, such as a tendency to acquire (other) illegal firearms".

76 The respondent does not concede that the evidence is "discreditable conduct evidence" within s 34P. This is because no evidence was adduced to establish that Bucca's possession of the weapons was unlawful. Otherwise the respondent supports the Court of Criminal Appeal's analysis.

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28 *R v Castle* [2015] SASCFC 180 at [92].

29 *R v Castle* [2015] SASCFC 180 at [90].

30 *Evidence Act* 1929 (SA), s 34P(3).

31 *R v Castle* [2015] SASCFC 180 at [87].

21.

77 In the context of evidence which revealed that Bucca was associated with the illegal drug milieu, the inference was open that Bucca's possession of three handguns was unlawful. While being in possession of a thing may more aptly be characterised as a state of affairs<sup>32</sup>, it is not submitted that evidence that Bucca was unlawfully in possession of firearms is not evidence of conduct. The discreditable conduct which Pascoe's evidence tends to suggest Bucca has engaged in is the unlawful possession of firearms. It is not evidence that Bucca had a propensity to discharge firearms or to threaten to do so.

78 The make and model of the handgun used to kill the deceased is unknown. Either of two handguns which Pascoe saw Bucca show to her father might have been the murder weapon. The fact that the prosecution could not prove that either weapon was the murder weapon did not deprive the evidence of probative value. Contrary to Bucca's submission, evidence that a person is in possession of an item that *might* have been used to commit the offence is relevant<sup>33</sup>. The central issue in Bucca's trial was proof that he was the shooter. The prosecution case was circumstantial. Handguns are not items that are widely available within the community. Evidence that Bucca had access to a handgun that might have been the murder weapon possessed considerable probative value. Although the issue of admissibility was not argued by reference to s 34P, it was, as the Court of Criminal Appeal held, open to conclude that the probative value of the evidence substantially outweighed any prejudicial effect it might have on the appellants.

### Orders

79 For these reasons there should be the following orders.

#### **Matter No A24/2016**

1. Appeal allowed.
2. Set aside the order of the Court of Criminal Appeal of the Supreme Court of South Australia made on 3 December 2015, and in its place order that:

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32 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 564 per Brennan J; [1985] HCA 43.

33 *Thompson and Wran v The Queen* (1968) 117 CLR 313 at 316 per Barwick CJ and Menzies J; [1968] HCA 21.

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- (a) the appeal be allowed;
- (b) the appellant's conviction be quashed; and
- (c) a new trial be had.

**Matter No A26/2016**

1. Appeal allowed.
2. Set aside the order of the Court of Criminal Appeal of the Supreme Court of South Australia made on 3 December 2015, and in its place order that:
  - (a) the appeal be allowed;
  - (b) the appellant's conviction be quashed; and
  - (c) a new trial be had.

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80 GAGELER J. The parties were agreed that the proviso in s 353(1) of the *Criminal Law Consolidation Act 1935* (SA) is to be interpreted and applied in accordance with the principles stated in *Weiss v The Queen*<sup>34</sup>. They were less than agreed about what those principles are. It is not easy to reconcile all that was said by this Court in *Weiss* with all that has been said in subsequent cases in this Court about *Weiss*. This, however, is not the occasion to address that difficulty.

81 The evidence wrongly left to the jury as a confession cannot be dismissed as inconsequential: that evidence was capable of being treated as having significant probative value. The reasoning of the plurality demonstrates that the other evidence properly admitted at the trial was not so strong that an appropriately instructed jury acting reasonably on the evidence properly before it and applying the correct onus and standard of proof would inevitably have convicted the appellants<sup>35</sup>. What in those circumstances cannot be excluded is a real chance that the confession evidence made the difference between the convictions that were actually recorded and the acquittals that might have occurred. That makes it impossible to conclude that no substantial miscarriage of justice actually occurred by reason of the evidence being left to the jury as a confession.

82 Subject only to that observation, I agree with the reasoning of the plurality and the orders proposed.

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34 (2005) 224 CLR 300; [2005] HCA 81.

35 *Wilde v The Queen* (1988) 164 CLR 365 at 371-372; [1988] HCA 6; *Lindsay v The Queen* (2015) 255 CLR 272 at 301-302 [86]; [2015] HCA 16.