IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY

No. A26 of 2016

BETWEEN

JASON LUKE BUCCA
Appellant

and

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

PART I PUBLICATION

10 1. This submission is suitable for publication on the Internet.

PART II CONCISE STATEMENT OF ISSUES PRESENTED BY THE APPEAL

2. Did the CCA err by applying the "proviso" despite having concluded that the trial judge wrongly directed the jury in terms that entitled them to treat as an admission an exculpatory out of court statement by the appellant?

3. Was evidence of the appellant's possession of black pistols some months prior to the shooting relevant and admissible having regard to s 34P of the *Evidence Act* 1929 (SA)?

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

4. Notice pursuant to s 78B of the *Judiciary Act* 1903 (Cth) is not required.

PART IV CITATION

20 5. *R v Castle; R v Bucca* [2015] SASCFC 180 (**CCA**).

PART V NARRATIVE STATEMENT OF FACTS FOUND OR ADMITTED

Overview of the issues at trial and before the CCA

6. Adrian McDonald (**McDonald**) was killed by gunshots while he was a passenger in a vehicle driven by his ex-partner Tristan Castle (**Castle**) at 6.36 am on Sunday 3 February 2013 at the "Big Bucket Carwash" at Parafield in Adelaide's north. CCTV showed McDonald enter the passenger seat of the car. A few moments later, a shot was fired at McDonald and he was hit by another shot after he fell out of the car (CCA [4]). The prosecution case was that McDonald was lured to the car wash and into the car on the pretext of a reconciliation with Castle, and that the appellant, who was hiding in the rear of
30 the car, shot McDonald shortly after he entered the car.

7. Castle gave evidence that she was communicating with McDonald because she wanted to arrange the return of her personal items, and that Wesley Gange (**Gange**) was sitting in the back seat. She said she did not know Gange had intended to kill or cause serious harm.

8. The only sworn evidence as to Gange's movements at the relevant time came from his then girlfriend (referred to as **M**), a habitual user of ice. Gange died prior to trial. M also gave

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evidence that two to three weeks before the shooting the appellant had brought a gun to the house and that it was handled by her and Gange[1].

9. The circumstantial case against the appellant primarily comprised (CCA [2]):

   9.1 evidence of tension between McDonald and the appellant concerning an unpaid debt of $1,000, and the belief of the appellant and Gange that McDonald had broken into their premises and stolen property from it; and

   9.2 telephone communication records said to show that between midnight and the time of the shooting at 6.36 am, Castle's phone and the appellant's phone moved around the north eastern suburbs and the vicinity of the carwash in "lock step", and that at the time of the shooting Gange's phone was some distance from the crime scene.

10. The prosecution relied on evidence of M in the nature of alibi evidence for Gange. She had said that she was at the Gosfield Crescent home where she was staying with Matthew Grace (**Grace**), his partner (**Tammy**) and children on the Saturday night. She claimed that although Gange left that house in the middle of the night (to meet with the appellant), he returned later in the morning, and, on the prosecution case, before the shooting.

11. The prosecution also relied on evidence given by a witness, Tamara Pascoe (**Pascoe**) that:

   11.1 some months before the shooting, she witnessed the appellant produce three boxes containing black pistols to her father, at the home of Jimmy Bristow (**Bristow**) (CCA [75]-[78]); and

   11.2 she overheard the appellant make a statement to her father about the shooting shortly after it occurred (CCA [2], [12]-[22]).

12. On his appeal to the CCA, the appellant advanced complaints concerning, inter alia:

   12.1 the admissibility and treatment by the trial judge of M's alibi evidence;

   12.2 the trial judge's admission and treatment of the evidence of Pascoe that the appellant had shown her father guns and the statement she overheard the appellant make.

13. In summary, the CCA:

   13.1 rejected the challenges to the treatment of M's alibi evidence (CCA [38]-[49]);

   13.2 rejected the challenge to the admission and treatment of the evidence of possession of handguns (CCA [75]-[99]); and

   13.3 found that the judge erred by leaving the statement overheard by Pascoe to the jury as possibly constituting an admission, when in fact it was exculpatory (CCA [21])[2].

14. Despite identifying errors or failures "capable of resulting in a miscarriage of justice" the CCA applied the proviso to dismiss the appeal (CCA [3], [22], [28], [128], [130]-[131]).

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1 The gun she described was "chunky" and said there was nothing attached to it (CCA [81]). She gave evidence by reference to some photographs of guns and a drawing she had made. She described one such photograph as being very similar to the one the appellant and Gange had been handling but not as "chunky", and another as being "very, very close" to the one she had seen but, unlike the gun depicted in the photograph, she could not remember anything being on top of the gun (CCA [82]).

2 In the co-accused Castle's appeal, the CCA accepted that the judge had erred by failing to direct the jury that out of court statements made by the appellant could not be used against Castle (CCA [28]).

The evidence at trial

15. In order to provide context for consideration of whether the CCA erred by applying the proviso, it is necessary to describe the evidence in further detail.

The participants and their living arrangements

16. The victim McDonald and the co-accused Castle were former partners. Their relationship ended in late 2012 or early 2013. They had lived together in a residence at Brooklyn Park before a bank took possession of it in late 2012. Following this (CCA [5]-[6]):

    16.1 McDonald went to live with Bristow at Cadell Court, Hope Valley (**Cadell Court**);

    16.2 Castle returned with her two youngest children to live with her mother but some of her property was stored at Cadell Court and she also stayed there occasionally.

17. Although the appellant visited or stayed at Cadell Court from time to time during 2012, he lived in a house rented with Gange at Sapphire Crescent, Highbury (**Sapphire Crescent**) under a lease which expired in February 2013. They were still in the process of moving out at the time of the shooting. Gange had moved most of his personal items out of the home by late January but some of the appellant's property remained there (CCA [6]).

18. At the time of the shooting, Gange and his partner M were staying with Grace, Tammy and their children at Gosfield Crescent, Hampstead Gardens (**Gosfield Crescent**) (CCA [11])[3]. Grace had worked for Gange selling ice. Grace was a long standing and close friend of Gange and the two had planned together to engage in large scale drug dealing and criminal activity more broadly[4].

19. The witness Pascoe and her father had lived with McDonald and Castle prior to their separation, and her father was evidently known to the appellant and Bristow. Pascoe's father had some criminal history. He was deceased by the time of the trial[5].

Antipathy towards McDonald

20. McDonald was upset at the breakdown of his relationship with Castle, and continued to send her text messages. After 22 January 2013, Castle commenced a relationship with the appellant. McDonald learnt of this by 26 January 2013 (CCA [7]).

21. On 31 January 2013, the Sapphire Crescent house where the appellant and Gange lived was broken into and a fridge, laptop, boxing bag and weights were stolen. Shortly before discovering the break-in, Castle saw McDonald driving in the vicinity of the house towing a trailer. She told the appellant this (CCA [8]). This was correctly described at trial not as evidence of motive, but of "antipathy" or "bad blood" (SU 128, 132).

22. The appellant sent a message to Bristow saying[6]:

> Hey let Adrian [McDonald] no, he might of got the trailer back but he still owes me a 1ooo N i want it soon.

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3 Gosfield Crescent was 2.7 km from Cadell Court (where McDonald was staying with Bristow), 12.4 km from the car wash (a drive of approximately 15 minutes at the relevant time) and approximately equidistant from the phone towers in the suburbs of Klemzig, Hampstead Gardens and Greenacres.

4 Tr 1358, 1390-1393 (M).

5 Tr 1907, 1911 (Pascoe).

6 Exhibit P15 entry 226.

23. He subsequently sent a message to McDonald saying[7]:

> U steal my shit n cant ansa phone, u dog piece a shit.

24. Gange was also angry. On 1 February 2013, he sent a message to McDonald saying[8]:

> I'm coming to get my stuff back cunt n u can tell George that whatever u get he will be getting the same so that will make 2 dogs felt with.

25. There was evidence to the effect that friends of Gange were concerned at his anger towards McDonald in the period leading to the killing[9], that Gange was generally quick to anger, sometimes without justification, and particularly when using ice[10], and that he had made threats of harm to others before and had had aggressive dealings with police[11]. Indeed, M's evidence was to the effect that she and Gange would consistently spend $2,000 - $5,000 per week on ice[12], that she was aware Gange was trading firearms for drugs, albeit she said possibly after the shooting[13]. Gange had sold ice to the victim McDonald[14].

26. Accordingly, while there was evidence of animosity on the part of the appellant towards McDonald, it was shared by Gange, and there was no suggestion of any particular motive on the part of the appellant such as any financial benefit to the appellant or any suggestion that he considered they were vying for Castle's affections. Nor were there custody issues.

The evidence of Gange's partner M

27. Apart from the evidence of M concerning the handling of a handgun by the appellant and Gange some time prior to the shooting, M gave evidence that she and Gange had been present during a discussion with Castle and the appellant, on the evening before the shooting, in which there had been discussion of Castle arranging a meeting with McDonald on the pretext of her wanting to get back with him and that in this context the appellant referred to McDonald as a "fucking dog"[15].

28. M said that after this, she and Gange went back to Gosfield Crescent, but she accepted that Gange later left between midnight and 2:00 am[16]. CCTV footage shows, and it was the prosecution case, that Gange met up with the appellant and they both went to Cadell Court for a period between 3:50 am and 4:50 am. (It was Castle's evidence that Gange and the appellant later met her at Sapphire Crescent and that, after a period of the three of them loading clothes and other personal belongings into her car, she and Gange left to go to the Big Bucket Carwash[17].)

29. M gave evidence concerning the time Gange returned to Grace's house at Gosfield Crescent. She said that Gange returned between 5:30 and 6:30 am but that as it stood at the date of giving evidence, she could not remember the exact time. She gave evidence that she could not identify how she had become aware of the time of the shooting but that she

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7 Exhibit P15 entry 230.
8 Exhibit P15 entry 259, Tr 1435 (M), and referred to at CCA [11] in generic terms.
9 Tr 1508, 1511, 1513 (M), 1538 (Finn).
10 Tr 1363, 1434 (M), 1538, 1540 (Finn).
11 Tr 1445-1448, 1452-1453, 1475 (M).
12 Tr 1344-1345 (M).
13 Tr 1399-1400 (M).
14 Tr 1358 (M).
15 Tr 1322-1327 (M).
16 Tr 1328 (M).
17 Tr 2273-2283 (Castle).

remembered saying to Gange "thank fuck you were home by that time" after she found out when McDonald had been murdered (CA [41]).

30. M admitted she might have taken drugs on the morning in question, that she had been drinking heavily, that she fell asleep for a time on the floor. Critically, part of M's basis for asserting a memory that Gange had returned early that morning was that she had awoken because Tammy had to have the kids out of bed for school. However, this was patently false, because it was a Sunday morning[18].

31. M's evidence in support of an alibi for Gange, with whom she had remained in a relationship to the time of his death[19], was the subject of challenge and criticism by the accused at trial. There was evidence that M suffered psychosis, false beliefs, auditory hallucinations, detachment from reality, paranoia and impaired reasoning[20].

Telecommunications evidence

32. The prosecution placed reliance on a sequence of events on 2 – 3 February 2013, based largely upon telephone communication records, to seek to establish that Castle was luring McDonald to meet with her and that, although Gange and the appellant were together in the early hours of 3 February 2013, at the critical time, the appellant's phone (and by inference, the appellant) was present with Castle, whereas Gange's phone (and by inference, Gange) had returned to Grace's home at Gosfield Crescent. That sequence (CCA [11]) included:

Thursday 31 January 2013

19:00 (to 19:30) Messages from appellant's phone to McDonald's phone abusing McDonald for breaking into his home, and demanding return of property.

Friday 1 February 2013

00:23 Abusive message from Gange's phone to McDonald's phone [set out earlier]

Saturday 2 February 2013

18:31 McDonald contacts Castle by phone and they exchange texts over the following 12 hours.

20:07 McDonald suggests in a text to Castle that they meet at a Bunnings car wash.

21:25 Phone communications between the appellant's phone and Gange's phone including the appellant's request that Gange bring him nurofen and some allen keys.

Sunday 3 February 2013

01:19 Gange's phone relays through the Hamstead Gardens and Klemzig towers.

01:50 CCTV shows McDonald arrives at car wash but Castle does not, and McDonald drives away.

01:52 Castle sends a message to McDonald: "Running xox".

02:05 McDonald sends first of a number of messages to Castle asking why she was not at the car wash.

02:31 Message from Bucca's phone to Gange's phone "Ur choice how long u b bro?"

02:42 Communications from Gange's phone are relayed through the Klemzig tower. Message from Bucca's phone to Gange's phone "Sweet cu soon bro".

03:50 CCTV shows the appellant and Gange arrive at Cadell Court. (Bristow testified that the appellant and Gange came looking for McDonald.)

04:50 CCTV shows the appellant and Gange leave Cadell Court.

05:01 Castle sends a text to Mr Bristow asking "Did Jas leave any keys at yours".

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18 Tr 1373 (M), and see also Tr 1327, 1370-1375, 1455-1456, 1459, 1461, 1462, 1481-1482, 1495.

19 Tr 1295 (M).

20 Tr 1298, 1344-1345, 1349, 1360, 1361, 1419, 1426-1428, 1479-1480 (M).

05:05 Call from Gange's phone through the Hope Valley tower to Grace at Gosfield Crescent.

05:14 Call from Gange's phone through the Hope Valley tower to Grace's phone. Subsequent phone calls from Gange's phone including at 5:49 am are relayed to or from that phone through the Klemzig, Hampstead Gardens or Greenacres towers.

05:30 Castle has telephone conversation with McDonald.

05:38 CCTV shows McDonald arrive at Cadell Court.

05:09 (to 05:49) Castle's phone and the appellant's phone are used at similar times and are relayed through the same towers.

05:49 Telephone call from the appellant's phone to Gange's phone.

05:59 Castle sends a message to McDonald: "Just got out been locked up half the night can I come meet you now", and a series of texts is exchanged.

06:01 Message from Castle to Gange's phone.

06:07 Castle has telephone conversation with McDonald in which, according to her testimony, they agree to meet at the Big Bucket car wash. (Castle testified that at this time she left Sapphire Crescent with Gange.)

06:13 The appellant's phone registers with Para Vista South tower and shortly thereafter with the Modbury tower.

06:20 McDonald leaves Cadell Court. CCTV shows Castle's car at the Big Bucket car wash. She is seen to alight from the car and move to the boot area.

06:25 Gange's phone is used to call the appellant's phone for two 5 second conversations and Castle's phone (but no connection is made). Two short calls are made from the appellant's phone to Gange's phone relayed through the Para Hills West tower.

06:30 CCTV shows McDonald's car arrive. At 06:32 he sends Castle a text: "I'm next to you", to which she replies: "I'm not getting out of the car, it's cold".

06:33 Gange's phone calls McDonald but he does not answer the call.

06:34 Gange's phone calls Castle's phone and a 64 second telephone call ensues. Gange's call is relayed through the Klemzig tower.

06:36 McDonald gets into the car after appearing to carefully look through the windows. After 30 seconds the car drives then stops and three shots are fired.

06:40 Call from Castle's phone to a friend of McDonald.

06:44 Castle's phone sends a text to McDonald's phone saying: "Had to leave the kids got up, I will call you later on n, we can meet up to talk". (Castle testified that Gange must have sent the message on her phone.)

33. The telephone evidence was important circumstantial evidence in the prosecution case. However, it is important to appreciate that:

33.1 there was evidence to the effect that the appellant was separated from his phone at the critical time. There was evidence that he left his phone in the car belonging to Castle's mother or that Castle had taken the phone to the car[21]; and

33.2 further, the evidence raised a reasonable hypothesis that Gange was not at the relevant time using the phone associated with him (0407 114 911) and referred to in the above summary as "Gange's phone". If that was so, the location of this phone did not provide a relevant alibi. The evidence suggested both that at the critical time Gange may have been using a different phone, and that others may have had access to or been using the Gange phone. Indeed "Gange's phone", although undoubtedly used by him, was apparently contracted in the name of M[22].

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21 Tr 2283, 2319 (Castle).

22 Tr 1384 (M).

34. On the evening in question, the text message records suggest that Gange may have been communicating with the appellant through another phone service[23]. At 2:31 am a message from the appellant's phone to Gange's phone asked "... how long u be bro?" and the next relevant text entry at 2:42 am is from the appellant's phone to Gange's phone stating "Sweet c u soon bro"[24], suggesting Gange had communicated with the appellant in the interim through other means. The evidence confirmed Gange had possession of at least two mobile phones; he had a pre-paid phone in addition to "Gange's phone"[25].

35. The evidence was also consistent with the possibility that others may have been in possession of or using Gange's phone after Gange left to meet with the appellant.

35.1 M and Gange shared one another's mobile phones[26]. An entry for example, a message recorded as emanating from M's phone on the night in question ("Yea K") to the appellant's phone was concededly sent by Gange and not M[27].

35.2 The evidence showed that the participants, including Grace and Grace's partner Tammy, with whom Gange and M were staying, were drug addicts. It was open to infer that they, like Gange and M, used phones in an atypical way.

35.3 It was reasonably possible that Grace or his partner may have accessed Gange's phone. As noted earlier, Grace had worked for Gange selling ice, was a long standing and close friend of Gange and the two had planned together to engage in large scale drug dealing and criminal activity more broadly.

35.4 It was reasonably possible that given their drug use, others may have been awake and active at the relevant times. M gave evidence that she and Gange would stay awake for days at a time and that Gange could stay up for up to a week without sleep when using drugs[28].

35.5 The movements of Gange's phone could have reflected Gange having left that phone behind when he went to meet the appellant, and the phone later being taken by Grace or Tammy or another to search for Gange, at Gange's residence (Sapphire Crescent), on an expedition to buy drugs, or for some other reason. Neither Grace nor his partner Tammy was called to give evidence at trial.

36. Another possibility the jury had to consider was whether Gange may have arranged to engineer an alibi by the use of his mobile phone.

The evidence of Pascoe of possession of guns

37. By way of context, it should be noted that there was ballistics evidence to suggest that the bullets that were fired at McDonald may have been fired by a "Glock 17" if fitted with an aftermarket barrel[29]. The prosecution submitted that the gun M claimed the appellant had

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23 At the relevant time M and Gange had four actual phones, albeit it appeared they were only using three numbers: Tr 1388-1389. M also explained that at times she and Gange would swap SIM cards and put them into different phones: Tr 1386. Further, as M explained, at times she and Gange changed their phone numbers if they didn't want certain people contacting them: Tr 1308, 1387.

24 Ex P15, entries 436 and 437.

25 Tr 1384 (M).

26 Tr 1381 (M). The trial judge said the evidence made it clear "there was a deal of interchangeability between Gange and [M] as to the phones" (SU 73).

27 Ex P15, entry 429, Tr 1382 (M).

28 Tr 1345 (M).

29 Tr 1066 ff (De Laine).

produced to Gange two to three weeks prior to the shooting was consistent with the appearance of such a firearm shortly prior to the shooting[30].

38. Over objection[31], Pascoe, who was 18 years old at the time of the trial, gave evidence that some months before the shooting, she witnessed the appellant produce three boxes containing black pistols to her father. She described an occasion when she and her father visited the home of Bristow at Cadell Court. Bristow was not home but the appellant was there and her father had a discussion with the appellant. Pascoe (who was apparently on her phone at the time and not "really paying attention") claimed to witness the appellant walk out of the hallway with three boxes ("sort of like black toolboxes, sort of like a suitcase but plastic")[32].

39. Her evidence in chief was brief and very general. The following exchange occurred:

Q Describe the guns to us.

A They were black. I can't describe guns as I don't have anything to do with guns. I didn't really look – yeah, yeah, they were black pistols.

Q Did he get any of the guns out of the boxes.

A No[33]

...

Q What do you remember of any of the guns, any features or –

A Yeah, two of the guns were a pistol, black pistols, but one of them had a long extension for it, yeah.

40. Pascoe subsequently identified, from two sets of photographs, one weapon that she said looked similar to the third pistol mentioned above. She said that the third pistol she had seen, like the photograph, had the writing "Jaguar" on the butt[34]. It was accepted this could **not** have been the weapon used in the shooting of McDonald (CCA [78]). Nor was it consistent with the description Gange's girlfriend M gave of a gun handled by the appellant and Gange two to three weeks before the shooting[35]. Pascoe did not identify any other photographs as resembling the firearms she earlier saw[36]. In chief, the only further description she gave of the other two guns was that they were approximately the same size and black[37].

41. At the time Pascoe witnessed the appellant handling these guns, there was no suggestion of any relationship between Castle and the appellant, or any difficulty in the relationship between McDonald and Castle[38]. There was also evidence to the effect that Pascoe's father had a history of involvement with police regarding firearms. There was no direct evidence

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30 Tr 2556. The highest the submission was put was "I'm not saying she identified the murder weapon, far from it. But what she was talking about was that she saw Mr Bucca, two to three weeks before the shooting, with a gun of the type that could have been used to kill Mr McDonald".

31 Tr 1829-1832 (Pascoe).

32 Tr 1877-1878 (Pascoe).

33 Under cross-examination she confirmed she was certain none of the guns were taken out of the boxes: Tr 1907. She was cross-examined on a reference in her statement to the third gun having been taken out of the box and shown to her father: Tr 1908.

34 Tr 1895 (Pascoe).

35 Although M agreed that Gange had handled guns before that time, she did not accept under cross-examination that the gun was Gange's and not the appellant's (CCA [83]). M gave evidence of having heard Gange discussing guns with Grace and that there were references to "Glocks" and "Berettas": Tr 1390-1392, 1394. M gave evidence of occasions where Gage had sold firearms in Melbourne for drugs: Tr 1401-1402 [check]. After Gange died M found a sawn-off part of a gun: Tr 1403-1404.

36 Tr 1893-1894 (Pascoe).

37 Tr 1897 (Pascoe).

38 Tr 1906-1907 (Pascoe).

about the nature of any discussion between the appellant and Pascoe's father regarding the firearm, and Pascoe's father, who had been to gaol many times, died before the trial[39].

42. In his address, the prosecutor said this regarding Pascoe's evidence[40]:

> So members of the jury, there is one other aspect of the evidence that suggests that Mr Bucca had **access to guns**. As I say, this one is a little bit longer away from the crime, it comes from Ms Pascoe. She described seeing him with a number, three weapons in particular, that were in a case. They were handguns, and you will remember that she looked through those photos P42 and P43.
>
> She picked out photo No. 9 in P42 as the Jaguar brand gun, because one of the guns she saw had a thing attached to the front of it which, not her exact words, which you might think was a silencer, a bit like she was pointing to P42.
>
> **I'm not suggesting that was gun used in commission of the crime, it shows Mr Bucca at least some months before the killing, had a number of guns in his possession.** Exactly when he had those guns is really up for grabs. I don't suggest it is within close proximity to the crime, but I do say it's in the later part of 2012.
>
> ... But she said she moved with her father, who is now deceased, moved with her father into a unit at Brooklyn Park, and we heard from Detective Georg that was 28 November 2012, and she thought she saw the gun a few weeks before that.
>
> So, even allowing for error on her part, it puts her seeing these weapons sometime in the last quarter of, if I can put it that neutral way, in the last quarter of 2012. **Relevant nonetheless I suggest.**

43. Although he earlier gave a general propensity warning (SU 53), in directing the jury in relation to this specific evidence, the trial judge said (SU 169):

> But the prosecution say here some time in November it would seem, potentially a bit earlier I suppose if she's out with her estimate, sighting three pistols. One of them she remembered and she was able to or said it looked very like another pistol that she was shown in the photograph which could not be a pistol that filed the projectiles but of course she was not able to say very much at all about the other two. **So you have a situation where one of the other two could of course be the Glock that was later seen by [M].** I mean, there's reason to believe that it was a Glock, the pistol that was seen by [M] ... closer to the time of the shooting on 3 February 2013. So you do have two bodies of evidence there of Bucca in possession of pistols, and they are coming from two different witnesses, and the prosecution would say at a relevant time, a time not too distant from the shooting in February, **and once again that's a matter for you to assess.**

The out of court statement Pascoe overheard the appellant make to her father

44. The evidence is described by the CCA at [13]-[17], and as the CCA identified, the net effect was that her evidence was not of an admission at all but, to the contrary, was evidence of a previous exculpatory statement (CCA [18]).

45. It appears the respondent accepts that assessment, having contended on the special leave application that whilst "technically there was a misdirection", because the statement had "no evidential value", it should be assumed the jury did not rely upon it[41]. In fact, however, because it was exculpatory, it constituted material in the trial which had to be negatived beyond reasonable doubt.

46. The context was that the appellant had visited the home of Bristow, a close friend of the deceased, but at a time when Bristow was out, and Pascoe and her father were home. Pascoe overheard the appellant who she described as crying and appearing distraught and devastated when he spoke (CCA [14]). The evidence, properly understood, was evidence of an unprompted exculpatory statement by the appellant. (There was also evidence that very

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39 Tr 1910-1911 (Pascoe).

40 Tr 2559.

41 Respondent's summary of argument filed 4 April 2016 [14]. No notice of contention has been filed.

shortly afterwards, in the presence of Bristow, and likely in the company of Grace, the appellant again made exculpatory remarks[42].)

47. As the CCA observed, the evidence of Pascoe was evidence of a previous exculpatory statement (CCA [18]). Counsel for the appellant in his address relied upon it[43]. The prosecutor had submitted that the jury could treat the evidence as amounting to an admission, by querying whether the witness had understood the purport of the cross-examination[44].

48. In summing up, the learned trial judge read out Pascoe's evidence in chief and re-examination (but not the cross-examination) and said:

> Ladies and gentlemen, **that's the state of the evidence on that matter**. Obviously [counsel for the appellant] 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.**[45]

49. In context, as the CCA held, because the judge omitted reference to the cross-examination in which Pascoe confirmed three times that Bucca had referred to the conduct of a third person, the judge was not right to suggest that what he had summarised reflected the state of the evidence, and as the CCA further held, the evidence should not have been left as a possible admission (CCA [20], [21]). Further, the judge's directions had the effect of undermining defence counsel's address.

Other evidence

50. Two other aspects of the prosecution evidence which, it is respectfully submitted, were either favourable to the appellant or were neutral, should be mentioned.

    50.1 DNA evidence taken from the left rear passenger seat release lever produced a mixed DNA profile that when compared to Gange's DNA profile was two times more likely to have obtained that mixed DNA profile if Gange was a contributor[46]. A further sample from an inner shelf of the interior of the boot produced a mixed DNA profile that was five times more likely to have obtained that profile if Gange was a contributor[47]. (Castle and her mother (the owner of the car) gave evidence that to their knowledge Gange had not been in the car at any time outside the time of the shooting[48].)

    50.2 Secondly, although part of the prosecution case, there was evidence of a statement by the appellant to a police officer that he had been with Castle for 95% of the 24 hour period preceding 3.30 pm on 3 February 2013 (CCA [2]). In context, however, the statement was effectively an assertion of Castle's innocence; as the appellant's

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42 Tr 1597, 1598, 1618 (Bristow).
43 Tr 2619-2623.
44 Tr 2560-2561.
45 The appellant's counsel complained, but the trial judge rejected the complaint (SU 183, 226).
46 Tr 2139 (Toop Michell).
47 Tr 2147 (Toop Michell).
48 Tr 2276, 2096. The trial judge emphasised to the jury the possibility that Castle's mother may simply not have known Gange's name or that she might not have been told by Castle that Gange had used the car. He said "I mean if Gange is the sort of character as he's been described, particularly by defence counsel in this case, you would not be particularly surprised, it's a matter for you, that the accused Castle might not be particularly eager to tell her mother that she is driving him around or associating with him in the Ford or elsewhere" (SU 120). He also directed the jury as to the possibility of transference (SU 120-121).

counsel pointed out in closing, it was a strange assertion to be making if the appellant was with Castle at the time of the shooting[49].

The evidence of Castle

51. The accused Castle gave evidence over three days. In her evidence she explained how Gange, not the appellant, had been with her in her mother's car when she met McDonald and how Gange had unexpectedly shot him. She said she did not know Gange had a gun with him before he used it to shoot McDonald. She said she had not gone to meet McDonald with any intention to harm him, nor had she thought Gange was going to harm him[50]. When McDonald was shot by Gange she could not believe what was happening[51].

PART VI SUCCINCT STATEMENT OF THE APPELLANT'S ARGUMENT

The application of the proviso

Principles

52. As confirmed and explained in *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 (at [27]-[29]), the Court's decision in *Weiss v The Queen* (2005) 224 CLR 300 requires that, in considering the common form proviso:

    52.1 an appellate court must undertake its task by reference to the whole of the record of the trial, including the fact that the jury returned a guilty verdict, but recognising that the significance of the verdict will require a consideration of whether the jury was properly directed;

    52.2 the proviso cannot be engaged unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the relevant charge. However, that is a necessary but not sufficient condition for the application of the proviso, as cases such as *AK v Western Australia* (2008) 232 CLR 438 show.

53. It has been suggested that *Weiss* may now need to be understood in light of what has since been observed in *Baini v The Queen* (2012) 246 CLR 469 at [28]-[32], albeit in the context of a differently worded provision, and in *Pollock v The Queen* (2010) 242 CLR 233 at [70]. In this connection, in *Lindsay v The Queen* (2015) 255 CLR 272, Nettle J said (at [86])[52]:

> That is to say, where there has been a miscarriage of justice the consequence of an error in the conduct of a criminal trial, a court of criminal appeal cannot fail to be satisfied that there has been a substantial miscarriage of justice unless it determines that, in the absence of the error, it would not have been open to the jury to entertain a reasonable doubt as to guilt. "Nothing short of satisfaction beyond reasonable doubt will do"[53]. A court of criminal appeal "can only be satisfied, on the record of the trial, that an error of the kind which occurred in this case did not amount to a 'substantial miscarriage of justice' if the ... court concludes from its review of the record that conviction was inevitable"[54]. And by "inevitable" what is meant is that, assuming the error had not been made, the result was bound not to have been any different for the jury if acting reasonably on the evidence properly before them and applying the correct onus and standard of proof. Unless it is so possible to

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49 Tr 2624.
50 Tr 2192-2193.
51 Tr 2336.
52 See also *Filippou v The Queen* (2015) 89 ALJR 776; [2015] HCA 29 at [78] (Gageler J).
53 *Baini* (2012) 246 CLR 469 at 481 [33].
54 *Baini* (2012) 246 CLR 469 at 481 [33].

> conclude that the accused has not been deprived "of a chance fairly open to him of being acquitted of murder"[55], there is no room for the proviso.

54. There may be scope for debate whether deprivation of a chance of acquittal fairly open (*Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J) involves the same inquiry as one of "inevitability"[56]. It may be debated whether these approaches are useful tests for resolving the necessary condition (as *Pollock* and *Baini* might arguably suggest), or merely a description of the operation of the statutory language (*Weiss* at [33]).

55. Further, although expressions such as "fundamentally flawed" and "root of the proceedings" have been used, it may be acknowledged that it is not possible comprehensively to describe the categories of cases where, despite the satisfaction of the necessary criterion, the Court will nevertheless be unpersuaded that a substantial miscarriage did not actually occur[57]. The Court must be astute to the potential interrelationship between the negative criterion and the seriousness of the departure from the requirements of a fair trial, because as Gummow and Hayne JJ observed in *Evans v The Queen* (2007) 235 CLR 521 at [42]:

> The graver the departure from the requirements of a fair trial, the harder it is for the appellate court to conclude that guilt is established beyond reasonable doubt. It is harder because the relevant premise for the debate about the proviso's application is that the processes designed to allow for a fair assessment of the issues have not been followed at trial.

(They went on to observe that in that case, the denial of the opportunity to call alibi evidence meant that despite the fact that the DNA evidence appeared "overwhelming", it was not possible to be persuaded that a substantial miscarriage had not occurred.)

56. The appellant submits that, however these subtleties regarding the proviso may be resolved:

    56.1 bearing in mind the "natural limitations"[58], a finding of guilt was not inevitable had the jury been directed that the statement Pascoe heard the appellant make was not an admission but in fact a statement of innocence that had to be negated beyond reasonable doubt; and

    56.2 here, if the appellant was entitled to proceed on the basis that the evidence elicited was exculpatory, and to conduct his case on that basis, the trial judge's directions undermined and distorted an important part of the defence case by inviting the jury to consider whether it in fact constituted evidence of an admission, which is evidence of the most prejudicial kind. That involved a substantial miscarriage.

The significance of admissions and confessions

57. It has been observed that "confession generally ranks high, or I should say, highest in the scale of evidence"[59]. For that reason among others, there is a need for care in the treatment of such evidence. The perceived reliability of admissions against evidence justifies an exception to the hearsay rule on the basis that, as Baron Parke said, "what a party himself admits to be true may reasonably be presumed to be so"[60]. Despite this, it is undesirable to

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55 *Pollock* (2010) 242 CLR 233 at 252 [70].

56 See, eg, *Wilde v The Queen* (1988) 164 CLR 365 at 371-372.

57 *Weiss* at [45], and see the subsequent discussion in *Libke v The Queen* (2007) 230 CLR 559 at [46] (Kirby and Callinan JJ) and *Evans v The Queen* (2007) 235 CLR 521 at [38]-[42] (Gummow and Hayne JJ).

58 See, eg, *Gassy v The Queen* (2008) 236 CLR 293 at [18], [60]-[63].

59 *Mortimer v Mortimer* (1820) 2 Hag Con 310 at 315 (Sir William Scott), referred to in *Cross & Tapper on Evidence* (2010, 12th ed) at 629 and Heydon's *Cross on Evidence* (2015, 10th Australian ed) at [33625].

60 *Slatterie v Pooley* (1840) 6 M & W 664 at 669 (Exch).

explain the traditional reasons why admissions against interest are commonly regarded as reliable[61].

58. Evidence that an accused has admitted his alleged criminal actions is likely, if accepted, to be regarded as decisive of guilt[62]. A confession alone may sustain a conviction[63], although in some cases a conviction based upon an uncorroborated confession will be regarded as unsafe[64]. The potentially decisive nature of the evidence, combined with the fact that contesting the fact of the admission will often entail other forensic constraints or disadvantages, is such that warnings may be required in the case of uncorroborated police evidence of a disputed confession which is the only (or substantially the only) basis for a finding of guilt beyond reasonable doubt[65].

59. Where evidence wrongly elicited or left to the jury is highly prejudicial or damning that has ordinarily been taken to preclude the application of the proviso even though there might be other evidence sufficient to ground the conviction: see, eg, *Maric v R* (1978) 52 ALJR 631[66]. See also *Domican v The Queen* (1992) 173 CLR 555 at 566-567[67]. In *R v LR* [2005] QCA 368 at [57] (Keane JA, McPherson JA and Douglas J agreeing), the Court cited with approval the observation[68] that in most cases the improper reception against an accused person of his admission of a fact that is of primary importance would render the application of the proviso highly unlikely.

The approach of the CCA in this case

The application of the necessary criterion to the issues in the case

60. Because Castle gave evidence that the shooter was Gange, the jury could not find the appellant guilty without rejecting her evidence in relation to the identity of the other person in the car beyond reasonable doubt. But that was a necessary but not sufficient pre-condition of the route to guilt. Even if Castle's evidence were set at nought, the jury had to be persuaded beyond reasonable doubt that the circumstantial evidence relied upon against the appellant negatived the reasonable possibility that Gange or any other person was nevertheless the culprit.

61. With respect, the CCA did not approach the case in this way[69]. In particular, the CCA based their application of the proviso primarily upon a conclusion (formed despite the natural

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61 *Mule v The Queen* (2005) 79 ALJR 1573; [2005] HCA 49 at [23] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

62 *Carr v The Queen* (1988) 165 CLR 314 at 336 (Deane J).

63 *McKay v The Queen* (1935) 54 CLR 1.

64 *Whitehorn v The Queen* (1983) 152 CLR 657 at 660.

65 *McKinney v The Queen* (1991) 171 CRL 468 at 476 (Mason CJ, Deane, Gaudron and McHugh JJ).

66 Referred to with apparent approval in *Patel v The Queen* (2010) 247 CLR 531 at [67].

67 In *Darkan v The Queen* (2006) 227 CLR 373 at [158], Kirby J, in dissent, observed with reference to *Domican* that "[v]erdicts that follow legal misdirection might not have been contaminated by the error. But the appellate court can never know. ... Other later rationalisations by judges, to support the verdict on other lines of reasoning, would not then truly sustain the verdicts actually returned. The appellants would have lost their right to a jury trial according to law".

68 *R v Hayes* [1998] QCA 415 at [5] (Thomas JA and Chesterman J).

69 For different reasons, neither did the trial judge. As advanced by Castle, the trial judge did not remind the jury of the salient elements of Castle's evidence in order that they might consider whether they could reject relevant aspects of it beyond reasonable doubt: cf. *R v Zilm* [2006] VSCA 72 at [60], [56]-60], [80]-[83], *El-Jalkh v R* [2009] NSWCCA 139 at [1], [134]-[153], [158]. Indeed, directed the jury that it seemed "from many points of view", that "the logical thing would be for you to first decide who was the shooter and then you will have a better starting point to decide what agreement, if any, there was into which Ms Castle had

limitations to which it was subject) that Castle's evidence was "so riddled with patent falsehoods that it can be given no weight at all" (CCA [127]). Apart from that analysis, the separate consideration of the proviso vis-à-vis the appellant was conclusory and, it is respectfully submitted, flawed (CCA [128]).

62. Further, because the case was circumstantial, the prosecution had to exclude all hypotheses consistent with innocence raised. Here, innocent hypotheses were raised directly by the defence evidence (of Castle) and by the prosecution witnesses (exculpatory statements by the appellant). The issue in such a case is not whether the evidence relied on by the prosecution is "overwhelming" but whether the exculpatory material and the innocent hypotheses have been negated beyond reasonable doubt.

63. Having accepted that the trial judge's approach to Pascoe's evidence of the appellant's out of court statement was erroneous, the CCA stated (CCA [22]):

> It is in the nature of evidence of an admission that it attracts the attention of a jury and may significantly influence their deliberations. In those circumstances it is not possible to apply the proviso unless the other evidence rendered [the appellant's] conviction inevitable **or so overwhelmed the evidence of the disputed admission that the jury would not have relied on it in any material way**. We return to that question below. (Emphasis added.)

64. Later, the CCA said (CCA [106]):

> In the ordinary course, the proviso could not be applied in a case in which the guilt or innocence of the appellant depended on an assessment of oral evidence. This is an exceptional case. Ms Castle's evidence is not just implausible and inconsistent with the objective evidence, it is on its face so obviously false that it carries no weight at all.

65. The Court embarked on an analysis of Castle's evidence, concluding that it was so riddled with patent falsehoods that it could be given no weight at all (CCA [107]-[122]). It concluded that the alleged admissions were a minor part of the evidence and were so overwhelmed by the circumstantial evidence against each of the appellants that it was unlikely that they had any influence on the jury's verdicts (CCA [108]).

66. Because of the potential impact that Pascoe's evidence, if treated as describing an admission, could have had, the CCA was wrong to find that in some way because of the strength of other evidence they would not have relied upon Pascoe's evidence. With respect, that involved unwarranted speculation. The jury could well have acted substantially on the basis of a confession cf. *Santos v R* (1987) 61 ALJR 668.

67. Moreover, in relation to the CCA's own assessment of the evidence, and the inevitability of a conviction, it is respectfully submitted that, although the CCA was correct to appreciate that Castle's evidence had to be rejected beyond reasonable doubt before any question of the proviso could apply, it erred in that:

    67.1 this was not a case where, on the evidence properly admitted, the CCA ought to have concluded that a finding as to the appellant's guilt was inevitable, and the CCA erred, inter alia, by focusing upon a destruction of Castle's credit as tending to prove the appellant's guilt; and

    67.2 further, it erred by treating the negative criterion identified in *Weiss* as in effect a sufficient criterion for the application of the proviso.

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entered. Ladies and gentlemen, obviously the Crown case is that it was Bucca and that an agreement was entered into with him ..." (SU 192).

The conclusion that a conviction was inevitable

68. For reasons to be advanced, the CCA's reasons at CCA [107]-[127], which focused on the credibility of Castle, failed to observe the natural limitations to which the CCA was subject and therefore did not establish the inevitability of the appellant's guilt, and although the case against the appellant was dealt with distinctly at CCA [128], the analysis was conclusory and inadequate.

68.1 First, the propositions made in CCA [107]-[108] relate to the credibility of Castle's evidence as to why she wanted to meet with McDonald. Apart from the fundamental point that the CCA did not have the benefit of seeing and hearing Castle's evidence, it is critical to appreciate that these criticisms did not directly impinge on the question of the identity of the shooter. The rejection of Castle's explanation as to her purposes only implicated the appellant, as distinct from Gange, if one had regard to *other* evidence, including, for example, M's evidence of the conversation earlier in the evening, to which the CCA made reference. But two points may immediately be made in that connection. First, on M's account, Gange was present while that discussion occurred, and secondly, it was far from clear the jury (or any trier of fact) would have accepted or should accept M's evidence. The same point may be made concerning CCA [110], in so far as Castle's evidence was rejected in part based upon the evidence of M.

68.2 Secondly, the analysis in CCA [109] involved speculation, which was particularly inappropriate given that, on the evidence, all the participants were liable to act unpredictably. Put another way, common experience and logic was not a sure guide to the inherent likelihood that the persons involved would act in any particular way. Likewise, the characterisation of an aspect of Castle's account at CCA [114] as "improbable", and the proposition at CCA [115] that "[t]here was no reason for Mr Bucca to part with his phone before he was ready to go" paid insufficient regard to the unusual behaviour of the people involved.

68.3 Thirdly, in so far as the CCA's analysis relied on the inferences to be drawn from the telecommunications, the Court's focus was upon the risk of electronic glitch or erroneous computer record (CCA [113]), whereas the appellant advanced other reasonable possibilities arising out of the use of multiple phones, the shared use of phones, and the possibility of others using Gange's phone. The proposition at CCA [117] that, on Castle's evidence, the appellant and Gange "suffered the misfortune of being separated from their phones, and in effect swapping phones" (CCA [117]) did not sufficiently address the hypothesis put by the appellant. To observe that there was no evidential foundation for that hypothesis paid insufficient regard to the question of onus, and to the fact that neither Grace nor his partner Tammy were called as witnesses.

68.4 Fourthly, the CCA's rejection of Castle's account to the effect that Gange clambered into the back seat to make room for McDonald, and that McDonald "happily got into her car even though he had seen [Gange]" (CCA [118]-[119]) involved reliance upon contentious inferences regarding Gange's physical condition and McDonald's character. But more fundamentally, it did not follow from the drawing of those inferences that it was the appellant who was concealed in the boot.

68.5 There were other criticisms of Castle's account and her credibility which did not logically bear on the question of identity, as distinct from her complicity in the shooting (CCA [124]).

69. When the Court then turned to the appellant, at CCA [128], it did so in a conclusory way, asserting that his guilt was proved beyond reasonable doubt by reference to six bullet points.

69.1 As to the evidence of telephone communications, it is accepted this was circumstantial evidence which together with other evidence might *entitle* a properly directed jury to reach a conclusion of guilt, but for reasons set out above at [insert], it did not require that conclusion.

69.2 As to the second matter ("motive"), the trial was in fact conducted on the basis that there was no relevant motive demonstrated, and that all that had been shown was animosity relating to a debt of $1,000, and a view, shared by the appellant and Gange, that McDonald had stolen some items from their home. In fact, the items belonged to Gange. In respect of the debt, as the appellant's counsel submitted to the jury, murder is a singularly ineffective means of debt recovery[70]. The absence of any motive was, if anything, a matter which militated against any conclusion that guilt was inevitable.

69.3 As to the third matter (M's evidence of a plan), that involved reliance upon a highly partisan and unsatisfactory witness who was a heavy user of ice and whose credibility was squarely challenged at trial. This is not a case where the Court of Criminal Appeal could treat the verdict as assisting in resolving the limitation of a review of the record[71]. One of the complaints made to the CCA was the learned trial judge's approach to the critical and contentious evidence of M. Despite having been an ice addict who had admitted involvement in dishonest conduct and police chases with Gange[72] (a large-scale drug dealer), the judge described M as "a fairly decent woman at the outset" (SU 48, cf. SU 167-168). Further, the judge described as a "mistake" (SU 163) her evidence that when Gange returned the kids were up getting ready for school, notwithstanding it was a Sunday. The judge also described the submission that she had lied as "a big allegation to make of a witness on oath" (SU 176).

69.4 As to the fourth matter (Castle's text messages), these were not conclusive on the issue of identity.

69.5 As to the fifth matter (phone records and M's alibi evidence), as has already been submitted, the former was obviously entitled to significant weight (but was not determinative), and the latter was highly contentious and the acceptance of that evidence having regard to the natural limitations of a review on the record was fraught.

69.6 As to the sixth matter (the difficulties Gange would have had in hiding in the boot), this was speculative, but also assumed the rejection of Castle's evidence that he was in the back seat.

70. The CCA did not expressly consider, and explain the basis for rejecting beyond reasonable doubt, evidence which supported the appellant's case, including:

70.1 the evidence of statements made by the appellant which were exculpatory (that is, the evidence of Pascoe and Bristow), or which could be viewed as exculpatory (the 95% statement made to Detective Georg);

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70 Tr 2633.

71 *McKinney v The Queen* (1991) 171 CLR 468 at 476 (Mason CJ, Deane, Gaudron and McHugh JJ).

72 Tr 1420-1421, 1438, 1451-1453 (M).

70.2 the other evidence (apart from Castle's testimony) which raised the possibility of Gange's involvement (his threatening text message, erratic and aggressive character, and drug use).

71. In a circumstantial case, the accused is entitled to have the jury consider (and reject before reaching a guilty verdict) all the circumstances that may be inconsistent or only partially consistent with guilt[73]. It is difficult to see how the CCA could properly apply the proviso without undertaking that process. The Court's analysis demonstrated at most that a finding of guilt beyond reasonable doubt may have been **open**, as distinct from relevantly **inevitable**.

72. A review on the record is always a large task, and the natural limitations are real. Not having heard and seen evidence carries with it a risk of misunderstanding. For example, here, the CCA apparently conflated or confused the identity of Grace's partner "Tammy", with the witness Tamara Pascoe (CCA [45]). But more fundamentally, there were two critical witnesses whose credit was squarely challenged, so that observing the witness's demeanour would have been critical.

72.1 In the case of Castle, whatever criticisms might have been made of her, she gave evidence on oath that the culprit was not the appellant. A conviction required a rejection beyond reasonable doubt not of her evidence on that particular point. It was not enough to find she downplayed her own involvement.

72.2 In the case of M, the appellant submitted she told outright falsehoods to seek to exonerate Gange. Disbelief of a witness does not necessarily prove the oppose of that which is asserted but a trier of fact is not precluded from drawing inferences from a false account, and where the onus is on the Crown to exclude innocent hypotheses[74], the potential consequences of disbelief of a Crown witness who purported to provide an alibi for an alternative suspect was significant.

73. Further, the CCA treated its conclusion of guilt as dispositive of the application of the proviso (CCA [131]). There was no consideration of whether the direction by the trial judge, which had the potential effect of converting evidence which had to be rejected beyond reasonable doubt into an admission of guilt, was so serious and fundamental that it should be characterised, without more, as a "substantial miscarriage of justice".

Firearms evidence

74. The CCA rejected the appellant's complaint regarding the judge's admission of the evidence of Pascoe, reasoning as follows.

74.1 Although the possession of three pistols by the appellant was "discreditable conduct" within the meaning of s 34P of the *Evidence Act* 1929 (SA), it was not sought to be led as propensity evidence (an impermissible use).

74.2 The only real question for the jury was whether they could exclude as a reasonably possible hypothesis that Gange was the shooter (CCA [86]). Possession of a pistol

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73 The importance of such an analysis was emphasised by Griffith CJ in *Peacock v The King* (1911) 13 CLR 619 at 628-630 by reference to the observations in *Starkie on Evidence* (1842, 3rd ed) which in turn referred to the writings of Sir Matthew Hale. See also *Pemble v The Queen* (1971) 124 CLR 107, *Barca v The Queen* (1975) 133 CLR 82, *Pollock v The Queen* (2010) 242 CLR 233.

74 See the discussion in *Henderson v Queensland* (2014) 89 ALJR 162; [2014] HCA 52 at [28] (Bell J).

or pistols by the appellant and/or Gange before the events of 12 February [*scil*, 2 February] was a "highly relevant matter" (CCA [87]).

74.3 The evidence of Pascoe had to be seen "in the context of" M's evidence that the appellant possessed a pistol shortly before the shooting (CCA [88]). Although the only pistol that Pascoe was able to describe was positively excluded as the murder weapon, the three pistols were produced at the same time, and that the appellant "had access to pistols" prior to the murder was "clearly relevant" and could be used by the jury in their assessment of the likelihood or unlikelihood of the appellant producing a pistol as asserted by M a few weeks before the shooting (CCA [95]).

74.4 The pistols were of the "same character" as those used in the commission of the crime and the fact that he had possession of such items was "logically probative of a fact in issue" and the probative value "substantially outweighed" the prejudicial nature of the evidence (CCA [96]).

74.5 The alleged production of the pistols had to be seen in the context that other evidence demonstrated that the main participants in the events were users of methamphetamine, some quite heavy users, and that evidence of drug use, including the use of multiple mobile phones, formed part of the background (CCA [91]).

75. By reference to three decisions of the Court, the CCA identified the relevant principle as being that evidence of possession of tools of crime other than those which were **or might have been used** to commit the crime charged is inadmissible if it proves no more than a disposition to commit crime (CCA [92]-[94]).

Relevance on the basis of actual use in the crime, relevance of "access"

76. In *Thompson and Wran v The Queen* (1968) 117 CLR 313, the particular tools of crime had been examined and it was clear on the evidence that they could not have been used in the commission of the charged acts. The Court therefore did not need to consider what was required before it could be concluded that weapons or tools "might have" been used to commit the crime charged.

77. In *Driscoll v The Queen* (1977) 137 CLR 517, where the issue was one of identity, Gibbs J (with whom Mason and Jacobs JJ agreed) said that the fact that the applicant had a number of weapons at his house which were not used in the crime was not probative of the fact that he was the person who had committed the murder with which he had charged (at 532). Again, there was no dispute about what those weapons were. However, he also considered inadmissible an account of an incident in which a generic description had been given that the accused had discharged a "black gun" in the course of a struggle involving people unconnected to the charged murder. Gibbs J said that evidence was irrelevant because it was not shown to have any connection with the death of the victim (at 535). On that aspect of the appeal Barwick CJ (at 520) and Murphy J (at 543) also agreed.

78. In *Festa v The Queen* (2001) 208 CLR 593, there was a difference between the members of the Court as to the admissibility of the tools of crime found at one accused's home, some of which could be demonstrated not to have been used in the charged bank robberies. The items were found amongst disguise instructions, wig stands and a can of hair. The judges who treated the evidence as admissible noted that the items found were relevant to a particular *modus operandi* and that the prejudicial effect of the evidence did not outweigh its probative value (Kirby J at [187]-[189], with whom Gleeson CJ agreed). Indeed, Callinan J went so far as to say that there was not a reasonable innocent explanation for

these items, and they were "exactly the sorts of items that would be required to commit the offences" with which the accused had been charged (at [259]). Even so, McHugh J ([86]-[92]), with whom Hayne J agreed (at [220]), took a different view. It is submitted that *Festa* was really a special case concerning when a propensity may be so significant and compelling that the evidence of the tools of crime is relevant and admissible even though not suggested to have been used in the charged acts.

79. Where the police find, and seize, the weapons, or if the prosecution tender the weapons, it will usually be possible to say whether they might have been used in the crime[75]. If so, subject to discretionary considerations, the evidence is admissible. But in cases where the evidence describing the item said to have been possessed or used is very general, such as the "black gun" evidence in *Driscoll*, the question arises whether the evidence is relevant[76]. It is submitted that where the evidence is so general that it does not permit of exclusion, and where the genus of item is relatively broad, such as a "pistol", the evidence is or should be treated as irrelevant. In effect, that was the approach taken on the facts by Priest JA (in dissent) in *Murrell v The Queen* [2014] VSCA 334. He said, at [122]:

> Of course, the guns had 'some resemblance' in the sense that there were two guns, and one of the two was a pistol. So far as the handgun is concerned, however, that is where the resemblance ended.

80. In the present case, the one gun Pascoe described in any detail was excluded. While completeness[77] or balance might justify evidence relating to that gun, that would only be if possession of the other two guns were relevant. But the description of the other two guns given by Pascoe was entirely generic. There is no particular reason to think they might have been used in the shooting of Gange, albeit because the description was so general, it is difficult to exclude the mere possibility. In the appellant's respectful submission, however, evidence of such a general character cannot rationally affect the probability of the fact in issue, and is so speculative as to be irrelevant.

81. Indeed, it is doubtful that it was actually relied upon by the prosecution as relevant on the basis that one or other of the two guns may have been used in the shooting. The prosecution address did not advance that proposition, although the trial judge did. With respect, the basis for relevance asserted by the CCA was not entirely clear. The reference to only one of the three pistols being positively excluded (CCA [95]) suggests that the Court may have proceeded on the basis that one of the other two guns may have been used (and if so, the appellant submits this was unjustified), but the matter was framed in terms of "access to pistols" as a relevant fact.

82. The CCA considered the evidence was not sought to be led as propensity evidence within the rubric of s 34P(2)(b) of the *Evidence Act* 1929 (SA) (CCA [90], [96]). In other words, it was not being relied upon to show that because the appellant had (illegal) firearms he was more likely to have committed the offence which involved the use of illegal firearms.

83. If "access" encompassed something different from the possibility that the appellant in fact possessed the weapon in fact used in the crime, it must have involved a reliance on a

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75 See, eg, *Joseph v The Queen* [2014] VSCA 343.

76 See also *R v Theos* (1996) 89 A Crim R 486, *R v Dunmall* [2008] VSCA 22.

77 See, eg, *Thompson and Wran* at 317 (Barwick CJ and Menzies J), *R v Taouk; R v Hanna* [1982] 2 NSWLR 974 at 978 (Street CJ, with whom Moffitt P and Maxwell J agreed), *Festa* at [189] (Kirby J).

propensity or tendency of some sort, such as a tendency to acquire (other) illegal firearms[78]. This also had a discreditable aspect to it.

Probative value and prejudicial effect

84. It is difficult to see how the Court concluded that the probative value of evidence admitted for a non-propensity purpose would substantially outweigh the prejudicial effect of the evidence: s 34P(2)(a). As to "probative value", whether or not credibility and reliability are to be presumed[79], the question was what a jury could rationally make of evidence which was not in fact evidence of identification but was simply evidence of the most general kind, some months prior to the shooting at a time before there was any apparent animus between the parties. The suggested line of relevance, namely, that it made it more likely the appellant produced a gun to Gange, rather than vice versa, some months later, was marginal, in that it depends on some suggested propensity to handle guns[80].

85. As against this, the "prejudicial effect" was patent[81]. The CCA appears to have reasoned that the **incremental** damage to the way in which the jury might perceive the appellant was limited because other evidence already revealed he was part of a group of users of drugs (CCA [91]). However, in a case where only one of the two possible culprits is on trial, and where there is no direct identification evidence, the fact that other evidence painted the appellant in a poor light highlights the risk of the jury attaching any or too much weight[82] to the fact the appellant possessed illegal weapons. Further, as the nebulous nature of the concept of "access" reveals, it would be very difficult for the jury to separate any permissible use from any impermissible use: s 34P(3).

PART VII LEGISLATIVE PROVISIONS [see annexure]

PART VIII ORDERS SOUGHT

86. That the appeal be allowed.

87. The orders and judgment of the Full Court of the Supreme Court of South Australia sitting as the Court of Criminal Appeal be set aside, and in lieu thereof, it be ordered that the appellant's appeal to that Court be allowed, the appellant's conviction quashed, and there be an order for a new trial.

88. Such further or other orders as this Honourable Court deems fit.

29 June 2016

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78 This sense of "access" was employed in *R v Debs* (2008) 191 A Crim R 231; [2008] VSCA 240 at [61]-[65] (Vincent, Neave and Weinberg JJA), but there the propensity was in respect of a specific make of weapon, and careful directions were given.

79 Cf. *IMM v The Queen* [2016] HCA 14.

80 On one view, the fact that the evidence showed the rival suspect had access to guns **detracted** from the probative value. Cf. *Jairam v The State* [2005] UKPC 21 at [12] (observation that in a society such as Trinidad where many people carry guns, fact of the accused's possession "would do little" to establish guilt).

81 Eg, *R v Rich (Ruling No 15)* [2009] VSC 34 at [43] (Lasry J) ("significant prejudice").

82 In *HML v The Queen* (2008) 235 CLR 334 at [12], Gleeson CJ explained that it is the risk that evidence of propensity will be taken by a jury to prove too much that the law seeks to guard against.

ANNEXURE – LEGISLATIVE PROVISIONS

Criminal Law Consolidation Act **1935 (SA)**

353—Determination of appeals in ordinary cases

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

Evidence Act **1929 (SA)**

34P—Evidence of discreditable conduct

(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.

(4) Subject to subsection (5), a party seeking to adduce evidence that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue under this section must give reasonable notice in writing to each other party in the proceedings in accordance with the rules of court.

(5) The court may, if it thinks fit, dispense with the requirement in subsection (4).

34Q—Use of evidence for other purposes

Evidence that under this Division is not admissible for 1 use must not be used in that way even if it is relevant and admissible for another use.

34R—Trial directions

(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.