HIGH COURT OF AUSTRALIA

GUMMOW, KIRBY, HAYNE, CRENNAN AND KIEFEL JJ

JEAN ERIC GASSY APPLICANT

AND

THE QUEEN RESPONDENT

Gassy v The Queen [2008] HCA 18
14 May 2008
A2/2006

ORDER

1. *Application for special leave to appeal granted.*

2. *Appeal treated as instituted, heard instanter and allowed.*

3. *Set aside the orders of the Full Court of the Supreme Court of South Australia made on 22 December 2005 and in their place order that:*

   (a) the appeal to that Court be allowed;

   (b) the appellant's conviction and sentence be quashed; and

   (c) there be a new trial.

On appeal from the Supreme Court of South Australia

Representation

J E Gassy appeared in person

C J Kourakis QC Solicitor-General for the State of South Australia with P R Brebner QC and E F Telfer for the respondent (instructed by Director of Public Prosecutions (South Australia))

CATCHWORDS

Gassy v The Queen

Criminal law – Practice and procedure – Directions to the jury – Deliberations continued, without success, for more than ten hours – The trial judge suggested that, if invited by the jury, she could suggest ways for the jury to "move forward" – Jury requested assistance – Further direction suggesting how the jury could approach its deliberations –The jury returned its guilty verdict about half an hour after the further direction – Balance of further direction – Whether the further direction constituted a miscarriage of justice.

Criminal law – Appeals – Application of the proviso – Whether no substantial miscarriage of justice actually occurred – Whether on the record of the trial an appellate court could conclude, beyond reasonable doubt, that the applicant was guilty – Relevance to the proviso of a separate consideration as to whether the trial was unfair – Relevance to the proviso of a consideration as to whether there has been such a departure from the essential requirements of the law that it goes to the root of the proceedings.

Criminal law – Practice and procedure – Legal representation of an accused – At the applicant's trial for murder, counsel sought to appear for the applicant in relation only to a voir dire hearing concerning the admissibility of certain evidence – Statement by the trial judge that counsel could not appear on the voir dire if counsel did not then represent the applicant for the entire trial – Counsel withdrew and applicant conducted voir dire himself – Error of law – Whether error constituted a miscarriage of justice.

Criminal Law Consolidation Act 1935 (SA), ss 288, 353.
Criminal Law (Legal Representation) Act 2001 (SA), s 11.

1 GUMMOW AND HAYNE JJ. Dr Margaret Tobin was Director of Mental Health for South Australia. On 14 October 2002, after lunch, Dr Tobin was returning to her office on the eighth floor of an Adelaide city building. She got into a lift with two men and another woman. One of the men, and the other woman, got out of the lift at the seventh floor. Dr Tobin got out of the lift on the eighth floor and, as she was walking away from the lift, she was shot four times. She died of her wounds soon after the shooting.

2 At the applicant's trial for murder in the Supreme Court of South Australia, the prosecution alleged that he had been the fourth passenger in the lift and that he had shot Dr Tobin. The prosecution case at the trial was that the applicant had been motivated by resentment and anger stemming from Dr Tobin's part in setting in train a sequence of events during the 1990s that had led to the applicant, then a legally qualified medical practitioner practising as a psychiatrist, being deregistered as a medical practitioner and disqualified from practising medicine and psychiatry.

3 Neither of the lift passengers who got out of the lift on the floor below the floor at which Dr Tobin got out recognised the other man in the lift. Neither positively identified the applicant from a selection of photographs shown to each. There was, therefore, no witness at his trial who said that it was the applicant who had been left alone in the lift with Dr Tobin, or that it was the applicant who had fired the fatal shots.

4 The applicant was convicted. He appealed to the Full Court of the Supreme Court of South Australia against his conviction. His appeal to that Court (Bleby and White JJ; Debelle J dissenting) was dismissed[1] and he applied for special leave to appeal to this Court. Two issues raised by the application for special leave were referred for consideration by a Full Court of this Court, to be argued as on an appeal; the balance of the application was dismissed[2].

The prosecution case at trial

5 In the Summary of Prosecution Case at Trial, filed in the Full Court of the Supreme Court, the prosecution's case at trial was described as having twelve elements. It is convenient to set out that description but adding paragraph numbers to identify the separate elements of the case.

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1 *R v Gassy (No 3)* (2005) 93 SASR 454.

2 *Gassy v The Queen* [2007] HCATrans 426.

"(1) Dr Gassy developed feelings of resentment and anger towards a number of other people who were involved in different ways in the sequence of events which led to his deregistration, that these feelings of resentment and anger endured into 2002 and it follows that he would have held similar feelings of resentment and anger towards Dr Tobin which would similarly have endured up until the time of her death.

(2) In April 2002 or about six months before the killing he booked into a motel in Brisbane under a false name and then the following day he was seen acting suspiciously at a convention centre where Dr Tobin was attending a conference and that the evidence suggests that he must have been carrying a pistol at the time.

(3) About five months later and over the weekend before the killing he travelled to Adelaide under a false name and then booked into a motel in Adelaide under a false name.

(4) A few hours before the killing he was seen in a lift in the Citi Centre Building.

(5) Traces of firearms residue were found in the hire car in which he drove to Adelaide. The elemental composition of the residue found was the same as the [S]peer brand ammunition which had been used to shoot Dr Tobin.

(6) He was an experienced pistol shooter.

(7) He owned pistols which were of the same brand of manufacture as was used to shoot Dr Tobin.

(8) He possessed ammunition of the same kind as that with which Dr Tobin was shot.

(9) He had accessed an internet site carrying information about firearms identification in the detection of crime some time before the killing.

(10) Dr Gassy's appearance at the time of the killing is not so inconsistent with the description of the killer, that it couldn't have been him.

(11) Both the killer and Dr Gassy had a beard at the time of the killing and that Dr Gassy had his beard shaved off shortly after the killing.

(12) Dr Gassy accessed internet sites carrying information about Dr Tobin's death on a number of occasions after the killing."

6 The prosecution sought to prove each of the second and the third elements (that the applicant was in Brisbane in April 2002 and in Adelaide over the weekend before the killing) by a mosaic of evidence. The applicant lived in Sydney. The evidence relied on as putting the applicant in Brisbane in April 2002 included evidence that he had rented a motorcar over the relevant period and that that car had travelled a distance sufficient to go to and from Brisbane. In addition, evidence was led of a man ordering a part for a Glock 26 pistol at a Brisbane gunshop and giving the name Gassy or Gass, the number of the applicant's firearms licence, and his sister's mobile telephone number as a contact number. A receipt for this transaction was later found at the applicant's flat and the salesman chose the applicant's photograph from the selection of photos he was shown by police as a photograph of the man who had come to the shop and ordered the gun part.

7 While this evidence, if accepted, placed the applicant in Brisbane on 27 April 2002, the prosecution's purpose in seeking to establish that fact was to show not just that the applicant had gone to Brisbane but that he was in Brisbane when Dr Tobin was conducting a workshop at the Brisbane Convention Centre as part of the annual conference of the Royal Australian College of Psychiatrists. In this regard the prosecution adduced evidence which, if accepted, was said to demonstrate that a man seen at the Brisbane Convention Centre on the day Dr Tobin was to conduct her workshop (27 April 2002) was the applicant, that that man was "behaving furtively", and that he "must have been carrying a pistol concealed under his clothing at the time". No witness positively identified the applicant as the man who was seen at the Brisbane Convention Centre. No witness saw any firearm being carried by the man in question. The conclusions urged by the prosecution, that the man observed by the witnesses was the applicant, and that he was armed, were open on the evidence led at trial but they were not conclusions that the evidence compelled.

8 The mosaic of evidence said to show that the applicant was in Adelaide over the weekend before Dr Tobin was killed had some similarities to the Brisbane evidence. Again the mosaic was made up of various pieces of evidence, not all of which it is necessary to refer to now. The prosecution alleged, however, that the evidence showed that on each occasion the applicant had hired a small car, had travelled under a false name, and had been seen at or near where Dr Tobin might reasonably be expected to be. The prosecution further alleged that on each occasion there was at least a suggestion that the applicant had a firearm with him. The prosecution submitted that "[t]he only conclusions that were reasonably and rationally open from this simple but significant combination of similarities" were that (a) the applicant "must have gone" to Brisbane and to Adelaide for the same reason; (b) because the applicant had gone to Brisbane "for a non-innocent purpose relating to Dr Tobin" he must have gone to Adelaide for the same reason; and (c) after he arrived in Adelaide, he succeeded in doing what he had failed to do in Brisbane. Again, these

conclusions were open on the evidence but they were not conclusions that the evidence compelled.

Issues argued in this Court

9 Two issues raised by the application for special leave to appeal to this Court were referred for argument as on appeal: an issue about representation of the applicant by counsel during argument on a voir dire, and an issue about a direction the trial judge (Vanstone J) gave to the jury, after the jury had indicated that they did not believe that they would be able to reach a verdict in the matter. In this Court, the applicant refused the offer of senior counsel to appear pro bono on his behalf and argued his own case.

Representation

10 Section 288 of the *Criminal Law Consolidation Act* 1935 (SA) provides that a person charged with an offence may be represented by counsel. At the trial, counsel sought to appear on behalf of the applicant in relation only to a voir dire hearing concerning the admissibility of certain evidence which the prosecution sought to adduce. The trial judge expressed the view that, if counsel were to be retained, it should be for the entire trial and further indicated that she may not give counsel leave to withdraw if counsel appeared on the voir dire argument. As a result, the applicant told the trial judge that he would conduct the voir dire himself.

11 In this Court, the respondent accepted that the trial judge erred in ruling that the applicant was not entitled to counsel for the purposes of only the voir dire hearing. The respondent further accepted that s 11 of the *Criminal Law (Legal Representation) Act* 2001 (SA) ("the Legal Representation Act") does not preclude an appeal on the grounds that counsel engaged by the applicant and available to appear for him was not heard[3]. These concessions departed from the

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3 Section 11 of the *Criminal Law (Legal Representation) Act* 2001 (SA) provided:

> "The fairness of a trial (or a prospective trial) cannot be challenged (and a trial or prospective trial cannot be stayed) on the ground of lack of legal representation unless—
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> (a) the Commission has, contrary to this Act, refused or failed to provide legal assistance for the defendant; or
>
> (b) the Commission has withdrawn legal assistance for the defendant on the ground that it has been unable to reach agreement with the Attorney-General on a case management plan."

stance taken by the respondent on the applicant's appeal against conviction to the Full Court of the Supreme Court. In that Court, the respondent had submitted that the trial judge had made no error and that, if there was error below, s 11 of the Legal Representation Act precluded subsequent complaint about the error.

12 All members of the Full Court of the Supreme Court held[4], however, that the trial judge had erred in ruling (in effect) that the applicant was not entitled to counsel for the purposes of only the voir dire hearing and that s 11 of the Legal Representation Act did not have the effect the respondent asserted it had. The Full Court below divided in opinion[5] about whether the error occasioned a substantial miscarriage of justice. The majority in that Court identified[6] the "only relevant question" presented by the wrongful refusal to allow legal representation of the applicant for the purposes of only the voir dire hearing as being "whether the trial [of the applicant] was unfair and a chance of acquittal was denied to [him] by the failure to allow the legal representation". Their Honours concluded[7] that there was "no miscarriage of justice" because it was "not possible to find that [the applicant] lost a chance fairly open to him of being acquitted by virtue of his failure to be represented by counsel at the relevant time". The third member of the Court, Debelle J, was of the opinion[8] that "the refusal to permit [the applicant] to be represented at [an] important stage of the voir dire hearing dealing with evidence [of identification] capable of having a critical bearing on the trial was so grave that the trial was fundamentally flawed".

13 The question identified by the majority as the only question relevant to whether there had been a substantial miscarriage of justice had two elements – whether the trial was unfair, and whether a chance of acquittal was denied to the applicant by the failure to allow him the legal representation he desired. The answer given by the majority to the question they had identified hinged about its second element (loss of chance of an acquittal) and no separate examination was made of the fairness of the trial. That is, the second element of the question appears to have been treated as including or governing the answer to the first element.

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4 (2005) 93 SASR 454 at 471 [23] per Debelle J, 501 [158] and 506 [183] per Bleby and White JJ.

5 (2005) 93 SASR 454 at 471 [23] per Debelle J, 511 [206] per Bleby and White JJ.

6 (2005) 93 SASR 454 at 507 [188].

7 (2005) 93 SASR 454 at 511 [206].

8 (2005) 93 SASR 454 at 472 [28].

14 Approaching the matter in that way is evidently awkward. It appears to treat an assessment of the fairness of the trial as governed by the safety or sufficiency of the verdict returned at the trial. On their face those are radically different considerations.

15 But the difficulty in the approach is more deep-seated than that. It is a difficulty that stems from treating judicial expositions of the application of common form statutory provisions to particular facts and circumstances[9] not only as capable of application even when divorced from the context in which they were made, but also as sufficient substitutes for the relevant statutory provisions, here s 353(1) and (2) of the *Criminal Law Consolidation Act*. Those sub-sections provided:

> "(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.
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> (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."

16 As this Court pointed out in *Weiss v The Queen*[10], judicial expressions describing the task presented by the proviso to the common form criminal appeal statute must not be taken as substitutes for the statutory language. It is the relevant language of the applicable criminal appeal provision that must be considered and applied.

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9 *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J; [1955] HCA 59: "the appellant may thereby have lost a chance which was fairly open to him of being acquitted".

10 (2005) 224 CLR 300 at 313 [33]; [2005] HCA 81.

17 The Court also pointed out in *Weiss*[11] that the use of the word "substantial" in the proviso to the common form appeal provision ("no *substantial* miscarriage of justice") was more than mere ornamentation. The expression "substantial miscarriage" was adopted to make plain that the common form appeal provision did away with the old Exchequer rule by which *any* departure from trial according to law, regardless of its nature or importance, entitled the accused to a new trial. But whether there has been a "substantial miscarriage" at any trial will depend, as was also pointed out in *Weiss*[12], upon the particular facts and circumstances and "[n]o single universally applicable description of what constitutes 'no *substantial* miscarriage of justice' can be given".

18 But as was said[13] in *Weiss*, one important negative proposition may be identified: "[i]t cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty". In undertaking that task the appellate court must make its own independent assessment of the evidence and make due allowance for the natural limitations that exist where an appellate court must proceed wholly or substantially on the written record. The negative proposition identified in *Weiss* states when the proviso may *not* be engaged but, as the reasons in *Weiss* make plain, it is not a statement that may be treated as a complete and sufficient paraphrase of the statute. To approach the application of the proviso as if its operation is sufficiently described by describing when it is *not* engaged would commit the very same error the decision in *Weiss* sought to identify.

19 The respondent making the concessions it did in this Court it follows that it was not disputed in this Court that at the trial of the applicant there was, within the meaning of s 353(1) of the *Criminal Law Consolidation Act*, either a wrong decision on a question of law or a miscarriage of justice. It follows that the Full Court of the Supreme Court, on the applicant's appeal against his conviction, was *bound* by s 353(1) of the *Criminal Law Consolidation Act* to allow the appeal (the Court *shall* allow the appeal) unless it considered that no substantial miscarriage of justice had actually occurred (in which event it *may* dismiss the appeal).

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11 (2005) 224 CLR 300 at 308 [18].

12 (2005) 224 CLR 300 at 317 [44].

13 (2005) 224 CLR 300 at 317 [44].

20 In the present case, the respondent submitted that the admitted failure of process at the applicant's trial (by which he was denied the legal representation he sought) did not lead to the wrongful admission of any evidence. Therefore, so the argument proceeded, the jury's verdict of guilty should stand. The respondent submitted that the jury's verdict should stand, not because the Full Court of the Supreme Court (or this Court) could or should be persuaded beyond reasonable doubt of the accused's guilt, but because it was not shown that the jury's decision might have been affected by the admitted want of proper process. In particular, the respondent submitted that even if counsel had appeared for the applicant at the voir dire, no different rulings about admissibility of evidence would have been made.

21 But the respondent's submission about the application of the proviso in connection with the acknowledged error about the applicant's legal representation need not be further examined. That is so because these reasons will show that the second issue argued in this Court by the applicant must be resolved in his favour.

The impugned direction

22 To explain the second of the issues which the applicant raised it is necessary to describe the course of the jury's deliberations. After a trial that had occupied many weeks, the jury were asked to retire to consider their verdict at 5.43 pm on 21 September 2004. The jury deliberated until about 8.30 pm on that day. On the following day the jury continued their deliberations between about 9.15 am and about 4.15 pm. During that time the jury sought and were given some further directions. At about 4.15 pm on that day the jury sent a note to the trial judge indicating that the foreman did not believe that they would be able to reach a verdict. The trial judge then gave the jury a *Black* direction[14] and the jury continued deliberating until about 7.45 pm when they indicated a wish to retire for the night.

23 On the following morning, the trial judge, of her own motion, had the jury brought into court at about 9.30 am and told them that she could suggest an approach to take in an attempt "to move [their] discussions along", but that she would not do that uninvited. At about 11.15 am the jury asked the trial judge to give to them her "suggestions as to how they might move forward". It is the instructions then given to the jury of which the applicant complains as constituting a miscarriage of justice.

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14 *Black v The Queen* (1993) 179 CLR 44; [1993] HCA 71.

24 It is necessary to set out the whole of those instructions and it is convenient to do so adding numbers to the paragraphs.

> "1. Sometimes, when one reaches a difficult position and cannot move on, of course, it is good to go back to the beginning. I am not suggesting that you would start the whole process again, of course. I am not suggesting days of work. But rather, why not take stock right back from the beginning and then, from that point, see if you can move forward in a different way. A good thing to do along the way is to sort out the common ground. And once you have got that common ground, ask yourselves how that helps you. What does it tell you?
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> 2. Now, you will remember in my summing up I spoke to you about a number of different topics which I suggested made up the prosecution case. That is only my way of labelling them. You might have done it differently but, since it is the way I used, I am going to go back to that. But I do suggest that you look at them in a new order, not the order which I gave you previously.
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> 3. Perhaps first look at the evidence that I discussed under the heading of 'Equipment'. That is a fairly straightforward topic, I would have thought, and I know you know what the evidence is under that topic. No doubt you have discussed it already. With that in mind, ask yourselves 'Are we at one about that? Can we call that evidence, and our view of that evidence, common ground?' And if you can, then move on.
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> 4. The next topic you could go to, perhaps, is what I called 'Motive'. That, of course, was the deregistration sequence, and it included that number of statements which various witnesses attributed to the accused about Dr Tobin. Well, once you have looked at that, again in overview, ask yourselves 'Are we at one about that?'
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> 5. Then I suggest you could go to 'Brisbane'. You will remember that I gave you quite extensive directions about Brisbane because, obviously, it is a very important part of the prosecution case and, in a sense, it is a difficult part of the case. So the question is, as I told you, 'Are you satisfied beyond reasonable doubt that the accused was the man at the Convention Centre, that he was there for a purpose related to Dr Tobin and that his motive was a sinister one?' And remember I gave you in my summing up – and I will not repeat it now unless you wish me to – a number of areas of evidence that bore on those questions. Now you need to make a decision about Brisbane, as it seems to me. It is a very significant part of the prosecution case.

6. If you have reached that conclusion about Brisbane, then I suggest, look again at the evidence I discussed under the topic of 'Opportunity'. Remember I said to you that it perhaps was not the best word to describe that topic. The topic is probably bigger than mere opportunity, but I mentioned a number of topics under that heading.

7. Then, ask yourselves the question 'Are we satisfied beyond reasonable doubt that the accused was in Adelaide when Dr Tobin was killed?' If that is a point of difficulty, then I suggest you go through all the evidence that bears on that question. If you cannot recall the detail of all that evidence, then, by all means, ask me a question about it and I will go through it systematically. But if that is where the difficulty is, you need to be able to call to mind all the evidence that bears on that topic and you need to be able to call to mind the arguments that the prosecutor and Dr Gassy put to you about that.

8. Then, finally, you could look at the scene. I spent little time on that because it seems to me that it does not help you all that much. But that is a question for you. You know from the scene the type of killing it was and, possibly, that the fourth man in the lift was the killer. But then there are competing arguments about that. So does that help you?

9. Of course, I do not know where your difficulty is but, if you get through that process, then you could ask yourselves 'Are we in agreement to this point?' And I say again, if you are not, then you need to isolate the exact point where your views diverge and you need to focus on that point and you need to go through that process: 'What is the evidence on this point? Do we have adequate recall of all that evidence? Do we need to hear some of it read? Do we need a summary of it? Do we need to know again what anyone said about it?' Make a list, I suggest, of that evidence and then make a list of the arguments on both sides relating to that point and then analyse those arguments.

10. Now, let me assume, for the purpose of this exercise, that you are in agreement to that point. The next question, of course, would be: 'Now we have decided the accused was in Adelaide when Dr Tobin was killed, what was his purpose for being here? Did he kill her?' So then you ask 'What evidence helps us on that point?' Here you will remember I gave you a direction about the use of the Brisbane evidence. It is a difficult direction in a way and I wonder whether it might help you if I gave it to you again.

11. FOREPERSON: Yes.

12. HER HONOUR: I will put it into context.

13. I had just gone through all the evidence I said you could take into account on this question of whether the accused was the man in Brisbane, and I will not go through that at the moment; I have really moved past that point for this purpose. Then I said to you: 'Now, having considered and evaluated all that evidence, if you are satisfied beyond reasonable doubt that it was the accused acting suspiciously at the Convention Centre on 27 April 2002, and that he was there for a purpose related to Dr Tobin, and that it was a sinister purpose, then you are entitled to use all that material and the conclusion when you come to consider the other evidence which bears on the identity of Dr Tobin's killer. You could use that conclusion in this way. First, you could use it as bearing on the identity of the man David Paes at the Shamrock and the Lindy Lodge Motels, and on the Renmark video. And, further, if you conclude that the accused and David Paes are one and the same, and that he used the vehicle with the registration number RSX-366 to drive to Adelaide, then you could use the Brisbane evidence to throw light on the reason for the accused's presence in Adelaide. Because once you know that Dr Tobin was killed in what might be called execution style in Adelaide in October, then any incident concerning her, or possibly concerning her, in the year or two leading up to that event, would potentially take on a new significance.

14. If it turns out that there was such an incident in Brisbane earlier in the year, and if you conclude that the accused was the person at the centre of that incident, and then, if you find a number of similarities between the circumstances of the Brisbane and Adelaide incidents, including that, on each occasion, if you find it so, this man with what you might find was a profound resentment towards Dr Tobin, a man who possessed the type of weaponry that killed her, had made a long, clandestine and otherwise unexplained journey to the place where Dr Tobin was at that time; a planned journey, using a hired car, notwithstanding the availability to him of his own and his parents' cars, a journey each time coinciding with his parents' absence from the home they shared, then your conclusion that the accused was that man in Brisbane could take on a decisive character in relation to your deliberations about the identity of Dr Tobin's killer in Adelaide.

15. It is for you to say whether such a line of reasoning is helpful in this case. The potential relevance of the Brisbane evidence is then

its tendency to prove the accused's presence in Adelaide and as to his purpose for being here. That is the proper use of the Brisbane evidence.'

16. And so you would have, on this question of the accused's purpose, the Brisbane evidence, the timing of the trip, the hiring of the car, the return of the car, the suggestion of the trip being clandestine, the false names used in the motels, the fact, if you find it so, of the dumping of rubbish at Renmark, potentially linking the two trips, the timing I think I said of the departure from Adelaide, if you find it so, and the very type of killing it was.

17. Well, again I say to you, if that is the point of difficulty, make a list of the evidence that bears on those matters, discuss what can be drawn from that evidence, recall the arguments as to each of those matters, decide whether you adequately recall all the evidence and all the arguments as to it and, if you do not, then please ask for help. And that, as I said, could be reading from some passages of a particular witness's evidence (and you could direct me to the very points that you wanted read out) or it might mean reading a part of my summing up again or asking me for a summary of something that you thought important. And I could compile something like that and let you have it.

18. So, that is the series of suggestions that I make to you. Perhaps I can ask you to retire again. Hopefully it has been of assistance."

25 As Debelle J rightly said in the present matter[15]:

"There will be occasions when it is appropriate for a trial judge to make suggestions as to what might be a convenient way for the jury to approach their deliberations[16]. However, any suggestion of that kind must maintain a proper balance between both the prosecution case and the defence case. The suggested approach must be expressed in neutral terms so that the jury is aware both that it is free to deliberate without any pressure to reach a verdict and that it may give the issues that free deliberation to which both the accused and the Crown are entitled[17]."

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15 (2005) 93 SASR 454 at 467 [14].

16 *Stanton v The Queen* (2003) 77 ALJR 1151 at 1157-1158 [38]; 198 ALR 41 at 50; [2003] HCA 29.

17 *Black v The Queen* (1993) 179 CLR 44 at 51.

26 The impugned instructions contained only one reference (in par 7) to the applicant's case. Otherwise the instructions restated the essential elements of the circumstantial case upon which the prosecution relied in proof of guilt. The "way forward" which the judge suggested was along a single path leading only to a verdict of guilty.

27 Immediately after the trial judge gave these instructions, trial counsel for the prosecution asked her Honour to supplement the impugned instructions by spelling out and "emphasis[ing] a little more" the fact that what the judge had said were "suggestions for [the jury's] assistance and they are free to accept or reject the suggestions as they see fit". The trial judge recalled the jury and said that:

> "[T]here was a concern that I have not made it clear enough that what I have said to you are merely suggestions for your consideration."

28 The jury returned a guilty verdict about half an hour later.

29 Did the impugned directions constitute a miscarriage of justice? In particular, were those impugned directions so "lacking in judicial balance and so partaking of partiality as to render this trial a miscarriage of justice"[18]? That depends upon the impression which the impugned directions, when taken as a whole, would have conveyed to the jury.

30 There are two telling indications of the impression conveyed by the impugned instructions. First there was the response of trial counsel for the prosecution. It is evident from that reaction that trial counsel for the prosecution considered that what had been said did not sufficiently inform the jury that the trial judge was offering no more than suggestions. While it is true that the trial judge then told the jury that what she had said were "merely suggestions for [their] consideration", the fact is that nowhere in the impugned instructions was anything said about the nature or content of any of the arguments the applicant had sought to advance at the trial. It is the lack of *any* but the most passing reference to competing arguments and evidence that constitutes the central deficiency in the impugned instructions. And the second telling indication of the impression conveyed by the impugned instructions is the speed with which the jury thereafter completed deliberations and returned the verdict of guilty. The jury were out for only about half an hour more.

31 Because the impugned instructions contained *no* substantial reference to the competing arguments and considerations relevant to the applicant's case the

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18 *Green v The Queen* (1971) 126 CLR 28 at 34; [1971] HCA 55.

impugned instructions "render[ed] this trial a miscarriage of justice"[19]. Section 353(1) of the *Criminal Law Consolidation Act* required that the appeal against conviction be allowed unless the proviso was engaged.

32 Both in the Full Court and in the written submissions that have been filed in this Court, attention focused upon whether giving the impugned instruction was an error of a kind which precluded engaging the proviso.

33 Identifying a priori some kinds of error as precluding application of the proviso presents difficulties of the same kind as are presented by using judicial statements about the application of the proviso as some substitute for the relevant statutory test. That is, it is neither possible nor useful to seek to apply the proviso according to a taxonomy of errors at trial which describes some as "fundamental" and others as not. And what was said in *Wilde v The Queen*[20] about "such a departure from the essential requirements of the law that it goes to the root of the proceedings" is not to be understood as prescribing or defining a class of cases to which the proviso cannot be applied. Rather, what was said in the passage quoted from *Wilde* is a description, in words other than the statutory words, of one kind of case in which an appellate court could *not* conclude that there had been no substantial miscarriage of justice. For the reasons given in *Weiss*, a negative proposition of this kind cannot be taken as a substitute for the statutory language.

34 Whether the error constituted by giving the impugned instructions is properly described as "fundamental" or as an error going "to the root of the proceedings" would depend upon the content that is given to the expressions used. The statutory question is whether the Full Court considers that "no substantial miscarriage of justice has actually occurred"[21]. In answering that question it is necessary to consider the nature of the error and in doing that it will be important to consider the possible effect that the error may have had on the outcome of the trial.

35 In assessing the possible effect of the giving of the impugned instructions, it is necessary to recall that the jury deliberated for more than a day and a half and initially reported to the trial judge that they did not consider that they could reach a verdict. The difficulties the jury experienced suggest a need for caution on the part of an appellate court before concluding that the charged offence was

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19 *Green* (1971) 126 CLR 28 at 34.

20 (1988) 164 CLR 365 at 373 per Brennan, Dawson and Toohey JJ; [1988] HCA 6.

21 *Criminal Law Consolidation Act* 1935 (SA), s 353(1).

proved beyond reasonable doubt. But ultimately it is the nature of the case that the prosecution sought to make against the applicant which shows that the proviso was not engaged here. An appellate court, making its own independent assessment of the evidence, and making due allowance for the natural limitations that exist in the case of an appellate court proceeding wholly or substantially on the record[22], could not conclude beyond reasonable doubt that the applicant was guilty of Dr Tobin's murder.

36 The case against the applicant depended, in critically important respects, upon what the jury made of each of two separate mosaics of evidence adduced by the prosecution in proof of what was alleged concerning the applicant's presence and actions in Brisbane and in Adelaide. Important elements of each of those mosaics were provided by evidence given by persons who did not know the applicant but identified him as the man whom they had seen.

37 The conclusions which the prosecution urged the jury to reach at the applicant's trial depended upon an assessment of the accuracy and reliability of this evidence. The conclusions for which the prosecution argued cannot safely be reached by an appellate court when it can refer only to the written record of the evidence. Further, in important respects the prosecution case depended upon drawing inferences from what was said to have happened in Brisbane, particularly at the Brisbane Convention Centre. As noted earlier in these reasons, the prosecution argued that the man seen at the Brisbane Convention Centre "*must have been* carrying a pistol concealed under his clothing" (emphasis added). The prosecution further argued that the applicant went to Brisbane "for a non-innocent purpose relating to Dr Tobin" and that he "*must have gone*" to Adelaide for the same reason (emphasis added). The evidence which was led at trial permitted the jury to draw these conclusions, but the evidence did not compel them. It follows that on the record of trial the Full Court could not have been persuaded beyond reasonable doubt of the applicant's guilt.

38 It also follows that the application for special leave to appeal should be granted, the appeal treated as instituted and heard instanter and allowed. The orders of the Full Court of the Supreme Court of South Australia made on 22 December 2005 should be set aside and in their place there should be orders that the appellant's appeal to that Court is allowed, his conviction and sentence are quashed, and there be a direction that a new trial be had.

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22 *Weiss v The Queen* (2005) 224 CLR 300 at 316 [41].

39 KIRBY J. Dr Jean Gassy ("the applicant") was tried in the Supreme Court of South Australia on an information that charged him with the murder of Dr Margaret Tobin. Dr Tobin was shot dead in Adelaide, South Australia on 14 October 2002. Nearly two years later the applicant's trial was conducted before Vanstone J and a jury. This trial followed fourteen pre-trial direction hearings, a *voir dire* and other applications, conducted before Vanstone J and other judges. The trial itself involved more than forty sitting days over an eleven week period.

The trial and appeal

40 During the trial, 163 witnesses were called. The evidence against the applicant was substantially circumstantial. The jury returned a verdict of guilty after more than a day and a half of deliberations, following circumstances that it will be necessary to describe. The trial judge convicted the applicant and sentenced him to life imprisonment.

41 The applicant sought leave to appeal against his conviction to the Full Court of the Supreme Court of South Australia, sitting as the Court of Criminal Appeal ("the Court of Criminal Appeal"). Leave was granted on eight grounds by Duggan J[23]. By further leave, additional grounds were later added[24]. By majority (Bleby and White JJ; Debelle J dissenting), the Court of Criminal Appeal ordered that the applicant's appeal against his conviction be dismissed on all grounds upon which leave had been granted[25].

42 In his minority opinion, Debelle J concluded that the applicant's appeal should be allowed on two grounds. The first concerned the ruling by the trial judge rejecting the applicant's request to have legal representation during the *voir dire* hearing only, without the necessity of the same or other legal representation at the trial[26]. The second ground concerned the "supplementary direction" given by the trial judge to the jury during their deliberations after the jury disclosed that they were experiencing difficulties in reaching a unanimous verdict[27]. On both

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23 *R v Gassy* [2005] SASC 68 at [221].

24 *R v Gassy (No 2)* [2005] SASC 491 at [4].

25 *R v Gassy (No 3)* (2005) 93 SASR 454.

26 (2005) 93 SASR 454 at 471-472 [22]-[29].

27 (2005) 93 SASR 454 at 462-471 [2]-[21].

grounds, Debelle J favoured allowing the appeal. By inference he would have ordered a retrial[28].

43 The application to this Court was confined by the special leave panel to the two grounds upon which Debelle J had dissented. The application was referred to the Court to be heard as an appeal. The applicant represented himself. Self-evidently, it is a large misfortune when a major enterprise, such as a prolonged trial that involves much circumstantial evidence, fails and has to be repeated. This is especially the case when one ground (representation in the *voir dire* proceeding) involves an interlocutory ruling made before the substantive hearing of the trial began. Such a ruling may subsequently assume limited importance in the context of the questions presented by the trial itself. It is particularly unfortunate when a complaint about a supplementary direction concerns an attempt by the trial judge, upon the jury's request, to assist the jury in overcoming an *impasse* in their deliberations.

44 The retrial of the applicant (which would follow the orders of this Court if the appeal were allowed) would significantly inconvenience the many witnesses who would have to be recalled. It would present considerable expense to the community. It would cause distress and anxiety for the family and friends of Dr Tobin otherwise entitled to closure. And it would risk new errors to which any human system of justice is subject.

45 On the other hand, the applicant has been found guilty of a heinous crime for which he protests his innocence and has been sentenced to the most severe punishment available within our legal system. His case turns significantly on the identification of him as the person who killed Dr Tobin. The risk of a miscarriage of justice in such a case is notorious and a proper matter for judicial vigilance[29]. The central obligation of a judge presiding in a criminal trial is to "ensure that the trial is conducted fairly and in accordance with law"[30]. This requires a very high standard of legal accuracy in the conduct of criminal trials, particularly where the offence is so grave and the punishment is so severe.

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28 His Honour did not indicate the detailed orders he would have made save for allowing the appeal: (2005) 93 SASR 454 at 472 [30].

29 cf *Domican v The Queen* (1992) 173 CLR 555 at 565; [1992] HCA 13; *Domican (No 3)* (1990) 46 A Crim R 428 at 445; Australian Law Reform Commission, *Criminal Investigation*, Report No 2 (Interim), (1975) at 52 [117].

30 *MacPherson v The Queen* (1981) 147 CLR 512 at 523; [1981] HCA 46.

An error of law and miscarriage of justice

46 For the reasons given by Gummow and Hayne JJ, I agree that there was an error of law in the interlocutory ruling concerning the applicant's entitlement to counsel for the purposes of the *voir dire* held before the trial[31]. Indeed, the conclusion that an error had arisen from the interpretation of s 11 of the *Criminal Law (Legal Representation) Act* 2001 (SA) was basically common ground in the Court of Criminal Appeal[32]. The contrary was not argued before this Court. Like the intermediate court, this Court is thus obliged to consider whether, notwithstanding an error arising in the trial which to some degree affected the conduct of the trial, the "proviso" should be applied to maintain the conviction, as envisaged by s 353 of the *Criminal Law Consolidation Act* 1935 (SA)[33].

47 I also agree with Gummow and Hayne JJ that there was a miscarriage of justice in the circumstances of the trial resulting from the supplementary jury direction given after the request for assistance from the jury.

48 Occasioning a "miscarriage of justice" by giving jury directions that appear to lack balance and impartiality would have been the furthest thing from the mind of the learned trial judge. There are many indications during the trial of her Honour's care to protect the rights of the applicant. He elected to appear without counsel although the provision of skilled legal representation was effectively his legal right[34]. By electing to represent himself, the applicant placed considerable additional burdens on the trial judge in a trial that was already large and complex.

49 The prosecutor at the trial endeavoured to preserve the legal correctness of the impugned directions by suggesting a limited redirection (which was given). However, legal representation of the applicant at the trial would almost certainly have substantially enlarged the application for further redirection and possibly its provision. The trial judge had to do her best without the assistance of defence counsel. She was properly concerned to do what could be done to assist the jury to reach a unanimous verdict if that was possible[35]. The applicant himself

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31 Reasons of Gummow and Hayne JJ at [19].

32 (2005) 93 SASR 454 at 471 [23] per Debelle J, 501 [158] and 506 [183] per Bleby and White JJ.

33 The text of s 353(1) and (2) is set out in the reasons of Gummow and Hayne JJ at [15].

34 *Dietrich v The Queen* (1992) 177 CLR 292; [1992] HCA 57. See (2005) 93 SASR 454 at 507 [188].

35 As provided by *Black v The Queen* (1993) 179 CLR 44 at 51-52; [1993] HCA 71.

accepts that the direction given by the trial judge in accordance with the decision of this Court in *Black v The Queen*[36] was "a model … direction". The attention of the judge in giving the further supplementary direction was doubtless, as she said, concentrated on creating a pathway through the evidence. As is usual in an accusatorial trial, as in this trial, that evidence was substantially the evidence for the prosecution.

50 Even so, I reach the same conclusion as Debelle J did in the Court of Criminal Appeal[37] and as Gummow and Hayne JJ do in this Court[38]. Taken as a whole and in context, the supplementary "way forward" provided by the trial judge to the jury led only to the unanimous guilty verdict that followed shortly thereafter.

51 The trial judge no doubt assumed that the jury would keep in mind the counter-balancing directions given earlier regarding the applicant's case, his protestations of innocence and his criticisms of the prosecution evidence. However, contemporaneous reminders of countervailing considerations were needed and should have been given as part of the supplementary direction. As they were not given, these judicial directions fell short of the legal standard of neutrality and impartiality required by the authority of this Court[39].

52 Consequently, the applicant has established on each of the residual complaints about his trial either a "wrong decision on any question of law" or "that on any ground there was a miscarriage of justice". According to the general provision of the *Criminal Law Consolidation Act* for the determination of criminal appeals in ordinary cases, it was therefore the *prima facie* duty of the Court of Criminal Appeal to allow the appeal against conviction[40].

53 When legislation was first enacted in the United Kingdom to create a Court of Criminal Appeal and to provide for appeals against criminal convictions[41], a practical qualification was introduced to permit specified convictions to be upheld despite the demonstration of an error of law or some miscarriage of justice. In the original English formulation, the qualification was

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36 (1993) 179 CLR 44.

37 (2005) 93 SASR 454 at 470-471 [21].

38 Reasons of Gummow and Hayne JJ at [29]-[30].

39 *Green v The Queen* (1971) 126 CLR 28 at 34; [1971] HCA 55.

40 s 353(1) ("shall allow").

41 *Criminal Appeal Act* 1907 (UK).

expressed in the language of a proviso to the primary provisions of the statute[42]. When this legislation was copied throughout the British Empire, some Australian jurisdictions followed the formulation of a proviso[43] and others did not[44]. In South Australia, Parliament followed the language of the 1907 English template except it substituted the word "but" for "provided that". In substance, the statutory formula is the same and no-one has suggested otherwise.

54 Since 1907, the legislation in the United Kingdom has been amended on several occasions[45]. Amendments have also been made to the equivalent legislation in Australia, but without enacting significant changes[46]. Through all these changes, the South Australian provision has remained substantially unaltered. After a century, one would expect that, given the imitation of the template throughout Australia and within other Commonwealth countries, all controversies about the proviso would have been settled. Yet, controversies over interpretation remain.

55 One difficulty involves the requirement in the preconditions to the operation of the section of a "wrong decision on any question of law". The issue is whether this necessitates a "decision" in the sense of a specific ruling that the trial judge has been asked to make on an issue that is contested, enlivening a "decision" of such a kind. Opinions to support that interpretation exist, mainly involving rulings on the admissibility of evidence[47]. In this Court, opinions to

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42 *Criminal Appeal Act* 1907 (UK), s 4(1): "Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred." See discussion, Spencer, "Quashing Convictions for Procedural Irregularities", (2007) *Criminal Law Review* 835 at 838.

43 eg *Criminal Appeal Act* 1912 (NSW), s 6(1); *Crimes Act* 1958 (Vic), s 568(1).

44 eg *Criminal Code* (Q), s 668E(1). See now *Criminal Appeals Act* 2004 (WA), s 30(4); *Criminal Code* (Q), s 668E(1A); and *Washer v Western Australia* (2007) 82 ALJR 33 at 54 [101]; 239 ALR 610 at 637; [2007] HCA 48.

45 *Criminal Appeal Act* 1968 (UK), s 2(1); *Criminal Appeal Act* 1995 (UK), s 2(1). Further reforms have been proposed. See Spencer, "Quashing Convictions for Procedural Irregularities", (2007) *Criminal Law Review* 835 at 835.

46 See eg *Criminal Appeals Act* 2004 (WA), s 30(4). See *Washer* (2007) 82 ALJR 33 at 55 [105]; 239 ALR 610 at 638.

47 See eg *Gardiner v The Queen* (2006) 162 A Crim R 233 at 260 [127]; *R v Tofilau (No 2)* (2006) 13 VR 28 at 35-36 [15]; *R v Huynh* (2006) 165 A Crim R 586 at 588 [4]-[5].

this effect have been expressed[48]. However, the issue has not been conclusively resolved.

56 The meaning of "decision" has attracted differing views, and the present case is an illustration of the need to avoid an unduly narrow meaning. The applicant did not himself object to the balance of the trial judge's supplementary direction to the jury and so could not request a ruling on an objection. He is not legally trained and was representing himself. The prosecutor suggested a need for only a limited redirection. In most important directions to a jury, a judge is bound to conform to many legal requirements. Normally, the judge will have planned at least the outline of the directions to be given. Thus it seems highly artificial to classify providing directions as not involving a "decision" by the judge. In my view, the supplementary direction given to the jury was a judicial "decision" on a "question of law" for the purposes of the statute. However, this point does not need to be decided in this case given the alternative provision of the statute postulating a "miscarriage of justice".

57 It follows that the applicant has, at the very least, made out a ground of a "wrong decision on any question of law" in respect of the unchallenged legal error on the explicit ruling about legal representation on the *voir dire*, and also "that on any ground there was a miscarriage of justice" in the lack of balance and neutrality in the supplementary jury direction. The preconditions to s 353(1) of the *Criminal Law Consolidation Act* therefore require that the Court of Criminal Appeal "shall" allow the appeal when the Court "thinks that the verdict of the jury should be set aside", relevantly, with a ground of a wrong decision on any question of law or a miscarriage of justice. The Court of Criminal Appeal would only then not set aside the verdict of the jury if it were to consider "that no *substantial* miscarriage of justice has *actually* occurred"[49].

The decision in *Weiss*

58 The history and purpose of statutory provisions of the kind found in the proviso were explained in this Court's reasons in *Weiss v The Queen*[50]. In English criminal procedure, an important purpose of the new procedure provided by the 1907 Act in the United Kingdom was to overcome the rigidities of the so-

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48 *Papakosmas v The Queen* (1999) 196 CLR 297 at 319 [72] per McHugh J; [1999] HCA 37; *Dhanhoa v The Queen* (2003) 217 CLR 1 at 12-13 [37]-[38], 15 [49] per McHugh and Gummow JJ; [2003] HCA 40.

49 s 353(1) (emphasis added).

50 (2005) 224 CLR 300; [2005] HCA 81.

called "Exchequer rule"[51]. The proviso to the new statutory procedure replacing Crown Cases Reserved aimed to substitute a more nuanced judicial decision, designed to produce outcomes in criminal appeals that reflected more than purely technical considerations. It drew attention to the *actuality* and *substance* of demonstrated defects in the trial.

59 Since 1907, courts of criminal appeal have thus been preoccupied by attempts to strike the correct balance, envisaged by the statute, between:

- The maintenance of a very high measure of legal accuracy, fairness and impartiality in the conduct of a criminal trial;
- The proper observance of procedural and other rules that protect the fair trial of the accused; and
- The adherence to the rule of law whilst preventing seemingly meritless, immaterial and insubstantial errors from controlling outcomes.

60 The important instruction for Australian decision-making on such issues contained in this Court's decision in *Weiss* was:

(1) The reminder to the appellate court to conform closely to the statutory language in which the duty of judges participating in criminal appeals is expressed by Parliament[52];

(2) The affirmation of the need to avoid substituting for the statutory language various "absolute rules or singular tests" that have developed in a century of judicial decision-making explaining and applying the statutory provisions[53];

(3) The instruction to avoid, in particular, judicial formulations that involved the legal fiction of speculating on or predicting what the original or a future hypothesised "jury of reasonable men, properly instructed and on

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51 *Weiss* (2005) 224 CLR 300 at 306-307 [13] referring to *Crease v Barrett* (1835) 1 Cr M & R 919 at 933 [149 ER 1353 at 1359].

52 *Weiss* (2005) 224 CLR 300 at 316 [41]-[42]. This is a recurring theme in recent decisions of this Court. Recent cases are collected in *Weiss* (2005) 224 CLR 300 at 312-313 [31] fn 49.

53 *Weiss* (2005) 224 CLR 300 at 316 [42].

such of the material as should properly be before them"[54] did, would do, or would have done without the legal error or miscarriage demonstrated; and

(4) The insistence upon the obligation of the appellate court to "make its own independent assessment of the evidence"[55] in deciding whether "no *substantial* miscarriage of justice has *actually* occurred". In this, the appellate court must make due allowance for the "natural limitations" that exist[56]: it is obliged to act on the record, but ordinarily does not hear or see witnesses, and typically decides appeals based substantially on selected extracts of the record emphasised by the parties or their representatives.

61 Neither of the two discrete issues reserved in *Weiss*[57] needs to be considered in this case. The first of these involves whether, in some cases, very serious breaches of the presuppositions of a criminal trial (occasionally called "fundamental") may undermine the intended operation of such a provision. Thus, provisions such as s 353 of the *Criminal Law Consolidation Act* are intended to apply to normal cases where a "verdict of the jury" has been reached in a process that answers to the description of a "trial". The second is whether, in the trial of indictable federal offences, considerations inherent or implied in s 80 of the Constitution may demand relief. Each of these considerations can be set aside or ignored in these proceedings.

62 The Court of Criminal Appeal proceeded in the way mandated by *Weiss*. The majority and minority judges in that Court nonetheless reached opposing conclusions. The indeterminate language of the statute ("*substantial* miscarriage" and "*actually* occurred") readily invites differing opinions. Because an appeal to this Court is not a fresh rehearing but a strict appeal[58], to succeed the applicant is required to demonstrate error on the part of the majority. The error propounded was that the conclusion reached by Debelle J was clearly right; that the applicant had demonstrated that there was a "wrong decision" on a question of law and also that a serious "miscarriage of justice" had occurred as a result of the trial judge's supplementary direction.

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54 *R v Storey* (1978) 140 CLR 364 at 376 per Barwick CJ; [1978] HCA 39. See *Weiss* (2005) 224 CLR 300 at 313 [34].

55 *Weiss* (2005) 224 CLR 300 at 316 [41].

56 *Weiss* (2005) 224 CLR 300 at 316 [41].

57 *Weiss* (2005) 224 CLR 300 at 317-318 [46].

58 *Eastman v The Queen* (2000) 203 CLR 1 at 13 [18], 24 [69], 35 [111], 60 [184], 97 [290]; [2000] HCA 29 applying *Mickelberg v The Queen* (1989) 167 CLR 259 at 267; [1989] HCA 35.

63 The application of the proviso starts from this point. As Gummow and Hayne JJ explained in *AK v Western Australia*[59]:

> "In every case it will be necessary to consider the application of the proviso … taking proper account of the ground or grounds of appeal that have been made out and which, but for the engagement of the proviso, would require the appellate court to allow the appeal."

In the present application it is thus necessary to consider the proviso in light of both of the established grounds: the lack of legal representation at the *voir dire* and the defects of the supplementary direction.

64 Alike with Gummow and Hayne JJ[60], I am prepared to put to one side the conceded "wrong decision on any question of law" in the ruling that the applicant could not have the benefit of legal representation only at the *voir dire*. There were strong arguments, in the circumstances of the trial, to support the conclusion reached by the majority in the Court of Criminal Appeal that this error, whilst attracting the application of s 353(1), did not justify allowing the appeal as "no substantial miscarriage of justice has actually occurred" as a consequence. Although the majority did not recite the actual language of the Act[61], the factual considerations for withholding relief on this ground are substantial. In the large canvas of the applicant's trial, I am not convinced that this error alone would justify relief. Nor, in terms of its consequences, would it attract an argument based on the suggested category of "fundamental" departures from the hypothesis of a fair trial.

65 This conclusion leaves the undoubtedly substantial argument advanced to this Court, challenging the majority's conclusion in the Court of Criminal Appeal[62] that the judge's supplementary direction to the jury did not qualify as a "substantial miscarriage of justice [that] has actually occurred".

66 In this Court the prosecution cannot, in my view, sustain the approach adopted by the majority in the Court of Criminal Appeal in terms of the reasons given. There, Bleby and White JJ rejected the submission that the supplementary direction was unbalanced[63]. Their Honours dismissed the applicant's submission

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59 (2008) 243 ALR 409 at 422 [55]; [2008] HCA 8.

60 Reasons of Gummow and Hayne JJ at [21].

61 (2005) 93 SASR 454 at 511 [206].

62 (2005) 93 SASR 454 at 530 [294]-[295].

63 (2005) 93 SASR 454 at 528-530 [286]-[295].

that the trial judge had failed to put "many important aspects of [his] case based on the evidence of what took place at the scene"[64]. They concluded that her Honour had only suggested "the questions that would then arise if [the jury] had got to" the point presented by her "way forward"[65]. They interpreted the supplementary direction as involving nothing more than a series of logical steps based on acceptance of the prosecution evidence. They regarded the prompt return of the jury after the supplementary direction as immaterial and explicable[66]. They rejected the contention that the supplementary direction suggested a conclusion that "should be reached"[67]. They insisted that the supplementary direction had to be read against the background of the earlier detailed charge given to the jury. They concluded[68]:

> "It was implicit in the suggestions made that all the evidence and arguments which the jury had heard were to be taken into account on each of the topics in question. In respect of some of the topics the judge actually reminded the jury of their duty to do that. The direction was not unbalanced but was neutral. It did not imply that any issue should be decided adversely to the [applicant]."

67 Upon this reasoning, it did not fall to the majority to consider the application of the closing words of s 353(1) of the *Criminal Law Consolidation Act*. However, with respect to their Honours, it is my view that their reasoning was erroneous. Whether or not a "wrong decision on any question of law" occurred (as I am inclined to think it did), in my view the supplementary direction certainly resulted in a "miscarriage of justice". It therefore invited consideration of the substantiality and actuality criteria expressed in the closing words of s 353(1).

68 Because an error has been shown in the reasoning of the majority, the applicant is *prima facie* entitled to have his appeal allowed by this Court. But it is then for this Court either to remit the proviso decision to the court below or to decide the matter for itself[69]. Because this Court has the advantage of the opinion

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64 (2005) 93 SASR 454 at 528-529 [287].

65 (2005) 93 SASR 454 at 529 [288].

66 (2005) 93 SASR 454 at 529-530 [291]-[293].

67 (2005) 93 SASR 454 at 530 [294].

68 (2005) 93 SASR 454 at 530 [295].

69 *Judiciary Act* 1903 (Cth), s 37; cf *Mahmood v Western Australia* (2008) 82 ALJR 372 at 379 [31]-[32]; 241 ALR 606 at 614; [2008] HCA 1.

of Debelle J on this point; has the full record of the trial; and has heard extensive argument on the issue, it is appropriate for us to decide the point. As the division in this Court demonstrates, there are strong arguments both ways.

"No substantial miscarriage … actually occurred"?

69 *A strong prosecution case*: In most crimes, perpetrators endeavour to remove or avoid identifiers that will result in their apprehension. Often the only way a guilty person can be brought to justice is by the painstaking presentation of circumstantial evidence. This was the course taken by the prosecution in the trial of the applicant. In deciding the proviso question I accept that the prosecution built a very strong case. That case included:

(1) Evidence supporting the conclusion that the applicant was in South Australia at the time that Dr Tobin was shot;

(2) Evidence of identification and of opportunity;

(3) Evidence showing that the applicant owned pistols of the same brand and manufacture as the pistol proved to have been used to shoot Dr Tobin, and ammunition of the particular kind used in that shooting;

(4) Evidence of earlier activities of the applicant in Brisbane that suggested that the applicant harboured a sinister animus towards Dr Tobin; and

(5) Evidence of motive for the applicant to effect the killing.

70 *Evidence of travel to Adelaide*: Dr Tobin was shot four times as she left an elevator on the eighth floor of the Citi Centre building in Adelaide. The Citi Centre building contained her professional office. When attended by a colleague immediately after the shooting and before she lost consciousness, Dr Tobin said that she had been shot. She did not identify the applicant as having been in the elevator or as her killer. Dr Tobin did not then regain consciousness before she died.

71 At the relevant time, the applicant resided with his parents in Oyster Bay, New South Wales. His parents were overseas and thus could not provide an alibi for the applicant.

72 There was no safe eye-witness identification of the applicant as the person who entered the same elevator as Dr Tobin and remained there after the other passengers had left. Thus the question presented by the prosecution is whether it had been proved to the requisite standard that the applicant had travelled from Sydney to Adelaide at the relevant time.

73 On 11 October 2002, three days before the killing, the applicant had certainly rented a motor vehicle at Hurstville in Sydney, using his credit card. The employee who processed the hiring transaction gave evidence accordingly. The applicant returned the rented vehicle on 17 October 2002 and paid the charges in cash. The speedometer showed that the vehicle had travelled 3,110 kilometres. The prosecution called evidence to prove that this distance was consistent with the return road journey from Sydney to Adelaide. The applicant agreed that he had hired the vehicle, but said that he had done so to practise surveillance. He claimed that following his earlier deregistration as a medical practitioner specialising in psychiatry, he was retraining for employment as a private investigator.

74 The prosecution called evidence to suggest that the applicant had stayed at the Shamrock Motel, Balranald and the Lindy Lodge Motel, Woodville Park at times consistent with the alleged travel to Adelaide and the shooting. Balranald is a town on the main highway between Sydney and Adelaide. The manager of the motel there gave evidence that, on the evening of 12 October 2002, a man had arrived at the motel seeking a room. This guest completed a registration form and the motel retained the carbon copy. The original form, allegedly retained by the applicant, was later found after investigations on 20 November 2002 in a white plastic bag at the Renmark rubbish dump. The name given was not that of the applicant. The nominated address of the guest was proved as fictitious.

75 The proprietor of the motel in Woodville Park, Adelaide, also gave evidence. He said that during the mid to late afternoon of 13 October 2002, a man had arrived at that motel without a prior reservation. He completed a registration form and paid cash in advance. The form bore the same false name and address as had been used at the motel at Balranald. It also contained a mobile telephone number which, apart from one digit, coincided with the number of a mobile telephone that had been in the name of the applicant since January 2000.

76 Evidence was presented by a secretary who had performed typing and secretarial work for the applicant at the St George Hospital in Sydney about ten years before the trial. She claimed familiarity with his handwriting and gave evidence that some of the handwriting on the copies of the two motel forms was that of the applicant. A handwriting expert also gave evidence that there were indications that the handwriting on both receipts was that of the applicant.

77 Each person who had dealt with the guest at the two motels selected the applicant's photograph from an array of photographs. Each also identified the applicant in court. However, another employee at the Balranald motel who saw the guest was unable to select a photograph of the applicant. Properly, the trial judge warned the jury about the dangers of such identification evidence.

78 On 15 October 2002, the day after Dr Tobin was killed, a video surveillance camera captured images of a person purchasing fuel and bottled water at a service station in Renmark, about three hours driving distance from Adelaide. This film revealed a person depositing a white object in a rubbish bin at the service station. The subsequent search of the Renmark rubbish dump with assistance from the service station proprietor led to the discovery of a white plastic bag. That bag contained the receipt and tax invoice from the Shamrock Motel and also a tax invoice for earlier accommodation at the Edmondstone Motel in Brisbane, the relevance of which will be explained shortly. There was additional, but weak, identification evidence from a hairdresser at the Arndale Shopping Centre. The applicant had allegedly received a beard trim or shave from this hairdresser on 14 October 2002, consequently altering his appearance somewhat after the killing.

79 Firearms discharge residue was found in the motor vehicle which the applicant had rented in Sydney and allegedly driven to Adelaide. This residue had the same elemental profile as the cartridges used in the killing of Dr Tobin. The applicant admitted that he had placed his shooting bag in the boot of the hired vehicle. He said that he had done this in case he had an opportunity to visit a shooting range. However, he said that he did not have such an opportunity. He did not deny his interest in, and possession of, registered firearms. Again, he suggested that he needed to practise the use of firearms for his new intended occupation.

80 None of Dr Tobin's colleagues in Adelaide identified the applicant and seemingly no surveillance camera images were obtained there. After the shooting, some bystanders were identified. They later selected the applicant from a photographic array as a man who had been seen in the vicinity of, and took the elevator in, the Citi Centre building shortly before the shooting. Properly, the trial judge also cautioned the jury about the dangers of reliance on this evidence.

81 *Evidence of opportunity*: The prosecution led evidence at the trial to suggest that the applicant was absent from his home in Sydney during the period of the alleged trip to Adelaide. This included specialist police evidence that addressed a suggested gap in the activity of the applicant's home computer during the relevant interval. Although there were fourteen computer operations during the period of the alleged absence, the evidence suggested that these were computer-initiated rather than operator-initiated.

82 Telephone usage records during the alleged interval of travel to Adelaide were also admitted in evidence in respect of the applicant's residence. The prosecution proved that a number of telephone calls to that address went unanswered. On the other hand, an eighteen second telephone call was made from the residence to an identified telephone number on the day of the shooting at 7.33 p.m. The applicant claimed that he had been away from home most of

that day practising surveillance. He claimed that that telephone call on 14 October 2002 was his mis-dialled attempt to telephone a cousin. However, the dialled telephone number and that of the cousin were quite distinct. The applicant deposed that he rarely answered telephone calls at his home as most of them were for his parents. This was supported by evidence from family members.

83 *Evidence of ownership of firearms*: The evidence showed that the applicant possessed a number of firearms at the time of the killing, including Glock pistols of the same make and calibre as that used to kill Dr Tobin. He also had two spare slides. The breech faces of both slides had been polished, thus destroying any chance of identifying inculpating impressions on an ammunition cartridge fired before the polishing. The applicant also possessed ammunition of the identical type used in the killing, stamped by the same bunters. However, the applicant pointed out that his boxes of ammunition cartridges were full, with no cartridges apparently missing, at least from that particular batch.

84 *Evidence of presence in Brisbane*: An important element in the prosecution case was evidence presented to show that a person (allegedly the applicant) had travelled to Brisbane before the alleged trip to Adelaide. The Brisbane trip coincided with a convention of the Royal Australian College of Psychiatrists during which Dr Tobin was advertised to present a talk. The prosecution suggested that the applicant had originally planned to kill Dr Tobin on this occasion.

85 Dr Tobin was co-convenor of a workshop at the Brisbane convention on 27 April 2002. The prosecution proved that, on 25 April 2002, the applicant had hired a vehicle in Kings Cross, Sydney. That vehicle was returned on 29 April having travelled 2,067 kilometres. The applicant admitted to hiring the vehicle but stated that he had only driven it to Lakes Entrance, Victoria. The prosecution case was that he had driven the vehicle to Brisbane and stayed at the Edmondstone Motel, South Brisbane, approximately two blocks from the convention centre where Dr Tobin was listed to speak. The guest at that motel, allegedly the applicant, filled out a motel registration form and paid in cash. The nominated vehicle licence plate number (GCO-183) closely resembled that of the vehicle shown to have been hired by the applicant (183-GEO). The original tax invoice for the Edmondstone Motel was one of those later found in the white plastic bag at the Renmark dump.

86 Staff at the Brisbane Convention Centre, including two security guards, gave evidence that their attention at one point had been attracted to a man thought to have been possibly carrying a weapon under his clothing. Two such staff selected the applicant's photograph from an array of police photographs as this suspect. There were some discrepancies in the attributed colour of the vehicle associated with the suspicious man. However, the registration number of the vehicle was noted down as "183-GEO" or "183-GEQ". This objective record

linking the applicant to suspicious conduct in Brisbane, possibly with a concealed weapon, and to a presence in Adelaide at the time of the killing was the centrepiece of the prosecution case. The applicant simply denied that he had driven to Brisbane or Adelaide.

87 The sales manager of a gun shop in Brisbane testified that on 27 April 2002 (the day of Dr Tobin's workshop) he served a man who placed an order for a bare slide for a Glock 26 pistol. Seven months later, the salesman selected a photograph of the applicant from an array of photographs. The applicant gave evidence to the effect that he had placed an order for such a slide, but by telephone from Sydney, and he had sent a postal order and a copy of his firearms licence by mail. A search of the records of the applicant's home telephone in Sydney contained no record of any telephone call to Brisbane made during the period of the alleged visit and thus at the time when the order was placed.

88 *Evidence of motive*: Motive alone does not demonstrate guilt of an offence, including murder[70]. The prosecution, however, proved a series of events in the mid-1990s as relevant to motive.

89 Whilst working in Sydney at that time as a medical practitioner, conduct of the applicant led to his deregistration both as a medical practitioner and registered psychiatrist. The evidence on this issue included testimony that showed an association at that time between the applicant and Dr Tobin, who was then in practice in Sydney. Although the applicant denied it, this testimony provided evidence suggesting a belief of the applicant that Dr Tobin was "out to get him" and had played a vital role in the procedures leading to his professional deregistration. Specifically, the prosecution relied on this evidence to demonstrate that the applicant had delusional beliefs and a profound resentment of Dr Tobin for her alleged role in the loss of his right to practise medicine. In his evidence, the applicant stated that his attitude towards Dr Tobin was benign.

90 *Conclusion: powerful evidence of guilt*: A consideration of the entirety of the case against the applicant leads to an opinion that the prosecution case was a strong one. Patiently, piece by piece, the prosecution had assembled what Gummow and Hayne JJ correctly call a "mosaic of evidence"[71]. Individually, the elements in the mosaic might be questioned or doubted. However, when placed together and in relation to each other, the resulting case was in my view powerful.

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70 See *De Gruchy v The Queen* (2002) 211 CLR 85 at 99 [53]-[54]; [2002] HCA 33.

71 Reasons of Gummow and Hayne JJ at [8].

91 I have elaborated the prosecution case at trial to explain the difficulty that decisions on the proviso sometimes present, in particular in respect of these proceedings. Having conducted my own independent examination of the record, as the appellate court with responsibility is bound to do, I am brought to the conclusion that the present case is a borderline one in respect of the proviso[72]. Definitely, it is at the cusp.

A new trial should be ordered

92 *Impact of the supplementary direction*: As has been explained, the invocation of the proviso, for me, is focused on the trial judge's supplementary direction to the jury[73]. It is therefore vital to note very closely the temporal context. The trial of the applicant was long and involved many witnesses. The trial judge commenced her charge to the jury at 2.36 p.m. on 21 September 2004. She concluded her directions at 5.50 p.m. that same day.

93 At 2.49 p.m. on 22 September 2004 the jury requested redirection on the meaning of the expression "beyond reasonable doubt". The trial judge made certain statements that are not in issue. The jury then resumed their deliberations. Later that day a note was sent to the judge by the foreman of the jury indicating that he did not believe that the jury would be able to reach a verdict. Properly, this information led the trial judge to give a *Black* direction, informing the jury that they should take additional time to deliberate and endeavour to reach a verdict.

94 At 11.17 a.m. on 23 September 2004 the jury sent the judge a further note. This note asked for the judge's suggestions as to how they might move forward. The impugned direction was then given and concluded at 11.41 a.m. The jury returned with their verdict of guilty at 12.15 p.m. Contrary to the opinion of the majority in the court below, the inference is inescapable that the supplementary direction had the almost immediate effect of removing whatever obstacles had, until then, existed to agreement upon a verdict.

95 *Essentiality of judicial balance*: The trial had reached a critical point and the judge was perfectly correct to attempt to save it. However, that endeavour could not be at the cost of manifest impartiality and neutrality and a fair presentation to the jury of the applicant's case.

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72 *Nudd v The Queen* (2006) 80 ALJR 614 at 637 [109]; 225 ALR 161 at 189; [2006] HCA 9; *Washer* (2007) 82 ALJR 33 at 54-55 [102]; 239 ALR 610 at 637-638.

73 The elements of the supplementary direction are set out in the reasons of Gummow and Hayne JJ at [24].

96 In *Pemble v The Queen*, this Court held that, whatever course counsel for the accused may take, the trial judge "must be astute to secure for the accused a fair trial according to law" and to that end must "put to the jury with adequate assistance *any* matters on which the jury, upon the evidence, *could find for the accused*"[74]. For the judge to give the jury a clear and firm reminder of the prosecution case, at that critical point, without equally reminding the jury of the applicant's main arguments, placed the applicant at a very great disadvantage. Not least was this important because, from the duration and announced difficulties of the jury's deliberations, it is apparent that the applicant had succeeded with some or all of them in at least some of his criticisms of the prosecution case. Such criticisms had arguably left the jury unconvinced or, at least, confused up to the time that the supplementary direction was given.

97 The reasons for manifest judicial impartiality and neutrality derive from the very nature of the judicial function and the purposes of a public criminal trial. They are reflected in fundamental principles of human rights as expressed in international law[75]. They have been repeatedly stated in the reasons of this and other courts[76]. They were well explained by Debelle J in the court below[77].

98 *Imperfections of appellate trial*: Sometimes it is possible for the appellate court, faced with an issue such as the present, to be satisfied that it can apply the proviso even though it has not seen or heard the witnesses[78]. Thus, there may exist compelling, objective evidence that points ineluctably to the prisoner's guilt of the offence charged. The appellate court may be able to conclude

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74 (1971) 124 CLR 107 at 117-118 per Barwick CJ; [1971] HCA 20 (emphasis added).

75 International Covenant on Civil and Political Rights, Art 14(1). For consideration of the position at international law, in particular, by the Human Rights Committee of the United Nations and the European Court of Human Rights, see *Antoun v The Queen* (2006) 80 ALJR 497 at 505-506 [37]-[40] per Kirby J; 224 ALR 51 at 60-62; [2006] HCA 2.

76 *Pemble* (1971) 124 CLR 107 at 117-118 per Barwick CJ; *Green* (1971) 126 CLR 28 at 34; *Courtney-Smith (No 2)* (1990) 48 A Crim R 49 at 55-56; *B v The Queen* (1992) 175 CLR 599 at 605 per Brennan J; [1992] HCA 68; *Antoun* (2006) 80 ALJR 497 at 506 [41] per Kirby J; 224 ALR 51 at 62.

77 (2005) 93 SASR 454 at 467 [14].

78 See eg *Festa v The Queen* (2001) 208 CLR 593 at 604 [28], 633 [127], 655 [205], 669 [255]; [2001] HCA 72; *Nudd* (2006) 80 ALJR 614 at 622 [20], 636-637 [107]-[109], 645 [162]; 225 ALR 161 at 169, 189, 200-201; and *Washer* (2007) 82 ALJR 33 at 55 [105]; 239 ALR 610 at 638.

affirmatively that no substantial miscarriage of justice has actually occurred as a result of demonstrated error or miscarriage. The present is not such a case.

99 Although she knew the applicant well, Dr Tobin did not identify him in her dying words. Perhaps her back was turned to him in the elevator. There was some evidence that he had altered his appearance. No DNA or other objective evidence, such as video film, incontestably linked the applicant to the crime. The composite circumstantial evidence is powerful (most specifically the evidence of the contents of the white bag retrieved from the Renmark dump). Yet that evidence still requires a number of judgments to be made to prove the links in the chain to produce the conclusion of guilt beyond reasonable doubt.

100 Apart from their role in resolving resulting contested issues of credibility raised during the trial, the jury in this trial had one significant advantage over an appellate court. The jury sat for weeks listening to and watching the prosecution construct its case. Absorbing the entirety of the evidence is a very important function of the decision-maker, especially in a very long trial[79]. Whilst this Court can certainly comprehend the gist and substance of the case, there are distinct risks in pretending that the appellate court can accurately and fairly comprehend the *entirety* of the evidence. Something obviously caused serious hesitation for the jury. This was only dispelled either by the content of the supplementary direction or by the jury concluding that the trial judge had made up her own mind and that they should follow her on the "way forward" that she provided. Effectively, that way forward led only to a guilty verdict. The applicant was entitled to have that "way forward" modified with a contemporaneous reminder of the essence of the applicant's case whose "way forward" urged acquittal. With respect, this was not provided.

101 It was not suggested that any of the evidence called at the trial would not be available on a retrial. The expense and inconvenience of such a retrial are significant indeed. However, so is the sentence of life imprisonment which the applicant is serving.

102 *The minority reasons*: It is true, as Crennan and Kiefel JJ point out in their reasons, that in the supplementary direction the trial judge was not "undertaking a summation of the case"[80]. However, whilst a complete recapitulation of all of the evidence was not required, it is the absence of *any* adequate or appropriate reference to the evidence favourable to the applicant that created the problem that I see in the balance of the supplementary direction.

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79 cf *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In liq)* (1999) 73 ALJR 306 at 330 [89]-[91]; 160 ALR 588 at 619-620; [1999] HCA 3; *Fox v Percy* (2003) 214 CLR 118 at 126 [23]; [2003] HCA 22.

80 Reasons of Crennan and Kiefel JJ at [133].

103 It is also true that the supplementary direction "cannot be considered in isolation"[81]. However, it is important to emphasise that the authority of *R v Glover*[82], which Crennan and Kiefel JJ cite, includes the insistence by King CJ that any points about the evidence should be made "fairly"[83]. It is the failure to make counterbalancing reference to evidence that favoured the applicant that deprived the supplementary direction of the fairness of which *Glover* speaks.

104 It is true, as well, that earlier directions were given by the trial judge that had emphasised the jury's primacy in fact-finding and the way they should undertake their task[84]. However, the time sequence of what then occurred is strongly against an inference that the "way forward" in the supplementary direction was no more than a helpful addition to the earlier directions. As events demonstrated, the supplement was quickly to prove decisive. At such a critical moment in the trial, the need for special care to uphold the judicial role of strict impartiality and neutrality was vitally important. The reference by the trial judge to the fact that her supplementary direction comprised "merely suggestions for your consideration"[85], whilst entirely proper, was not adequate to afford the balance that was essential at that point.

105 Crennan and Kiefel JJ conclude that there was no resulting miscarriage of justice so they do not need to consider the proviso[86]. I accept that whether or not there is a "miscarriage" is, in part, a question of impression addressed to the suggested error in the context of the entire trial. No doubt the resulting conclusion is influenced by values and perceptions of justice that are to some extent individual and can only be explained so far. It is enough for me to say that I place the highest value on the principle of manifest judicial impartiality and neutrality. Those qualities were of cardinal importance given the *impasse* that the applicant's trial had reached. In the end, this case stands for the principle that, particularly in circumstances of jury disagreement after a long trial, the trial judge must balance "ways forward" that lead to conviction with a reminder of those that lead to the opposite outcome.

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81 Reasons of Crennan and Kiefel JJ at [134].

82 (1987) 46 SASR 310.

83 *Glover* (1987) 46 SASR 310 at 314.

84 Reasons of Crennan and Kiefel JJ at [136].

85 Reasons of Crennan and Kiefel JJ at [130].

86 Reasons of Crennan and Kiefel JJ at [145].

106 *Conclusion: a retrial is necessary*: In Weiss[87], this Court said:

> "[T]here may be cases where it would be proper to allow the appeal and order a new trial, even though the appellate court was persuaded to the requisite degree of the appellant's guilt. Cases where there has been a significant denial of procedural fairness at trial may provide examples of cases of that kind."

There have been many cases where judges of this Court have made similar points[88]. *AK v Western Australia* involved a trial by judge alone but the principles are relevantly the same. There Gleeson CJ and Kiefel J, although in dissent as to the disposition, said[89]:

> "[S]ome errors are so fundamental or involve such a departure from the essential requirements of a fair trial that they exclude the operation of the proviso, irrespective of the strength of the prosecution case, or the appellate court's view as to the guilt of the accused."

107 To similar effect Gummow and Hayne JJ, in the majority, said[90]:

> "[P]ersuasion of the appellate court of the accused's guilt does not in every case conclude the enquiry about the proviso's application in appellate review of a jury trial".

And Heydon J, also in the majority, citing the foregoing passage from *Weiss*, observed that[91]:

> "there may be cases where it would be proper to allow an appeal and order a new trial without applying the proviso … includ[ing] cases 'where there has been a significant denial of procedural fairness at trial'".

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87 (2005) 224 CLR 300 at 317 [45]. See also *Libke v The Queen* (2007) 81 ALJR 1309 at 1321 [43]; 235 ALR 517 at 531; [2007] HCA 30.

88 See eg *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J; [1955] HCA 59; cf *Nudd* (2006) 80 ALJR 614 at 645 [162]; 225 ALR 161 at 200-201; *Libke* (2007) 81 ALJR 1309 at 1322 [53]; 235 ALR 517 at 533.

89 (2008) 243 ALR 409 at 415 [23].

90 (2008) 243 ALR 409 at 423 [59].

91 (2008) 243 ALR 409 at 433 [87].

108 Before the verdict was given in the present case, the trial judge did not adequately repair the injustice to the applicant of her late supplementary direction. The applicant thereby lost the chance of a trial that was conducted fairly, impartially and in accordance with law. This Court is not in a position to conclude that no substantial miscarriage of justice has actually occurred. It follows that the primary principle of the statute should be given effect. The appeal must be allowed and a new trial ordered.

Orders

109 I agree in the orders proposed by Gummow and Hayne JJ.

110 CRENNAN AND KIEFEL JJ. The applicant was convicted of the murder of Dr Margaret Tobin in Adelaide, which occurred on 14 October 2002. His application for special leave to appeal from the dismissal by the Court of Criminal Appeal of the Supreme Court of South Australia of his appeal against conviction is limited to two aspects of the proceedings leading to his conviction: his lack of legal representation on preliminary hearings, concerning the admissibility of certain evidence; and the further direction given by the trial judge, as to the evidence in the prosecution case, at a point when the jury were having difficulty in their deliberations. The applicant says that her Honour's further direction was unbalanced and unfair to him.

111 Dr Tobin was a psychiatrist and the Director of Mental Health for South Australia at the time of her death. She was shot as she left a lift in the building in which she worked. The killer was not identified by her whilst she remained conscious, nor by any other person at the scene. She died shortly thereafter. The applicant was a psychiatrist whose name had been removed from the Register of Medical Practitioners by the Medical Tribunal of New South Wales in 1997. Investigations into his fitness to practise had been initiated by Dr Tobin. The prosecution's case was that Dr Tobin's involvement gave rise to feelings of resentment and anger on the part of the applicant towards her.

112 The case against the applicant was based almost entirely on circumstantial evidence. The prosecution sought to prove that the applicant had travelled to Adelaide in a car he hired in Sydney on 11 October 2002 and that he had taken advantage of his parents' absence from their home, where he resided, to do so. There was evidence which might identify the applicant as the person who stayed at motels on the highway leading into Adelaide and in Adelaide in the days before the killing. The prosecution relied upon evidence concerning the pistol used to kill Dr Tobin. The applicant owned a pair of pistols of the same type and he was an experienced shooter. It was sought to prove that he had tampered with components of the pistols which are useful to identify used cartridges. Gunshot residue from ammunition of the type used in the killing was present in the hired vehicle, which the applicant returned on 17 October 2002. The prosecution adduced evidence that the applicant had hired a car some six months earlier, in April 2002. It was alleged that he drove to Brisbane, where Dr Tobin was attending a medical conference. Evidence was produced which might identify the applicant as the person seen at the conference venue and who stayed at a motel nearby, and identify the vehicle hired by him. The prosecution pointed to evidence which linked the Brisbane and Adelaide trips.

113 The applicant represented himself upon his trial and gave evidence. He denied any feeling of ill-will towards Dr Tobin. He denied being in Brisbane at the time of the conference and in Adelaide at the time of the murder. He said that he had had an interest in handguns for some time, was licensed to possess the pistols and used them for target shooting. He gave an explanation for having

spare slide components for the pistols and he denied tampering with the breech faces. He said that he had hired the vehicle in October 2002 to undertake surveillance exercises, as he was contemplating work as a private investigator. He admitted hiring the vehicle in April 2002 but said it was used for a trip to Lakes Entrance. He relied upon a call made from his parents' house, on the day of the shooting, as alibi evidence.

114 In his address to the jury the applicant attacked the prosecution case, so far as it concerned the firearms evidence and the documentary examination of his signature on motel records. He said that the majority of the witnesses who identified him were mistaken. He pointed out that his fingerprints were not found in the building, or near the lift, where the killing took place. The applicant relied upon the fact that Dr Tobin did not identify him as the killer following the shooting. He said that the spread of shot suggested a shooter who did not have his level of training or expertise.

The further direction

115 The trial before the jury took place over eleven weeks. The prosecutor and the applicant addressed the jury at length. The applicant's address took some five hours. Her Honour's summing-up followed. Her Honour dealt with what she described as the main "limbs" of the prosecution case under the headings: "opportunity", "Brisbane", "equipment", "motive" and "the scene". An understanding of what the further direction conveyed to the jury requires consideration of what was discussed by her Honour in summing up.

116 Her Honour commenced by referring to "opportunity", a description she would later concede to be unhelpful. At this point her Honour described this body of evidence as "what the Crown would say was a carefully planned, clandestine, quick and rather expensive trip to Adelaide for which there was, on the face of it, no reason, apart from to kill the victim." The applicant's parents were overseas at the time, her Honour reminded the jury. Her Honour discussed the evidence concerning the journey of the fictitious person who registered at the motels on the highway to Adelaide (the Shamrock Motel at Balranald) and in Adelaide (the Lindy Lodge Motel) and the evidence identifying that person as the applicant, including that as to his handwriting on the motel records. It was in connection with this evidence that her Honour reminded the jury of the evidence of receipts from the motel in Brisbane and from the Shamrock Motel having been found amongst rubbish from a service station located on the highway between Adelaide and Sydney. The prosecution had produced a video recording of a man, which it alleged was the applicant, taken at the service station on 15 October 2002. Her Honour alerted the jury to the significance of that evidence to the prosecution case. Her Honour reminded the jury of the evidence that, save for one call, no telephone calls were made or answered at the applicant's parents' house in the period before and after the killing. The

exception was a call recorded as having been made on 14 October 2002. Her Honour explained to the jury how the applicant sought to rely upon this evidence.

117 The jury were then informed by her Honour that she proposed to turn to the "events in Brisbane" in April 2002. She told them that the prosecution:

> "points to this evidence as throwing light on the identity of Margaret Tobin's killer [and] says that something of a pattern emerges when one examines what it alleges are the accused's activities in Brisbane in late April 2002, as against what it says are his activities in the days surrounding Dr Tobin's death."

118 Her Honour identified, as relevant to that pattern: the hiring of the vehicles; the extensive mileages recorded; the motels hired by a person with a false name; and the lack of telephone activity at the applicant's parents' house in the two periods. Her Honour then detailed the evidence from the time of the hiring of the vehicle in Sydney. She referred to the evidence of some seven witnesses who had been impressed by the strange behaviour of a man at the conference venue in Brisbane. Two security officers entered in the security log a description of the person and that he was reported as carrying "something which resembled a possible weapon underneath his clothing." The colour and registration number of the man's vehicle were recorded. The registration was the same as that of the vehicle hired by the applicant, save for the last letter, about which there was some uncertainty. Her Honour later discussed the identification of the applicant by the witnesses. Her Honour then turned to the evidence from the sales manager at a gun exchange in Brisbane who, on 27 April 2002, had served a man who placed an order for a slide for a Glock pistol of the kind owned by the applicant. The sales manager wrote out the order after having sighted a New South Wales licence. He identified the applicant as the customer from photographs.

119 At the conclusion of her discussion about the "Brisbane evidence" her Honour said that, if the jury concluded that it was the applicant at the conference venue in Brisbane on that day, it would be necessary to consider what his motive was for being there and whether it showed a morbid or sinister interest in Dr Tobin, which was part of the prosecution case. She said that she would further discuss the use to be made of this evidence.

120 Her Honour discussed the topics of "equipment" and "motive". In relation to the former she reminded the jury that the applicant had an interest in firearms. She said there was no suggestion about his possession and use of them, in the way he described, being other than lawful and that they should not draw any inference from the fact of gun ownership adverse to him. The question of motive involved evidence of the correspondence leading up to his deregistration and of his being diagnosed as having a mental illness, which, from the applicant's

perspective, was contentious. In any event the jury were directed not to reason that there was any correlation between it and the commission of the crime. The question was whether the applicant had feelings which gave rise to a wish to kill Dr Tobin and which engendered the resentment and malice necessary to carry this desire out. The prosecution pointed to the list, maintained by the applicant, of doctors who had been involved in his investigation, diagnosis and deregistration, as relevant to his continuing state of mind.

121 Although having commenced the summing-up with a reference to "the scene", her Honour mentioned only the bare facts of the shooting and the lack of eye witness identification of a fourth, unknown, person in the lift, before she concluded her discussion on what she referred to as "the limbs comprising the prosecution case". She then discussed a number of other matters, including evidence concerning fingerprints. She said that nothing of significance to the prosecution case was found, including in the area of the lift in the building in Adelaide. She reminded the jury of the applicant's reliance upon this gap in the prosecution case. Her Honour gave directions and discussed the identification evidence at some length.

122 Her Honour returned to the topic of the Brisbane evidence. She told the jury that it was obvious that "proof of this incident and the circumstances surrounding it is of some importance to the prosecution case" and "[d]epending on the view you take of it, it could amount to very significant evidence going to the issue of the identity of Dr Tobin's killer." Her Honour, however, drew the jury's attention to a threshold test which had to be met before they could make use of that evidence. She directed the jury that the test involved being satisfied beyond reasonable doubt of three matters: that it was the applicant who was in Brisbane; that his purpose in being there related to Dr Tobin; and that that purpose was opposed to her interests. Only then was the jury entitled to use the applicant's presence there in considering whether it was proved that he was Dr Tobin's killer, she directed.

123 After identifying the evidence relevant to the conclusion urged by the prosecution, that the applicant was the man in Brisbane, her Honour said that if the jury were satisfied of the three matters she had listed "then you are entitled to use all that material and the conclusion itself when you come to consider the other evidence which bears on the identity of Dr Tobin's killer." Her Honour went on:

> "You could use that conclusion in this way. First you could use it as bearing on the identity of the man David Pais at the Shamrock and Lindy Lodge Motels and on the identity of the man shown on the Renmark video. And further, if you conclude that the accused and David Pais are one and the same and that he used the vehicle with the registration number RSX-366 to drive to Adelaide, then you could use the Brisbane

evidence to throw light on the purpose for the accused's presence in Adelaide.

Because once you know that Dr Tobin was killed in what could be called 'execution style' in Adelaide in October, then any incident concerning her or possibly concerning her in the year or two leading up to that event would potentially take on new significance. If it turns out that there was such an incident in Brisbane earlier in the year, and if you conclude that the accused was the person at the centre of that incident; and then if you find a number of similarities between the circumstances of the Brisbane and Adelaide incidents, including that on each occasion – if you find it so – this man, with what you might find was a profound resentment towards Dr Tobin, a man who possessed the type of weaponry which killed her, had made a long, clandestine and otherwise unexplained journey to the place where Dr Tobin was at that time; a planned journey using a hired car notwithstanding the availability to him of his own and his parents' cars; a journey each time coinciding with his parents' absence from the home they shared, then your conclusion that the accused was the man in Brisbane could take on a decisive character in relation to your deliberations about the identity of Dr Tobin's killer. It is for you to say whether such a line of reasoning is helpful in this case. The potential relevance of the Brisbane evidence is, then, its tendency to prove the accused's presence in Adelaide and his purpose for being here. That is the proper use of the Brisbane evidence."

124 Her Honour then summarised the defence case. Her Honour reminded the jury of the applicant's evidence and the points made in his address. Included in the summary of issues dealt with by her Honour was the applicant's reliance upon the fact that Dr Tobin did not identify him as the killer, as indicating that he was not the killer.

125 The jury retired to consider their verdict on the evening of the summing-up. The following afternoon the trial judge received a note from the foreperson, to the effect that he did not believe that the jury would be able to reach a verdict. Her Honour gave the jury a direction to further consider the evidence in an attempt to reach agreement[92]. Some few hours later her Honour suggested that the jury might consider whether hearing any part of the summing-up might assist. She asked the jury to turn their minds to it and send a note if the reading of it, or some evidence, or the framing of a question, might assist.

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92 See *Black v The Queen* (1993) 179 CLR 44; [1993] HCA 71.

126 It would appear from the remarks made by her Honour the following morning that she had expected to hear from the jury. She said that she could suggest some kind of approach the jury might take ("to move your discussions along") but that she would not do so unless asked for that assistance. Later that morning her Honour received a note from the foreperson asking for "suggestions as to how they might move forward."

127 Her Honour commenced her response to that inquiry by suggesting that the jury commence afresh and identify where there was common ground. She suggested that the jury review the evidence under the topics she had previously identified, but in a different order. She reminded the jury of the topics "equipment" and "motive". She suggested that members of the jury ask, with respect to each of them, whether they could come to a common view. If they could, they should move on. In relation to the "Brisbane" evidence her Honour repeated what she had said in her summing-up – that it was a very important part of the prosecution case and that the jury needed to make a decision about it. Any conclusion, that the applicant was the man at the conference venue, and as to his purpose in relation to Dr Tobin, could only be reached if the jury were satisfied, beyond reasonable doubt, of the three matters she had identified. If the jury were so satisfied, her Honour suggested consideration, again, of the evidence she had discussed under the heading of "opportunity", a word which she now accepted was not a good description of the evidence intended to fall under it. Clearly enough, as the summing-up had indicated, it was intended to cover evidence relevant to the journey to Adelaide and the timing of it. Her Honour went on:

> "Then, ask yourselves the question 'Are we satisfied beyond reasonable doubt that the accused was in Adelaide when Dr Tobin was killed?' If that is a point of difficulty, then I suggest you go through all the evidence that bears on that question. If you cannot recall the detail of all that evidence, then, by all means, ask me a question about it and I will go through it systematically. But if that is where the difficulty is, you need to be able to call to mind all the evidence that bears on that topic and you need to be able to call to mind the arguments that the prosecutor and Dr Gassy put to you about that.
>
> Then, finally, you could look at the scene. I spent little time on that because it seems to me that it does not help you all that much. But that is a question for you. You know from the scene the type of killing it was and, possibly, that the fourth man in the lift was the killer. But then there are competing arguments about that. So does that help you?
>
> Of course, I do not know where your difficulty is but, if you get through that process, then you could ask yourselves 'Are we in agreement to this point?' And I say again, if you are not, then you need to isolate the exact point where your views diverge and you need to focus on that point

> and you need to go through that process: 'What is the evidence on this point? Do we have adequate recall of all that evidence? Do we need to hear some of it read? Do we need a summary of it? Do we need to know again what anyone said about it?' Make a list, I suggest, of that evidence and then make a list of the arguments on both sides relating to that point and then analyse those arguments.
>
> Now, let me assume, for the purpose of this exercise, that you are in agreement to that point. The next question, of course, would be: 'Now we have decided the accused was in Adelaide when Dr Tobin was killed, what was his purpose for being here? Did he kill her?' So then you ask 'What evidence helps us on that point?' Here you will remember I gave you a direction about the use of the Brisbane evidence. It is a difficult direction in a way and I wonder whether it might help you if I gave it to you again."

128 To this inquiry the foreperson answered "yes" and her Honour said that she would put it into context. Her Honour was referring to its place in the summing-up. She said:

> "I had just gone through all the evidence I said you could take into account on this question of whether the accused was the man in Brisbane, and I will not go through that at the moment; I have really moved past that point for this purpose. Then I said to you: 'Now, having considered and evaluated all that evidence, if you are satisfied beyond reasonable doubt that it was the accused acting suspiciously at the Convention Centre on 27 April 2002, and that he was there for a purpose related to Dr Tobin, and that it was a sinister purpose, then you are entitled to use all that material and the conclusion when you come to consider the other evidence which bears on the identity of Dr Tobin's killer. You could use that conclusion in this way. …'"

129 Her Honour then repeated that part of her summing-up which is set out earlier in these reasons[93]. Her Honour concluded by saying:

> "And so you would have, on this question of the accused's purpose, the Brisbane evidence, the timing of the trip, the hiring of the car, the return of the car, the suggestion of the trip being clandestine, the false names used in the motels, the fact, if you find it so, of the dumping of rubbish at Renmark, potentially linking the two trips, the timing I think I said of the departure from Adelaide, if you find it so, and the very type of killing it was.

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93 At [122]-[123].

> Well, again I say to you, if that is the point of difficulty, make a list of the evidence that bears on those matters, discuss what can be drawn from that evidence, recall the arguments as to each of those matters, decide whether you adequately recall all the evidence and all the arguments as to it and, if you do not, then please ask for help. And that, as I said, could be reading from some passages of a particular witness's evidence (and you could direct me to the very points that you wanted read out) or it might mean reading a part of my summing up again or asking me for a summary of something that you thought important. And I could compile something like that and let you have it.
>
> So, that is the series of suggestions that I make to you. Perhaps I can ask you to retire again. Hopefully it has been of assistance."

130 Following a discussion with the prosecutor the trial judge brought the jury back to mention a few matters briefly. She explained that the matters she had referred to "are merely suggestions for your consideration", in case she had not made that clear enough. She said that she should have added that motive would be relevant, if the jury found the applicant was in Adelaide at the time of the killing, and that she had failed to mention that gunshot residue in the vehicle might be significant.

131 The applicant submits that the direction was not balanced, presented only the prosecution case and strongly implied that he was in Adelaide on the day of the shooting. He points to the jury returning a verdict of guilty shortly after the direction, as indicating the force of what had been put to the jury by her Honour. He said that her further direction ignored his argument about factors concerning "the scene" of the homicide, which he said excluded him as the killer. He submitted that the significance of the Brisbane evidence was emphasised too strongly by her Honour and as potentially decisive on the question of guilt. He said that it was tantamount to an instruction to the jury to find him guilty if it were concluded that he was the man involved in the Brisbane incident. A number of the aspects of the evidence identified by her Honour implied this. In the applicant's submission her Honour did not point out the course the jury should take if they were not satisfied about aspects of the prosecution case which he had sought to show were problematic, such as deficiencies in the evidence about the firearms and about events at the scene of the killing, but had only moved in one direction, towards the prospect of conviction.

132 The majority in the Court of Criminal Appeal, Bleby and White JJ, considered that the applicant's complaints proceeded from a misconception about what the trial judge was undertaking – namely, the suggestion of a process by which the jury could consider the evidence, rather than that they should find a

particular fact[94]. Their Honours did not accept that the time taken by the jury to then reach their verdict supported the applicant's argument. In their view it might be that the process suggested by the trial judge resolved a difficulty in the path of their decision[95]. Debelle J, however, considered that her Honour departed from a discussion as to a process of decision-making to be undertaken by the jury[96]. In his Honour's view, the further direction became a recapitulation of the prosecution case, albeit qualified, at points, by reminders to the jury about their function as triers of the facts. His Honour considered that the prejudicial effect this had was heightened by the trial judge's failure to remind the jury of any aspect of the defence case, save – in a general way – that they should recall what the applicant had said about the evidence concerning his being in Adelaide[97].

133 In our view, there were two aspects to her Honour's further direction to the jury. The earlier part of the further direction comprised her Honour's suggestions that the jury go back over the evidence and make findings on particular subjects. They were clearly directed to the jury's method in decision-making. Later her Honour came to discuss a separate topic, concerning the relevance of a finding, that the applicant was the man in Brisbane. This was directed to the jury's understanding of the use of this finding, what it might convey and the evidence to which it might be connected. In neither case was her Honour undertaking a summation of the case. Moreover, the latter part of the direction was by way of an answer to an inquiry from the jury.

134 The terms of the further direction cannot be considered in isolation. A consideration of the influence, if any, which her Honour's discussion may have had upon the jury requires an understanding of what had already been conveyed, about the evidence and about the jury's role in making findings upon it. Questions about the need to balance what was then said about the prosecution case should also be seen in context. They may depend upon the extent to which her Honour was revisiting the evidence on particular topics. Whether a reminder was necessary with respect to the defence case needs to be considered in light of the inquiry from the jury that her Honour came to address.

135 It is important to bear in mind that no questions concerning the balance and fairness of the summing-up arise on the application. The summing-up was as fair as the evidence permitted. Her Honour's summation of the prosecution

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94 *R v Gassy (No 3)* (2005) 93 SASR 454 at 527 [274].

95 *R v Gassy (No 3)* (2005) 93 SASR 454 at 529 [292].

96 *R v Gassy (No 3)* (2005) 93 SASR 454 at 465 [4].

97 *R v Gassy (No 3)* (2005) 93 SASR 454 at 466 [6].

case took much longer than that of the defence, but this is hardly uncommon[98], especially in cases based almost entirely upon circumstantial evidence. Her Honour made forthright observations, in her summing-up, about the importance of some of the evidence to the prosecution case, but it has long been held that a judge is entitled to comment upon the evidence to the jury[99] and may do so in strong terms. In *R v Glover*[100] King CJ said that it is not a criticism of a summing-up that a judge refers to points which tend in the direction of conviction, if those points may fairly be made upon the evidence and if it is made clear to the jury that the facts are within their province[101].

136 In *RPS v The Queen*[102] Gaudron ACJ, Gummow, Kirby and Hayne JJ reiterated that the division of functions between judge and jury should never be obscured[103]. It is important that the jury be told that they are not bound by any view, expressed or to be implied, in what the trial judge says, and that they are not relieved from the responsibility of forming their own opinion[104]. At the outset of the summing-up her Honour directed the members of the jury, in clear and unequivocal terms, that their interpretation of the facts was all that mattered and that they should act upon their own view, regardless of anything that she said. In relation to inferences which the prosecution suggested might be drawn, her Honour advised the jury that she was making no suggestion herself as to whether that should be done. On retiring to consider their verdict, the members of the jury would have understood their role and that of the judge. It cannot be assumed that, when her Honour came to the further direction, the jury had forgotten what her Honour had conveyed about their task, because it had been continually reinforced throughout the summing-up. The jury were reminded of this, in the direction, by the suggestions made by her Honour about the process of fact-finding which should be undertaken. That it was the jury's task to work through the topics suggested and to make the critical decisions about whether the

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98 *Courtney-Smith (No 2)* (1990) 48 A Crim R 49 at 55.

99 *Broadhurst v The Queen* [1964] AC 441 at 464; *Courtney-Smith (No 2)* (1990) 48 A Crim R 49 at 55; *B v The Queen* (1992) 175 CLR 599 at 605; [1992] HCA 68; *RPS v The Queen* (2000) 199 CLR 620 at 637 [42]; [2000] HCA 3.

100 (1987) 46 SASR 310.

101 *R v Glover* (1987) 46 SASR 310 at 314.

102 (2000) 199 CLR 620.

103 *RPS v The Queen* (2000) 199 CLR 620 at 637 [42].

104 *Broadhurst v The Queen* [1964] AC 441 at 464.

applicant had been present in Brisbane and in Adelaide on the dates in question could hardly have been made clearer by the trial judge.

137 Her Honour reminded the jury of the topics "equipment", "motive", "Brisbane", "opportunity" and "scene", clearly referring back to her summing-up, but without going over that evidence again. Her Honour largely left it to the jury to request assistance in particular areas, once they had undertaken the process suggested and identified areas where jury members were not in agreement. Her Honour had said that the evidence about the weapons was fairly straight-forward and assumed the jury knew what it was. She did not restate the prosecution's evidence. In these circumstances it was not necessary, for balance, for her Honour to remind the jury of aspects of the defence case or of the applicant's arguments. Her Honour did not need to go over the applicant's contentions about evidence from the scene. Her Honour explained that she had not spent much time on that evidence in the summing-up because she did not consider it to be of much assistance. Her Honour was entitled to state that view, but she clearly left the determination of the evidence's importance as a matter for the jury. The point had been made on a number of occasions about Dr Tobin not identifying the applicant as the killer. Her Honour, in the further direction, did not elevate the prosecution case in this regard and it was not necessary to revisit the issue in the way for which the applicant contends.

138 Contrary to the contention of the applicant, her Honour did not suggest that the jury should find that he was in Adelaide. Before turning to the use to which the Brisbane evidence could be put, her Honour made a statement which assumed that the jury had reasoned that he was in Adelaide, but it is plain that this was premised upon the jury having come to such a conclusion upon that matter. It was at no point suggested that that was the only course open to the jury or one which should be taken. One aspect of the Brisbane evidence, which her Honour discussed, was that it might make it more likely that the applicant was the person in Adelaide at the time of the killing. This followed from the nature of the evidence, not from her Honour's direction as to its application.

139 The focus of the further direction came to be the use to which the Brisbane evidence could be put. The discussion about that use was also premised upon a finding, by the jury, that the applicant was the man in Brisbane. The trial judge did not revisit the evidence upon that point and no view on the subject, on the part of her Honour, can be seen to intrude into the jury's consideration of it. Her Honour offered to repeat to the jury what she had said about the areas of evidence which were relevant to that question, but received no such request. At this point in the further direction her Honour advised the jury that it was necessary to make a decision about Brisbane, for it was a "very significant" part of the prosecution case. Her Honour had described it as a "very important" but also "difficult" aspect of the case shortly before. Clearly enough her Honour was referring to the multiple uses to which the evidence could be put, which might

not be obvious to a jury dealing with a circumstantial evidence case, although she had attempted to outline them in her summing-up. It is unremarkable that her Honour described the potential effect of the evidence in the way that she did. It had been identified as important to the prosecution case from the outset and its significance had been reinforced throughout the trial. What her Honour said on the occasion of the further direction was no more than she had already said.

140 The reference to the effect of the evidence taking on a "decisive" character in relation to the identity of Dr Tobin's killer, about which the applicant complains, was contained in the passage from the summing-up which her Honour read. It would have been understood by the jury to repeat what had earlier been said, not to convey that the evidence was now given additional significance by the trial judge. So far as her Honour's statements revealed a view about the importance of the evidence, in the context of the prosecution case, it was one which was plainly objective. The further direction did not contain a suggestion, let alone an instruction, that they should find that the applicant was present in Brisbane.

141 The trial judge's direction was a reminder to the jury as to the use to which a finding, that the applicant was the man in Brisbane, could be put. That fact, if found, could weigh heavily in the reasoning of the jury, if the jury understood how it could be relevant. Her Honour's direction in the summing-up had identified its relevance, to explain features of the evidence which pointed to the applicant's presence in Adelaide and to the applicant's motive. That state of mind was, in turn, relevant to proof of a number of other facts. Importantly, the restatement of the earlier direction, in relation to the use of the evidence, was sought by the jury, making it unlikely to be seen as conveying an instruction by the judge that the evidence should be used in this way. The applicant's submissions imply that her Honour had in some way imposed the direction upon the jury, and that they would therefore infer that her Honour held a view about the appropriateness of reasoning to guilt by reference to this evidence. The transcript does not support the applicant's contentions. To the contrary, the transcript suggests that her Honour had come to a question about the evidence which she identified as of concern to the jury. This appears to be borne out by the alacrity with which the foreperson accepted her Honour's offer to repeat the direction about the Brisbane evidence, when no offer to do so with respect to other evidence had been taken up.

142 In dealing with the jury's request, her Honour repeated what she had earlier said on the subject in the summing-up. The additional remarks in conclusion were reiterations of a few points, but were unlikely to have altered the purport or effect of what was said by her Honour. The repetition of the summing-up could not now convey what it had not conveyed before, namely that her Honour thought that the jury should reason from this evidence to guilt. The content of the direction did not misstate or overstate the use to which the

evidence could be put, accepting that it can be difficult to explain multiple uses of evidence of this kind. The jury may have been assisted in their further deliberations once the relevance of the evidence was apparent to them. This may go some way towards explaining how the jury came to return their verdict expeditiously, but it is not wise to speculate about these matters.

143 It could not be said to be unfair to an accused that a jury be reminded of the use to which a finding may be put, when the jury request that assistance. Of course a trial judge must be conscious of the need to correct any perception, that she or he is putting forward only the prosecution case and that it is credible. But not every further direction requires a judge to remind the jury of points made by the defence. Much depends upon the subject-matter. The fact that it concerns an aspect of the prosecution case does not of itself mean that it requires balance.

144 The fact that the further direction concerned the use to which a finding of the presence of the applicant in Brisbane in April 2002 could be put and the context in which the request for that direction was made did not make it necessary for her Honour to reiterate points made by the applicant in defence. They were not connected to the relevance of the evidence in question. The direction could not be of importance to the jury unless the jury made the critical finding about the applicant's presence in Brisbane. In that regard her Honour had repeated warnings to the jury about the standard of proof of the prosecution case and had not offered any view upon the matter. The applicant had not produced any evidence, independent of the prosecution case, which might have weighed against it. He had argued that the jury should not accept the evidence which identified him and the vehicle as accurate. These matters were all dealt with in the summing-up. The jury would have understood the need to address these matters when considering the evidence and applying the standard of proof that they had been directed to apply. The jury were reminded of that requirement in the further direction.

145 The further direction also contained a reminder to the jury of the need to address questions of fact. It did not instruct them to make particular findings. The jury were not invited to reason to the applicant's presence in Brisbane in April 2002, by reference to the uses to which that evidence could be put. The jury were clearly and repeatedly told that the evidence could not be used unless they were satisfied, beyond reasonable doubt, that the applicant was in Brisbane at that time. The significance of that finding had been impressed upon the jury before. Its importance, in the questions it raised generally about the applicant's feelings towards Dr Tobin, would have been obvious to the jury. Its application to other facts from that point may not have been. That was the inquiry which the trial judge was addressing in the further direction. There was no unfairness in repeating the earlier direction. There was undoubtedly force in what was conveyed about the use to which the evidence could be put, but it followed from

the nature of the finding. There was no miscarriage of justice by reason of the further direction.

The applicant's representation on the voir dire

146 At the first directions hearing of the trial, counsel appearing for the applicant informed the trial judge that he was instructed to appear only on preliminary hearings concerning any further directions or the exclusion of evidence, but that the applicant intended to appear for himself at trial. This reflected the applicant's choice. So much appeared from an assurance that the applicant had signed some months before, that he did not wish to be legally represented at trial. Her Honour the trial judge did not, however, accept that counsel could appear only for these limited purposes. Her Honour expressed the firm view that it was to be expected that counsel retained for argument on a voir dire would continue to represent the accused at trial. At the third directions hearing the applicant appeared unrepresented and advised her Honour that he had elected to conduct the voir dire himself, given what her Honour had said.

147 In the period of eleven days during which the applicant was not represented during the voir dire, his counsel was present in court for eight of them and arrangements were made to allow the applicant to seek his advice from time to time during the course of the hearing. Transcripts were made available for the purpose. Counsel was unaccountably absent from court for the last few days of that period. He returned with instructions to appear for the applicant, including appearing at the trial. He continued to appear for the applicant for a time until he advised the Court that his instructions had been terminated. The applicant appeared for himself on the further preliminary applications until a jury was empanelled on 8 July 2004. Thereafter the applicant conducted his own defence.

148 The trial judge's preference, that the applicant be represented at trial, is understandable. It was not, however, correct to suggest that there was some legal or ethical impediment to the course proposed by the applicant. On the special leave application the respondent conceded that her Honour was in error in the stance she took. At an earlier point in the argument it was unclear whether it was also conceded that a ground of appeal was thereby made out under s 353(1) of the *Criminal Law Consolidation Act* 1935 (SA), leaving only the application of the proviso for consideration. In what followed it became apparent that the respondent was not conceding this to be the case. It was submitted that there was an anterior question necessary to be determined; one as to the effect, if any, of the lack of representation.

149 There was some debate, in the early directions hearings before her Honour, as to whether her Honour had ruled that the applicant's counsel was not entitled to appear on the preliminary hearings. That does not appear to have

occurred, but her Honour's view was strongly stated and no doubt contributed to the election made by the applicant. This does not suggest as appropriate for consideration the ground that the conviction should be set aside on the basis of a wrong decision on a question of law. In the circumstances the relevant ground of appeal is whether there has been a miscarriage of justice.

150 *Dietrich v The Queen*[105] does not hold that an accused's lack of representation itself amounts to a miscarriage of justice[106]. Mason CJ and McHugh J acknowledged that a lack of representation may mean that an accused is unable to receive a fair trial, but that such a finding depended upon the circumstances of the particular case[107]. The notion of a fair trial requires the observance of conditions essential to a satisfactory trial[108]. It involves consideration of the process undertaken[109]. In the present case the focus is upon what occurred during that part of the pre-trial procedures when the applicant was unrepresented.

151 The majority in the Court of Criminal Appeal considered it to be significant that the trial judge did not rule upon the exclusion of any contentious evidence in this period. The exclusion of identification evidence was argued in this period, by reference to video recordings and statements. The admissibility of other evidence – such as the list of doctors kept by the applicant, the deregistration proceedings and his firearm training and pistol club attendance[110] – which was also then argued, did not assume importance in submissions on the application. One witness as to identification was called on the voir dire and cross-examined by the applicant. That evidence was excluded by the trial judge[111]. Rulings upon the exclusion of other evidence were postponed until well after the applicant's counsel was again participating fully in the process. The

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105 (1992) 177 CLR 292; [1992] HCA 77.

106 *Dietrich v The Queen* (1992) 177 CLR 292 at 311 per Mason CJ and McHugh J, 325 per Brennan J, 343 per Dawson J.

107 *Dietrich v The Queen* (1992) 177 CLR 292 at 311.

108 *Nudd v The Queen* (2006) 80 ALJR 614 at 617 [5] per Gleeson CJ; 225 ALR 161 at 162; [2006] HCA 9.

109 *Nudd v The Queen* (2006) 80 ALJR 614 at 618 [7] per Gleeson CJ; 225 ALR 161 at 164.

110 *R v Gassy (No 3)* (2005) 93 SASR 454 at 508 [194].

111 *R v Gassy (No 3)* (2005) 93 SASR 454 at 508 [193].

point made by Bleby and White JJ in the Court of Criminal Appeal was that the rejection of evidence was not foreclosed in the period in question. Not only had the applicant's counsel been present for the majority of the arguments, he was in a position to put further submissions and to seek to call evidence, if necessary, when he was again instructed in the matter[112].

152 The applicant's argument on this ground relied principally upon the later admission of the evidence of some of the witnesses as to identification and in particular the evidence of the witness Ms Durrington. She worked in the building where Dr Tobin was shot and had identified the applicant, from photographs, as a person who had been present in the building some hours before the shooting. The applicant's argument reflects the views of Debelle J in the Court of Criminal Appeal. His Honour observed that the evidence of this witness was so unsatisfactory as to require the trial judge to give a strong warning about its use and mentioned that, had the evidence of identification witnesses been excluded, the prosecution case would have been weakened[113]. His Honour concluded that the denial of legal representation meant that the trial was fundamentally flawed[114].

153 It may be accepted that the prosecution case may not have been so strong if some of the identification evidence had been excluded. But there is nothing to suggest that the evidence was other than legally admissible. On the application to add grounds of appeal, Debelle J rejected the applicant's proposed ground – concerning the admissibility of the evidence of seven of the witnesses as to identification – on the basis that it raised questions going only to the weight. In his Honour's view, it was not reasonably arguable that that evidence should have been excluded[115].

154 The applicant declined the opportunity to examine Ms Durrington on the voir dire. His contention was that her evidence was weak and tainted by a conversation with a police officer. Evidence is not, however, inadmissible on account only of its weakness[116]. It cannot be concluded that the evidence should have been excluded in the exercise of the trial judge's discretion. It is not

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112 *R v Gassy (No 3)* (2005) 93 SASR 454 at 509 [196]-[197].

113 *R v Gassy (No 3)* (2005) 93 SASR 454 at 471 [25].

114 *R v Gassy (No 3)* (2005) 93 SASR 454 at 472 [28].

115 *R v Gassy (No 2)* [2005] SASC 491 at [37].

116 *Festa v The Queen* (2001) 208 CLR 593 at 599-600 [14]-[15] per Gleeson CJ, 609 [51] per McHugh J; [2001] HCA 72.

sufficient for the applicant to assert that his counsel did not have an opportunity to persuade the trial judge to the contrary. In any event, if the grounds for its exclusion had been obvious, the applicant's counsel may have been expected to have raised the question before its admission was ruled upon.

155 No unfairness has been shown to have resulted by reason of the applicant not being represented for part of the voir dire of the trial.

Orders

156 The application for special leave should be granted but the appeal should be dismissed.