HIGH COURT OF AUSTRALIA

BELL, GAGELER, KEANE, NETTLE AND EDELMAN JJ

FRITS GEORGE VAN BEELEN APPELLANT

AND

THE QUEEN RESPONDENT

Van Beelen v The Queen
[2017] HCA 48
8 November 2017
A8/2017

ORDER

1. *Summons filed 9 August 2017 dismissed.*

2. *Appeal dismissed.*

On appeal from the Supreme Court of South Australia

Representation

K V Borick QC and F R Gerry QC with A J Redford for the appellant (instructed by Michael Hegarty & Associates)

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

CATCHWORDS

Van Beelen v The Queen

Criminal law – Appeal against conviction – Second or subsequent appeal – Application for permission to appeal pursuant to s 353A(1) of *Criminal Law Consolidation Act* 1935 (SA) – Where appellant convicted of murder – Where expert evidence of time of death given at trial based on stomach contents of deceased – Where new evidence demonstrated expert estimation of time of death at trial erroneous – Where new evidence required to be fresh and compelling in order to be admitted – Where evidence compelling if reliable, substantial and highly probative in context of issues in dispute at trial – Whether new evidence substantial – Whether new evidence highly probative in context of issues in dispute at trial – Whether in interests of justice to consider new evidence on appeal – Whether admission of evidence based on stomach contents at trial occasioned substantial miscarriage of justice – Whether significant possibility jury acting reasonably would have acquitted had new evidence been before it.

Words and phrases – "compelling", "fresh evidence", "highly probative in the context of the issues in dispute at the trial", "second or subsequent appeal", "substantial", "substantial miscarriage of justice".

Criminal Law Consolidation Act 1935 (SA), s 353A.

BELL, GAGELER, KEANE, NETTLE AND EDELMAN JJ.

Introduction

1 Section 353A(1) of the *Criminal Law Consolidation Act* 1935 (SA) ("the CLCA") confers a novel jurisdiction on the Full Court of the Supreme Court of South Australia to determine a second or subsequent appeal by a person convicted on Information[1]. The jurisdiction is conditioned on the Full Court's satisfaction that there is fresh and compelling evidence that should, in the interests of justice, be considered on appeal. A second or subsequent appeal may only be brought with the permission of the Full Court[2]. The appeal may only be allowed if the Full Court is satisfied that there was a substantial miscarriage of justice[3].

2 By special leave given by Kiefel CJ and Nettle J on 10 February 2017, the appellant appeals against the Full Court's refusal of permission to bring a second appeal against his conviction for the murder of Deborah Joan Leach. The Full Court (Vanstone and Kelly JJ; Kourakis CJ dissenting) determined that the evidence on which the application was based, while fresh, was not "compelling". For the reasons that follow, it was an error to refuse permission to appeal. The evidence meets the criteria of being fresh and compelling and it is in the interests of justice that it be considered on appeal. Consideration on appeal, however, does not disclose that there was a substantial miscarriage of justice and so the appeal must be dismissed.

Background facts and procedural history

3 Deborah, a fifteen year old school girl, was murdered on 15 July 1971. She was last seen alive at around 4:00pm that afternoon running down a track that led to Taperoo Beach. Her body was found buried under a layer of seaweed on Taperoo Beach at around 4:20am the following morning. The autopsy revealed that she had died of drowning and that her body had been sexually interfered with after death.

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1 Section 353A was inserted into the CLCA by the *Statutes Amendment (Appeals) Act* 2013 (SA) and came into effect on 5 May 2013.

2 CLCA, s 353A(2).

3 CLCA, s 353A(3).

4 Only a handful of people were known to have been present on Taperoo Beach on the afternoon of 15 July 1971. The appellant was one of them. At 4:00pm his car was parked between some bushes adjacent to the track on which Deborah was seen running. The appellant left Taperoo Beach not later than 4:30pm. On 29 July 1971 he was interviewed by the police and he denied any knowledge of, or involvement in, Deborah's death. He agreed to the police taking possession of, and examining, the clothing that he had been wearing on the afternoon of 15 July 1971. Among the items taken by the police was a red and black woollen jumper. The fibres of that jumper matched fibres found on Deborah's singlet. Two brown fibres on the appellant's red and black jumper matched the brown fibres of Deborah's jumper.

5 In October 1971 the appellant was charged with Deborah's murder. Following a lengthy trial in the Supreme Court of South Australia, on 19 October 1972 the jury returned a verdict of guilty of murder. The appellant successfully appealed against his conviction and a new trial was ordered[4].

6 The second trial commenced on 16 April 1973. The prosecution case was circumstantial and depended on the fibre evidence and the fact that the appellant was one of the few male persons with the opportunity to have committed the offence. On 12 July 1973 the appellant was again found guilty of murder. An appeal against conviction was dismissed[5]. An application to this Court for special leave to appeal was dismissed[6].

7 A petition for mercy dated 5 February 1974 was submitted to the Governor and subsequently the whole case was referred by the Chief Secretary to the Full Court to be heard and determined as an appeal. The appeal constituted by the reference was dismissed[7].

The application for permission to bring a second appeal

8 On 25 August 2015, the appellant applied to the Full Court for permission to bring a second appeal. The fresh evidence on which the application relied was

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4 *R v Van Beelen* (1973) 4 SASR 353.

5 *R v Van Beelen (No 3)* (1973) 7 SASR 125.

6 *Van Beelen v The Queen* (1973) 47 ALJR 666 (note).

7 *In the matter of a Petition by Frits Van Beelen* (1974) 9 SASR 163.

the report of Professor Michael Horowitz dated 10 February 2016, which was critical of the expert evidence as to the time of Deborah's death. That evidence was given by Dr Colin Manock, the Director of Forensic Pathology at the Institute of Medical and Veterinary Science in Adelaide.

9 Dr Manock examined Deborah's body at Taperoo Beach at around 5:00am on 16 July 1971. He did not measure the temperature of the body. It had rained during the night and quite a strong wind was developing that morning. Dr Manock understood that prior to his arrival, the body had been almost entirely covered with seaweed. The weather would have affected the rate at which the body lost heat and he considered that there was no utility in measuring its temperature because he could not compare the rate of cooling at the time of examination with the rate of cooling before the body was uncovered.

10 In Dr Manock's opinion, the time of Deborah's death could be estimated from examination of the stomach contents, provided the time of her last meal was known. Dr Manock was informed that Deborah ate lunch on 15 July 1971 between 12:30pm and 12:45pm and that it consisted of a half pint of flavoured milk, an apple pie and a pasty. The stomach contained four fluid ounces of partly digested meal. Dr Manock estimated that three-quarters of the meal had emptied from the stomach. Dr Manock concluded that death had occurred between three and four hours from the start of the meal, which placed the time of death between 3:30pm and 4:30pm.

11 Evidence given at the trial suggested that Deborah's lunch had in fact been eaten between 12:15pm and 12:30pm, and Dr Manock revised his estimate to place the time of death 15 minutes earlier, observing that "I don't think one can be very precise on these matters". Notwithstanding this caveat, Dr Manock maintained that death could not have occurred later than 4:30pm.

12 It was the defence case that estimates of the time of death based on the rate of gastric emptying are imprecise and that the prosecution had failed to exclude the reasonable possibility that Deborah had been attacked and killed after 4:30pm, when it was common ground that the appellant had left Taperoo Beach. Dr Manock was taken to statements in authoritative texts on forensic pathology to the effect that the rate of gastric emptying is too variable to provide any certain indication of time of death, as many factors affect the rate and rates vary between individuals. Dr Manock generally agreed with these propositions but he asserted that estimates of longer emptying times were limited to cases in which there were special circumstances which altered the normal rate. Dr Manock's opinion assumed that there is a normal rate and that there was no reason to consider that Deborah's digestion was outside it. Dr Manock maintained that while it was not

possible to be precise as to the time of death within the range of three to four hours, the outer limit of that range was reliable.

13 The defence called Dr Derek Pocock, a forensic pathologist with the Department of Public Health of Western Australia. Dr Pocock considered that the most reliable means of estimating time of death is to take the temperature of the body and calculate the time that it has had to cool. In his opinion, estimates based on the rate of gastric emptying are not reliable. The rate of emptying may be affected by the nature of the meal, the amount of fat and carbohydrate and the amount of fluid, the volume of the meal, the activities undertaken following the meal and the person's emotional state. Dr Pocock disputed that it was possible to put an outer limit of four hours on Deborah's death from the start of her last meal. In cross-examination he accepted that the time for stomach contents to empty is "very approximately" three to four hours.

14 Professor Horowitz gave evidence before the Full Court on the hearing of the application for permission to appeal. He is a Professor of Medicine at the University of Adelaide and Director of the Endocrine and Metabolic Unit at the Royal Adelaide Hospital. For over 35 years, the focus of Professor Horowitz' research has been gastric emptying. Professor Horowitz explained that there has been a rapid expansion of knowledge of this subject since the mid-1970s. Before 1976 there were no techniques which permitted the reliable measurement of the rate of gastric emptying. Objectively validated studies since that time have demonstrated substantial variation in the rates of gastric emptying in individuals.

15 Professor Horowitz characterised Dr Manock's evidence at the trial as "unequivocally highly erroneous" in light of scientific evidence available since 1972. The substantial variation in rates of emptying between individuals means that estimating time of death from the volume of stomach contents cannot be determined with the suggested precision of 60 minutes or less. Professor Horowitz calculated that Deborah's lunch had an energy content of 680 calories. It was a meal which in some individuals may empty from the stomach completely in less than three hours and in other individuals may take more than eight hours to do so.

Section 353A

16 Before turning to the Full Court's analysis, the relevant provisions of s 353A of the CLCA should be set out in full:

"**353A – Second or subsequent appeals**

(1) The Full Court may hear a second or subsequent appeal against conviction by a person convicted on information if the Court is satisfied that there is fresh and compelling evidence that should, in the interests of justice, be considered on an appeal.

(2) A convicted person may only appeal under this section with the permission of the Full Court.

(3) The Full Court may allow an appeal under this section if it thinks that there was a substantial miscarriage of justice.

(4) If an appeal against conviction is allowed under this section, the Court may quash the conviction and either direct a judgment and verdict of acquittal to be entered or direct a new trial.

…

(6) For the purposes of subsection (1), evidence relating to an offence is –

(a) ***fresh*** if –

(i) it was not adduced at the trial of the offence; and

(ii) it could not, even with the exercise of reasonable diligence, have been adduced at the trial; and

(b) ***compelling*** if –

(i) it is reliable; and

(ii) it is substantial; and

(iii) it is highly probative in the context of the issues in dispute at the trial of the offence.

(7) Evidence is not precluded from being admissible on an appeal referred to in subsection (1) just because it would not have been admissible in the earlier trial of the offence resulting in the relevant conviction."

The Full Court

17 It was common ground in the Full Court that Professor Horowitz' evidence was "fresh" (sub-s (6)(a)) and "reliable" (sub-s (6)(b)(i))[8]. The Full Court was divided on whether the evidence was "substantial" (sub-s (6)(b)(ii)) and whether it was "highly probative in the context of the issues in dispute at the trial" (sub-s (6)(b)(iii))[9].

18 The majority rejected that "substantial" in this context is to be given its ordinary meaning of "sufficient importance, worth or value"[10]. To read the provision in this way, it was said, would largely duplicate the requirement of "high probative value" under the third limb[11]. Their Honours concluded that the second limb requirement of substantiality imposes a qualitative and a quantitative threshold: the evidence must be of substance and worth in its own right, and it must subsist or stand by itself[12]. Applying this test, Professor Horowitz' evidence is not "substantial" because it is evidence of research which serves only to confirm the correctness of an earlier body of opinion that was closely examined at the trial[13]. In their Honours' view, the fresh evidence does no more than show that Dr Manock was wrong to state that death could not have occurred after 4:30pm: a point that was well made by Dr Pocock[14]. Their Honours also said that Professor Horowitz' evidence did not possess high probative value in the context of the issues in dispute at the trial: Dr Manock's opinion had been

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8 *R v Van Beelen* (2016) 125 SASR 253 at 258 [16] per Kourakis CJ, 293 [157]-[158] per Vanstone and Kelly JJ.

9 *R v Van Beelen* (2016) 125 SASR 253 at 258 [16] per Kourakis CJ, 294-295 [162]-[163] per Vanstone and Kelly JJ.

10 *R v Keogh (No 2)* (2014) 121 SASR 307 at 337 [106].

11 *R v Van Beelen* (2016) 125 SASR 253 at 294 [160].

12 *R v Van Beelen* (2016) 125 SASR 253 at 293-294 [159].

13 *R v Van Beelen* (2016) 125 SASR 253 at 294-295 [162].

14 *R v Van Beelen* (2016) 125 SASR 253 at 294-295 [162].

directly challenged at the trial and Professor Horowitz' opinion was simply added ammunition supporting that challenge[15].

19 Underlying the majority's approach to the construction of the criteria which qualify fresh evidence as "compelling" is the view that jurisdiction to determine a second or subsequent appeal is a further exception to the principle of finality and the conditions governing its engagement should be construed with restraint. Their Honours cautioned as to the need for particular care in determining whether the conditions are met when the fresh evidence is expert opinion[16]:

> "The experience and the empirical evidence upon which each [expert] draws in expressing a view will vary enormously at any given time, let alone over a period of decades. Different views on any topic and new research will always be available. It is for the Court to ensure that, if the jurisdiction given in s 353A is to be exercised, the fresh evidence to be considered strictly answers each of the requirements set out in the provision."

20 The majority's conclusion, that the fresh evidence was not "substantial" or "highly probative in the context of the issues in dispute", did not deny that the time of Deborah's death was an important issue in the trial. The conclusion reflected not only the assessment that Professor Horowitz' evidence would not have added greatly to the material before the jury, but also the assessment that the persuasive evidence of the time of death came from the civilian witnesses[17]. Their Honours observed that Professor Horowitz' evidence did not undermine the prosecution case[18]. In their view, even if Professor Horowitz' evidence answered the conditions qualifying it as "compelling", it was not in the interests of justice (sub-s (1)) that it be considered on an appeal because it would have made no difference to the resolution of the issues at trial[19]. For the same reason, their

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15 *R v Van Beelen* (2016) 125 SASR 253 at 295 [163].

16 *R v Van Beelen* (2016) 125 SASR 253 at 294 [161].

17 *R v Van Beelen* (2016) 125 SASR 253 at 295 [164].

18 *R v Van Beelen* (2016) 125 SASR 253 at 295 [164].

19 *R v Van Beelen* (2016) 125 SASR 253 at 295-296 [165].

Honours considered that had the evidence been considered on appeal, it would not have established that a substantial miscarriage of justice had occurred[20].

21 Kourakis CJ, in dissent, concluded that the evidence was fresh and compelling and that it was in the interests of justice that it be considered on appeal[21]. His Honour considered that on the research now available it would be an agreed fact that Deborah's death could have occurred well after 4:50pm[22]. Notwithstanding that the fibre evidence was, on its face, strongly probative of guilt, Kourakis CJ reasoned that the prosecution had not comprehensively excluded other sources of the fibres found on Deborah's singlet or the presence on Taperoo Beach of possible offenders after 4:25pm[23]. Kourakis CJ was not persuaded that a properly directed jury would necessarily have convicted the appellant at a trial at which Dr Manock's dogmatic opinion as to the time of death was not in evidence[24].

22 As the respondent submits, the latter conclusion is suggestive of the application of a less stringent test than applies to the determination of an appeal on fresh evidence under the common form criminal appeal provision[25]. Nonetheless, his Honour's ultimate conclusion[26] was stated conformably with the test that commanded the support of the majority in *Mickelberg v The Queen*[27]: whether the court considers that there is a significant possibility that the jury, acting reasonably, would have acquitted the appellant had the fresh evidence been before it at the trial.

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20 *R v Van Beelen* (2016) 125 SASR 253 at 296 [166]-[167], referring to *R v Keogh (No 2)* (2014) 121 SASR 307 at 344 [128].

21 *R v Van Beelen* (2016) 125 SASR 253 at 258 [16].

22 *R v Van Beelen* (2016) 125 SASR 253 at 258 [14].

23 *R v Van Beelen* (2016) 125 SASR 253 at 276 [77].

24 *R v Van Beelen* (2016) 125 SASR 253 at 276 [77].

25 *Mickelberg v The Queen* (1989) 167 CLR 259 at 273 per Mason CJ, 288-289 per Deane J, 301 per Toohey and Gaudron JJ; [1989] HCA 35.

26 *R v Van Beelen* (2016) 125 SASR 253 at 276 [78].

27 (1989) 167 CLR 259.

23 It is not in issue that the Full Court was right to hold that the question of whether there has been a substantial miscarriage of justice for the purposes of s 353A(3) is answered by applying the *Mickelberg* test[28]. As the majority observed, the presupposition for a second or subsequent appeal is that the accused has had a fair trial according to law on the available evidence. There is no reason why an appeal under s 353A should be determined by applying a less rigorous test than applies to an appeal against conviction on fresh evidence under s 353 of the CLCA[29].

The submissions

24 The appellant submits that the majority's construction of the requirements of sub-s (6)(b) is unduly restrictive and the focus on finality misplaced. Given the issues in the trial, the appellant submits that it is plain that Professor Horowitz' evidence qualifies as "compelling" under each of the statutory criteria.

25 The respondent supports the broad thrust of the majority's analysis, submitting that the requirements of sub-s (6)(b) are to be understood as imposing a "robust threshold" on the jurisdiction to determine a second or subsequent appeal. This approach, it is said, is consistent with the scheme of the CLCA: a person convicted on Information may appeal by right on a question of law and with the permission of the Full Court or on the certificate of the court of trial on any other ground[30]. The determination of the appeal is final[31]. If the conditions governing an appeal under s 353A are liberally construed, the absence of limitation on the number of applications that may be brought is said to have the capacity to undermine the statutory scheme. The Parliament's choice to retain the mechanism for the referral of a petition of mercy by the Attorney-General to the

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28 *R v Van Beelen* (2016) 125 SASR 253 at 273 [59] per Kourakis CJ, 297-298 [171]-[173] per Vanstone and Kelly JJ, citing (1989) 167 CLR 259 at 273 per Mason CJ.

29 *R v Van Beelen* (2016) 125 SASR 253 at 298 [173].

30 CLCA, s 352.

31 *Grierson v The King* (1938) 60 CLR 431; [1938] HCA 45; *Burrell v The Queen* (2008) 238 CLR 218; [2008] HCA 34.

Full Court to be heard as in the case of an appeal[32] is suggested to reinforce the narrow compass of the s 353A appeal.

26 The respondent does not embrace the majority's analysis that "substantial" imposes a quantitative and qualitative threshold. In the respondent's submission, "substantial" is to be understood in the context that a second or subsequent appeal may only be allowed in a case in which the Full Court thinks that there was a "substantial miscarriage of justice". The fresh evidence, it is said, must be substantial in its ability to bear on the determination of that question.

The scope of s 353A

27 Section 353A manifests an intention that finality yield in the face of fresh and compelling evidence which, when taken with the evidence at the trial, satisfies the Full Court that there has been a substantial miscarriage of justice. If, following an unsuccessful s 353A appeal, further fresh and compelling evidence is discovered, the evident intention is that the Full Court have jurisdiction to remedy any substantial miscarriage of justice. The right to approach the Full Court directly conferred by s 353A in such a case is to be contrasted with the mechanism of executive referral in the case of a petition of mercy. The concern that a convicted person may bring successive, meritless applications under s 353A is addressed by the requirement to obtain the Full Court's permission to appeal.

28 Nothing in the scheme of the CLCA or the extrinsic material[33] provides support for a construction of the words "reliable", "substantial" and "highly probative" in other than their ordinary meaning. Understood in this way, each of the three limbs of sub-s (6)(b) has work to do, although commonly there will be overlap in the satisfaction of each. The criterion of reliability requires the evidence to be credible and provide a trustworthy basis for fact finding[34]. The criterion of substantiality requires that the evidence is of real significance or importance with respect to the matter it is tendered to prove. Plainly enough, evidence may be reliable but it may not be relevantly "substantial". Evidence

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32 CLCA, s 369(1).

33 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 19 February 2013 at 3165.

34 *R v Keogh (No 2)* (2014) 121 SASR 307 at 337 [105]; *R v Drummond (No 2)* [2015] SASCFC 82 at [325] per Blue J.

that meets the criteria of reliability and substantiality will often meet the third criterion of being highly probative in the context of the issues in dispute at the trial, but this will not always be so. The focus of the third criterion is on the conduct of the trial. What is encompassed by the expression "the issues in dispute at the trial" will depend upon the circumstances of the case. Fresh evidence relating to identity is unlikely to meet the third criterion in a case in which the sole issue at the trial was whether the prosecution had excluded that the accused's act was done in self-defence. On the other hand, fresh evidence disclosing a line of defence that was not apparent at the time of trial may meet the third criterion because it bears on the ultimate issue in dispute, which is proof of guilt.

29 It does not do justice to Professor Horowitz' evidence to characterise it as merely supporting Dr Pocock's opinion. As earlier noted, Dr Manock's opinion was based upon acceptance that there is a normal rate of gastric emptying in the human population. Kourakis CJ was right to say that Professor Horowitz' evidence based on the results of objectively validated studies falsifies the basis for that opinion[35]. Had the results of these studies been known at the date of the trial, Dr Manock's opinion as to the time of Deborah's death should not have been admitted over objection. Professor Horowitz' evidence is of real significance on the issue of the time of Deborah's death. It possesses the requisite high probative value given that time of death was an issue in dispute at the trial.

30 Jurisdiction under s 353A(1) is further conditioned on the Full Court's satisfaction that it is in the interests of justice to consider the fresh and compelling evidence on appeal. Commonly, where fresh evidence is compelling, the interests of justice will favour considering it on appeal. Nonetheless, as the respondent submits, it is possible to envisage circumstances, such as where an applicant has made a public confession of guilt, where the interests of justice may not favour that course. Contrary to the analysis of the majority[36], the circumstance that a conviction is long-standing does not provide a reason why, in the interests of justice, fresh and compelling evidence should not be considered on a second or subsequent appeal.

31 The majority's consideration of the interests of justice was posited on the view that Professor Horowitz' evidence did not undermine the conclusion of

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35 *R v Van Beelen* (2016) 125 SASR 253 at 261 [27].

36 *R v Van Beelen* (2016) 125 SASR 253 at 295-296 [165].

guilt[37]. This was to conflate the interests of justice with the determinative issue in the appeal.

32 As explained, Professor Horowitz' evidence is fresh and compelling and it is in the interests of justice that it be considered on appeal. The issue in the appeal is whether the appellant has established on the balance of probability that, in light of Professor Horowitz' evidence taken with the evidence adduced at the trial, there is a significant possibility that a jury, acting reasonably, would have acquitted. The answer to that question requires consideration of the whole of the evidence.

The trial

The evidence

33 Deborah was living with her parents at 40 Morea Street, Osborne, South Australia. On the afternoon of 15 July 1971, Deborah and her friend, Janice Hazelwood, left school at around 3:30pm. The school was located on Morea Street, to the south of Deborah's home. The two walked north along Morea Street to Deborah's home, where they parted. The walk took about five minutes. It would seem that Deborah went inside the house, put down her school bag, put a sponge cake that she had cooked at school on the kitchen table, changed from her school uniform into a pair of tartan slacks and a brown jumper, and left the house with her dog to go for a walk on Taperoo Beach.

34 Taperoo Beach faces west and lies between Outer Harbor (to the north) and Largs Bay (to the south). Morea Street is to the east of, and parallel with, Lady Gowrie Drive. Lady Gowrie Drive runs in a north south direction parallel to Taperoo Beach. An unfenced paddock opposite Deborah's home separated Morea Street and Lady Gowrie Drive. A track roughly opposite Deborah's home led from Lady Gowrie Drive to the beach. After a short distance the track divided into smaller tracks leading in southerly, south-westerly and westerly directions. Between the junction of two of these tracks were two stands of bushes. Opposite these bushes, about 100 yards west of Lady Gowrie Drive, was a shed belonging to the Taperoo Beach Surf Lifesaving Club. On the afternoon of these events the appellant's car was parked between the bushes, roughly opposite the shed.

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37 *R v Van Beelen* (2016) 125 SASR 253 at 295-296 [165].

35 At around 4:00pm Mrs Hazelwood, Janice's mother, was driving along Morea Street and saw Deborah with Deborah's dog running across the paddock towards the beach. Deborah was wearing a jumper, which Mrs Hazelwood thought was brown, and dark coloured slacks.

36 The prosecution called persons who were known to have been present on Taperoo Beach between 2:00pm and 4:20pm on the afternoon of 15 July 1971. Sandra Drummond and her father, Colin Lukeman, were fishing on the beach between around 2:00pm and 3:40pm that afternoon. The only people that Mrs Drummond saw on the beach were a man sitting on the seaweed bank (later identified as Kenneth Streeter), two couples walking along the beach, and three men in a fishing boat. She spoke to one of the couples and learned that they had come from a liner which was moored in Outer Harbor. Mrs Drummond did not see Mr Streeter on the beach at the time she left. As she drove away from the beach a small car driven by a man turned off Lady Gowrie Drive and passed her car, travelling towards the beach. Mr Lukeman recalled the same small number of persons as present on the beach that afternoon. He spoke to Mr Streeter and the older of the two couples. He, too, said that Mr Streeter appeared to have left the beach by the time he and his daughter departed. He saw a "cherry coloured" car, which he thought was a Datsun, turn off Lady Gowrie Drive and head towards the beach as they were leaving.

37 Mr Streeter lived about five minutes' walk from Taperoo Beach. He took his dog to the beach sometime around 2:30pm that afternoon. He was back at home at about 3:50pm to listen to the last leg of a race on which he had placed a bet.

38 Dennis Shiels was fishing with two workmates, Alexander Dickson and Patrick Keating, at Taperoo Beach that afternoon. On the way to the beach, Mr Shiels noticed a red Torana parked near the lifesaving shed. This was at around 3:15pm. Mr Shiels saw two men, a woman and a dog on the beach (on the prosecution case, Mr Lukeman and Mr Streeter, Mrs Drummond, and Mr Streeter's dog) when they arrived. He and his companions launched their boat and went fishing. While in the boat, Mr Shiels saw two people on the beach in the vicinity of where he had seen the two men and the woman earlier, though he was not able to say whether they were the same people. In cross-examination he was asked if one of the persons he saw from the boat was wearing a red jumper. He said that one was wearing a red cardigan or jumper. He thought the person wearing the red cardigan was the woman. He went on to say that "it was too far away" and he could not say it was a woman. These people moved from the beach towards Lady Gowrie Drive. The weather was not good and Mr Shiels and his companions returned to the shore.

39 When they were leaving, Mr Shiels observed that the red Torana was parked near the lifesaving shed where he had earlier seen it. Mr Keating made a comment and Mr Shiels looked back at the Torana and saw the letters "RCC" on the number plate. As they neared Lady Gowrie Drive Mr Shiels again looked back and he noticed that the red Torana was shielded from view by bushes. Mr Shiels recalled that they left the beach at around 4:20pm.

40 Mr Dickson remembered seeing a maroon Torana next to some bushes, to their left, as they drove down the track past the lifesaving shed on arrival. This was around 3:10pm. He saw a man and a woman who appeared to be fishing by the edge of the water. As they were leaving he again saw the maroon Torana and he noted that the first three letters of the number plate were RCC. Mr Dickson agreed that they had left Taperoo Beach at around 4:20pm. Mr Keating was in Scotland at the date of the trial and he did not give evidence.

41 Wojciech Tajak ran the Taperoo Beach kiosk. The kiosk faced onto Lady Gowrie Drive and was located just to the north of the track leading from Lady Gowrie Drive to the beach and was approximately 100 yards due east of the lifesaving shed. Sometime between 11:30am and 12 noon on 15 July Mr Tajak saw a red Torana which was parked in front of the kiosk. He sold the driver a packet of cigarettes. He saw a similar car in the parking lot south of the kiosk at around 1:00pm. Later, at around 3:00pm, he saw a red car, which was of a similar size, parked "[o]n the corner of the Lifesaving shed". Mr Tajak was uncertain about the time he left the kiosk on that day. Initially he put it at 3:45pm or 3:50pm and said that it "must have been before" 4:00pm, but he conceded that he "wouldn't be one hundred per cent sure". As he was taking some stock from the kiosk to his car, he looked towards the sea and he saw a dog to the south-west of the kiosk running from the direction of Largs Bay towards Outer Harbor. A girl ran after the dog in the same direction. Mr Tajak said the girl was wearing something "similar to a school uniform" and he described her clothing as being "[n]avy blue, something to that effect, or it could have been black".

42 Deborah's mother, Gwenneth Leach, arrived home from work at the usual time, which was around 4:40pm. Deborah used to take her dog for a walk on the beach each afternoon after school but Mrs Leach said that "she was always home when I got home normally". Mrs Leach looked for Deborah and saw her school clothes in her bedroom. She thought that she might have gone for a longer walk than usual. After 10 minutes Mrs Leach decided that Deborah should be at home. She looked out the front window but she could only see Deborah's dog playing on top of the bank of seaweed. This was about 4:50pm. Mrs Leach walked over to the beach and called out to Deborah. There was no sign of her

and it occurred to Mrs Leach that Deborah had gone home along a different path. Mrs Leach collected the dog and returned home. When she discovered that Deborah was not at home she went back to the beach and continued to look for her. This would have been at about 5:15pm or 5:20pm.

43 On the first occasion when Mrs Leach walked to the beach, and collected the dog, she saw nobody else. On the second occasion, she saw two men walking horses in the water, a young girl riding a horse, and a woman bringing her dog down to the beach. When she was unable to find Deborah, Mrs Leach rang her husband from a nearby telephone.

44 Mr Leach returned home at around 6:10pm and contacted the police. He and a neighbour then went to search for Deborah. After an initial search they returned home, collected the dog, and went back. They walked down the track to the beach and turned north. At its most western point the surface of the beach was sand. Moving east there was a bank of seaweed about one foot to 18 inches high[38]. The bank extended for about 20 yards to a second, higher bank of seaweed. The second bank was about three feet high. Mr Leach and his neighbour walked on the landward side of the high seaweed bank, proceeding some distance past the lifesaving shed. Mr Leach was looking for footprints. He observed some in a clearing. They appeared to have been made by more than one person. Mr Leach thought that one set of tracks could have been Deborah's because the pattern of the footprint was similar to the pattern of the boots that she had been wearing. The dog had led them to this clearing but the dog seemed to be confused and did not know which way to go.

45 Mr Leach returned home and rang the police again. Later that evening Mr Leach showed two detectives the clearing. They drove down the track past the kiosk for about 100 yards. Then they got out of the vehicle and walked about 60 yards to a location on the eastern side of the high seaweed bank approximately due west of the kiosk. It had been raining and most of the markings that Mr Leach had earlier observed were no longer visible.

46 In the early hours of 16 July the police located a rubber boot, a transistor radio and a dog lead not far from the water on the most western point of the first, lower bank of seaweed. They belonged to Deborah. Her body, buried under seaweed, was located slightly to the south of her belongings and 20 yards east of

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38 Consistently with the evidence given at the trial reference to distances will be given in Imperial measures.

them on the second, higher bank. Her arms were extended over her head. She was wearing a brown woollen jumper which had been pulled up and was covering her mouth and nose. Her slacks had been completely removed from her right leg. Her white singlet remained in place.

47 The autopsy revealed a small tear on the posterior of the vaginal wall. Dr Manock considered this occurred after Deborah's death and was more likely to have been occasioned by sexual intercourse than digital penetration. There was semen in the vagina. Dr Manock concluded that death had occurred as a consequence of drowning in salt water.

The appellant's account of events

48 The appellant was first questioned by police on 29 July 1971. A signed copy of the interview was in evidence. The appellant acknowledged that he was the owner of a red Torana sedan registration number RCC 718. He said that he had arrived at Taperoo Beach around 4:00pm on 15 July and that his car had been parked on the south side of the lifesaving shed, facing the sea, until around 4:25pm[39]. He said that he had walked for about half a mile in a southerly direction. He was asked what he had been wearing and he replied "[b]lack trousers, a red or blue jumper I cannot think which one I was wearing".

49 The police accompanied the appellant to his home on 29 July to collect the clothes that he had been wearing. Detective Sergeant Cocks said that the appellant handed him a red and black jumper, a pair of dark trousers and a pair of black shoes. Detective Sergeant Cocks said that he also took possession of a blue jumper, a dark grey jumper and a mohair jumper.

50 On 6 October 1971 the appellant went with the police to Taperoo Beach. He showed the police where he had parked his car: a location adjacent to a large bush on the southern side of the lifesaving shed. The police asked why he had waited until late in the afternoon to take a walk along the beach. The appellant said he had not been at Taperoo Beach all the time that day: he had driven back and forth along the beaches to Glenelg. He was asked to show the police the

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39 The transcript of the interview records 4:45pm and not 4:25pm, but Detective Zeunert, in cross-examination, said that the reference to 4:45pm in the transcript was an error. The reason he thought it was a typing error was because at that time he phrased a question around the incident to the time of 4:25pm, but he could not discount the possibility that he had put the question by reference to 4:45pm.

route that he had taken on his walk. He said he had walked to the northernmost building of the Largs Bay Police Academy and then walked back. He had not walked or sat on the seaweed at any time that afternoon.

51 The appellant did not give evidence at the trial. His evidence given at the first trial was read in the prosecution case. In summary, he said that he had been looking for work that day. He had checked the newspaper but had not found any jobs. He then decided to go for a drive, initially to the Adelaide Hills and then to the beaches. He stopped at Taperoo Beach and purchased a drink and an ice-cream at the kiosk. He then parked his car between the kiosk and the lifesaving shed and read a comic book. After this he drove back towards Glenelg and then he returned to Taperoo Beach and parked in the same general area: "just off the track by a bush" on the southern side of the lifesaving shed.

52 The appellant said that he had walked south along Taperoo Beach, on the landward side of the seaweed bank, to the Police Academy and then back to his car following the same route. He saw no one on the beach. He then drove from the beach to the city to collect his wife. She was working at the Post Office on King William Street and was due to finish work at 5:00pm. He arrived at the Post Office at around 4:45pm.

53 The appellant denied that he had been wearing his red and black jumper and he said he had handed his blue jumper to the police along with his red and black jumper. At the time he had been unsure about which jumper he had been wearing on 15 July. Subsequently, and before his arrest on 6 October, he recalled that he had been wearing the blue jumper. He rejected the suggestion that he had changed his account after hearing the prosecution evidence at the committal hearing. He recalled that he had been wearing his blue jumper because he had been looking for work and it was his best jumper.

54 The appellant agreed that he had told the police initially that he had arrived at Taperoo Beach on the second occasion at around 4:00pm, and that he had arrived at the Post Office at 5:00pm. When the appellant was first spoken to by the police he said that he had walked as far as "the guns", a reference to the gun mountings at the Police Academy. On 6 October when he showed the police the route that he had taken he said that he had not walked as far as the guns. He denied that he had changed his account because of a realisation that he could not have walked to the guns and back and had time to get to the Post Office by 5:00pm. The appellant's wife gave evidence that on 15 July 1971 she left work at "a few minutes before 5" and the appellant was in his car in King William Street. It was not in issue that the appellant must have left Taperoo Beach not later than 4:30pm.

The fibre evidence

55 Detective Sergeant Cocks, who was in charge of the South Australian Police Forensic Science Laboratory, gave evidence of the collection and examination of fibres from Deborah's clothing and the appellant's clothing. He took samples from Deborah's singlet with tweezers and by dabbing a short length of adhesive tape on the garment. He found 17 black, 19 red, and one blue fibre on the upper front of the singlet. He also found a number of brown fibres, which were consistent with the fibres of the brown jumper that Deborah had been wearing, and a number of white fibres on the upper front of the singlet. He always ignored white fibres in forensic work because they are so common. On the lower part of the singlet there were brown fibres which were similar to the fibres of Deborah's jumper and a mixture of coloured fibres: red, black, green, blue and mauve.

56 Deborah's slacks were of tartan design and were composed of black, green, brown, blue, red, mauve and yellow fibres. The red fibres comprised a "purply" red and a lighter red. The majority of these fibres were wool fibres. There were no differences between the black wool fibres of the slacks and the black wool fibres on the upper front of Deborah's singlet. The red fibres from the upper front of the singlet were "completely different" from the purply red fibres of the slacks. There were no differences in colour or appearance between the lighter red wool fibres of the slacks and the red wool fibres on the upper part of the singlet.

57 The fibres on the bottom of the singlet consisted of 23 red and 25 black fibres, 14 green, 14 brown, six blue and one mauve. The green, blue and mauve fibres were all similar to the fibres of the same colours taken from the slacks. Four of the brown fibres were similar to the brown fibres in the slacks and ten were similar to the brown fibres of Deborah's jumper.

58 In Detective Sergeant Cocks' opinion, it was of the very highest order of improbability that the red and black fibres on the upper front of the singlet had come from the slacks. The most common fibre in the slacks was green and there were no green fibres on the upper front of the singlet. The second most common fibre in the slacks was black, and there were similar black fibres on the upper front of the singlet. The third most common fibre in the slacks was brown, and there were no brown fibres on the upper front of the singlet that were consistent with the slacks. There were no blue fibres on the upper front of the singlet that were consistent with the slacks, nor were there any purply red fibres on the upper front of the singlet. The purply red fibres were more prevalent than the lighter red fibres in the weave of the slacks. Although the lighter red fibres on the upper

front of the singlet were microscopically similar to the lighter red fibres in the slacks, the lighter red fibres in the slacks were part of the same thread made up of brown and purply red.

59 Although Detective Sergeant Cocks found black wool fibres in Deborah's home which were similar to the black wool fibres found on the upper front of the singlet, these were not found in association with any red wool fibres. Detective Sergeant Cocks found no fibres at all in Deborah's home which matched the red fibres on the upper front of the singlet. He did find a source in Deborah's home for the blue fibre found on the upper front of the singlet.

60 There was seaweed in the material vacuumed from the red and black jumper and in the vacuumings from the dark trousers. In the vacuumings from the red and black jumper Detective Sergeant Cocks found two brown, artificial fibres, and green, blue, mauve, yellow and some further brown fibres. All of the fibres could have been sourced to materials in the appellant's home save for the two brown, artificial fibres. These did not appear to originate from any materials in the appellant's home. They were indistinguishable from the brown, artificial fibres of Deborah's jumper. Random samples of the fibres taken from the appellant's red and black jumper were in the ratio of 19 red to 18 black.

61 Mr Charles Crisp, a senior analyst employed with the South Australian Government Department of Chemistry, gave evidence in the prosecution case of the results of microscopic examination and chemical testing of fibres taken from Deborah's clothing and the appellant's red and black jumper. These revealed a large number of points of similarity between the red and black fibres taken from the singlet and the red and black fibres of the jumper and no significant dissimilarities.

62 The defence called Mr Jack Fish, who for many years held an appointment as senior biologist with the Home Office Laboratories, Nottingham, in England. At the date of trial Mr Fish was the Director of the Cardiff Forensic Science Laboratory. In his years at the Nottingham laboratory Mr Fish had extensive experience in the forensic examination of fibres. He reviewed Mr Crisp's work and agreed with his conclusions. Mr Fish agreed the fact that no green, artificial black, brown or purply red fibres were located on the upper front of the singlet indicated that the slacks were an extremely improbable source of the red and black fibres. Mr Fish agreed that the tartan slacks were made of mainly woollen fibres but with a mixture of some artificial fibres. The black woollen fibre in the slacks was associated with a black artificial fibre. The bright red fibre of the slacks occurred only as part of a thread with a brown woollen and a purply red fibre. The length of the red and black fibres taken from the upper front of the

singlet made it very probable, in Mr Fish's opinion, that they had come from a knitted woollen garment. Deborah's tartan slacks were a woven garment.

63 In addition to the tests carried out by Mr Crisp, Mr Fish tested a sample of the fibres taken from the upper front of the singlet and the fibres of the appellant's red and black jumper by a process known as thin layer chromatography. The results of the tests conducted by Mr Fish established that at least three different dye mixtures were used in dyeing the bright red fibres of the slacks and at least two different dye mixtures were used in dyeing the black woollen fibres of the slacks. This was in contrast with results of all the work done on the red and black fibres found on the upper front of the singlet, which showed no variability between the blacks and the reds. Mr Fish agreed that all the black fibres in the red and black jumper were dyed with the same dye material as the black fibres located on the singlet, and all the red fibres from the red and black jumper were dyed with the same red dye material as the red dye of the fibres on the top of the singlet. Taking into account the results of the microscopic examination, chemical testing and thin layer chromatography, Mr Fish agreed there were "a very large number of points of similarity between the reds and blacks said to be on the top of the singlet and the reds and the blacks from the pullover, and no significant dissimilarity".

The way the parties put their cases

64 It was the prosecution case that Deborah died on Taperoo Beach as the result of an attack by a male who intended to sexually assault her. Taperoo Beach was a fairly lonely beach and her assailant was one of a small number of males present on the beach at the time. The red and black fibres found on the upper part of Deborah's singlet were consistent in characteristics and relative frequency with the fibres of the appellant's red and black jumper, which it was contended he was wearing that afternoon. This inference was supported by the presence of the two brown, artificial fibres and the scraps of seaweed found on the jumper. The prosecution contended that the appellant had moulded his account of the length of his walk and the clothes that he was wearing to avert suspicion. More generally, the prosecution contended that the appellant's account of his conduct was unsatisfactory: there was no explanation for why he had chosen to park in a location that was more or less concealed and no apparent reason for "hanging around" at the beach during the course of the day.

65 In closing address, defence counsel submitted "[w]e agree that there is an indication on the evidence as it stands that someone wearing red, or red and black had contact with the singlet presumably during an act of necrophilia". It was the defence case that the prosecution had not established that Deborah died before

4:30pm, when the appellant left Taperoo Beach. It was pointed out that the dyes used in the appellant's red and black jumper were common dyes. It was also pointed out that the defence had arranged for the fibres to be subjected to more sophisticated scientific testing than had been undertaken by the prosecution authorities. While Mr Fish's tests had not eliminated the appellant's jumper as the source of the fibres on the singlet, the defence invited the jury to consider the improbability that a guilty man would have taken the risk that testing might confirm the prosecution case.

The way the trial judge left the issue

66 The trial judge left the prosecution case on the question of time of death in these terms:

> "Taperoo Beach, on a winter's afternoon on a week-day, appears to be a fairly little used area. You must ask yourself whether Debbie died on the beach. The sea material found in her lungs may lead you to think so. If so, we must carefully consider when she died. We know that she was alive at about 4 pm on the 15th. We know that she died some time before 4.20 am on the 16th for that is when Mr Richter found the body.
>
> To try to fix a time of death more precisely we have to consider the evidence of Dr Manock the pathologist. You will have to make up your minds as to whether you accept him as a man of science, competent in his work. You will have to determine what weight you give to his evidence, and since his evidence is in some respects founded on other evidence, especially on evidence of the stomach contents and the time of the last meal before death, you will have to examine that evidence too.
>
> … [Dr Manock] placed the time of death at about three to four hours after the start of the last meal, so ... that puts the time of death at three to four hours after about 12.15; this is somewhere between 3.15 and 4.15.
>
> You will bear in the mind the submission by Mr Borick, supported by Dr Pocock and various textbooks, three to four or four and a half hours is an average time for an ordinary meal to pass through the stomach of a person in an ordinary physical state of health.
>
> … It may be, on Dr Manock's evidence alone, you could not be certain that Debbie died before 4.30 pm, although you might think this probable. However, you must consider his evidence and the strictures made upon it, and form your own conclusions.

> You will, when considering his evidence, think also of other evidence, such as Mrs Leach's evidence, which assists in fixing the time of death."

His Honour continued:

> "[I]f we accept the evidence that Debbie was alive on the beach at about 4 pm or a few minutes earlier we can narrow the gap at the beginning.
>
> Mrs Leach looked for Debbie first from her window and then on the beach itself. She gives her time of arriving home about 4.40 pm when Debbie was usually home. Her time of looking through the window is ten minutes later. She saw the dog through the window playing on the seaweed but not Debbie. She went down to the beach. If you are satisfied that Debbie had been attacked by this time and if you accept Mrs Leach's evidence as to time, you may also be satisfied that the attack was before 5 pm and probably before the time that the dog was playing alone."

67 The jury was directed that unless it was satisfied that there was "chest to chest contact between the [appellant] and the deceased" it was to acquit without going any further. The jury could only be satisfied of chest to chest contact on the basis of its acceptance that the appellant was wearing his red and black jumper that day. The consideration of whether there has been a substantial miscarriage of justice is to be undertaken upon acceptance of that fact.

A substantial miscarriage of justice?

68 Dr Manock's evidence as to time of death placed the appellant as one of the few persons on Taperoo Beach at the time of the attack. The appellant adopts Kourakis CJ's analysis that Professor Horowitz' evidence markedly extends the period during which some other person had the opportunity to commit the offence[40]. Among the possibilities proposed by the appellant at trial and on the appeal was that Deborah may have left the beach in company with her assailant and that her body may have been deposited on the bank of seaweed later that evening. In support of this hypothesis it was argued that had Deborah's body been lying under the seaweed shortly after 4:50pm when Mrs Leach walked along the beach looking for her, the probability is the dog would have led Mrs Leach to the body. The footprints and tyre marks in the clearing were also suggested to support the hypothesis that Deborah may have left the beach with her assailant.

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40 *R v Van Beelen* (2016) 125 SASR 253 at 275 [72].

69 The footprints and tyre marks are neutral. No inference should be drawn from the circumstance that Mrs Leach did not see Deborah's boot or other belongings or her body when she went to the beach to look for her. On the first occasion, Mrs Leach went to where the dog was playing, looked around and called out for Deborah, and took the dog home. On the second occasion, she walked along the sand on the seaward side of the bank of seaweed in the direction of Outer Harbor. She thought that she walked nearly to the lifesaving shed. She then climbed over the seaweed and walked back on the landward side calling out for Deborah. On this occasion Mrs Leach did not have the dog with her and it is not clear that she walked as far north as the location at which Deborah's belongings were found before she turned back.

70 Nor should the inference be drawn that Deborah's body was not buried under the seaweed at the time that Mr Leach and his neighbour carried out their searches. On the first occasion they walked down the track to the beach and turned south and walked towards Largs Bay until they reached the high school. They returned from the school walking along the roadway. On the second occasion, when they took the dog to the beach, they turned north at the end of the track and walked in the direction of Outer Harbor, proceeding some distance past the lifesaving shed. However, they were walking on the landward side of the high bank of seaweed and would not have been in a position to see Deborah's belongings, which were on the seaward side of the lower bank of seaweed.

71 The presence of diatoms in Deborah's lungs was consistent with her having drowned in salt water. The only particulate matter adhering to the mucosa or in the air passages were extremely fine particles of sand. It was possible that she drowned in a shallow pool containing water no more than a quarter or half an inch deep. It was not in issue that there would have been small puddles of water at the edge of the seaweed bank and elsewhere on the beach. There was a stain on the front of Deborah's jumper which consisted of sand, seaweed and foam from Deborah's mouth. If, as seems likely, the jumper had been pulled up during the fatal attack such that it covered Deborah's mouth and nose, it would have acted as a filter and explain the relative absence of sand in the airways. The circumstance that the back of the jumper was relatively dry compared to the front was consistent with drowning in a shallow body of water.

72 Whatever the precise mechanism of her death, it is implausible that Deborah left Taperoo Beach with her assailant and that she drowned in salt water at some other location. It is all the more implausible to contemplate in such an event that her killer might have returned to Taperoo Beach and buried the body at the very place at which people might be expected to be looking for her. And, finally, there is the location of Deborah's right boot: 20 yards from the body,

against the low bank of seaweed near the sand and not far from the water. The evidence that Deborah was sexually penetrated after death was unchallenged. The clear inference is that her assailant removed her right boot, along with her right trouser leg, to effect his purpose. It is fanciful to consider that this took place other than at Taperoo Beach and that her killer returned and deposited not only the body but the boot. The prosecution established beyond reasonable doubt that Deborah drowned on Taperoo Beach in a location not far from where her belongings were found.

73 The strength of the fibre evidence lay in the acknowledged high degree of improbability that the red and black fibres found on the upper front of the singlet came from Deborah's tartan slacks. It is consistent with the act of post-mortem sexual intercourse that the killer's clothing would have come into contact with Deborah's singlet, given that her jumper had been pulled up over her head. The strength of the fibre evidence was also the correspondence between the ratio of red to black fibres that were transferred to the singlet and the ratio of red to black fibres of which the appellant's jumper was composed.

74 To observe that Professor Horowitz' evidence does not exclude a time of death as late as 8:15pm is not to conclude upon a review of the whole of the evidence that it was reasonably open to find that Deborah died after 4:50pm. Putting Dr Manock's evidence to one side, the inference is overwhelming that Deborah was dead by the time Mrs Leach looked through the front window and saw Deborah's dog playing by itself. Indeed, bearing in mind Mrs Leach's evidence that Deborah was always at home when she returned from work, the inference is that Deborah was dead by 4:40pm.

75 Deborah was last seen alive at around 4:00pm as she ran towards the beach. Had she continued running in the direction in which Mrs Hazelwood and Mr Tajak saw her running, she would have passed the location of the appellant's parked car. Her body was found 324 feet from that location. The appellant was on the beach at this time and he was wearing his red and black woollen jumper. The inference of guilt depended upon all of the circumstances, but critical to it was the conclusion that it was not reasonably possible that another man, wearing a knitted garment made of red and black woollen fibres in approximately the same proportion as the red and black woollen fibres of the appellant's jumper, was present on Taperoo Beach that afternoon, and that this other man killed Deborah. Dr Manock's evidence said nothing as to this possibility. The elimination of Dr Manock's opinion of the time of death leaves a window of 20 minutes after the appellant left the beach and before Mrs Leach saw Deborah's dog playing alone in which expert evidence does not exclude the fatal assault taking place. It does not, however, significantly reduce the improbability of a

second man, wearing a knitted garment made of red and black woollen fibres in approximately the proportion of the red and black woollen fibres of the appellant's jumper, being present on this relatively deserted beach that afternoon. The majority in the Full Court were right to conclude that there is not a significant possibility that a properly instructed jury, acting reasonably, would have acquitted the appellant had Dr Manock's erroneous opinion as to the time of death not been in evidence[41].

The application to reopen

76 On 9 August 2017, after judgment was reserved, the appellant filed a summons seeking an order to reopen the hearing of the appeal to adduce further fresh evidence. In support of that application the appellant filed affidavits sworn by Allan Robert Brown, Mary Doreen Johnston and Maureen Alexina Wheeler. The evidence of each deponent is relied on as further fresh and compelling evidence within the meaning of s 353A(1) of the CLCA.

77 In submissions filed in support of the summons on 9 August 2017, the appellant relied on the dissenting reasons of Deane J in *Mickelberg* for the proposition that in the interests of justice it was open to the Court to receive the fresh evidence[42]. It is well-settled that the appellate jurisdiction of this Court is confined to appeals in their true sense and does not permit the Court to receive evidence which has not been considered by the Court below[43].

78 The parties were informed that the Court was minded to deal with the application to reopen on the papers and a timetable was fixed for the filing of written submissions. The appellant requested that the Court delay any final determination of his application until the respondent answered a series of requests for information concerning the existence of police records relating to the investigation. The respondent opposes the reopening of the appeal, submitting that the Court is without power to receive the further evidence. Moreover, the respondent submits that the reliability of the evidence sought to be adduced from Allan Robert Brown would require to be tested by oral evidence, an exercise that

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41 *R v Van Beelen* (2016) 125 SASR 253 at 298 [174].

42 (1989) 167 CLR 259 at 282.

43 *Gallagher v The Queen* (1986) 160 CLR 392 at 400; [1986] HCA 26; *Mickelberg v The Queen* (1989) 167 CLR 259 at 266, 274, 299; *Eastman v The Queen* (2000) 203 CLR 1 at 10 [9]; [2000] HCA 29.

is inappropriate to be carried out by this Court[44], and that the evidence sought to be adduced from Mary Doreen Johnston and Maureen Alexina Wheeler, even if accepted, is incapable of impugning the appellant's conviction.

79 Following the filing of his submissions in reply on the application to reopen, the appellant forwarded further written submissions to the Court on more than one occasion. The filing of these submissions was outside the terms of the Court's direction and no regard has been had to them. The appellant does not identify any arguable ground upon which this Court would depart from the long-standing principles affirmed in *Mickelberg* and, more recently, in *Eastman v The Queen*[45]. There is no reason to delay the determination of the application to reopen: this Court does not have power to receive the evidence that is the subject of the application.

80 As the appellant notes, it is open to him to apply to the Full Court of the Supreme Court of South Australia for permission to bring a subsequent appeal pursuant to s 353A of the CLCA. In the circumstances, it is inappropriate to say anything further about the material that is the subject of the application to reopen.

Orders

81 For these reasons there should be the following orders:

1. Summons filed 9 August 2017 dismissed.

2. Appeal dismissed.

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44 *Mickelberg v The Queen* (1989) 167 CLR 259 at 274 per Brennan J.

45 (2000) 203 CLR 1.