HIGH COURT OF AUSTRALIA

GAGELER CJ,
EDELMAN, STEWARD, GLEESON AND JAGOT JJ

DEREK JOHN BROMLEY APPLICANT

AND

THE KING RESPONDENT

Bromley v The King
[2023] HCA 42
Date of Hearing: 17 & 18 May 2023
Date of Judgment: 13 December 2023
A40/2021

ORDER

Application for special leave to appeal dismissed.

On appeal from the Supreme Court of South Australia

Representation

S J Keim SC with S T Lane for the applicant (instructed by Stanley Law)

M G Hinton KC with W M Scobie for the respondent (instructed by Director of Public Prosecutions (SA))

CATCHWORDS

Bromley v The King

Criminal law – Appeal against conviction – Second or subsequent appeal – Where applicant convicted of murder in 1985 – Where applicant's conviction depended to considerable extent upon evidence of witness with schizophrenia or schizoaffective disorder – Where reliability of witness' evidence was relevant issue at trial – Where applicant applied for permission to appeal pursuant to s 353A(1) of *Criminal Law Consolidation Act 1935* (SA) ("CLCA") – Where s 353A(1) of CLCA relevantly provided "Full Court may hear a second or subsequent appeal against conviction ... if the Court is satisfied that there is fresh and compelling evidence that should, in the interests of justice, be considered on an appeal" – Where fresh psychiatric and psychological evidence demonstrated developments since 1985 in field of cognitive and memory deficits in people with schizophrenia or schizoaffective disorder – Where new evidence required to be fresh and compelling – Where evidence compelling if reliable, substantial, and highly probative in context of issues in dispute at trial – Whether fresh psychiatric and psychological evidence compelling – Whether fresh psychiatric and psychological evidence highly probative of relevant issue at trial – Whether in interests of justice to consider fresh evidence on appeal – Whether substantial miscarriage of justice occurred.

High Court – Special leave to appeal – Where application for special leave did not purport to raise any question of legal principle – Where application for special leave argued on basis of interests of justice in particular case – Where Court required to reconsider evaluative conclusions of fact reached by Court below – Where exceptional procedural course taken – Where one aspect of application permitted to be subject of full argument on merits as if on appeal – Whether application for special leave ought to be granted.

Words and phrases – "cognitive and memory deficits or impairments", "compelling", "exceptional procedural course", "expert opinion", "fresh and compelling evidence", "inconsistencies and inaccuracies", "independent corroboration", "interests of justice", "jury direction", "psychiatric and psychological evidence", "reliability", "reliable, substantial, and highly probative", "second or subsequent appeal", "special leave to appeal", "substantial miscarriage of justice".

Judiciary Act 1903 (Cth), s 35A(b).
Criminal Law Consolidation Act 1935 (SA), s 353A(1).

1 GAGELER CJ, GLEESON AND JAGOT JJ. This Court has emphasised in the past that the jurisdiction it exercises in determining an application for special leave to appeal "is not a proceeding in the ordinary course of litigation" but "a preliminary procedure recognized by the legislature as a means of enabling the court to control in some measure the volume of appellate work requiring its attention"[1]. The Court has explained[2]:

> "Such an application has special features which distinguish it from most other legal proceedings. It is a long-established procedure which enables an appellate court to control in some measure or filter the volume of work requiring its attention. Ordinarily, it results in a decision which is not accompanied by reasons, or particularly by detailed reasons. It involves the exercise of a very wide discretion and that discretion includes a consideration of the question whether the question at issue in the case is of such public importance as to warrant the grant of special leave to appeal. To that extent at least, the Court, in exercising its jurisdiction to grant or refuse special leave to appeal, gives greater emphasis to its public role in the evolution of the law than to the private rights or interests of the parties to the litigation."

2 Accordingly, the giving of extensive reasons for the refusal of an application for special leave to appeal has long been extremely rare. And because such reasons have been recognised to create no binding precedent[3], it is important to the maintenance of legal certainty that the giving of reasons for the refusal of such an application which descend in detail into the merits of the decision under appeal should remain extremely rare. The Court has for some years scrupulously adhered to the prudential practice of confining the exposition of its reasons for refusing such an application to a concise summation of the principal factor or factors informing the exercise of its discretion.

3 The exception to that practice in the present case is justified by the exceptional feature of the application that it does not purport to raise any question of legal principle. Rather, the application has been framed and argued to warrant the discretionary grant of special leave solely on the basis that the interests of the

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1 *Coulter v The Queen* (1988) 164 CLR 350 at 356.

2 *Smith Kline & French Laboratories (Aust) Ltd v The Commonwealth* (1991) 173 CLR 194 at 217-218 (citations omitted).

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

administration of justice in the particular case[4] require this Court's reconsideration of the evaluative conclusions of fact reached by the Court of Criminal Appeal. To determine whether special leave should be granted on that exceptional basis, the Court has considered it most efficient to take the exceptional course of permitting one aspect of the application to have been the subject of full argument on the merits as if on an appeal by reference to the totality of the relevant evidence that was before the Court of Criminal Appeal. These reasons are a reflection of that exceptional procedural course.

4 On 14 March 1985, the applicant, Derek Bromley ("Bromley", also known as "Milera")[5], along with a co-accused, John Karpany ("Karpany"), was convicted of the murder on 4 April 1984 of Stephen Docoza ("the deceased" or "Docoza"). Bromley and Karpany were each sentenced to life imprisonment. Their subsequent appeal was dismissed. Bromley's application for special leave to appeal to this Court was also dismissed. Bromley remains in prison.

5 Bromley applied for special leave to appeal from an order of the Court of Criminal Appeal of the Supreme Court of South Australia refusing him permission to appeal a second time against his conviction for murder under s 353A of the *Criminal Law Consolidation Act 1935* (SA) ("the CLCA")[6]. Section 353A(1) provided[7] that the 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". Section 353A(2) provided that a convicted person could appeal under s 353A only with the permission of the Court.

6 By an order of this Court made on 16 September 2022, the application for special leave to appeal, limited to the questions whether the fresh psychiatric evidence is compelling within the meaning of s 353A(1) of the CLCA and whether it is in the interests of justice that it be considered on the second appeal, was referred to an enlarged bench of the Full Court.

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4 Section 35A(b) of the *Judiciary Act 1903* (Cth).

5 *R v Bromley* [2018] SASCFC 41 at [2], [4].

6 *R v Bromley* [2018] SASCFC 41.

7 Section 353A has been repealed and re-enacted as s 159 of the *Criminal Procedure Act 1921* (SA) but continues to apply to this proceeding by operation of Sch 2, item 41 of the *Summary Procedure (Indictable Offences) Amendment Act 2017* (SA).

7 The fresh psychiatric evidence is the evidence of three psychiatrists and two psychologists. The evidence comprised expert reports and oral evidence given by the experts on 12 December 2016 before Stanley J. The evidence concerns developments in the field of cognitive deficits or impairments in people suffering from schizophrenia and schizoaffective disorder and their effects on memory since the date of Bromley's conviction, 14 March 1985. The evidence is relevant to an issue in Bromley's trial, being the reliability of a witness, Gary Carter ("Carter", sometimes known as "Beau" or "Bo")[8], given Carter's undisputed schizoaffective disorder at the time of the event on 4 April 1984 and when giving evidence.

8 It was also undisputed that the three requirements for evidence to be "compelling" in s 353A(6)(b) of the CLCA, that evidence is compelling if it is reliable, substantial, and highly probative in the context of the issues in dispute at the trial of the offence, are to be understood and applied as explained in *Van Beelen v The Queen*[9]. Accordingly: (a) the words "reliable", "substantial", and "highly probative" are to be given their ordinary meaning; (b) each criterion has work to do, but they will commonly overlap; (c) "reliable" means a credible and trustworthy basis for fact finding; (d) "substantial" means of real significance or importance with respect to the matter the evidence is tendered to prove; (e) evidence that is reliable and substantial will often but not always also be "highly probative" in the context of the issues in dispute at the trial; and (f) this is because the issues in dispute at the trial will depend upon the circumstances of the case[10]. "Commonly, where fresh evidence is compelling, the interests of justice will favour considering it on appeal", but there are circumstances where that may not be so (eg, a public confession of guilt). The fact that the conviction is long-standing, however, does not weigh into the consideration of the interests of justice in deciding if fresh and compelling evidence should be considered in a second or subsequent appeal[11].

9 As will be explained, in the present case the Court of Criminal Appeal was right to conclude that the fresh psychiatric and psychological evidence is not compelling as it is not highly probative in the context of the relevant issue in dispute in Bromley's trial, being the reliability of Carter's evidence identifying Bromley as the man who, with Karpany, attacked Docoza at the River Torrens in

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8 *R v Bromley* [2018] SASCFC 41 at [3], [162].

9 (2017) 262 CLR 565.

10 *Van Beelen v The Queen* (2017) 262 CLR 565 at 577 [28].

11 *Van Beelen v The Queen* (2017) 262 CLR 565 at 578 [30].

the early hours of 4 April 1984. For this reason, the application for special leave to appeal must be dismissed.

Background

10 In the joint trial of Bromley and Karpany for Docoza's murder, Bromley's case was, in part, that it had not been proved either that the deceased was murdered or, if murdered, that Bromley had any involvement in that crime. The prosecution called several witnesses, including Carter. The trial judge dealt with Carter's evidence in his summing up, including in these terms:

> "Whilst on the subject of witnesses, I want to say something about Gary Carter. He undoubtedly has a mental illness; undoubtedly, as Mr Borick [Counsel for Bromley] said, he was more affected by that illness on the night in question than he was when he gave evidence before you. You must, therefore, approach Gary Carter's evidence with considerable caution, especially bearing in mind as the Crown, Mr Martin, put to you, that his evidence is so crucial to the Crown case. You must scrutinise his evidence with special care. It is open to you to act on his evidence if you are convinced of its accuracy, and you should not do so without first giving careful heed to the warning that I am now giving you. There is no doubt that in some important respects he is mistaken. I say 'mistaken' because I do not think that anyone seriously suggests that he was lying. He was clearly mistaken, you may well think, in believing that all of Docoza's clothes were removed. He was clearly mistaken in believing that the accused, Bromley, laboured Docoza with the barbell. You may decide that he was right in saying that Bromley picked it up, that he may have been struck one or more glancing blows, but the fact remains that Dr Manock's evidence undoubtedly proves that Carter was mistaken as to the use made by Bromley of the barbell.
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> Counsel mentioned other matters as well and you will bear them in mind when considering whether you can accept any part of Carter's evidence. Mr Martin argued that notwithstanding all that the defence has put to you, and some of which I mentioned, Carter was supported by independent evidence to a substantial extent, and I direct you that if after scrutinizing his evidence, and bearing in mind the warning I have just given you, if that support, if you find it exists, persuades you to accept some or a great deal of what he has said, you may do so."

11 Bromley and Karpany were convicted of Docoza's murder on 14 March 1985. Their appeals were dismissed by the South Australian Court of Criminal

Appeal[12]. In dismissing Bromley's appeal, which was brought on six grounds, including, relevantly, that the verdict against Bromley was unsafe, King CJ (with whom Mohr and O'Loughlin JJ agreed[13]) recorded that Bromley's conviction "depended to a considerable extent upon the evidence of Gary Carter", who was schizophrenic and whose history of mental illness meant that his evidence required "careful scrutiny"[14]. King CJ observed that there was a "considerable body of evidence which supported Carter's story at various points" and, having regard to the "very convincing body of evidence against Bromley", concluded that he felt no doubt that the jury's verdict was correct[15].

12 Bromley applied for special leave to appeal to this Court against his conviction. Gibbs CJ (with whom Mason, Wilson and Dawson JJ agreed) recorded that in support of the application "it was argued that the fact that Carter was a schizophrenic made his evidence so inherently unreliable that it was necessary for the learned trial judge to direct the jury that it would be dangerous for them to act on it unless it was corroborated and to explain to them what evidence was capable of amounting to corroboration"[16]. Gibbs CJ said that, in such a case, where there was no legal requirement for "the full warning as to the necessity of corroboration", "the jury should be given a warning, appropriate to the circumstances of the case, of the possible danger of basing a conviction on the testimony of that witness unless it is confirmed by other evidence. The warning should be clear and, in a case in which a lay juror might not understand why the evidence of the witness was potentially unreliable, it should be explained to the jury why that is so. There is no particular formula that must be used; the words used must depend on the circumstances of the case."[17] Gibbs CJ concluded that the trial judge's warning about Carter's evidence was sufficient[18]. Brennan J considered this was a case in which a warning was required[19], and the trial judge had given a warning directing

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12 *R v Bromley and Karpany* (1985) 122 LSJS 454.

13 *R v Bromley and Karpany* (1985) 122 LSJS 454 at 467.

14 *R v Bromley and Karpany* (1985) 122 LSJS 454 at 462.

15 *R v Bromley and Karpany* (1985) 122 LSJS 454 at 462.

16 *Bromley v The Queen* (1986) 161 CLR 315 at 318.

17 *Bromley v The Queen* (1986) 161 CLR 315 at 319.

18 *Bromley v The Queen* (1986) 161 CLR 315 at 320.

19 *Bromley v The Queen* (1986) 161 CLR 315 at 325.

the jury's "attention precisely to the danger of acting on Carter's evidence where it was unsupported by other evidence"[20]. According to Brennan J, therefore[21]:

> "No more was needed. The credibility of Carter was the chief issue in the case and the jury could not have failed to consider whether it was safe to act on his evidence nor, once it was pointed out to them, could they have failed to appreciate the danger of placing too much reliance on the appearance of Carter in the witness box."

13 It is convenient to record here that the reference by Gibbs CJ to a legal requirement for "the full warning as to the necessity of corroboration" means a common law requirement for a warning that it would be dangerous to convict in the absence of corroboration in respect of certain classes of witness and certain classes of case. The point being made is that Carter's evidence was not within a class requiring a corroboration warning, but was required to be subject to a warning, as given by the trial judge[22]. In their evidence, the psychiatrists and psychologists referred to "corroboration" interchangeably with other descriptions, all of which should be understood to mean no more than supporting evidence or material of any kind.

14 It may also be inferred that, when observing that the jury could not have failed to consider if it was safe to act on Carter's evidence, Brennan J had in mind not only the warning given by the trial judge, but also the closing address of counsel for Bromley. Bromley's counsel, in closing address, said:

> "Secondly, you have a schizophrenic witness. How do you assess him? Not only do you have a schizophrenic witness but the man you saw in the witness box is a different man to the man who was very ill, critically ill with his illness that night. He is not the same man. You haven't seen Carter at a point of time when the schizophrenia has a hold on him. You saw some physical manifestations of it with his hands above his head all the time. You saw it later one afternoon when he was getting obviously tense and the trial stopped a little early. You have not seen him with the devil talking to him."

15 Bromley's counsel said that Carter was the prosecution's "crucial link and that is no link at all". Bromley's counsel reminded the jury about what Carter had said to them about the devil in order to "get an assessment of what is real and what

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20 *Bromley v The Queen* (1986) 161 CLR 315 at 326.

21 *Bromley v The Queen* (1986) 161 CLR 315 at 326.

22 eg, *B v The Queen* (1992) 175 CLR 599 at 615-616.

is fantasy". He said Carter "is desperately ill and mental illness can be one of the worst illnesses. It is often hidden and debilitating." He continued, saying that Carter was in "the schizophrenic state ... on the night he was supposed to have made these observations", and that Carter said to the jury "the devil really appeared to him twice", and that the devil was inside his head the night he said he witnessed the offence, and he had a feeling that what he was seeing that night was "unreal". Bromley's counsel also pointed out parts of Carter's evidence that it was said were known not to be true (that the deceased was hit with a barbell, that Bromley was standing and dunking the deceased in the river, that the deceased was stripped naked, that Bromley was very drunk, and that Carter went into the water to try to get the deceased out) and said these are "[c]ritical issues", and Carter was "wrong and unreal about every one of them". Counsel said "[i]f he believes that the Devil is real, why isn't it just as possible that he believes these things that he saw which you know are not true are real too, and that what you are getting is a description from a man who is very, very ill".

16 In 2016, Bromley applied for permission to appeal against his conviction for a second time, this time pursuant to s 353A of the CLCA. In his application, Bromley relied on two classes of evidence said to be fresh and compelling: forensic pathology evidence, and the psychiatric and psychological evidence. As noted, this Court's order of 16 September 2022 referred only the psychiatric (meaning psychiatric and psychological) evidence to an enlarged bench of the Full Court for determination of the application for special leave to appeal.

17 The Court of Criminal Appeal, to the extent relevant to the psychiatric and psychological evidence, summarised the effect of that evidence in these terms[23]:

> "1 Since 1984 there has been an expansion of knowledge and understanding in relation to the condition of schizoaffective disorder. It is now well recognised that cognitive impairment in memory functioning may be associated with schizoaffective disorder and that patients so affected are much more likely to have memory defects than was appreciated at the time of the trial in 1985, although the existence of such cognitive deficits was known in 1985. The consensus of expert opinion is that most persons suffering from schizoaffective disorder are unreliable historians due to impairment in memory function and the difficulty they experience in distinguishing between real events and delusions when they are psychotic. Accounts given by persons suffering schizoaffective disorder may not be reliable absent independent corroboration.

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23 *R v Bromley* [2018] SASCFC 41 at [38].

2 It is now well recognised that a core feature of schizoaffective disorder is that people suffering from it may be susceptible to what is referred to as 'suggestibility'. In the present context, this means that such a person may form beliefs that an event occurred, but that such beliefs may emanate from the effect of suggestibility associated with procedures such as interrogations conducted by authority figures, rather than from an actual memory of such an event.

3 The broad distinction that Dr Barrett postulated in his report dated 6 August 1984 between grandiose delusional beliefs and memory of objective factual events can no longer be accepted.

4 However, notwithstanding the above propositions, it is generally accepted that a person suffering from schizoaffective disorder is capable of giving reliable evidence and accurately recalling events they witnessed."

18 During the hearing of the application in this Court, Bromley's counsel accepted that this summary is accurate other than that the words "may not be" in the last sentence of proposition one should read "[a]ccounts given by persons suffering schizoaffective disorder *are not* reliable absent independent corroboration". Bromley's counsel also accepted that the Court of Criminal Appeal's detailed summary of the psychiatric and psychological evidence (Appendix I to the Court of Criminal Appeal's reasons) is accurate.

19 With respect to proposition one, the Court of Criminal Appeal concluded that the "considerable evidence supporting Carter's account", not all of which had been considered by the psychiatric and psychological experts, "significantly diminishes" the weight to be given to their opinions about the reliability of Carter's evidence[24].

20 With respect to proposition two, the Court of Criminal Appeal concluded that the evidence did not "demonstrate that the phenomenon of suggestibility led to Carter confabulating or acquiring a false memory of Bromley attacking the deceased"[25].

21 With respect to proposition three, the Court of Criminal Appeal concluded that "Dr Barrett's assessment of the capacity of Carter to give evidence at Bromley's trial, based on a distinction between his delusional beliefs and his

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24 *R v Bromley* [2018] SASCFC 41 at [139]-[140].

25 *R v Bromley* [2018] SASCFC 41 at [196].

memory of the events on the banks of the Torrens the night before his re-admission on 4 April 1984, can no longer be sustained"[26]. The rejection of this distinction, however, did not "lead to a conclusion that the evidence given by Carter concerning the actions of Bromley must necessarily be incorrect", given "the consensus of the experts was also that a person suffering from schizoaffective disorder is capable of giving reliable evidence and accurately recording events they have witnessed"[27]. In any event, Dr Barrett's statement was not before the jury[28].

22 With respect to proposition four, the Court of Criminal Appeal concluded that it was of "high importance"[29].

23 The Court of Criminal Appeal was prepared to assume that the psychiatric and psychological evidence was fresh and considered it to be reliable and substantial. It was not, however, highly probative in the context of the issues in dispute at the trial and therefore not "compelling"[30]. Accordingly, permission to appeal was refused.

The submissions on the application

24 The essential argument for Bromley is that the fresh psychiatric and psychological evidence, properly understood, means that each and every part of Carter's evidence is potentially unreliable. While parts of Carter's evidence had been corroborated, his identification of Bromley as the man who, with Karpany, attacked the deceased on 4 April 1984 was not corroborated. According to the submissions for Bromley, the fresh psychiatric and psychological evidence demonstrates that, in the circumstances of Carter's illness, this uncorroborated evidence identifying Bromley as a person who attacked the deceased on 4 April 1984 was unreliable. The trial judge's direction did not say that no part of Carter's evidence could be accepted unless corroborated, contrary to what – as contended for Bromley – was required, as demonstrated by the fresh psychiatric and psychological evidence.

25 According to the submissions for Bromley, this means that the fresh psychiatric and psychological evidence is reliable, substantial, and highly

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26 *R v Bromley* [2018] SASCFC 41 at [213].

27 *R v Bromley* [2018] SASCFC 41 at [214].

28 *R v Bromley* [2018] SASCFC 41 at [214].

29 *R v Bromley* [2018] SASCFC 41 at [216].

30 *R v Bromley* [2018] SASCFC 41 at [375]-[377].

probative in the context of the relevant issue in dispute at the trial, being Carter's lack of reliability as a witness due to his schizoaffective disorder and the inability, in consequence, for a trier of fact to distinguish between those aspects of Carter's evidence which were true and those which were untrue. Accordingly, it is said, the Court of Criminal Appeal erred in using Carter's evidence that was corroborated to diminish the significance of the fresh psychiatric and psychological evidence that no part of Carter's evidence was reliable if not corroborated, specifically his uncorroborated evidence that it was Bromley who was with Carter and Karpany on the evening in question and it was Bromley who, with Karpany, attacked the deceased on the banks of the River Torrens.

26 The respondent argued that, as the psychiatric and psychological experts all accepted that: (a) a person with schizoaffective disorder is capable of accurately recalling events; (b) the extent to which other evidence confirmed Carter's evidence would be relevant to an assessment of his reliability; and (c) they had not fully assessed the evidence that confirmed parts of Carter's evidence, their initial evidence in their reports that Carter was a wholly unreliable witness was unsustainable. In the respondent's submission, it followed that the Court of Criminal Appeal was right to conclude that the weight to be given to their evidence was significantly diminished by these circumstances, with the consequence that their evidence was not compelling, in the sense of highly probative, in the context of the issue of Carter's reliability as a witness of the events in question.

The fresh psychiatric and psychological evidence

27 It is not useful to repeat the summary of the fresh psychiatric and psychological evidence that the Court of Criminal Appeal appended to its reasons. The focus of this part of these reasons is the overall effect of the expert evidence, including the evidence given in cross-examination, on: (a) whether accounts of past events given by persons suffering schizoaffective disorder may not be or are not reliable absent independent corroboration; and (b) the experts' approach to Carter's accounts and evidence. In evaluating whether the evidence is "compelling" within the meaning of sub-ss (1) and (6)(b) of s 353A of the CLCA, it is the whole of the evidence which must be considered, not merely a part of the evidence. In the case of the opinion of an expert, accordingly, the opinion given in a report or reports from the expert must be considered together with any oral evidence, including evidence in cross-examination, given by that expert.

28 It should be recorded here that the expertise of the psychiatrists and psychologists to give the evidence they gave is not in dispute. Nor, given the focus in this Court, is it fruitful to focus on the "freshness" (or otherwise) of the evidence. The Court of Criminal Appeal was prepared to assume the freshness of the

evidence[31] and, in the circumstances of the case as put in support of this application, we too adopt that approach.

29 It is also common ground that schizoaffective disorder is schizophrenia together with a mood disorder. Schizophrenia is a psychotic illness. A psychotic illness involves perceptual disorders including delusions (fixed beliefs in something false) and hallucinations (perceiving things which are not real). A mood disorder can include severe mania or severe depression. The symptoms of a mood disorder, and of psychosis, can resolve whereas the underlying schizophrenia continues.

Dr Barrett's statement

30 The experts referred to the "report" of Dr Barrett, amongst other things. This is a reference to a statement by Dr Barrett, psychiatrist, dated 6 August 1984. Dr Barrett said Carter was his patient and had been since August 1983 when he was admitted to a hospital and treated for schizoaffective disorder, a "major psychotic form of mental illness characterized by hallucinations, delusions and a disturbance of mood varying from depression to elation". Carter was hospitalised from 26 August until 23 September 1983. He was re-admitted between 6 and 17 October 1983 and was subsequently treated as an outpatient. Carter failed to attend as an outpatient from the beginning of 1984. The balance of Dr Barrett's statement should be recorded in full. It said:

> "He was readmitted on 4/4/84, presenting on this occasion with delusional beliefs of a persecutory and grandiose nature, viz. That the devil was affecting him, that he was a psychic, that he was a minister of religion, a top footballer and an expert in martial arts. A history was elicited from his family that he had gradually been [deteriorating] over the four weeks prior to admission. His mood at the time of admission was noted to be extremely elated, euphoric and expansive. This constellation is commonly referred to in psychiatric terms as a hypo-manic phase of a psycho-affective disorder.
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> On admission he also gave a history to the admitting medical officer that he had seen two aboriginal men beating up a drug addict and throwing him into the river.
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> He was treated as an inpatient at Hillcrest Hospital under a custody order of the guardianship board until 13/7/84, when he commenced a period of

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31 *R v Bromley* [2018] SASCFC 41 at [375].

> extended trial leave, living at the address of his mother and attending the Hospital day clinic.
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> In my opinion his mental state has stabilized sufficiently to enable him to understand the proceedings of the court and to competently give evidence to the court. It is also my opinion that a distinction in quality can be drawn between his delusional beliefs and the account which he gave of events which allegedly took place on the date of his admission. Whereas the former are characterized by the grandiose belief that he is someone who has exceptional power and qualities, the latter account is not. That is to say it is my opinion that his description of events was not a product of delusional thinking or of hallucinated experience."

31 Dr Barrett's statement was not in evidence in Bromley's trial. The fresh psychiatric and psychological evidence disputed Dr Barrett's opinion that a distinction could be drawn between Carter's delusional beliefs and his evidence of the event he witnessed.

Dr Furst

32 Dr Richard Furst is a psychiatrist. Having reviewed Dr Barrett's statement and other material, Dr Furst considered in his reports that it was reasonable to conclude that Carter was most likely acutely psychotic and manic on 4 April 1984 and remained so after his admission to hospital for several weeks. This could have made Carter more suggestible when interviewed by police. Dr Furst considered it difficult to reconcile the detailed account Carter gave police in an interview with the fact he was delusional and manic at that time and when compared with the various versions he gave a psychiatric nurse, Mr Steele, while in hospital. While the evidence indicated that Carter had largely recovered from the acute phase of his illness when he gave evidence at the trial, Dr Furst considered that the inaccuracies in Carter's evidence (as noted by the trial judge) and acute illness at the time of the events on 4 April 1984 cast doubt over the reliability of his evidence at the trial. Dr Furst said in his first report:

> "Given he was mentally unwell, delusional and manic at the time of his admission to hospital and initial interviews with detectives, it is difficult to determine with any degree of certainty or reliability what events really took place and what memories were based on delusional interpretations, hallucinations and/or false memories. In this respect, I note the various versions of events at the Torrens River he apparently gave to Mr Steele, psychiatric nurse, shortly after his admission to hospital."

33 Dr Furst confirmed that this remained his opinion in his supplementary report.

34 In oral evidence in chief, Dr Furst said that the appreciation of cognitive deficits associated with schizophrenia and schizoaffective disorders was not nearly as rigorous or recognised in 1985 as it is currently. People with schizophrenia and schizoaffective disorders have deficits in abstract thinking, impacting not just memory but also processing of information, attention, and problem-solving. As such, they are more likely to be suggestible than people who do not have schizophrenia or schizoaffective disorders. Dr Furst said he remained of the view that, given his acute psychotic and manic symptoms, Carter's accounts involved too much internal inconsistency and uncertainty to know what was real and what was part of his delusional system.

35 In cross-examination, Dr Furst agreed that Carter's accounts that he was a black belt, a psychic, a millionaire, a league footballer, and a minister of religion, and that he fought people off with nunchakus, were delusions fitting the same pattern. Dr Furst agreed that Carter's evidence that he saw Bromley and Karpany bash someone was of a very different nature or category to Carter's "grandiose or mood congruent elevated delusions". Of the hundreds of patients Dr Furst had seen with schizoaffective disorder, their ability to recall events accurately involved "quite a variation from patient to patient". Dr Furst said that some patients have a "very good recollection". Some patients do not. Dr Furst said that, much as with witnesses without any illness, "some are very good and some are very bad at remembering things and expressing that". As schizoaffective disorder involves recognised deficits in working and short-term memory, a person with the disorder is more likely than a person without the disorder to have impaired memory encoding, but they have the capacity to accurately recall what they have witnessed at a later time.

36 Dr Furst agreed that if someone else supported what the patient was saying, that would tend to suggest the patient was reliable and accurate. Of his patients with schizophrenia accused of a violent crime, about two-thirds or three-quarters had a fairly good memory of the incident and about one-quarter or one-third had no memory or a very inconsistent narrative or denial. Dr Furst said that it is now an accepted fact in psychiatry that schizophrenia and schizoaffective disorder involve cognitive and memory deficits and persons with schizophrenia or schizoaffective disorder are more likely to have such deficits than people without schizophrenia or schizoaffective disorder.

37 Dr Furst considered the mistakes Carter made in his evidence were "very relevant" as they showed Carter made untrue statements under oath and was adamant these things had happened when they had not (eg, the use of a dumbbell – also referred to as a barbell – to attack the deceased), which made Dr Furst question the reliability of all Carter's evidence given his mental illness. The five inconsistencies in Carter's evidence that informed Dr Furst's opinion of his unreliability given his mental illness were: (a) the use of the dumbbell; (b) the

deceased being completely naked rather than naked from the waist down; (c) Carter giving Panadol or some prescription medication to the deceased; (d) Carter pulling the deceased out of the river; and (e) Carter using nunchakus. Dr Furst said he was not asked to consider those parts of Carter's evidence that were corroborated by other evidence. If asked to assess a person's reliability as a psychiatrist, he would consider "external support" for the information given. That, however, was not his brief in this case.

38 Dr Furst confirmed it was not his opinion that a person with schizoaffective disorder, when in remission, could not give evidence capable of being accepted by a court beyond reasonable doubt. He agreed that a trier of fact would be entitled to look at other evidence that supports the evidence given by a person with schizoaffective disorder and find that person reliable. Dr Furst agreed that, in respect of Carter's potential suggestibility, it would be important to consider what Carter said before giving his police statement to assess whether his police statement was affected by his suggestibility. Dr Furst had seen no evidence that the police had in fact provided answers or asked questions of Carter in a way that would have affected his answers.

39 The effect of Dr Furst's evidence of particular relevance is that: (a) due to his schizoaffective disorder, Carter was psychotic and manic both when witnessing events on 4 April 1984 and for some weeks thereafter, including when giving his statement to police, but had improved significantly by the time of the trial; (b) it was now known, which it had not been in 1985, that people with schizophrenia or schizoaffective disorder suffer from cognitive deficits including in respect of memory formation and recall and are more likely to be suggestible than people without these disorders; (c) the capacity of people with schizophrenia to recall events accurately varies greatly from person to person, as is the case with any person, but it is more likely that a person with the disorder will have impaired memory than a person without the disorder due to the cognitive deficits associated with the disorder; (d) given the inconsistencies and inaccuracies both in his accounts over time and in his evidence, it was difficult to tell if Carter's statements and evidence were reliable or based on delusional interpretations, hallucinations and/or false memories; (e) there is a clear difference, however, between Carter's obviously delusional statements and his statements about the events of the assault on 4 April 1984, and this difference is relevant to his reliability; (f) if Dr Furst had to assess the reliability of a person with schizoaffective disorder to recall events accurately he would consider if other evidence supported that person's account, but had not been asked to do so in this case; and (g) a person with schizoaffective disorder, when in remission, could give evidence capable of being accepted by a trier of fact beyond reasonable doubt.

Dr Hook

40 Dr Stephen Hook is a psychiatrist. In his report, Dr Hook considered that, in contrast to Dr Barrett's opinion, it was not possible to make a clear-cut distinction between psychotic manifestations and rational thinking in a person who is acutely psychotic. "Some statements may be obviously delusional, but frequently there is also confusion between objective reality and fantasy, and misinterpretation of objective events. Further, manic states are characterised by a flight of ideas where many statements are made which are only tenuously linked to objective reality (if at all)." Further, according to Dr Hook, "[e]ven once an acute psychotic phase has passed, this does not mean that the individual is now able to accurately recollect and/or reality-test material that emerged whilst psychotic. In this situation, individuals generally have incomplete recollection of events because of multiple factors – disruption of cognitive processes in psychosis; psychological defenses such as denial and rationalization, and the effects of medication." Dr Hook reviewed each of Carter's statements to police[32], and considered they did not reflect his illness in form or content as Carter was psychotic when he gave them. Rather, the statements were in a reasonably clear sequence without the digressions that would be expected if a person were thought disordered. Dr Hook considered that the possibility of Carter's involvement in the events of 4 April 1984 complicated matters further as Carter's psychosis did not mean he was incapable of directing attention to others by saying he was a witness and not a perpetrator.

41 In oral evidence in chief, Dr Hook confirmed his view that, on the available material (including Dr Barrett's statement), Carter was psychotic on admission to Hillcrest Hospital and remained in that state for several weeks. Dr Barrett had recorded that Carter was hypomanic, meaning in an elevated mood state with increased activity, rate of speech and thinking, and decreased need for sleep often associated with pressure and digression in thinking. Dr Hook said that, in a psychotic state, there is the possibility of hallucinations and misinterpretation of events in terms of both perception and processing.

42 In cross-examination, Dr Hook agreed that a person with schizoaffective disorder who is in remission may be capable of giving accurate evidence. Such a person may be reliable or unreliable in their recall. The likelihood of them being unreliable in recall would be higher if they were suffering acute symptoms of the disorder. The actual effect of the disorder on recall depends on the individual, including the severity of their illness. Generally, for all people, accuracy of recall is higher closer in time to the events in question. Dr Hook agreed that a person

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32 The statement of 11 April 1984 is extracted below at [122]. The statements of 30 April 1984 and 24 July 1984 are not in evidence.

without any psychotic illness might also lie to protect themselves. Dr Hook agreed that if a person other than Carter had confessed to the crime it would undermine the hypothesis of Carter's involvement in the event.

43 Dr Hook accepted that it was relevant to consider any patterns in the delusions of a person with psychosis. He agreed Carter's delusions at the relevant time involved grandiosity and these were different from his statements about having witnessed a bashing of a person.

44 Dr Hook acknowledged that people with schizoaffective disorder can accurately and inaccurately recall events, including events which occur during psychosis. As they recover from psychosis some people will be able to distinguish between real events they misunderstood or misinterpreted while psychotic and some will not be able to do so. It is not uncommon for a person to be able to accurately recall events even when in the acute stage of psychosis. Dr Hook saw no evidence that Carter was confabulating when giving his testimony in court. Dr Hook's concern about the low reliability of Carter's evidence was based mostly on the fact that Carter witnessed the event when suffering from psychosis, rather than the inconsistencies in Carter's statements and evidence. Dr Hook considered that inconsistencies would be expected in many witnesses' evidence whether or not they have an illness, but his main concern remained that Carter's psychotic state "rendered the quality of the information that he was able to convey lower than you would otherwise expect". Dr Hook accepted that this concern applied to some, but not necessarily all, of Carter's evidence. Overall, Dr Hook remained of the view that Carter's testimony was of low reliability.

45 The effect of Dr Hook's evidence of particular relevance is that: (a) acute psychosis disrupts cognitive processes involved in perception, processing, and recall; (b) this disruption does not cease once the psychosis has been alleviated; (c) the effect of psychosis on recall depends on the individual; (d) a person with schizoaffective disorder who is in remission may be capable or incapable of giving accurate evidence – it depends on the individual and their circumstances; (e) Carter was psychotic and hypomanic when admitted to hospital on 4 April 1984 and for several weeks thereafter, including when he gave his statements to police; (f) Carter's police statements do not appear to be as thought disordered as Carter would have been when he gave them; (g) Carter's statements about his delusions were different from his statements about having witnessed a bashing of a person and this would be relevant to his reliability; (h) other evidence would also be relevant to testing a hypothesis of Carter's possible involvement in the event; and (i) the reliability of Carter's evidence, or some of his evidence, would have been low, mainly due to his psychosis when witnessing the event, but there was no evidence of Carter confabulating.

Dr Brereton

46 Dr William Brereton is a psychiatrist. In his report, Dr Brereton disagreed with Dr Barrett's opinion that it was possible to distinguish between Carter's delusional beliefs and his description of the offence. As Carter was "grossly affected by the symptoms of his mental illness at the time", this would have affected his "perception, interpretation, memory and account of the actual events he witnessed". Dr Brereton said Carter had "experiences that had no basis in reality but was not able to distinguish them from reality. His illness would have affected his cognitive functioning globally and so it would not be possible to distinguish some aspects of his recollections and assertions as unaffected by his mental illness and therefore accurate." This was not to say Carter was "wholly incapable" of providing an accurate account of the events of 4 April 1984, but the "likelihood he was inaccurate is extremely high and there is no way of determining an accurate recollection from an inaccurate one".

47 Dr Brereton said in his report that there had been substantial advances in psychiatry since 1984 in respect of the extent of cognitive impairment and dysfunction in people with schizophrenia. According to Dr Brereton:

> "An individual who was acutely psychotic, as Mr Carter appears to have been at the time of the offence, would have their perception of the world affected by a set of beliefs and assumptions that are delusional (i.e. not in contact with reality) and by direct perceptual disturbance in the form of hallucinations (i.e. a false perception without a stimulus). Individuals can also experience delusional memories, which can include a delusional misinterpretation of a real memory or a memory of an event that did not happen that has delusional significance. It is not possible, in a period of acute illness such as this, for an individual to discriminate between what is real and what is the product of their mental illness."

48 As Carter was acutely unwell at the time of the events on 4 April 1984, Dr Brereton considered Carter's evidence of those events to be "very unreliable", despite Carter being apparently stable at the time he gave evidence. Dr Brereton said that almost the entirety of Carter's evidence would have to be corroborated before he would consider its reliability had been sufficiently demonstrated. He would have "grave concerns about relying in any significant way on aspects of his evidence that were uncorroborated".

49 In oral evidence in chief, Dr Brereton confirmed that the fact Carter had been unwell for about four weeks and not taking his medication before 4 April 1984 led him to believe Carter was psychotic at the time of the offence. Dr Brereton said that, in contrast to Dr Barrett's opinion, when a person is psychotic, especially as severely as Carter was at the relevant time, "their thinking

is so disturbed that they don't have an area of thinking and processing that is walled off from the psychosis, they don't have a preserved area of functioning ... so the psychosis is going to affect globally an individual's pattern of thinking ... an individual's cognition is globally affected". Dr Brereton said that over the last 20 to 30 years it has been recognised that cognitive dysfunction is central to schizophrenia, which was not the case in 1984; it is now clear that the cognitive deficits remain when the other symptoms are treated. Dr Brereton considered that almost the entirety of Carter's evidence would need to be corroborated to be accepted as reliable given the severity of his psychosis at the time. In his experience, acutely unwell individuals, as Carter was, have a lot of problems recalling accurately what their experiences have been while acutely unwell, and range from completely unable to recall anything, to patchy memory, to "being able to give you quite a good account of what happened but it not being accurate", leading Dr Brereton to conclude that Carter's evidence was unreliable.

50 In cross-examination, Dr Brereton agreed that some people with schizophrenia or schizoaffective disorder had good ability to recall events accurately and others did not. Even people with severe symptoms could recall events accurately. The ability to recall depended on several different considerations, particularly the individual themselves. Dr Brereton said that "the findings about cognitive impairment are not universal, so there are some individuals with schizophrenia who have higher than average intelligence and cognitive abilities" and it was possible Carter was giving an accurate account of events. Other relevant factors include: pre-existing cognitive function; the nature and severity of symptoms; if manic, the amount of sleep a person has had; and the use of drugs and alcohol. Further, the nature of what is being recalled may be relevant, so that a more reliable account could be expected for a simple, concrete, and emotionally neutral event. And as for all people, generally, the more complex the event, the harder it is to recall every detail accurately. A person still in the acute phase of psychosis, however, would be inaccurate in their description of events more often than not. As an individual is treated and their psychotic symptoms resolve and they begin to gain insight, the person might then give a more accurate recollection of events. But that depends on the individual. Once symptoms resolve, the global cognitive deficits generally remain to a greater or lesser extent.

51 For Dr Brereton, Carter's reliability was in issue both in principle (because of the cognitive deficits and perceptual abnormalities associated with schizoaffective disorder) and because of the clinical features (the nature and severity of the delusions and perceptual abnormality with which he presented on 4 April 1984). For Dr Brereton, the issue was not to do with the consistency of Carter's account with other evidence, but that he presented with such a severe illness involving extreme perceptual abnormality, auditory and visual hallucinations, a number of very clear fixed delusions, agitation, and flight of ideas, all of which indicated that his account was unreliable. With the severity of

his symptoms, Dr Brereton said it is safe to assume that Carter had cognitive deficits which would affect his perception, processing, understanding, and laying down of memory. Dr Brereton accepted, however, that research showed that people with severe symptoms could have normal or average cognitive levels, but said cognitive deficits are generally present in such people.

52 Dr Brereton then gave evidence in which he said that: (a) not being able to recall details of an event accurately one year later did not indicate a cognitive deficit; (b) to ascertain if Carter suffered from cognitive deficits it would be important to look at what he was able to recall a year later during the trial and to see if it was supported by what other people said; (c) if a person is shown to be accurate in many different aspects of their recollection, that would tend in the direction that the person did not have cognitive deficits from their disorder; and (d) what has been shown to be accurate by other evidence cannot be dismissed merely because the person has schizoaffective disorder, but the parts that are not confirmed must be regarded with suspicion due to the effects of the psychosis.

53 Dr Brereton also gave evidence that when he agreed with Professor Coyle that there is no way of knowing whether what Carter was saying did occur or was an hallucination, he meant there was no *clinical* way of knowing this. Dr Brereton was not saying Carter was incapable of reliable recall. He was saying only that from a purely clinical perspective, and without regard to other evidence, it is likely that there would have been an event precipitating what Carter said but there was no way of knowing what was accurate and what was not. Third-party corroboration of Carter's account would be significant to its reliability.

54 In respect of Carter's possible suggestibility, Dr Brereton said that a spontaneous statement was not likely to be affected by suggestibility. It was impossible to say if Carter's statements to police were affected by his potential suggestibility. Further, in his practice, Dr Brereton would consider if a person's recollection of events was connected to or different in nature from the person's obvious delusions in evaluating the reliability of their recollection. Carter's recollections about the event were "very much removed" from his delusions insofar as the event did not have an element of grandiosity about it. The reason Dr Brereton was concerned about Carter's reliability was Carter's inferred perceptual difficulties and abnormalities and the fact that Carter was highly likely to be wrong in a matter of detail. Dr Brereton agreed, however, that a person's reliability could not be measured and there will be factors pointing both for and against a person's reliability. This is so with all people whether or not they have schizoaffective disorder. But Dr Brereton continued to disagree with Dr Barrett's opinion that there was a clear distinction that could be drawn between what was influenced by Carter's psychotic symptoms and what was not so influenced, as this was "way too dichotomous". Dr Brereton considered that he could not be certain

of the accuracy of what Carter was saying unless it was corroborated but accepted the same could be said of "a lot of people" without schizoaffective disorder.

55 The effect of Dr Brereton's evidence of particular relevance is that: (a) at 4 April 1984 and for some weeks thereafter Carter was grossly affected by the symptoms of his mental illness and this would have affected his perception, interpretation, memory, and account of the events he witnessed; (b) Carter was apparently stable when he gave evidence; (c) to assess if Carter suffered from cognitive deficits when he gave evidence it would be important to consider what he could recall and if it was supported by other people, as the cognitive deficits and accuracy of recall depend on several factors including the individual themselves; and (d) it is not clinically possible to know if what Carter was saying in evidence was accurate and corroboration of his evidence would be significant in assessing its reliability, but this could also be said of a lot of people without schizoaffective disorder.

Dr Sugarman

56 Dr Roy Sugarman is a psychologist and neuropsychologist. In his report, Dr Sugarman said that since the 1980s it has become apparent that neurocognitive impairment is a core feature of psychotic disorders. Research about the unreliability of memory in mentally healthy individuals, including because of suggestibility, let alone people with impaired neurocognitive processing, has developed since the 1980s. Mentally healthy individuals can easily come to believe fantasy and can have false memories. Memory generally is a "highly plastic, suggestible, multiply-encoded phenomenon of which we have to be highly skeptical [sic]" in mentally healthy individuals, and more so in those with severe mental illness.

57 From his review of the available material, Dr Sugarman considered Carter had given "multiple and incredible versions of the subject murder" and was "vulnerable and suggestible" and "desperate to comply" with the police. There was a significant chance Carter's recall would be unreliable and subject to both suggestibility and confabulation. As such, Carter's statements to police may not match the reality of what happened and "nor is the clarity of any such statement congruent with his described neurocognitive incapacity at the time". Dr Sugarman described Carter, from the available material, as "ingratiating, grandiose, compliant, psychotic and suggestible, aware of the need for police endorsement of his value to them and the successful prosecution", with his "presentation in the ward [being] incompatible in all likelihood with a reasoned iteration of the events of the murder", all leading Dr Sugarman to infer that Carter's "final testimony has a high risk of being at odds with the events he actually witnessed and his understanding of them".

58 In oral evidence in chief, Dr Sugarman said that since the mid-1980s it had been recognised that a core feature of psychotic disorders such as schizophrenia and schizoaffective disorder is cognitive impairment. That impairment remains, regardless of the resolution of more florid symptoms of psychosis, and is found even in first-degree relatives of patients. The cognitive impairment most affects verbal learning and memory.

59 Dr Sugarman said that he would have no confidence in what Carter was saying "across the board" as Carter "was delusional or at least ill for at least four weeks before the murder" and one would not be able to determine if what he was saying was real or not. Dr Sugarman considered that the view of the police that Carter was capable of giving reliable evidence "flies in the face of all of the medical documentation that he was unable to give coherent histories and that he was prone to rambling and irritability and hallucinations" and was also "over-compliant". In Dr Sugarman's view, while some of Carter's evidence may be correct, as a witness Carter would be unreliable.

60 In cross-examination, Dr Sugarman accepted that it was possible but not likely a person suffering from schizophrenia or schizoaffective disorder could witness an event and then accurately recall it, depending on the severity of the illness and many other factors. In the case of Carter, as he had shown signs of illness for four weeks before the event and for four months afterwards, Dr Sugarman would have difficulty in accepting that what Carter said was correct, but agreed it was possible. Dr Sugarman said that "memory is unreliable, for all of us".

61 Dr Sugarman did not look for evidence that Carter was influenced by police when giving answers to their questions. In terms of general processing of memory, Dr Sugarman would "always suggest the machinery of such a person so demonstrably ill, in all likelihood is not accurate".

62 The effect of Dr Sugarman's evidence of particular relevance is that: (a) memory involves a complex process of which we have to be highly sceptical in all people, but more so in a person suffering from schizophrenia or schizoaffective disorder due to the likely cognitive impairments in people with those disorders; and (b) while it is possible Carter was capable of accurate recall, the duration and severity of his illness before and after the event mean this was unlikely.

Professor Coyle

63 Professor Ian Coyle is a psychologist. In his report, Professor Coyle said there had been an explosion in knowledge about memory since the mid-1980s. It is now known that memory can be significantly contaminated by post-event

information and by the format and manner of questions asked. It is also now known that assessing the credibility of a person's claim to have observed or experienced something, without collateral information, is usually performed at a "chance level". People with schizoaffective disorder are much more prone to memory deficits than was recognised in the mid-1980s. They are also more prone to interrogative susceptibility. As Carter was experiencing psychosis at the time of the relevant event, there is no way of knowing if what he claimed to have occurred did occur or whether it was an hallucination. For example, Carter's recall of the deceased being bludgeoned with a barbell was so manifestly wrong that it brings into question virtually everything he claims to have recalled.

64 In cross-examination, Professor Coyle said that, given his symptoms, it was overwhelmingly likely that Carter's capacity to recall the event would be "grossly affected". As such, it is not possible to be certain about anything Carter claimed to have observed. Where the interpretive process of memory is affected by a disorder such as schizoaffective disorder, the prospect of accurately recalling information decreases dramatically. As what the person is saying cannot be relied upon, collateral information has to be considered. Apart from collateral information to prove or disprove a version of events, "there is no foolproof method of determining whether someone's [ie any person's] claimed recall of events is truthful or not ... you must have collateral information to fully confirm or disconfirm in a forensic context, any particular version of events".

65 Professor Coyle considered it futile to try to identify what Carter did or did not see while psychotic. He accepted that, to the extent Carter's evidence was corroborated, it would be reflective of accurate recall, but this would not mean other parts of his recall had not been altered, affected, or replaced. Professor Coyle said the problem was that we did not know where confabulation stops and reality starts and "never will", except to the extent Carter's evidence was supported by other evidence. As Professor Coyle put it, "was [Carter] capable of having some accuracy in recollection? Yes. What parts were accurate? I don't know."

66 Professor Coyle had never treated a person with schizoaffective disorder. He had been involved in treating people with schizophrenia in conjunction with a psychiatrist.

67 The effect of Professor Coyle's evidence of particular relevance is that: (a) a person with schizoaffective disorder will be more prone to memory deficits and interrogative susceptibility than a person without the disorder; (b) given his symptoms at the time of the event, Carter's recall of it was likely to be grossly affected, and collateral information to confirm or disconfirm his evidence was required; (c) collateral information confirming one part of Carter's evidence did not mean other parts of his evidence were accurate; (d) Carter was capable of accurate recall but Professor Coyle could not say which parts were accurate; and

(e) research has shown that, other than collateral information, there is no foolproof method of assessing a person's truthfulness above the level of chance.

The overall effect of the fresh psychiatric and psychological evidence

68 It is apparent that the concerns of the psychiatric and psychological experts about the reliability of Carter's accounts, including the evidence he gave in the trial, stem from three sources: (a) the fact that he had schizoaffective disorder and was psychotic on 4 April 1984 and for weeks thereafter and, accordingly, was likely to have cognitive deficits affecting his memory; (b) the changes in the accounts he gave over time, as, given (a), he was likely to be more suggestible than people without schizoaffective disorder; and (c) given (a) and (b), the inaccuracies in Carter's evidence and inconsistencies between his evidence and other evidence.

69 The fresh expert evidence unanimously confirms that: (a) cognitive deficits, including deficits affecting memory, are a core feature of schizoaffective disorder; (b) a person with schizoaffective disorder, even if psychotic at the time of witnessing an event, may be capable of giving accurate evidence recalling the event when they are no longer psychotic; (c) whether or not such a person could do so would depend on the individual and numerous other factors including the severity of the person's illness; (d) Carter was severely ill, being both psychotic and manic or hypomanic, before and after the events of 4 April 1984; and (e) Carter was much better and apparently stable at the time he gave evidence.

70 The principal difference between the psychiatrists and the psychologists is that, during cross-examination, the three psychiatrists, Dr Furst, Dr Hook, and Dr Brereton, each accepted that a person with schizoaffective disorder, if giving evidence when they were not psychotic, may be able to give accurate and reliable evidence about events witnessed when psychotic. They also accepted that such a person could be found to be reliable if other evidence supported their evidence. During cross-examination the psychiatrists: (a) each accepted that if other evidence supported the evidence of the person with schizoaffective disorder, that could be used to infer that the person was giving accurate evidence; and (b) did not say that no part at all of the evidence of the person with schizoaffective disorder could be accepted to be accurate if there was not other evidence supporting it. The following aspects of the psychiatrists' evidence are particularly important in this regard.

71 Dr Furst:

> "A. … I would never go so far as to say that someone with schizoaffective disorder or any other mental disorder cannot be accepted beyond reasonable doubt, that would be ridiculous.

Q. Rather than go through all the aspects of the evidence that I say does in fact support what Mr Carter said and supports his reliability, do you agree at least with this proposition: that a trier of fact would be entitled, notwithstanding his schizoaffective disorder, to look at other evidence that supports him and find that he was in fact reliable.

A. Yes, I agree with that."

72 Dr Hook:

"Q. So there are some people who, when they get to the point of remission, will be able to distinguish between an event that they previously saw and misinterpreted or misunderstood, and there will be others who simply are unable to draw that distinction.

A. Yes, that's correct.

…

Q. And in the course of taking a history or a statement from a person suffering from a schizoaffective disorder and charged with a criminal offence, have you had occasions where the patient has admitted to you that they had in fact done the act of which they're accused.

A. I'm trying to think of an example that comes to mind. I can easily imagine that scenario. I think that that has occurred.

Q. I think by your answer you're agreeing that it's not uncommon for a person, even in the acute stages of schizoaffective disorder, to be able to remember and recall that they have done something a week, two weeks, a month before.

A. Yes, yes, they can do that.

Q. And accurately do so.

A. That can happen, yes.

Q. Some of what they remember may be coloured by inaccuracy but that doesn't mean that they weren't aware that they, for example, punched someone.

A. Yes, that's a fair statement."

73 Dr Brereton:

"Q. So, to look at whether Mr Carter himself suffered cognitive deficits it would then be important to look at what he was able to recall one year later, and what of that was supported by other people, which would tend to suggest its accuracy.

A. Yes, absolutely, in the parts that were supported by other people. I suppose my concern that I tried to put in the report is that despite that any parts that aren't confirmed you must regard with suspicion.

…

Q. And so whilst it might be thought that many people with schizoaffective disorder will have cognitive deficits, if a person is shown to be accurate in many different aspects as to the events on that particular night, that would tend to support that he/she didn't have specific cognitive deficits as a result of their schizoaffective disorder.

A. It points in that direction, yes, I do see what you're saying, it does point in that direction, it's still hard to say unless you've got some explicit testing, but I agree with what you're saying, I just don't think it's as straightforward as that. I agree it's an indication, it points in that direction, but I wouldn't want to extrapolate too far from that.

Q. Might it depend on the amount of detail able to be recalled accurately, and the nature of the detail able to be recalled accurately.

A. I think if he could demonstrate a highly detailed and independently accurate recall of the situation, I mean that does speak for itself in terms of his ability to accurately recall in terms of – I mean again you're still not entirely sure what his underlying cognition would be, but you have to – I suppose that's partly what I was trying to say in my report, you have to – you can't dismiss what has shown to be accurate just because he has schizophrenia or schizoaffective disorder.

Q. Well, as I understand what you're saying, that would be contrary to common sense, wouldn't it.

A. Yes.

Q. And there might be a risk of unreliability, but if someone is shown independently to be reliable, well then their evidence and their account is reliable.

A. Is reliable, yes. I just, I suppose what I wouldn't want to say is – here we've got evidence, he's produced a really reliable account, therefore Dr are you saying that he has not cognitive problems? That's not what I'm saying.

...

Q. So, it is actually wrong to say there is simply no way of knowing what he claimed to have seen did occur or whether it was a hallucination because there is a way to work that out and, that is, if someone corroborates an aspect of what he said.

A. Absolutely. I apologise – I suppose in a way what I should have said was clinically, from a clinical perspective.

Q. It is, in effect, looking at his account in a vacuum which gives rise to the concerns as to his reliability.

A. Yes.

Q. That is not to say that he is not reliable, it is not to say that he is incapable of reliable recall.

A. Absolutely, I wanted to make that point in that paragraph.

…

Q. … where you have said there is no way of determining an accurate recollection from an inaccurate one, you make that statement in the context of looking at his account without regard to any other evidence at all.

A. Yes, from a purely clinical perspective, yes.

Q. If Mr Carter had walked in off the street and told you this particular account, in light of all you knew about his symptoms, you would not know whether to accept what he said was the truth.

A. That is correct, yes."

74 The evidence of the two psychologists, however, included that memory generally (that is, in all people) is so susceptible to influence recollection cannot be assessed as accurate or not at better than the level of chance unless the recollection is independently confirmed. In a person with schizoaffective disorder, which involves cognitive deficits, memory is more likely to be impaired than in a person without the disorder. Given the severity of Carter's symptoms, Dr Sugarman considered it unlikely Carter could accurately recall events, but accepted it was possible. Professor Coyle also accepted it was possible Carter could accurately recall events but considered that no part of Carter's evidence could be accepted as reliable unless it was independently confirmed.

75 None of the experts had been instructed to consider the whole of the material (whether admitted into evidence in the trial or not) relevant to the reliability of Carter's evidence before giving their opinions.[33] To the contrary, it is apparent that while Dr Furst, for example, in his practice as a psychiatrist would consider "external support" in assessing the reliability of one of his patients' accounts, in this case he had focused on five inconsistencies in Carter's evidence rather than the external support for it. Dr Hook accepted that other evidence confirming Carter's account was relevant to, for example, the hypothesis of Carter's possible involvement as a perpetrator of the crime but had not otherwise tested the hypotheses or opinions against the whole of the evidence confirming aspects of Carter's evidence. Dr Brereton accepted that third-party corroboration would be significant to an assessment of Carter's reliability, albeit he would treat the parts of his evidence that were not corroborated with "suspicion". Dr Brereton, however, did not give evidence of the extent to which his "suspicion" might continue or be ameliorated by reference to those parts of Carter's evidence which had been corroborated. Professor Coyle considered that, even if a person did not have schizoaffective disorder or schizophrenia, "you must have collateral information to fully confirm or disconfirm in a forensic context, any particular version of events". Professor Coyle, however, had focused on the inconsistencies and inaccuracies in Carter's statements, particularly Carter's description of the use of the barbell against the deceased, not the other evidence which supported Carter's statements (including with respect to the possible use of the barbell, as discussed below). Dr Sugarman also had not examined all the evidence which supported Carter's statements.

76 No doubt this is what the Court of Criminal Appeal had in mind when it said that the experts "conceded that if aspects of his evidence were supported by other evidence, this would be relevant to whether his recall was in fact essentially

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33 *R v Bromley* [2018] SASCFC 41 at [140].

correct"[34]. The psychiatrists did concede this, albeit that Dr Brereton would continue to regard the parts of Carter's evidence that were not independently confirmed with "suspicion". Professor Coyle also conceded this, but his concession was confined to the accuracy of that part of Carter's evidence that was independently confirmed. Professor Coyle alone maintained steadfastly that he would not accept as reliable *any* part of Carter's evidence that was not independently confirmed. The Court of Criminal Appeal's further observation, that none of the experts had been provided with all of the evidentiary material which supported Carter's account[35], is correct. The Court of Criminal Appeal said that this "significantly diminishes the weight to be given to their opinions as to the reliability of Carter's trial evidence"[36]. This observation cannot be gainsaid insofar as it applies to the evidence of the three psychiatrists. It applies also to the evidence of Professor Coyle and Dr Sugarman as explained in the further observations below.

77 This nuance in the experts' evidence is also relevant to the dispute about the accuracy of the Court of Criminal Appeal's proposition one. It will be recalled that part of proposition one was that "[a]ccounts given by persons suffering schizoaffective disorder may not be reliable absent independent corroboration"[37]. It was submitted for Bromley that the fresh expert evidence was to the effect that "[a]ccounts given by persons suffering schizoaffective disorder *are not* reliable absent independent corroboration". As discussed, this latter version is the ultimate effect of the evidence of Professor Coyle, but not the other experts. The evidence of the other experts, considered as a whole, accords with the description of the Court of Criminal Appeal (although more will be said about Dr Sugarman's evidence).

78 Because the Court of Criminal Appeal did not separate Professor Coyle's and Dr Sugarman's psychological evidence from the evidence of the other experts, the Court did not need to consider other aspects of their evidence that would be relevant to an assessment of whether their evidence, even if considered in isolation from the psychiatrists' evidence, would be "compelling" under sub-ss (1) and (6) of s 353A of the CLCA.

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34 *R v Bromley* [2018] SASCFC 41 at [139].

35 *R v Bromley* [2018] SASCFC 41 at [140].

36 *R v Bromley* [2018] SASCFC 41 at [140].

37 *R v Bromley* [2018] SASCFC 41 at [38(1)].

79 Professor Coyle had never treated a person with schizoaffective disorder. As a psychologist (unable to prescribe medication), he only treated people with schizophrenia in conjunction with a psychiatrist. According to his curriculum vitae, his relevant specialist areas of clinical and forensic psychological expertise include visual perception and eyewitness testimony, legal capacity, and witness demeanour and detection of deception. This expertise is apparent from Professor Coyle's evidence, which includes his opinion that it has been demonstrated that: (a) memory is "surprisingly malleable" in all people; (b) "assessing the credibility of individuals' claims to have observed or experienced something in the absence of collateral information ... is usually performed at a chance level"; and (c) collateral information is always required in a forensic context to confirm or disconfirm any person's version of events, whether or not the person has any mental or other illness.

80 The evidence of Dr Sugarman, also a psychologist, included that: (a) mentally healthy individuals can easily come to believe fantasy and can have false memories; and (b) memory generally is a "highly plastic, suggestible, multiply-encoded phenomenon of which we have to be highly skeptical [sic]" in mentally healthy individuals, and more so in those with severe mental illness.

81 Accordingly, the overall effect of the evidence of the psychologists includes that: (a) all evidence based on recall, whether from a mentally healthy person or not, is unreliable in the sense of being far more susceptible to influence than had been previously considered to be the case; (b) without independent corroboration, no trier of fact can discern truth from untruth at better than the level of chance, so independent corroboration of memory-based evidence is always required; and (c) the difference for people with schizophrenia or schizoaffective disorder is one of degree – they are more likely to be unreliable than a person without the disorder because of both the symptoms of the condition, if active at the relevant time (eg, psychosis), and the cognitive deficits associated with the condition.

Significance of experts not considering other supportive material

82 It was submitted for Bromley that the Court of Criminal Appeal erred in concluding that the evidentiary effect of the fresh expert evidence was diminished because the experts had not considered the whole of the other material supporting Carter's evidence. According to the submissions for Bromley, this was illegitimate, as: (a) the effect of the expert evidence was that independent confirmation of Carter's evidence in one respect would not confirm that his evidence was accurate in any other respect; and (b) none of the supporting evidence put Bromley at the scene of the offending or directly incriminated him as a person who committed the assault.

83 As explained, the three psychiatrists accepted that supporting evidence generally would be relevant to an assessment of the accuracy and reliability of Carter's evidence overall. Only Professor Coyle said that independent confirmation of Carter's evidence in one respect would not be evidence that his evidence was accurate in any other respect. But, as noted, Professor Coyle held the same view about all evidence based on any person's memory irrespective of the person having any illness. And Dr Sugarman, while of the view that it was possible but unlikely that Carter could give accurate evidence given his psychosis at the time of the event, was also "highly skeptical [sic]" of the accuracy of all evidence based on any person's memory irrespective of the person having any illness.

84 The question being whether the fresh evidence is compelling in the sense of being "highly probative in the context of the issues in dispute at the trial of the offence", and the issue being the reliability of Carter's evidence identifying Bromley as a person who assaulted the deceased on 4 April 1984, the relevant evidence in this appeal includes other material (Karpany's statement to Jennifer Carter – one of Carter's sisters) that could not be admitted against Bromley, but which is relevant to the reliability or otherwise of Carter's accounts and evidence. We do not doubt that this material, in contrast to the additional propensity evidence on which the prosecution also sought to rely[38], is admissible as evidence relevant to Carter's reliability and accuracy of recall which the psychologists and psychiatrists could have taken into account but did not.

Karpany's admissions to Jennifer Carter

85 The other material included Jennifer Carter's statement that on 8 April 1984 Karpany said to her that "they beat him up too bad and if he went and told the police about it they would get five years in gaol so they picked him up and threw him in the river"[39]. Jennifer Carter also gave evidence in the trial, admitted against Karpany but not Bromley, that on 8 April 1984 she asked Karpany who the fellow he had bashed was and Karpany said "Beau [Carter] had to open his mouth". Jennifer Carter continued, saying "he [Karpany] said that Derek [Bromley] was hitting the bloke and he [Karpany] saw him and he just joined in"; Karpany said this happened "[j]ust under a bridge"; Karpany said they had bashed "[j]ust one white bloke"; Karpany said "they chucked the bottom half of his trousers for fingerprints, they chucked it in the water"; Jennifer Carter asked Karpany why they had done it "and he [Karpany] said that they had bashed him that much that they

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38 The propensity evidence concerned Bromley's earlier conviction for attempted rape.

39 *R v Bromley* [2018] SASCFC 41 at [156].

were looking at five years so they just went all the way" and "Derek [Bromley] wanted to have sex with him [the white bloke they bashed]"[40].

86 This evidence was inadmissible against Bromley in the trial[41] but is admissible as evidence which is relevant to the psychiatrists' and psychologists' assessment of Carter's reliability and accuracy and, accordingly, the significance of that expert evidence in the context of the issues in dispute at the trial. The experts did not have regard to this material in forming their opinions about the accuracy or reliability of Carter's evidence that Bromley and Karpany had bashed the deceased at the River Torrens.

Bromley's unsworn statement

87 In his unsworn statement, Bromley said he did not know Carter and the only mistake he, Bromley, made was "going to the city alone for a drink on my first night out of gaol". Bromley said he walked down Hindley Street across Morphett Street to a bar. Later, he got into an argument in a carpark and a bloke took a swing at him, so Bromley hit him once. Bromley walked back down Hindley Street to cross Morphett Street and headed down a little street that goes under the bridge to go up North Terrace to see if another bar was open. He then saw a police patrol and panicked because he was on parole and had been in a fight. This statement places Bromley in the Adelaide CBD area on Hindley Street and Morphett Street and under the Morphett Street bridge at the relevant time. There is access from the Morphett Street bridge to the River Torrens where the deceased's body was found.

Edith Carter's evidence

88 Edith Carter is Carter's mother[42]. Edith Carter said that at about 2.00 am or 3.00 am on 4 April 1984, she heard Carter say to Karpany that they were going out. When she awoke at 7.00 am on 4 April 1984, Carter and Karpany had gone[43]. This places Carter and Karpany together in the early hours of 4 April 1984.

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40 *R v Bromley* [2018] SASCFC 41 at [415].

41 eg, *Bannon v The Queen* (1995) 185 CLR 1 at 22; *Cross on Evidence*, 13th Aust ed (2021) at 1319-1320 [33520]; *Ross on Crime*, 9th ed (2022) at 380-381 [3.5345].

42 *R v Bromley* [2018] SASCFC 41 at [77].

43 *R v Bromley* [2018] SASCFC 41 at [79].

Evidence that Carter, Karpany and the deceased were together

89 Michael George, a taxi driver, gave evidence that he drove an Aboriginal man (whom he later identified as Carter) and another Aboriginal man to Hindley Street in the Adelaide CBD, opposite Jules Bar. The two men got out of the car and greeted another Aboriginal man across the road, who was with a "white lad". The men, four now, all got back in the taxi. The four men left the taxi at about 3.30 am and walked towards West Terrace on the northern side of Hindley Street. Mr George also gave evidence that overwhelmingly supported his identification of Carter as one of the Aboriginal men who first entered the taxi as correct. According to Mr George, this man mentioned signing up to play for the Port Adelaide Football Club and having been in Hillcrest Hospital, in relation to which this man said: "I'm glad I don't have to go to Hillcrest anymore" and "I don't have to take any tablets anymore". This closely corresponds with objective evidence about Carter[44], who had: (a) been in Hillcrest Hospital in August and September 1983 and then again in October 1983; (b) stopped attending the hospital as an outpatient at the beginning of 1984 and also stopped taking his medication; and (c) when re-admitted to Hillcrest Hospital on 4 April 1984 said that he "[w]ants to play football for Port Adelaide this year because he is a top footballer". This evidence places Carter, with two Aboriginal men and a white man, in the taxi driven by Mr George in the early hours of 4 April 1984.

90 Although Mr George could not identify the second Aboriginal man who was with Carter in the taxi from the outset as Karpany (as this other man sat in the back of the taxi), the evidence that this man was Karpany includes: (a) Edith Carter's evidence that at about 2.00 am or 3.00 am on 4 April 1984 she heard Carter say to Karpany that they were going out, and that when she awoke at 7.00 am on 4 April 1984, Carter and Karpany had gone; (b) Jennifer Carter's evidence that Karpany knew two sisters who lived in Hawker Street, Brompton[45]; (c) Mr George's evidence that the second Aboriginal man, who was in the back seat of the taxi, directed him to drive to a house in Hawker Street, Brompton and, on arriving, left the taxi and visited the house before returning to the taxi[46]; and (d) Karpany's admissions to Jennifer Carter that he and Bromley attacked a man under a bridge, and that Carter was present. This places Karpany in the taxi driven by Mr George with Carter and the other Aboriginal man and the white man in the early hours of 4 April 1984.

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44 *R v Bromley* [2018] SASCFC 41 at [90].

45 *R v Bromley* [2018] SASCFC 41 at [94].

46 *R v Bromley* [2018] SASCFC 41 at [82].

91 Mr George also identified the "white lad" as the deceased. The other evidence that the person in the taxi was the deceased is also strong and includes: (a) when invited into the taxi this man said he had a bike, and the deceased had a motorcycle later found in Gilbert Street in the Adelaide CBD[47]; and (b) one of the Aboriginal men in the taxi said something like the white man "reckons he is one of us" as "[h]e is married to an Aboriginal" person, and the deceased had been in a long-term relationship with a woman of Aboriginal descent[48]. This places the deceased in the taxi driven by Mr George with Carter and Karpany, and the other Aboriginal man, in the early hours of 4 April 1984.

Evidence of the death of the deceased

92 Further, there was strong evidence that the deceased died in the early hours of 4 April 1984 at the River Torrens near the Morphett Street bridge.

93 The deceased's body was found floating in the river directly under the Morphett Street bridge on 9 April 1984[49]. When the body was discovered, the deceased's trousers, underpants, shoes, and socks were all missing[50]. The body was found with a shirt and "windcheater" on the upper half[51]. Subsequent post-mortem established the cause of death as drowning[52]. Lack of water in the stomach suggested the deceased was unconscious when he entered the water[53]. Post-mortem changes suggested death had occurred four to five days before the body was discovered on 9 April 1984[54]. The body had a laceration to the lip which had occurred shortly before the time of death[55]. There was also: (a) a bruise to the left side of the forehead, a bruise on top of the head, and bruising on the scalp, with the bruising extending downwards behind the ears on both sides; (b) a bruise on

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47 *R v Bromley* [2018] SASCFC 41 at [98].

48 *R v Bromley* [2018] SASCFC 41 at [99]-[100].

49 *R v Bromley* [2018] SASCFC 41 at [1].

50 *R v Bromley* [2018] SASCFC 41 at [124].

51 *R v Bromley* [2018] SASCFC 41 at [125].

52 *R v Bromley* [2018] SASCFC 41 at [226].

53 *R v Bromley* [2018] SASCFC 41 at [226].

54 *R v Bromley* [2018] SASCFC 41 at [227].

55 *R v Bromley* [2018] SASCFC 41 at [230(ii)].

the right forearm; (c) a bruise on the upper left arm; (d) rupture of small blood vessels in the brain causing subarachnoid haemolytic staining on the scalp; (e) a bruise of the vertex or upper surface of the head; and (f) bruising to the carotid artery on the right side of the neck, all incurred before (within 24 hours of) the time of death[56]. There was evidence that, if someone has drowned, their body will sink to the bottom of the body of water but in due course, as putrefaction takes place, gases from inside the body would cause the body to float to the surface[57].

94 The deceased's father last saw him on the evening of 3 April 1984 and the deceased did not return for dinner the following evening as arranged. The deceased's father identified a pair of desert boots that the police found during a search near the southern bank of the river in front of the Australian National Railways rowing shed as the boots he had bought for his son[58]. When found by police on the bottom of the river, the laces of the desert boots were tied up[59].

95 The deceased's housemate said the last time she saw the deceased was on the evening of 3 April 1984. The deceased went out at about midnight on his motorcycle[60].

96 A friend of the deceased's father said he saw the deceased's motorcycle parked in Gilbert Place at about 3.00 pm on 4 April 1984. He returned to Gilbert Place on 10 April 1984 and the motorcycle was still parked there[61].

97 Mr George, taxi driver, said he dropped off the deceased and the three Aboriginal men at about 3.00 am to 3.30 am on 4 April 1984 and the deceased said he was concerned about leaving his motorcycle in the city[62].

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56 *R v Bromley* [2018] SASCFC 41 at [230]-[237].

57 *R v Bromley* [2018] SASCFC 41 at [224].

58 *R v Bromley* [2018] SASCFC 41 at [118], [188].

59 *R v Bromley* [2018] SASCFC 41 at [113].

60 *R v Bromley* [2018] SASCFC 41 at [119].

61 *R v Bromley* [2018] SASCFC 41 at [120].

62 *R v Bromley* [2018] SASCFC 41 at [121].

98 This strongly supports an inference that the deceased died soon after leaving the taxi with Carter and Karpany and the other Aboriginal man in the early hours of 4 April 1984.

Evidence Bromley was with Carter, Karpany, and the deceased

99 Mr George, taxi driver, also identified Bromley as the Aboriginal man who got in the taxi at Hindley Street[63]. This identification was supported by Mr George's evidence that this man (or Carter) had said in the taxi that he (the Aboriginal man who got in the taxi at Hindley Street) had just got out of gaol or had been in gaol. Bromley had in fact just got out of gaol[64]. Mr George described the Aboriginal man who got in the taxi at Hindley Street as "dapper", "very smartly dressed: light coloured suit, white tie, black shirt and a hat. Unusually – in fact, very well dressed"[65]. This description does not accord with the other evidence of how Bromley was dressed on 4 April 1984. Margaret Bromley (who was married to Bromley's foster brother) said that when she dropped Bromley off at about 8.00 pm on 3 April 1984 he "was wearing brown corduroy trousers, a checkered [sic] western style shirt which was thin, blue and white sneakers and my husband's blue woollen jacket, a new one". Bromley also owned a brown woollen hat[66]. Two police officers saw Bromley at about 4.25 am on 4 April 1984. One (Constable Burden) said Bromley was wearing a light-coloured shirt and a darker-coloured pair of trousers and shoes, was not wearing a tie, coat or hat, and was scruffy and definitely not "dapper". The other (Constable Griggs) said Bromley was wearing dark trousers and a light shirt. He was not wearing a hat. Constable Griggs could not recall Bromley wearing a white coat or a tie. Constable Griggs considered Bromley to be "quite tidily dressed", not "scruffily dressed".

100 In directing the jury, the trial judge said that "if you look at the jacket, Exhibit P5, members of the jury, you may agree that it is a very light colour and it may well be that in the lights of Hindley Street that night, the witness George was reasonably mistaken in thinking that it was not light blue but white". The trial judge also noted that "Mrs Bromley his foster sister-in-law said that he did have a smart little hat, and possibly he was wearing it"[67].

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63 *R v Bromley* [2018] SASCFC 41 at [102]-[103].

64 *R v Bromley* [2018] SASCFC 41 at [104]-[106].

65 *R v Bromley* [2018] SASCFC 41 at [107].

66 *R v Bromley* [2018] SASCFC 41 at [340].

67 *R v Bromley* [2018] SASCFC 41 at [341].

101 On this basis the clear inconsistencies between the evidence of Mr George as to the clothing of the Aboriginal man who got in the taxi in Hindley Street and the clothing Bromley was wearing are: (a) Bromley was not wearing a white suit, but was wearing a new light-blue jacket which might have appeared white in lights at night and was wearing dark trousers; (b) Bromley was not wearing a black shirt, but was wearing a checked blue shirt; and (c) Bromley was not wearing a white tie. It is also apparent from the evidence that people's views as to what is "scruffy" and "tidy" may differ, given the evidence of the police. The trial judge directed the jury that if "you think George might be right, that the man who got into the taxi was wearing a white shirt and white trousers, black shirt and tie and a hat with a brim, it must be a reasonable possibility that the man who got into the taxi was not Bromley"[68].

Evidence of Bromley and Carter leaving the area of the River Torrens

102 It is relevant that Constables Burden and Griggs gave evidence relating to the whereabouts of both Bromley and Carter on 4 April 1984. Constable Burden said she saw Bromley on the western side of the Morphett Street bridge walking back towards the city early in the morning on 4 April 1984. When the police car turned back from a U-turn that had taken them from the northern towards the southern end of the bridge, they had seen Bromley again, but he had disappeared by the time they completed a further U-turn at the southern end of the bridge. The police officers drove in a clockwise loop around the River Torrens and were driving under the Morphett Street bridge when they saw Bromley for a third and then a fourth time. By the fourth time, Bromley was on an embankment on the eastern side of the bridge. They fixed the car headlights on him and he ran in a northerly direction on the embankment towards Festival Drive. They drove in the same direction. They got out of the vehicle. Another Aboriginal man approached them. Constable Griggs spoke to this man. Constable Burden located Bromley in her flashlight beam on the northern side of the ramp to the Morphett Street bridge. He was stuck in some bushes. Two plain clothes railway police officers arrived and pulled Bromley out of the bushes. Bromley gave his name to the police and said that he ran because he wanted to be left alone and he had just got out of gaol that day. Constable Burden asked him where he got blood on his shirt from, and he said he had been in a fight in a pub. Bromley later said to Constable Griggs that he had been bashed and robbed by two men. He said he was robbed of $60. He had $60 in his wallet. He did not appear to be affected by alcohol.

103 Constable Griggs gave evidence to the same effect. Constable Griggs also said that when they first saw Bromley it was about 4.25 am. Further, the other Aboriginal man who approached them was carrying a blue airways style bag which

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68 *R v Bromley* [2018] SASCFC 41 at [342].

had books in it. Constable Griggs spoke to this man. This man then continued to walk north along the footpath of the bridge. This other Aboriginal man was undoubtedly Carter.

104 This evidence means that both Bromley and Carter were walking in the vicinity of the River Torrens and the CBD at about the same time, which was about one hour after Mr George dropped Carter and the unidentified Aboriginal man who had entered the taxi with Carter, the deceased, and the Aboriginal man whom Mr George identified as Bromley, off in Hindley Street towards West Terrace.

Summary thus far

105 This evidence, none of which depends on Carter's evidence, places an Aboriginal man that Mr George, taxi driver, identified as Bromley in a taxi with another Aboriginal man, Carter, and the deceased, a young white man, in Hindley Street at about 3.30 am on 4 April 1984. It puts Carter and Bromley separately walking near the River Torrens across the Morphett Street bridge about an hour later. It puts the deceased's body under the Morphett Street bridge where it would have sunk when he drowned and floated back to the surface with putrefaction.

106 Further, if, for the purpose of assessing the reliability of Carter's evidence, regard is had to Karpany's admissions to Jennifer Carter, then there is also material to the effect that, under a bridge, Bromley wanted to have sex with the young man, this resulted in Bromley bashing the man, Karpany joined in, and as they were looking at five years in gaol, they "went all the way" and removed the man's trousers and threw them in the river. Karpany also claimed that Carter "had to open his mouth", which means that Carter witnessed the bashing.

107 As noted, the psychiatric and psychological experts did not consider this evidence or material in assessing the reliability of Carter's accounts.

108 The psychiatric and psychological experts referred to some, but not all, of the other evidence that was available to assist in assessing the reliability of Carter's accounts. That evidence, relevant also to the changes in Carter's account over time, is summarised below. It is relevant to all three sources of concern of the experts about Carter's evidence – that is: (a) the fact that Carter had schizoaffective disorder and was psychotic on 4 April 1984 and for weeks thereafter and, accordingly, was likely to have cognitive deficits affecting his memory; (b) the changes in the accounts Carter gave over time as, given (a), Carter was likely to be more suggestible than people without schizoaffective disorder; and (c) given (a) and (b), the inaccuracies in Carter's evidence and inconsistencies between his evidence and other evidence.

Jennifer Carter's statement

109 Carter's sister, Jennifer Carter, gave a statement to police on 14 April 1984 in which she said Carter came home at 4.30 am to 5.00 am on 3 April 1984 (later corrected to 4 April 1984). She said:

> "He came in, and he has a habit of moving around a lot as he speaks. He was moving around with his arms stretched out. He seemed to be confused like he didn't know what was going on. He said, 'Me and JK was on the way home, but he jumped out the taxi and went with Derek. Sis, I saw Johnnie and Derek bash this fellah, then I told them "Eh that'll do – I don't want to be no witness to a murder.""

Beverley Carter's statement

110 Another of Carter's sisters, Beverley Carter, gave a statement to police in April 1984 in which she said she and Carter had a conversation at about 9.30 am on 4 April 1984. Her statement said:

> "He (Bo) [Carter] was really disturbed – he was ranting and raving really loudly, he was running around the house and carrying on.
>
> We were waiting for the postie to come with our cheques and he was really getting uptight. He came into the kitchen and he calls me Aunty Bo and he said 'I seen it last night. I seen J.K. and Derek MILERA kill that boy.'
>
> He calls Johnnie Karpany J.K. and I said Uncle Bo 'What was this boy, he was standing in front of Jules Bar with Derek MILERA and J.K. and he had a brown jumper on and necklace and they went down the back to the caravan where we get something to eat and J.K. and Derek MILERA went off with this boy – up onto the bridge there and I had a [REDACTED] with me and I left it down at the caravan where we had a feed and I went back to get it and the other 3 were up on the bridge and when he was walking back I seen J.K. and Derek fighting with the young lad.' And I said 'Bo – what do you mean – were they trying to rape him?' as they are both like that. He said 'They were far away and I run up and tried to stop them' and then he just stopped right in the middle of this sentence and he wouldn't say anything more and he kept on saying 'They're the devil – they're the devil. They are really going to get it this time.'
>
> He was really ranting and raving more than he always does. He just couldn't keep still. This was all on the Wednesday morning when he spoke to me in the kitchen."

Edith Carter's statement

111 Carter's mother, Edith Carter, gave a statement to police on 15 April 1984 in which she said she had a conversation with Carter on the morning of 4 April 1984 in which Carter was "really agitated" and saying things like "You don't know where I've been" and "You don't know what I've seen". Carter also said "Derek MILERA is out – I've seen him. I was with him and Johnnie last night."

Father Pearson's statement

112 Father Pearson gave a statement to police on 12 April 1984 that he saw Carter at about 2.00 pm on 4 April 1984. Father Pearson said:

> "When I spoke to him on his arrival, he was talking about being possessed by the devil. He said he had drunk blood the night before. He also made mention of saving a man from being beaten on the River Torrens. He was raving about a lot of things which I can't remember, mainly because it was quite obvious that he was mentally unstable."

113 Father Pearson then took Carter to Hillcrest Hospital, where he was admitted. At Carter's request, they made a detour along the way so Carter could speak to Karpany about his lost bag, a fact discussed further below.

Hillcrest Hospital notes

114 Hillcrest Hospital staff notes of 4 April 1984 record that Carter:

> "Doesn't want to stay in hospital as there is nothing wrong with him.
>
> Wants to play football for Port Adelaide this year because he is a top footballer. Yesterday saved a drug addict's life - by intervening when he saw 2 Aboriginal men beating up a drug addict & throwing him in the river. Gary said he is planning to ring the director [sic] of the Advertiser to tell him about it, & the story will be on the front page tomorrow.
>
> He also described being 'psychic' by which he meant that he could put me to sleep & walk out of the room. However, he decided not to do this.
>
> ...
>
> He denied any recent alcohol use, saying he had been running 'eight days a week'."

115 Hillcrest Hospital staff notes (by a social worker) of 5 April 1984 record that Carter:

> "Appears to be rather 'high' at present. Describes himself as being 'over active' - hasn't been able to sleep. Became quite tearful during interview, saying that he wanted 'mummy' & wanted to hold her hand. Tends to talk in a fairly grandiose manner - says he is a millionaire, saved a drug addict from drowning etc ..."

116 Hillcrest Hospital staff notes of 6 April 1984 record that Carter absconded from hospital and "denies any problems but content indicates grandiose delusions at present. Talks of saving drug addicts on the banks of the Torrens and 'fighting off all attackers'".

117 Frederick Steele, a general/psychiatric nurse at Hillcrest Hospital, gave a statement to police on 11 April 1984 that in the evening of 6 April 1984 he spoke to Carter and that Carter's:

> "... general manner was secretive and a little excited. He said to me 'I've got to tell you something'. Then he told me first of all he had saved a fellow's life. He made this point repeatedly. He said there were two blokes who attacked this young fellow on the river Torrens. He did specify young. He suddenly broke from this line and said he has saved this man's life by putting some drugs in his mouth. Then he changed again - he told these two men not to hurt this man, and then he told me he had pulled a pair of nun chukas out of his bag and fought these two [men] off. They ran away. He then said they were trying to rape this young fella. As he said this he made a gesture with an extended forefinger and thumb and finger of the other hand - the classical mimic for sexual intercourse. This is when he said that's no bloody good is it. (I got the idea he didn't like this act.) Straight after this he said a remark such as or using words to the effect of 'those bloody', or 'those bastards' Aboriginals. This struck me as funny at the time as he said it in a very effected way. But by this time he seemed very disturbed by what he was saying. He had become increasingly agitated whilst telling me this story."

118 Mr Steele's statement said that he also spoke to Carter on the afternoon of 7 April 1984 and:

> "This time he came up to me and grasped me and said: 'Listen to me Fred, there's something I want to tell you.'
>
> This time he told me the same story – much more briefly – he launched straight into it, and he spoke mostly about how he fought these men off.
>
> He told me that these men had attacked this bloke, I told them to stop it, and I fought them off. I think the words he used were 'sent them on their way'.

He made a gesture with his hands making them both into fists and he shaped up to me like he had fought with them.

That's when he again mentioned they had raped this young fella again.

I then closed the conversation because he was obviously excited about it. (it's just that sometimes when patients are in an acute stage if they become too excited it can escalate into higher states which makes them harder to control)

He spoke to me on several other occasions making brief references to this incident but I fogged [sic] him off."

119 It should be noted here that the first media publication about the incident occurred on 9 April 1984 when the deceased's body was discovered.

120 Dr David Ash, a staff psychiatrist at Hillcrest Hospital, gave a statement to police on 30 April 1984. His statement records that he saw Carter on 9 and 10 April 1984. He said:

"... I first saw him on Monday the 9th April 1984. I thought he presented hypomanic symptoms. By that I mean that he was over active. His speech was pressured, he was rather grandiose, disinhibited, and he exhibited labile mood or poor impulse control.

I saw CARTER again on 10th of April 1984. He gave an account of himself being involved in an incident where two Aboriginals were beating up a third chap and that they had killed him. He also claimed to be black belt karate and a league footballer. I can't remember any of the conversation, I just noted the content of what he said on his case notes. He maintained he had seen the event at the River Torrens.

My observations of him indicated that he was not hallucinating or suffering from delusions. People suffering from Garry's condition may elaborate events that they have experiences in a grandiose manner, but there is usually some basis of truth in the story told. I judged that there had been an incident take place at the River Torrens. I don't believe Garry to be telling me lies. I believe there is some substance to what he has been saying, and that of course is why we contacted the police.

The other possibility is that what Garry was saying was a drug induced psychosis, and that he hallucinated the entire incident. However, given his progress in hospital and given the complexity of his observations, and given that he maintains his account of events in spite of his illness settling, it is unlikely that he was in fact suffering from a drug induced state. There were

no specific signs or symptoms on admission to suggest drug induced psychosis. His illness was such that his insight and judgment were impaired, but he would still be able to tell the difference between right and wrong. However, he would have been less concerned about the consequences of his actions to himself and to others than if he had been well."

121 According to Mr Steele's statement, he spoke to Carter again on the morning of 10 April 1984. His statement records:

"I next saw him at the morning of Tuesday 10th April, 1984, it was mid morning. He got hold of a newspaper – the Advertiser – and he pointed to the article, of that young man being found in the river.

He said to me 'This is what I have been telling you about. This is the thing I have been telling you about.' I looked at him doubtfully and he said 'It's true.' He became quite insistent then. (I really know Gary – it's been my experience with him that if he tells me a story and I call his bluff he very often admits that it's just a story.) By this stage however I was beginning to take him seriously as I too had seen the story. It's just that the times were so coincidental.

He said; 'Two men had attacked a young man down by the river. They raped him in the anus' He made that gesture for sexual intercourse again. I think he said something about fighting these too men again. He said that there were Aboriginals. I asked Gary what happened to the young man but he just didn't tell me, at this time. I said 'Did he see what happened to him?' but he didn't tell me anything. I then said 'What was the young bloke wearing?' just to see what he would say – he thought about it for a few moments then he said he had on desert boots, dark trousers, dark jumper but he hadn't seen a shirt or collar. I then got side tracked – I went and saw the Charge Nurse and told him about it – the coincidences in Gary's story and the one in the Paper – I only saw him briefly again on Tuesday but we didn't talk much about it as I didn't want to as the Police were coming.

Today he asked me when the Police were coming to see him and he also told me that these men may have used a 50lb weight he had in his bag. He said they might have tied it about his feet or his throat to make him sink in the river. He also told me this morning (Wednesday 11/4/84) that he had seen these two men in Grote Street, ADELAIDE and I presume it was in the 24 hour time he had absconded from Hillcrest B/C that is the way he said it. He's implied he had seen them in the company of other people he knew – one who he named as Grandpa – and I can't remember the surname. (By implied I mean that he said to me 'I saw these two men and I saw Granpa?')

(Knowing Gary as I do I have come to understand his way of talking so I would say he saw them with Grandpa) I asked him if he knew them and he said 'Yes.' He didn't go into any detail and I didn't want to push him as I didn't want to scare him off and anyway it's not my job. The rest of the day he just said 'When are the Police coming?' all day he has been on like this.

Knowing Gary as I do I know he is prone to exaggerate when he is ill. But he has never been as consistent with a story before like this. Always it has involved the two Aboriginal men, the young fellow he said a young bloke – rape and that it happened on the River Torrens near the Morphett Street bridge (he told me the location on the first day he told me about this – last Friday.)

His story has changed as to his involvement – his heroic involvement in saving life has diminished."

Carter's police statement – 11 April 1984

122 On 11 April 1984 the police (Detective Peglar) interviewed Carter. The police statement said:

"Sometime between 2.00 a.m. and 4.00 a.m. on Wednesday the 4th April 1984, I was out the front of Jules Bar in Hindley Street ADELAIDE, when I met Stephen DOCOZA. He was with Derek MILERA and John Kenneth KARPANY. DOCOZA looked like he needed calming down, so I gave him some Valium, cerepax, some little white pills and some yellow and purple capsules. I would describe Stephen as having straight blonde hair, an earing in his ear. He was short and muscly, with a solid V shaped body and clean shaven face. He was drugged out of his head. We all walked down to the Morphett Street Bridge, and from North Terrace, we cut through the rail yards then down onto the banks of the Torrens, on the southern side, between the weir and Morphett Street Bridge. I had a bag I was carrying and it had some cassettes in it and a dumbell. It was like a home made welded dumbell, like a 50 pound type, that you'd hold in one hand. We all got to a spot on the southern bank near some willows. We sat there and decided to wait for the Criterion Hotel to open.

John and Derek wanted to have sex with Stephen and Stephen didn't want any part of it. John and Derek started kicking and punching Stephen all over the body. I saw that Stephen had blood all over his face. He was saying 'leave me alone, leave me alone.' Stephen was crying out for help. I told them to lay off him and leave him alone. The next thing I saw was that somebody, I'm not sure who, started hitting him with a barbell. The one I had in my bag. They were sort of dropping it on him, not actually bashing

> him with it. I didn't want any part of it so I left and went back to the pie [cart] on North Terrace, under the Morphett Street Bridge. The bloke there knows me, and he gave me a glass of water. I then went up the steps, got onto the bridge and walked along the bridge. When I go to the River, I could see Derek and John, but I couldn't see Stephen.
>
> When Derek initially got angry at Stephen because Stephen wouldn't give him sex, somebody produced a knife and they started cutting his trousers off. I told them to lay off him then they put the knife away and just pulled his trousers off. I saw them throw the trousers into the river just where they were bashing him. He was wearing black trousers, and he had fawn like desert boots.
>
> When I got back to the Bridge after getting the glass of water, I called out to them if they wanted a drink, and they came up and saw me. I asked them what they'd done with the barbell, and they said they'd thrown it in the river near where they had beaten Stephen.
>
> When the four of us first went down to the river bank, we sat and talked about gaol. Derek said, 'I am the Captain today', because he had money, he pulled his wallet out. His wallet was like it had a $10 note printed on the outside of it.
>
> I was wearing Pro Sport sandshoes, blue and white and red in colour at the time.
>
> After they came up on the bridge, we split up, and I think Derek was arrested by the police.
>
> I had not known Stephen before, it was the first time I had met him out the front of Jules."

123 Detective Peglar gave evidence in the trial. He said he was the first police officer to speak to Carter. Detective Peglar also gave evidence in the committal hearing (not in evidence at the trial) which Dr Brereton summarised in part in his report. Dr Brereton recorded that Detective Peglar said that when, on 11 April 1984, he "tried to elicit from Carter in normal statement fashion [he] found that [Carter] was rather excitable and difficult to contain and at times went so fast that [he] found that [he] couldn't write out a statement in the normal fashion". Detective Peglar said that "[b]ecause of [Carter's] manner of condition of excitability it was difficult for me to contain, to pull up, to get a logical flow of events. So I would continually have to pull [Carter] back in to check and try and get what [Carter] was telling me before I lost control of the interview as it were." Detective Peglar then described Carter as talking quickly, digressing and being "very excitable". When

Detective Peglar met Carter on 30 April 1984, Carter "was much calmer ... he appeared to be a good deal more relaxed and appreciative of the fact that perhaps the police were actually taking notice of what he was saying and were in fact believing what he was saying".

Carter's other interactions with police

124 On 18 April 1984, Detectives Zeuner and Thomas had a conversation with Carter at Hillcrest Hospital. In the investigation log, the Detectives note that "Carter very unstable of mind and would not be capable of being a witness". And in a police action message it is noted: "Spoke to Gary Carter at Hillcrest. Nothing further. Cannot be used."

Evidence of Arthur George

125 In his statement to police, Carter said he "went back to the pie [cart] on North Terrace, under the Morphett Street Bridge. The bloke there knows me, and he gave me a glass of water." Mr Arthur George operated a pie cart on the northern side of North Terrace, to the west of the Morphett Street bridge. He said that a young Aboriginal man approached him asking for some water between 2.00 am and 2.30 am on either the Thursday morning or Friday morning around 6 to 10 April 1984. He said that he did not personally serve him, but his assistant gave him some water in a polystyrene cup[69].

Inconsistencies and changes in Carter's accounts

126 The psychiatrists and psychologists focused on the inconsistencies in and changes of Carter's statements and evidence over time. It is not apparent that they considered the consistencies in Carter's statements and evidence. Within two hours of the events, Carter told his sister he saw "Derek" (Bromley) and "JK" (Karpany) "bash this fellah" and that he had told them "Eh that'll do – I don't want to be no witness to a murder". Some hours later he told another sister that "I seen it last night. I seen J.K. and Derek MILERA kill that boy." Carter said they had been at Jules Bar and "J.K. and Derek MILERA went off with this boy – up onto the bridge there" and he "seen J.K. and Derek fighting with the young lad". He told his mother on the same morning "Derek MILERA is out – I've seen him. I was with him and Johnnie last night."

127 When he saw Father Pearson in the afternoon Carter "made mention of saving a man from being beaten on the River Torrens". At the hospital on admission, Carter said "[y]esterday [he] saved a drug addict's life - by intervening

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69 *R v Bromley* [2018] SASCFC 41 at [132].

when he saw 2 Aboriginal men beating up a drug addict & throwing him in the river". The next day, 5 April 1984, he again mentioned that he "saved a drug addict from drowning". On 6 April 1984, he "[t]alk[ed] of saving drug addicts on the banks of the Torrens and 'fighting off all attackers'". On 6 April 1984, he told a nurse "he had saved a fellow's life" and "there were two blokes who attacked this young fellow on the river Torrens". He said he had "saved this man's life by putting some drugs in his mouth". The nurse recorded that Carter "told these two men not to hurt this man, and then he told me he had pulled a pair of nun chukas out of his bag and fought these two [men] off. They ran away. He then said they were trying to rape this young fella." On 7 April 1984, he told the nurse "the same story", "that these men had attacked this bloke, [he] told them to stop it, and [he] fought them off" and again "mentioned they had raped this young fella". On 10 April 1984, after the first newspaper story about the discovery of the body, Carter told the hospital psychiatrist he was "involved in an incident where two Aboriginals were beating up a third chap and that they had killed him" and he "had seen the event at the River Torrens". Carter spoke to the same nurse again on 10 April 1984 and, referring to the newspaper story, said "[t]his is what I have been telling you about. This is the thing I have been telling you about", "[i]t's true", "[t]wo men had attacked a young man down by the river. They raped him in the anus", the young man was wearing "desert boots, dark trousers, dark jumper". The next day, Detective Peglar came and took Carter's statement.

128 The consistencies in Carter's statements are: (a) in the early hours of 4 April 1984, he was with Bromley, Karpany, and a young man; (b) Bromley and Karpany bashed the young man; and (c) the bashing occurred at the River Torrens. Another consistent theme in many of Carter's statements was that Bromley and Karpany had tried to rape, or had raped, this young man. Carter mentioned that Bromley was "out" and, as noted, Bromley had in fact been released from gaol that day. Further, Bromley told the police this same fact, and it was mentioned in front of Mr George in the taxi. Carter said the young man was wearing desert boots and a pair of laced up desert boots were found on the bottom of the river near the bridge which the deceased's father identified as the pair he had bought for the deceased.

129 The actual or potential inconsistencies or implausible aspects in Carter's accounts include telling Father Pearson he had "saved" a man from being beaten at the River Torrens. This should be seen in the context that: (a) Carter also told his sister Beverley Carter that he had tried to stop Bromley and Karpany bashing the deceased; and (b) Father Pearson considered Carter to be raving and mentally unstable and therefore could not remember what Carter said. It is clear from the fresh psychiatric and psychological evidence that one symptom of a manic episode in schizophrenia and schizoaffective disorder is grandiosity and that Carter's self-perception of the heroism of his actions to try to stop the bashing increased over the next few days to the point where he: (a) saved the life of a drug addict at the River Torrens (albeit noting that Carter consistently said that the deceased had

taken drugs and was drug affected on the night); (b) "pulled a pair of nun chukas out of his bag and fought these two [men] off" who were trying to rape a young man at the River Torrens; and (c) "sent [these men] on their way". According to the notes from Hillcrest Hospital, by 10 April 1984 Carter's "heroic involvement in saving life has diminished". In other words, the grandiosity diminished with treatment, but the essential facts of the attack remained.

130 There were other grandiose and delusional aspects of Carter's accounts that appeared over the days immediately after 4 April 1984, many of which diminished or disappeared by 10 April 1984, including being possessed by the devil, having "drunk blood the night before", being a "top footballer" wanting to play or in fact playing for Port Adelaide, being psychic, and being a millionaire.

131 It may be inferred that Carter remained manic when Detective Peglar took his statement, given Detective Peglar's description of Carter's excitability, rapid talking speed, and digressiveness. The fact that Detective Peglar arranged the statement in a chronological order, when it may be inferred that Carter was very likely to have given a description of events out of order, and did not include extraneous material, when it may be inferred that Carter included extraneous material, does not establish that Carter's potential vulnerability to suggestion (which according to Professor Coyle is a vulnerability all people have in certain circumstances, and which is greater for persons with schizophrenia or schizoaffective disorder) was in fact manifested. It was not the object of Detective Peglar to create a record that conveyed Carter's psychological state. Detective Peglar's object was to obtain an intelligible statement of what Carter had witnessed. Detective Peglar cannot be criticised for this, and it does not prove that Carter's police statement is an unreliable manifestation of Carter's suggestibility.

132 The oral evidence of the psychologists and psychiatrists cannot be disregarded. For example, Professor Coyle accepted that, when making spontaneous utterances – as Carter did to his sisters, his mother, and Father Pearson, and in Hillcrest Hospital – it could not be said that Carter was subject to suggestibility. Professor Coyle accepted that there was no "precise evidence" of the police having put any "suggestive question" to Carter. Professor Coyle accepted that Detective Peglar having found it hard to get Carter's statement all down was "in no way, shape or form" evidence of "suggestive questioning". Professor Coyle accepted that if there was other evidence or material supporting Carter's accounts it would prove accurate recall for that part of his account rather than suggestibility. It should also be recalled, in this context, that it was Carter's identification to the staff at Hillcrest Hospital that he had witnessed the bashing at the River Torrens that caused the staff to contact the police once they saw the discovery of the body in the newspaper. The police had no basis to suggest to Carter that he had seen a murder or that Bromley was involved. It was Carter who

had been saying he had seen the event and that Bromley was involved before any involvement of the police.

133 Similarly, Dr Sugarman considered Carter to be "over-compliant" in trying to please the staff at Hillcrest Hospital. It is not apparent how Carter's descriptions to staff of what he had witnessed involved over-compliance on his part as, until they saw the newspaper report, it may be inferred the staff assumed Carter's descriptions of what he witnessed were mere manifestations of his manic and delusional state. If it had been otherwise, staff would have contacted the police as soon as they were told by Carter about what he had seen. Dr Sugarman also made plain that he was not an expert on the science dealing with suggestibility, deferred to the forensic psychiatrists on that issue, and did not look for evidence as to whether the police's questioning of Carter involved suggesting answers to him.

134 Dr Furst said that Carter's spontaneous utterances before he spoke to the police would be relevant to assessing his suggestibility. Dr Furst also accepted that it was mere supposition or conjecture that the questions the police asked Carter might have prompted a particular answer.

135 While Dr Hook expressed concerns about the way in which the interviewer structured Carter's statements to police, Carter's statements to police did not go to the jury. It follows that the jury could not have been given a false sense of Carter's rationality and accuracy from these statements. Dr Hook also said he saw no evidence that Carter was confabulating when giving evidence.

136 Dr Brereton agreed that Carter's spontaneous utterances before he spoke to the police would not be affected by Carter's potential suggestibility. Dr Brereton said it was impossible to say if Carter's statement to police was affected by suggestibility, but also accepted there was no evidence of that being so. Dr Brereton further accepted that his evidence that Carter's account was distorted by reason of Carter's suggestibility was supposition by Dr Brereton. While Dr Brereton expressed concern that Carter had been interacting with Hillcrest Hospital staff before he was interviewed by police and may have been influenced by those staff, it is not apparent how that could be so in any relevant manner given that there was no newspaper report of the discovery of the body until 9 April 1984 and, until then, the staff considered Carter's accounts to be a manifestation of his illness. Dr Brereton's further evidence that Carter may have "ramp[ed] up his story" because staff disbelieved him is obvious supposition and, in any event, the "ramp[ing] up" that occurred was directly related to Carter's increasing grandiosity about his role in the event, not the event otherwise.

137 What emerges from the expert evidence as a whole is that many people are vulnerable to suggestibility depending on the circumstances, but a person such as Carter was more vulnerable due to his schizoaffective disorder. Carter's

vulnerability, however, would not have affected his spontaneous utterances about the event. It is apparent that Detective Peglar structured Carter's statement to make it intelligible – which, it may be inferred, included putting things in chronological order and eliminating digressions. There is no evidence, however, that Carter's statement to police was a product of Carter's suggestibility. In any event, the statement was not before the jury. The grandiose aspects of Carter's accounts are also obvious. They are, as the experts accepted, different in quality from his account of the attack on the deceased.

138 Before moving to Carter's evidence in the trial, it is convenient to make a further observation about the fresh evidence of the psychiatrists and psychologists. A distinct theme of their evidence was their concern that because Carter was not manic and psychotic at the time he gave evidence and there was no evidence adduced from a forensic psychiatrist about how ill Carter had been at the time of the relevant events, the jury could not have appreciated the true extent of Carter's illness despite the direction given by the trial judge. For example, Dr Furst said that the direction was insufficient "because it didn't tell the jury that [Carter] was floridly psychotic and manic".

139 The jury, however, had seen Carter give evidence. They saw him say he thought he had "seen the Devil", and it frightened him and he got "all tense and sick". They saw him say that he thought he was a Port Adelaide football player. They heard that: (a) he had memory blanks before 1981; (b) he was diagnosed with schizophrenia in 1982; (c) he had been in hospital in 1982 because he was seeing things, including the "Devil with the horns and the red face", as well as a tail; (d) the devil would speak to him; (e) he saw the devil again around the time of the incident at the River Torrens; (f) the devil frightened him but he could not describe it and he was "freaking out" at the time; and (g) he was very sick in 1982 when he went to the hospital but did not realise he was sick, and was very sick again when he went back to the hospital in 1984. The jury saw Carter say that when he was sick he "could have said anything" as, when sick, he just speaks whatever is in his mind. They saw him say that: (a) he escaped from the hospital as he did not think he was sick; (b) he still suffered from his illness; (c) his illness could get worse; (d) he had not been taking his medication for three to four weeks before the incident; and (e) he was feeling confused when giving that part of his evidence about the use of the barbell. The jury also heard the submissions of Bromley's counsel about Carter's mental illness and its effect on his evidence.

140 Given this and the ultimate effect of the fresh evidence of the psychiatrists and psychologists, it is not apparent how their evidence could materially change the "evidentiary landscape"[70] of the case against Bromley.

Carter's evidence in the trial – inconsistencies and inaccuracies

141 The submissions for Bromley focused on Carter's evidence in the trial that was wrong or said to be inconsistent with other, reliable evidence.

142 *The route the taxi took*: Carter said the taxi that he and Karpany took to the city went over the Morphett Street bridge and drove up Hindley Street towards Jules Bar, did a U-turn near King William Street, and then stopped in Hindley Street opposite Jules Bar. Mr George, taxi driver, said the taxi entered Hindley Street from the King William Street end and stopped near Jules Bar.

143 It is well within the realm of ordinary human experience for a person to believe they took one rather than another route. This discrepancy (and any other discrepancies) about the route the taxi took does not support any concern about the reliability of Carter's evidence. Discrepancies of this kind are to be expected in the ordinary course of a person recollecting events, including parts (such as a taxi trip) on which they had no reason to focus at the time. The important fact is the common evidence that the taxi went to Hindley Street and stopped near Jules Bar.

144 *Carter embracing the "dapper man"*: Carter said he first met Bromley in 1981 and that he was not sure if he and Bromley were related. The Mileras were his cousins. He next met Bromley in April 1984. Mr George, taxi driver, said that when Carter and Karpany got out of the taxi to greet the other Aboriginal man near Jules Bar, Carter put his arms around the other Aboriginal man in a close greeting.

145 It was submitted for Bromley that this would have been odd behaviour if the other Aboriginal man was Bromley, whom Carter had met only once previously in 1981.

146 This submission overlooks four matters. One, Carter was psychotic and manic at this time, so an over-effusive greeting would accord with the elevated mood which he exhibited around 4 April 1984 and for some weeks after. Two, Carter and the other Aboriginal man were members of Adelaide's Aboriginal community, and it cannot be assumed that it would be odd for two members of Adelaide's Aboriginal community to greet each other in the way Carter greeted Bromley. Three, Carter referred to Bromley as Milera, and the Mileras were Carter's cousins, although Carter was not sure if Bromley was a member of his

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70 *R v Keogh [No 2]* (2014) 121 SASR 307 at 347 [141].

extended family or not. Four, Carter's statement to his mother the next day about Bromley being "out" supports an inference that Carter's mother knew who Bromley was and that he had been in gaol.

147 The important fact is the common evidence that the taxi stopped outside Jules Bar. Carter and Karpany were joined by the other Aboriginal man and the young white man.

148 *Purchasing a flagon*: Carter said that when they were back in the taxi they stopped and he got out to buy a flagon at "Martinas" on the northern side of Hindley Street, but they would not serve him. Mr George said Carter went into Katz (or Kats) Bar on the northern side of Hindley Street and returned with a flagon in a brown paper bag.

149 The important point, however, is the common evidence that the taxi stopped on the northern side of Hindley Street at a bar and Carter either tried to or did buy a flagon.

150 *Payment of the taxi fare*: Carter said Bromley paid the taxi fare at Martinas and they then all left the taxi, and the men walked off down Register Street (which intersects with Hindley Street), across North Terrace and across the railway yards to the River Torrens. Carter said they were not dropped off near the Suburban Taxis depot, which was further down Hindley Street towards West Terrace. Mr George said that after the taxi stopped at Katz Bar, the three Aboriginal men got back in the taxi (where the white man had remained) and said they wanted to go to the parklands, which Mr George was not too keen about. Mr George asked for the fare and stopped outside the Suburban Taxis depot. Bromley paid the fare. According to Mr George, the men got out and headed towards West Terrace across Hindley Street.

151 It may be accepted that it is more likely that Mr George was right about this sequence of events and Carter was wrong. Mr George would have had good reason not to want to take four men to the parklands in the western part of the CBD late at night and, rather, to stop near the Suburban Taxis depot. But it also must be recognised that the common evidence is that: (a) the men got out of the taxi together; (b) they got out on Hindley Street; and (c) Bromley paid the taxi fare.

152 *Bromley's clothing*: as discussed, Carter identified the other Aboriginal man who joined the taxi at Hindley Street as Bromley. Mr George identified Bromley's clothing inconsistently with the clothing other evidence indicates Bromley was wearing. The submission for Bromley is that it should be concluded that Carter's identification of Bromley was wrong. This submission does not confront other evidence, including: (a) Carter's reference to Bromley being "out" when Bromley had just got out of gaol; (b) Mr George's reference to Bromley having just been

released from gaol; and (c) Mr George's own identification of Bromley as the other Aboriginal man who joined the taxi at Hindley Street. It also does not confront the evidence, inadmissible against Bromley but admissible for the purpose of assessing Carter's reliability and the question under s 353A(1) of the CLCA in this appeal, of Karpany's statement to Jennifer Carter identifying Bromley as the person who, with Karpany, bashed the young man.

153 *Bromley being drunk*: Carter initially said that, at the river, Bromley was "pretty drunk", Karpany looked "half shot" but not as drunk as Bromley, the deceased was "pretty drunk and off his face with drugs", and Carter had not been drinking. Later in his evidence, Carter said that the deceased was "pretty drunk", Bromley was "really drunk" and "the drunkest of the lot" (and was "[s]taggering around" and "couldn't walk straight"), and Karpany was "half shot". Constable Griggs said that when he spoke to Bromley (after 4.25 am on 4 April 1984) he had a very slight smell of alcohol on his breath but was not affected by liquor. Constable Burden said she did not smell liquor on Bromley, and he did not appear to be affected by liquor. Mr George, taxi driver, said he would not say Bromley was affected by alcohol.

154 This is an inconsistency between Carter's evidence and other evidence, at least to the extent that it is possible to assume that, if Bromley was "really drunk" by the river, it may be unlikely that two police officers would assess him as not affected by alcohol perhaps around an hour or so later.

155 *The barbell*: Carter said that he had a barbell with him. According to Carter, when the deceased refused to have sex with Bromley, Bromley started bashing him and Karpany joined in, and they were punching and kicking the deceased. Bromley also used the barbell on the deceased, hitting him on the body, face, and head. The barbell had been in Carter's bag. Bromley got the barbell from the bag which he had seen earlier. Dr Manock, forensic pathologist, considered the pathology evidence to be "totally and absolutely" inconsistent with the use of a barbell against the deceased as Carter had described (that is, blows against the deceased while the deceased was on the ground, including blows to the head).

156 In assessing this evidence, however, other evidence is relevant: (a) Carter did own a barbell; (b) Carter thought the barbell had fallen into the river; (c) the police divers found a barbell under the Morphett Street bridge when they found the desert boots; (d) the barbell found in the river matched the other barbell Carter owned; (e) Dr Manock also said that the injury caused by a blow from a barbell would depend on whether the body part struck was capable of moving away from the blow and whether the blow was direct or glancing. Given this, he could not say that a barbell was or was not used in causing the injuries to the deceased. This explains the part of the trial judge's direction that the jury may decide Carter was right that Bromley picked up the barbell and struck one or more glancing blows

but was undoubtedly mistaken that Bromley had hit Docoza as described, that is, while Docoza was on the ground.

157 *The deceased was stripped naked*: Carter said the deceased was wearing a shirt, trousers, and desert boots. When they were bashing the deceased, Karpany and Bromley stripped him naked. Bromley used a knife he had to take the deceased's trousers off. They took his shoes and socks off. When the deceased was found, he was naked from the waist down but was wearing a shirt and windcheater.

158 Accordingly, Carter was wrong that the deceased was stripped of all clothing. He was right, however, that the deceased had his trousers, shoes, and socks removed. Moreover, he was right that the deceased was wearing desert boots, and the same desert boots, laces tied, were found at the bottom of the river near the Morphett Street bridge.

159 *Bromley in the water*: Carter said that when Bromley and Karpany were bashing him the deceased rolled down the bank into the water and they ducked the deceased's head under water. It was submitted for Bromley that if this were so Bromley would have been "up to his hips in mud and water in the River Torrens", but the police officers did not suggest this to be the case. It was submitted for the respondent that there was a timber landing out the front of the Australian National Railways rowing shed so it is not the case that Bromley would have had to get wet to duck the deceased's head under the water if Bromley was on the landing.

160 It is not possible to know exactly what occurred, but there is no doubt the deceased was in the river. There is also evidence that, whatever the police might or might not have noticed about Bromley's clothing in the early hours of 4 April 1984: (a) when the police found him, Bromley was hiding and stuck in a prickly bush from which he had to be helped to escape; (b) on the morning of 4 April 1984 Bromley's sister-in-law, Margaret Bromley, noticed dry mud on Bromley's trousers; (c) Bromley had to borrow some clothes as he wanted to and did wash his clothes, including his shoes, which had mud on them, and when his sister-in-law asked him why he was doing so Bromley said "it gives me something to do"; (d) the police divers found the barbell in the river at the eastern end of the landing outside the front of the Australian National Railways rowing shed and were able to retrieve the barbell from the river while remaining on the landing; and (e) the desert boots were each located about two metres out from the landing towards its eastern end, in water about two to three feet deep.

161 *Carter's interaction with Bromley and Karpany on the bridge*: Carter said that when he left the river after the bashing, he went to the pie cart under the Morphett Street bridge and then walked up the bridge where he saw Bromley and Karpany leave the area of the river. They were walking towards Carter. Carter gave them a drink of the water he got from the pie cart. Then the police appeared.

Bromley and Karpany then "cut it" and went their separate ways. Carter spoke to the police. Then he saw other police cars and they found Bromley, who was hiding. Carter went home.

162 It was submitted for Bromley that the police had seen Bromley alone on the bridge, not with Karpany, and there would not have been enough time for the events Carter said had occurred to have in fact occurred. This submission, however, is mere surmise and is not based on any specific evidence of timings. Further: (a) there was a pie cart under the bridge; (b) the pie cart operator gave evidence that could have been interpreted as supporting Carter having sought and being given a cup of water, albeit the date and time given by the pie cart operator being incorrect; (c) Carter did meet the police on the bridge and spoke briefly to them; (d) the police did see Bromley on the bridge, albeit alone; and (e) Bromley did run and hide when he saw the police again.

163 It was also submitted for Bromley that there was an inconsistency between Carter's account about Bromley getting into the police car when apprehended and the evidence of Constables Burden and Griggs. Carter said in his statement to police that "I think Derek was arrested by the police". In his evidence Carter said that when the police car came Bromley and Karpany "tried to cut it and ran away" and "went separate ways". Then Carter saw other police cars coming "and I seen them get Derek in the car; Derek was hiding". Carter said Bromley was hiding "[d]own off the edge of the road" and when he saw the police get Bromley he went home. As he put it, the police "had" Bromley. Later in his evidence, Carter said that, when the police car arrived, Bromley and Karpany "scattered, cut it". The asserted inconsistency with the police evidence is Carter saying that he "seen them get Derek in the car". It is clear from the police evidence, however, that the police did "get" Bromley in the car as they used the headlights of the police car to locate Bromley and fixed their lights on him on high beam, causing Bromley to run and try to hide. The asserted inconsistency does not exist.

164 *Carter's blue bag*: Carter said that when he left the river, he had his cassettes with him. He did not have his bag with him. When he saw Karpany on the bridge, Karpany had Carter's bag and kept it. Father Pearson took Carter to Hillcrest Hospital the following afternoon but, on the way, they looked for Carter's bag at Carter's request. Carter saw Karpany at Victoria Square, and Karpany said the bag was at the River Torrens. Constable Burden said that she did not recall Carter carrying anything when she saw him on the bridge. Constable Griggs said that Carter was carrying a blue airways style bag when he saw him on the bridge. It had books in it.

165 From this, it may be inferred that Carter was wrong about leaving his blue bag at the river and Karpany having his bag when he saw him on the bridge. Other evidence, however, confirms that: (a) Carter did have a bag in which he had a

sheepskin rug and other items that he used to "collect"; (b) Carter's blue bag, still containing the sheepskin, was later located by a city council gardener on 7 April 1984 near Festival Drive, on the eastern side of the Morphett Street bridge, behind a fence on the river embankment; and (c) Carter's evidence that he carried various tablets in his blue bag, and gave the deceased some headache tablets, was supported by other evidence at trial, including that a number of tablets were found by police in Carter's blue bag after it was located, that one of the tablets included a drug containing oxazepam, and that low levels of oxazepam were detected in the urine and liver of the deceased, which were "consistent with the deceased having taken a 15 milligram tablet of that drug some hours before death".

Dr Furst's five inconsistencies

166 It will be recalled that Dr Furst identified five inconsistences in Carter's evidence that informed his opinion of Carter's reliability given his mental illness.

167 *The use of the barbell*: it is not apparent that Dr Furst had regard to the facts that: (a) proved Carter did have a barbell in his bag, and that the barbell was at the scene of the attack and had been removed from the bag at the scene, given it was found in the water; and (b) while Dr Manock said that the injuries to the deceased were "totally and absolutely inconsistent" with the use of the barbell while the deceased was on the ground as Carter had described, Dr Manock also said that he did not know if the barbell had been used in the attack or not as it was possible that lesser injuries would have been caused if the body part was free to move when struck and/or was struck by a glancing blow only (that is, if the deceased was not struck on a body part on the ground, preventing the body part from moving with the momentum of the barbell). Further, when the whole of Dr Manock's evidence in respect of the use of the barbell is considered, it is not apparent how this supports the opinion of Professor Coyle that, in respect of the barbell, Carter's "recall was so manifestly wrong" that it brings into question virtually everything he claims to have recalled.

168 *The deceased being completely naked*: it is not apparent that Dr Furst had regard to the facts that: (a) Carter was right that the deceased was wearing desert boots; and (b) those desert boots were found, with the laces tied, in the river near the location of the attack as Carter described. If those facts are also considered it is readily understandable that the shock of witnessing the attack and seeing a man stripped of his trousers, socks, and shoes, particularly in the context of a rejected sexual advance, might be reconstructed by the ordinary interpretive process of a person's memory as the man being stripped naked.

169 *Carter giving Panadol or some prescription medication to the deceased*: it is not apparent that Dr Furst had regard to the facts that: (a) proved Carter did have various tablets in his bag, including a drug containing oxazepam; and (b) low

levels of oxazepam were detected in the urine and liver of the deceased, which were "consistent with the deceased having taken a 15 milligram tablet of that drug some hours before death".

170 *Carter pulling the deceased out of the river*: it is not apparent that Dr Furst had regard to all of the evidence about this aspect of the event. In his evidence in chief, Carter said he told Bromley and Karpany to leave Docoza alone and, after Docoza rolled down the bank and Bromley and Karpany ducked Docoza's head in the water, Carter pulled Docoza up on the bank. According to Carter, when he ran away from this (as he was "freaked out") Docoza was again in the river. In cross-examination, Carter said (consistently with his evidence in chief) that Docoza was twice put in the river during the attack. Again, according to Carter, the first time Carter helped Docoza out of the water and told Bromley and Karpany to leave Docoza alone. He did so by putting his arms under Docoza's arms and helping him out of the water by the shoulders while Carter was standing on the lawn area of the bank. Docoza was still conscious at this time. Carter said that when Docoza went into the water the second time he was naked and still calling for help while Bromley was pushing his head under the water. Carter did not accept that he had not helped Docoza out of the water on the first occasion. It is not apparent that Carter's evidence that he helped Docoza out of the water on the first occasion is demonstrably wrong. The evidence he gave at trial in this regard was consistent and cogent.

171 *Carter using nunchakus*: a nunchaku is a martial arts weapon comprising two sticks joined by a chain or rope of some kind. The only reference to nunchakus in Carter's accounts is his statement to Mr Steele in Hillcrest Hospital that "he had pulled a pair of nun chukas out of his bag and fought these two [men] off". This accords with Carter's statement to Dr Ash in Hillcrest Hospital that he had a black belt in karate. There is no evidence that Carter owned or had with him on 4 April 1984 (or at any time) nunchakus. Carter's description of using nunchakus occurs in the part of his account where he claimed to have saved the young man being beaten up by seeing off his attackers. Dr Furst agreed in cross-examination that these aspects of Carter's accounts (which were not part of his evidence before the jury) fitted the same pattern of grandiose delusions while he was in Hillcrest Hospital and were of a very different nature compared to Carter's account otherwise of the bashing of Docoza.

Conclusion about inconsistencies

172 In this context, it is apparent that a great deal of Carter's evidence was strongly supported by other evidence or material not admitted into evidence against Bromley but relevant to an assessment of Carter's reliability.

173 Given that the psychiatrists accepted that: (a) a person with schizophrenia or schizoaffective disorder could accurately recall events witnessed when psychotic; (b) they would consider all supporting and non-supporting evidence in their practice to assess a patient's reliability; and (c) they had not been instructed to and did not consider all of the evidence or other material that supported Carter's evidence, the Court of Criminal Appeal did not err in concluding that the weight of all of the fresh expert evidence was significantly diminished by the fact they did not do so.

174 Although Professor Coyle and Dr Sugarman continued in their cross-examination to take a different view about the relevance of inconsistencies in Carter's evidence to the assessment of the accuracy and reliability of his recall, the psychiatrists' evidence also significantly diminished the weight of the psychologists' evidence as: (a) it was clear the psychiatrists routinely treated people with schizophrenia and schizoaffective disorder, but the same could not be said of Professor Coyle; (b) Professor Coyle and Dr Sugarman had not considered the whole of the supporting evidence and material, but focused heavily on the inconsistencies and inaccuracies in Carter's statements and evidence; and (c) Professor Coyle and Dr Sugarman's overall position was that everyone's memory is unreliable and that it could never be ascertained if a person was recalling events accurately or not, so supporting evidence is always required before evidence based on recall is accepted, and this view merely applied with even greater force to a person with schizophrenia or schizoaffective disorder.

175 In these circumstances, the submission for Bromley that the Court of Criminal Appeal erred by diminishing the weight given to the fresh expert evidence because the evidence and material that supported Carter's evidence did not incriminate Bromley by placing Bromley at the scene of the offending cannot be accepted. The proposition that the supporting evidence and material "does not corroborate [Carter's] evidence on the only issue that matters in this case – the guilt of [Bromley]" is unrealistic. It ignores the statement of Karpany to Jennifer Carter that, at the time and the location Carter identified, Bromley and he had bashed a white bloke under a bridge "too bad" and "all the way" as Bromley wanted to have sex with the bloke, removed the bloke's trousers and threw them in the river, and also threw the bloke in the river, and did so in front of Carter, who then "had to open his mouth". It fails to give the required weight to the other evidence that: (a) Carter and Karpany went to Hindley Street together; (b) the Aboriginal man they met was Bromley and the white man they met was the deceased; (c) the Aboriginal man they met had just got out of gaol and Bromley had just got out of gaol; and (d) Bromley and Carter were both seen in the vicinity of the area of the crime at around the same time.

176 Further, in these circumstances, the submission for Bromley that the Court of Criminal Appeal erred by diminishing the weight of the inaccuracies and

inconsistencies in Carter's accounts also cannot be accepted. As discussed, the inaccuracies and inconsistencies in Carter's accounts, assessed in their overall context, do not support an inference that he was an unreliable witness in the sense asserted, that is, as a person who could not be accepted in any respect absent specific confirming or corroborative evidence in that respect.

177 The detailed examples proffered for Bromley in support go nowhere. First, the fact that Carter may be inferred to have been wrong that Karpany had Carter's blue bag and that Carter is likely to have lost or left his bag where it was found (near Festival Drive, on the eastern side of the Morphett Street bridge, behind a fence on the river embankment) does not lead to an inference that Carter had the bag with him in Hillcrest Hospital and deposited it in the location it was found after he absconded from Hillcrest Hospital on 6 April 1984. The gardener who saw the bag did so from his car while driving to work. The fact that he did not see the bag when working in the area on the previous two days is unsurprising. Further, Father Pearson did not suggest Carter had his bag with him when he drove Carter to Hillcrest Hospital on 4 April 1984. Father Pearson also gave evidence supporting Carter's evidence that Carter asked Father Pearson to drive him to Victoria Square to see Karpany (Carter having given evidence that he wanted to see Karpany to get his bag back).

178 Second, it cannot be inferred that the Court of Criminal Appeal was unaware of the fact that Arthur George's evidence of the date on which "a young Aboriginal man approached him asking for some water between 2:00 and 2:30am" was either 5 or 6 April 1984 and not 4 April 1984. Nor could the Court of Criminal Appeal have been unaware that Arthur George identified the time as between 2.00 am and 2.30 am, when the other evidence supports an inference that Carter must have approached the pie cart for a drink of water at a later time, around 3.30 am to 4.30 am. The fact that Officer Moyle (railway police) was parked on North Terrace just under the Morphett Street bridge at about 4.00 am and could see the pie cart but did not see Carter is also immaterial. Officer Moyle said there were always taxis near and customers at the pie cart and there could have been customers there at the time, but he did not recall any specifically. That is to be expected, as Officer Moyle had no reason to be focusing on the pie cart. It may be inferred that the Court of Criminal Appeal considered that Arthur George's evidence supported Carter's account, because it is ordinary human experience that a person is more likely to recall an event than the day or time of the event. There is no error in the Court of Criminal Appeal having characterised Arthur George's evidence as supporting Carter's evidence despite the inconsistencies of date and time.

179 Third, there is no error apparent in the Court of Criminal Appeal's treatment of the police officers' observations that Bromley had blood on his clothing when they saw him. The Court of Criminal Appeal knew that Bromley had to be helped

to escape from the prickly bush in which he was hiding[71]. Constable Griggs asked Bromley why he had run from the police, and he said that he had just been released from gaol and that he had been robbed of $60, and when Constable Griggs looked in Bromley's wallet he had $60 in it. Constable Griggs said he saw a stain that appeared similar to blood on the front of Bromley's shirt. Constable Burden said she saw what appeared to be fresh blood on Bromley's shirt front about the size of a fist. She asked him where this had come from. Bromley said he had been in a fight at a pub and then said he had been bashed and robbed by two men of $60 and when Constable Griggs checked Bromley's wallet he had $60 in it. Contrary to the submissions for Bromley, Bromley did not suggest at this time that the blood was caused by the prickly bush. Further, in his unsworn statement, Bromley said he got into a fight in a carpark across the road from a bar but did not suggest he had been robbed.

180 The Court of Criminal Appeal's point was simply that when the police saw Bromley, they identified what appeared to be blood on his shirt and Bromley's explanation was a fight he had been in (albeit not with the deceased). This was, as the Court of Criminal Appeal concluded[72], one of the "skeins of evidence" supporting Carter's account that Bromley violently attacked the deceased, irrespective of the inconsistency in Bromley's account of being robbed. Had Bromley considered that the blood came from injury caused by the prickly bush, as now posited for him, it would be expected that he would have said so at the time the blood was pointed out to him by the police officers. Rather, Bromley's explanation was a fight, that is, a violent incident with another man (but not the deceased), earlier in the evening. In these circumstances, the fact that there was no forensic evidence proving the stain was blood does not undermine the fact that Bromley explained the blood not by reference to being caught in prickly bushes, but by being involved in violence with another man earlier in the evening.

181 Fourth, it was submitted for Bromley that Margaret Bromley's evidence of having seen mud or clay on Bromley's trousers and jacket the next morning, and Bromley washing his clothes, was not evidence of Bromley's consciousness of guilt given that it could be expected he would get dirty having been trapped in a prickly bush. This submission overlooks other circumstances, namely: (a) in his unsworn statement, Bromley said he had to wash the jacket as it had got dirty from "food, booze or in the blue in the carpark", or from being in the bush; (b) the police officers saw blood on the front of Bromley's shirt; (c) Margaret Bromley saw mud on Bromley's trousers and shoes, and a stain on the jacket; (d) to wash everything, Bromley had to ask his sister-in-law how to use the washing machine and had to

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71 *R v Bromley* [2018] SASCFC 41 at [53].

72 *R v Bromley* [2018] SASCFC 41 at [127]-[128].

borrow a shirt from his sister-in-law's son to wear; and (e) Bromley did not mention to his sister-in-law that he had been robbed. In the circumstances, and as the Court of Criminal Appeal concluded, this evidence was a "second skein" supporting Carter's evidence of a violent attack by Bromley on the deceased[73].

182 Fifth, the Court of Criminal Appeal did not confuse Dr Manock's evidence of the recent bruising on the deceased (the "third skein" of evidence) with the other two skeins of evidence which it identified. The Court of Criminal Appeal identified these three matters as "skeins" of evidence because, together, they implicated Bromley in the attack on the deceased and, accordingly, supported Carter's evidence as reliable in that regard[74]. It must be kept in mind that the issue with which the Court of Criminal Appeal was dealing was not an appeal against conviction, but an application for permission to appeal for a second time. The question with which it was dealing was whether the fresh psychiatric and psychological evidence was compelling, one aspect of which was whether that evidence was highly probative in the context of the issues in dispute at the trial. The issue in dispute to which the fresh evidence was relevant was Carter's reliability as a witness. In that context, the Court of Criminal Appeal was not using the skeins of evidence to find Bromley guilty to the criminal standard of beyond reasonable doubt. It was using the skeins of evidence to conclude that, properly understood, the fresh psychiatric and psychological evidence was not highly probative of Carter's reliability as a witness.

183 Contrary to the submissions for Bromley, the three skeins of evidence do inculpate Bromley and do diminish the relevance and cogency of the fresh psychiatric and psychological evidence. They do so because the overwhelming weight of that evidence accepted that material supporting Carter would be relevant to an assessment of his reliability as a witness, and the experts did not have regard to the whole of the material that supported numerous aspects of Carter's accounts and evidence. The analogy to *OKS v Western Australia*[75] that was sought to be drawn for Bromley does not exist. In that case, the evidence of the accused and complainant lying on a bed together was said not to be evidence of the charge that, on that occasion, the accused indecently dealt with the complainant[76]. That circumstance, in which there was no other apparent evidence of what occurred but that of the complainant, bears no resemblance to the present case, where there is

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73 *R v Bromley* [2018] SASCFC 41 at [129].

74 *R v Bromley* [2018] SASCFC 41 at [127]-[130].

75 (2019) 265 CLR 268.

76 (2019) 265 CLR 268 at 278 [26], 279 [30].

other material and evidence leading inexorably to the conclusion that Carter's accounts and evidence of the event were right in nearly all material respects and wrong about some details.

184 Sixth, the Court of Criminal Appeal did not err in failing to recognise the changed "evidentiary landscape"[77] created by the fresh psychiatric and psychological evidence in respect of the evidence of Mr George, taxi driver, as to the clothing worn by the other Aboriginal man who entered the taxi at Hindley Street. The Court of Criminal Appeal appreciated that the jury must have reasoned that Mr George was wrong about the clothing that man wore[78]. This does not mean the Court of Criminal Appeal reasoned that Carter must have been right that the man was Bromley. There was ample other evidence that the man was Bromley, including: (a) Mr George's identification of Bromley as the man; (b) Mr George having heard Bromley or Carter say that the man had just got out of gaol when Bromley had just got out of gaol; (c) Bromley having told the police officers he had just got out of gaol; and (d) Carter having told his mother on 4 April 1984 that "Derek MILERA is out – I've seen him. I was with him and Johnnie last night." As to the last matter, given that Bromley was only released from gaol on 3 April 1984 it is not apparent how Carter could have known Bromley was "out" other than that Carter had indeed seen Bromley and was with him and Karpany that night. The fresh psychiatric and psychological evidence has no effect on that evidentiary landscape.

185 Accordingly, the Court of Criminal Appeal's reasoning was not illogical, and nor was it contrary to the fresh evidence. Rather, it rationally reflected the evidence of the psychiatrists that the material and evidence supporting Carter's evidence was relevant to his reliability as a witness. As discussed, the evidence of the psychiatrists also significantly diminished the weight of the evidence of the psychologists, as did the other aspects of the psychologists' evidence identified above.

Other matters

186 The Court of Criminal Appeal concluded that the fresh psychiatric and psychological evidence was reliable and substantial but not highly probative "in the context of the issues in dispute at the trial of the offence". The Court of Criminal Appeal reached this view without regard to the additional propensity

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77 *R v Keogh [No 2]* (2014) 121 SASR 307 at 347 [141].

78 *R v Bromley* [2018] SASCFC 41 at [344].

evidence on which the respondent sought to rely[79]. It is therefore unnecessary to consider the Court of Criminal Appeal's alternative conclusion that the fresh evidence was not compelling, taking into account that additional propensity evidence[80].

187 We see no error in the Court of Criminal Appeal's reasoning and agree with its conclusion. Accordingly, the Court of Criminal Appeal was right to deny permission for the second appeal under s 353A of the CLCA as there was not "fresh and compelling evidence that should, in the interests of justice, be considered on an appeal", as referred to in s 353A(1). The first special leave question, whether the fresh psychiatric and psychological evidence is compelling within the meaning of s 353A(1) of the CLCA, must be answered "no". The second special leave question, whether it was in the interests of justice that it be considered on an appeal, must also be answered "no".

188 For these reasons, the application for special leave to appeal must be dismissed.

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79 *R v Bromley* [2018] SASCFC 41 at [377], [507].

80 *R v Bromley* [2018] SASCFC 41 at [508].

EDELMAN AND STEWARD JJ.

Introduction

189 The applicant for special leave to appeal has been in prison for almost 40 years, maintaining his innocence of the murder of Mr Stephen Docoza. The murder occurred early in the morning on 4 April 1984 in the course of an assault by the River Torrens in central Adelaide. There was a large volume of evidence given at the trial at which the applicant was convicted. Some of that evidence is described in the reasons of Gageler CJ, Gleeson and Jagot JJ. Much of it need not be repeated in these reasons because the focus is upon the only direct evidence of the assault which was essential for the applicant's conviction. That evidence was an account, that was undeniably wrong in important respects, given by a witness (Mr Gary Carter) who was present at the assault, and who, at the time, was suffering from schizoaffective disorder and was acutely psychotic and hypomanic.

190 There is no doubt that the jury accepted that an assault occurred and that at least the applicant and Mr Carter were present at the scene of the assault. But the conviction of the applicant depended upon Mr Carter's evidence about what happened during that assault. Some of Mr Carter's evidence concerning relatively mundane events before and after the assault was corroborated and was likely to be correct. Some was plainly wrong. But this evidence from Mr Carter about events before and after the assault is a distraction from the events of the assault. The accuracies and inaccuracies of Mr Carter's account of mundane events before and after the assault provide little guide to the accuracy of his account of the critical and emotional event of the assault. As was said by the psychiatrist who was instructed by the Crown to give expert evidence, for a person with Mr Carter's psychiatric condition, "if you were asking something that was simple and concrete and emotionally neutral, you could expect to get a more reliable account".

191 Even if Mr Carter's accounts of those mundane events before or after the assault were entirely correct (which they certainly were not), and even if his accounts of those mundane events were corroborated in every essential respect (which they certainly were not), the jury could not convict on that evidence. It was Mr Carter's account of the assault that was crucial. The real issue, therefore, is whether the jury should have been told that they could not accept Mr Carter's evidence concerning the assault itself without corroboration of each aspect of that evidence that was necessary to convict the applicant.

192 Mr Carter's evidence at trial concerning the assault differed in significant respects from earlier accounts that he had given but which were not before the jury. As we explain below, contrary to the approach of the Court of Criminal Appeal of the Supreme Court of South Australia, those earlier accounts (even if admissible on that appeal) do not bolster Mr Carter's reliability. They detract from it.

193 More fundamentally, there were numerous aspects of Mr Carter's account of the assault at trial that were either extremely unlikely or inconsistent with established facts. As the trial judge said to the jury, "[t]here is no doubt that in some important respects he [was] mistaken"[81]. One of the numerous examples can be seen from the evidence of a forensic pathologist at trial who accepted that Mr Docoza's injuries were "totally and absolutely inconsistent with the description" of the assault given by Mr Carter according to which the applicant struck Mr Docoza with *Mr Carter's* dumbbell weight (also referred to at trial as a "barbell"). Another example can be seen from the evidence of a police diver concerning the depth of the water in which Mr Carter alleged the applicant had held Mr Docoza's head underwater while kneeling on a landing. The evidence was that, even two metres out from the landing where Mr Docoza's shoes were found, the water was only approximately 60 to 90 cm deep. There is serious doubt whether Mr Docoza's head could have been held underneath the water in the manner described by Mr Carter in the even more shallow water at the point of the landing.

194 As mentioned, and most significantly for the unreliability of Mr Carter's account of the assault, Mr Carter was a man who, on 4 April 1984, was suffering from schizoaffective disorder and was acutely psychotic and hypomanic at the time of the murder. At trial, Mr Carter explained that he had seen the Devil and that the Devil had spoken to him at the time that he said he witnessed the assault. He presented on the day of the murder to Hillcrest Hospital, where he remained for about four months. There he claimed: that the Devil had been affecting him; that he was a psychic; that he was a millionaire; that he was a minister of religion; that he was a top footballer wanting to play for Port Adelaide that year; and that he was an expert in martial arts and a black belt in karate.

195 As the Crown properly conceded, the case "would never get to the jury" if the evidence of Mr Carter needed to be corroborated in every respect. The essential question for the Court of Criminal Appeal below was whether Mr Carter's evidence needed substantial corroboration in each and every respect in relation to his account of the assault, upon which the applicant's conviction depended. It did. In this respect, the corroborative evidence need not, by itself, prove the facts of the assault about which Mr Carter gave evidence: it would be enough that it "'confirms', 'supports' or 'strengthens' [that] evidence in the sense that it 'renders [that] other evidence more probable' ... It is not necessary that corroborative evidence, standing alone, should establish any proposition beyond reasonable doubt ... it is sufficient if it strengthens that evidence"[82]. But every essential detail of Mr Carter's account of the alleged assault by the applicant upon Mr Docoza

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81 *R v Bromley* [2018] SASCFC 41 at [19] per Peek, Stanley and Nicholson JJ.

82 *Doney v The Queen* (1990) 171 CLR 207 at 211 per Deane, Dawson, Toohey, Gaudron and McHugh JJ, quoting *R v Kilbourne* [1973] AC 729 at 758.

required substantial corroboration by independent evidence before the jury could accept it.

196 Professor Coyle, an expert psychologist instructed by the applicant, said in his expert report in 2015 for the Court of Criminal Appeal that in light of the "extraordinary advances" since 1985 in scientific knowledge with respect to "memory, cognition, interrogative suggestibility" of individuals suffering from schizoaffective disorder, he could not "conceive of an appropriately qualified forensic psychologist or forensic psychiatrist now accepting that Mr Carter's evidence was in any way reliable". Dr Brereton, an expert psychiatrist instructed by the Crown, said in his report that "[a]lmost the entirety of Mr Carter's evidence would need to be corroborated before I would consider his reliability had been sufficiently demonstrated".

197 Three of the experts who gave evidence in the Court of Criminal Appeal also raised concerns about the potential for further exacerbation of Mr Carter's unreliability by the effect of his psychosis if Mr Carter had been involved as a perpetrator, or if he feared being accused of being a perpetrator. One of them noted the particular concern that at the time of the assault Mr Carter was under an arrest warrant for a previous assault. Hearsay evidence of statements allegedly made by Mr John Karpany, the applicant's co-accused, and relied upon by the Crown on this application, described Mr Carter as having struck Mr Docoza with Mr Carter's own dumbbell. And Mr Carter's treating psychiatrist at Hillcrest Hospital described Mr Carter's concerns about the legal implications of his position. Notably, also, all of the physical evidence found at the crime scene (including Mr Carter's dumbbell that Mr Carter said had been used to strike Mr Docoza) belonged to either Mr Carter or the deceased; none of it belonged to the applicant.

198 No explanation was given on this appeal for why Mr Carter was apparently never treated by the police as a suspect. At trial, counsel for the applicant sought a direction from the trial judge based on the possibility that Mr Carter was an accomplice, saying "You cannot avoid the accomplice role by accepting what [Mr Carter] says at face value". Indeed, hearsay evidence elicited by the Crown from Ms J Carter included a statement by Mr Karpany that Mr Carter had hit the deceased "a couple of times on the back with a dumbbell ... up towards the neck". It is notable that although Ms J Carter later recanted every hearsay suggestion in her pre-trial witness statements that the applicant was involved in the assault, she did not recant the evidence related to Mr Carter's involvement.

199 At the applicant's trial, no expert medical evidence was presented concerning Mr Carter's mental illness or the effect of his psychosis on his ability to give a reliable account of what occurred on 4 April 1984. The essential purpose of the application under s 353A of the *Criminal Law Consolidation Act 1935* (SA) ("the CLC Act") to the Court of Criminal Appeal for a further appeal from the

applicant's conviction was to bring such fresh expert evidence to the attention of the Court for the first time.

200 The Court of Criminal Appeal heard the application for permission as though it were an appeal but refused permission for the applicant to appeal on the basis that the fresh expert evidence was not compelling and that it was not in the interests of justice for permission to be granted. The Court of Criminal Appeal further concluded that had permission been granted the appeal would have been dismissed on the basis that there was no substantial miscarriage of justice[83].

201 The applicant seeks special leave to appeal against the decision of the Court of Criminal Appeal. In circumstances in which it appeared that a large volume of material may have needed to be considered in order to determine whether the applicant had been the subject of a substantial miscarriage of justice, the ground of the application for special leave to appeal concerning this expert medical evidence was referred by Keane, Edelman and Steward JJ for consideration by a Full Court to be heard as though it were an appeal. The application did not raise any novel issue of legal principle for resolution by this Court. But a miscarriage of justice loomed very large.

202 The aspect of the miscarriage of justice that loomed large at the special leave hearing concerned the reliability of Mr Carter's evidence concerning the assault on Mr Docoza. However, the applicant sought also to raise a further proposed ground of appeal asserting that new pathological evidence demonstrated that Mr Docoza may have died by natural causes rather than by drowning as Dr Manock, a forensic pathologist, had suggested at trial. Although the two matters were not unrelated, the panel hearing the special leave application in the first instance was not satisfied that the new pathological evidence relating to cause of death would substantially add to the proposed ground of appeal concerning the reliability of Mr Carter's evidence. The issues for determination on the hearing of the special leave application before this enlarged Court therefore reduce to three:

(i) whether the fresh expert evidence of the three psychiatrists and the two psychologists was "compelling" for the purposes of s 353A(6)(b) of the CLC Act;

(ii) if so, whether it was in the interests of justice for this fresh evidence to be considered on a further appeal for the purposes of s 353A(1) of the CLC Act. This issue turned upon whether the Court of Criminal Appeal was

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83 *R v Bromley* [2018] SASCFC 41 at [377], [388], [509] per Peek, Stanley and Nicholson JJ.

correct to receive additional propensity and other evidence led by the Crown, much of which was not fresh in any way; and

(iii) if the fresh evidence should have been admitted, whether it established that there was a substantial miscarriage of justice.

203 For the reasons below, special leave to appeal to this Court should be granted and the appeal should be allowed. The Court of Criminal Appeal should have concluded that the fresh expert evidence was compelling and that it was in the interests of justice for the evidence to be considered on a further appeal. Having heard the application as though it were an appeal, the Court of Criminal Appeal should also have concluded that there was a substantial miscarriage of justice and allowed the appeal.

The approach taken in these reasons

204 These reasons follow the following format. **First**, we set out the legal framework for this application concerning the central issue of when fresh evidence is "compelling".

205 **Secondly**, we set out the evidence relevant to this application, namely the different versions of the assault given by, or attributed to, Mr Carter. In that context it is important to separate (i) the versions of the assault that were given at trial, which included accounts given directly by Mr Carter, as well as hearsay accounts given by other witnesses of what Mr Carter, or other persons, had told them, from (ii) the hearsay accounts of what Mr Carter had said that were not in evidence at the trial.

206 The relevance to this appeal of accounts falling into the latter category, namely the hearsay versions of the assault allegedly given by Mr Carter not in evidence at trial, was extremely opaque. Some aspects of the hearsay versions of the assault demonstrated esoteric knowledge that an assault had occurred but none demonstrated esoteric knowledge of any detail of the assault (who committed the assault? Was there any assistance? How was the assault committed?). Nor was any of the hearsay evidence about any of the details of the assault independently verified or corroborated[84]. As one of the experts put it, "having a person repeat a version ... again and again doesn't mean that [it is] true"—in short, Mr Carter could not corroborate himself. Nor could the hearsay evidence of Mr Carter's pre-trial versions of the assault bolster his credibility through consistent repetition by him even if those versions were entirely consistent, which they certainly were not: they

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84 cf *Kamleh v The Queen* (2005) 79 ALJR 541 at 545 [16] per Gleeson CJ and McHugh J; 213 ALR 97 at 101.

were shifting and inconsistent and involved aspects that were plainly fantasy and aspects that were contradicted by evidence at trial.

207 The only relevance of the hearsay evidence of Mr Carter's pre-trial accounts of the detail of the assault lies in the suggestion by the Court of Criminal Appeal that there was a gap in the assessment of Mr Carter's unreliability by the expert witnesses who considered some, but not all, of those pre-trial hearsay statements by Mr Carter. But those pre-trial hearsay statements—which included statements from Mr Carter that he had seen the Devil and drunk blood and which contained inconsistencies with his evidence at trial, as well as references to matters that it is known could not have occurred—could only have reinforced the evidence of all the experts about the effect of his psychosis at the time, the consequent unreliability of his evidence of the detail of the assault at trial, and the need for that detail to be corroborated in every essential respect by independent evidence.

208 **Thirdly**, we describe the most significant errors and inconsistencies in Mr Carter's accounts of the assault. These errors are divided into two categories. The first category concerns the errors and inconsistencies in Mr Carter's pre-trial statements, including to staff at the hospital to which he was admitted on the same day as the assault. Separately from the Court of Criminal Appeal's assertion that these statements demonstrated a gap in the experts' assessment of Mr Carter's reliability, at times in this application these statements were relied upon (impermissibly) apparently to bolster Mr Carter's trial evidence. Neither of these approaches to the pre-trial statements is correct. The extent of errors and inconsistencies in Mr Carter's pre-trial statements reinforces the experts' assessment and detracts even further from Mr Carter's reliability. The second category that we consider concerns the most significant errors and inconsistencies in Mr Carter's evidence at trial.

209 **Fourthly**, we consider the evidence concerning alleged admissions that were said to have been made by Mr Karpany concerning the assault. Not only was the evidence of these alleged admissions not admissible against the applicant but the relevant part of that evidence was subsequently recanted by the witness who gave it.

210 **Fifthly**, we set out in detail the Crown case against the applicant as it related to the crucial matter of the assault. In particular, we consider two essential elements that the Crown was required to prove beyond reasonable doubt: (i) that the applicant was present at the scene of the assault on Mr Docoza; and (ii) that the applicant took part in that assault. There was corroboration of Mr Carter's evidence that the applicant was at, or was close to, the scene of the assault at the relevant time. But there was no corroboration of Mr Carter's evidence that the applicant was a principal or a participant in the assault.

211 **Sixthly**, it is necessary for us to consider in detail the fresh expert evidence. This evidence concerns both the reliability of Mr Carter and his suggestibility. The fresh expert evidence of Dr Brereton, instructed by the Crown, and Professor Coyle, instructed by the applicant, was the most detailed and clear in stating that Mr Carter's psychosis at the time of assault meant that all details of his account of the assault at trial needed to be corroborated before they could be accepted. Their evidence was internally consistent and was consistent with each other's evidence. Dr Brereton was the only witness who was asked specifically to comment on the findings of Professor Coyle's report and, subject to one minor disagreement regarding how Mr Carter's symptoms were to be classified, which Dr Brereton described as "academic", Dr Brereton expressed agreement with Professor Coyle. Dr Furst was also provided with Professor Coyle's report after Dr Furst had provided his written report. During oral examination, Dr Furst did not express disagreement with any of Professor Coyle's conclusions, and indicated express agreement with Professor Coyle's views on suggestibility. All of the written reports and oral evidence provided by the other experts were otherwise consistent with Professor Coyle's reasoning and conclusions.

212 **Seventhly**, we identify and summarise the significant areas of agreement among some or all these expert witnesses. There were at least seven matters on which multiple experts agreed including, critically, the fact that there was no way of knowing whether what Mr Carter claimed to have seen had occurred or was a hallucination, absent independent corroboration.

213 **Eighthly**, we explain that the fresh expert evidence meets the legal test for being "compelling" within the meaning of s 353A(6) of the CLC Act, which requires that the evidence be "reliable", "substantial" and "highly probative in the context of the issues in dispute at the trial". There was no dispute that the expert evidence was reliable and substantial[85]. And the evidence was highly probative[86]. Other evidence relied upon by the Crown does not detract from this conclusion. Importantly, none of the other evidence relied upon by the Crown provides any substantial corroboration for the essential detail of Mr Carter's account of the applicant's involvement in an assault on Mr Docoza. And the pre-trial hearsay evidence relied upon by the Crown concerning statements by Mr Carter in fact provides further support for the expert evidence about the unreliability of Mr Carter.

214 **Ninthly**, we explain that it is in the interests of justice for the fresh and compelling expert evidence to be considered on appeal pursuant to s 353A(1) of the CLC Act. The Crown sought to adduce new evidence in three categories to

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85 *R v Bromley* [2018] SASCFC 41 at [376] per Peek, Stanley and Nicholson JJ.

86 cf *R v Bromley* [2018] SASCFC 41 at [377] per Peek, Stanley and Nicholson JJ.

demonstrate that the admission of the fresh and compelling expert evidence was not in the interests of justice. None of the evidence in those categories is admissible for the purpose of identifying the applicant as an assailant. Most is not fresh. None is compelling. And even if the Crown evidence were fresh and compelling, it provides no substantial corroboration for any of the details of the assault that Mr Carter witnessed and, in important respects, provides further support for the compelling nature of the fresh expert evidence.

215 The first category (alleged esoteric knowledge of Mr Carter based on others' statements recounting conversations with Mr Carter) does no more than place Mr Carter at the scene of, and support his involvement in, the assault. The second category (alleged esoteric knowledge of Mr Karpany based on hearsay evidence of admissions by Mr Karpany) also goes no further than that. To the extent that the witness who gave that evidence suggested that the hearsay evidence implicated the applicant in the assault, that account was inadmissible against the applicant and, in any event, was recanted by the witness. Moreover, the Crown did not seek to rely on this evidence as proof that the applicant was involved in the assault[87]. The final category was the alleged propensity evidence based upon the applicant's prior conviction in 1981 of attempted rape. Even if that propensity evidence were admissible, which it is not, it provides no substantial corroboration for Mr Carter's account of the assault and may even raise further issues concerning whether Mr Carter's account was based upon confabulation or suggestion. It is also notable, in the context of the attempted rape offence being said to be one of propensity, that the applicant fully admitted the offence of attempted rape to the Parole Board[88], in stark contrast to his repeated denial of the offence of murder for nearly 40 years.

216 **Finally**, we set out the conclusion that necessarily arises from considering the fresh and compelling evidence of the experts on appeal, particularly the evidence to the effect that Mr Carter's evidence of the assault needed to be corroborated in every respect in order to sustain a conviction of the applicant. As the Crown properly accepted, the case would never have gone to trial if Mr Carter's account needed to be corroborated to this extent. It follows that there has been, and continues to be, a substantial miscarriage of justice within the meaning of s 353A(3) of the CLC Act. For the reasons described below, the conviction must be quashed and an acquittal entered. There is, at least, a significant possibility that an innocent person has been convicted.

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87 *R v Bromley* [2018] SASCFC 41 at [406] per Peek, Stanley and Nicholson JJ.

88 cf *R v Bromley* [2018] SASCFC 41 at [467] per Peek, Stanley and Nicholson JJ.

Legal framework: "Compelling" evidence, the "interests of justice", and a "substantial miscarriage of justice"

The issue of compelling evidence

217 Section 353A of the CLC Act relevantly provided[89] as follows:

> "(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—
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> ...
>
> (b) ***compelling*** if—
>
> (i) it is reliable; and
>
> (ii) it is substantial; and
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> (iii) it is highly probative in the context of the issues in dispute at the trial of the offence.
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> (7) Evidence is not precluded from being admissible on an appeal referred to in subsection (1) just because it would not have been

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89 On 5 March 2018, s 353A was repealed but then re-enacted, in almost identical terms, as s 159 of the *Criminal Procedure Act 1921* (SA).

> admissible in the earlier trial of the offence resulting in the relevant conviction."

218 The Court of Criminal Appeal correctly treated the expert evidence as "fresh" and accepted that it was both "reliable" and "substantial"[90]. The real question was whether it met what has been called the "third criterion"[91] in the definition of the word "compelling" set out above; namely, was it "highly probative"[92]? In considering the "third criterion" it is important to focus upon the "issue" for which the fresh evidence was led to determine whether it was or was not "highly probative" in relation to that issue. As this Court observed in *Van Beelen v The Queen*[93]:

> "Evidence 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."

219 The requirement that the fresh evidence be "highly probative" is tied to the context of the issues in dispute at the trial. The probative value of the fresh evidence is to be considered "in the context of the issues in dispute at the trial of the offence". The central issue in dispute at trial was whether the applicant killed Mr Docoza as Mr Carter alleged in his account of the assault. That is the context in which the fresh evidence in this case falls to be considered. Related to that, counsel for the applicant said the following, after referring to the warning in the closing statement by the Crown for the jury to be very careful about Mr Carter's evidence:

> "I think your Honour should give a warning to be very careful about [Mr Carter's] evidence. He falls exactly within a new, perhaps special, category, a witness who is manifestly unreliable because of his illness and manifestly wrong and for those reasons the warning should be very very strong. I am saying you ought to tell them to be careful of his evidence."

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90 *R v Bromley* [2018] SASCFC 41 at [375]-[376] per Peek, Stanley and Nicholson JJ.

91 *Van Beelen v The Queen* (2017) 262 CLR 565 at 577 [28] per Bell, Gageler, Keane, Nettle and Edelman JJ.

92 *R v Bromley* [2018] SASCFC 41 at [377] per Peek, Stanley and Nicholson JJ.

93 (2017) 262 CLR 565 at 577 [28] per Bell, Gageler, Keane, Nettle and Edelman JJ.

220 The trial judge directed the jury to exercise "considerable caution" in relation to Mr Carter's evidence. His Honour also directed the jury that they must "scrutinise [Mr Carter's] evidence with special care". But his Honour did not treat Mr Carter as falling within any new or special category of unreliability. And his Honour therefore did not give any direction that substantial corroboration was required for every aspect of Mr Carter's evidence upon which it was essential for the jury to convict. That was ultimately the point upon which the fresh expert evidence from the psychiatrists and psychologists was relied upon as highly probative.

221 A consideration of the probative value of the fresh evidence does not permit any appellate court, including this Court, to attempt to retry the case. As explained below, even the ultimate question for the Court, once permission to appeal is granted, is not whether an appellant is guilty. The ultimate question is whether there was a "substantial miscarriage of justice". As explained below, in the context of an appeal based on fresh evidence that is relied upon to demonstrate error or irregularity in the original trial, that ultimate question requires the appellate court to be satisfied only that the error or irregularity had the capacity to affect the result of the trial and that the Crown has not shown that the appellant's conviction was nevertheless inevitable.

The issue of the interests of justice

222 In *Van Beelen v The Queen*, this Court said[94]:

> "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."

223 There is an obvious reason that the interests of justice will commonly favour considering, on a new or second appeal, evidence that is fresh and compelling. That reason is that fresh and compelling evidence can provide a strong foundation for a conclusion that there was a substantial miscarriage of justice. But, in exceptional circumstances, that will not be the case. One exceptional circumstance described by the Court in *Van Beelen v The Queen*[95] is where "an applicant has made a public confession of guilt".

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94 (2017) 262 CLR 565 at 578 [30] per Bell, Gageler, Keane, Nettle and Edelman JJ.

95 (2017) 262 CLR 565 at 578 [30] per Bell, Gageler, Keane, Nettle and Edelman JJ.

The issue of a substantial miscarriage of justice

224 In *Baini v The Queen*[96] this Court considered the content of what an applicant or appellant must establish to demonstrate a substantial miscarriage of justice based upon an irregularity or error at trial. In those circumstances, it is enough for an applicant or appellant to demonstrate the error and for the appellate court not to be satisfied that the error made no difference to the outcome. That method of establishing a substantial miscarriage of justice has been reiterated in this Court in the context of a first appeal: it means that once the appellant shows that an irregularity or error of law had the capacity to affect the result of the trial then, as a practical matter, the Crown will be required to show that the appellant's conviction was nevertheless inevitable[97]. The same test should apply in the context of establishing the same type of substantial miscarriage of justice on a second or subsequent appeal[98].

225 The test for a substantial miscarriage of justice is more rigorous when the appeal is based on fresh evidence that does not demonstrate any irregularity or error in the original trial but is instead based on evidence that might have supported the defence case or weakened the prosecution case. In such a case, "[t]he underlying rationale for a court of criminal appeal setting aside a conviction on the ground of fresh evidence" is that the miscarriage of justice arose from "the absence of that evidence from the trial"[99] rather than the evidence showing that there was a "wrong decision on any question of law or other irregularity at the trial"[100]. In that circumstance, it has been held that for fresh evidence to establish a substantial miscarriage of justice there must be "a significant possibility that the jury, acting reasonably, would have acquitted the appellant had the fresh evidence been before it at the trial"[101].

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96 (2012) 246 CLR 469 at 479 [26] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

97 See *Awad v The Queen* (2022) 96 ALJR 1082 at 1096 [78] per Gordon and Edelman JJ; 405 ALR 589 at 605. See also (2022) 96 ALJR 1082 at 1088 [26]-[27] per Kiefel CJ and Gleeson J; 405 ALR 589 at 595.

98 See *Van Beelen v The Queen* (2017) 262 CLR 565 at 575 [23] per Bell, Gageler, Keane, Nettle and Edelman JJ.

99 *Mickelberg v The Queen* (1989) 167 CLR 259 at 301 per Toohey and Gaudron JJ.

100 *Gallagher v The Queen* (1986) 160 CLR 392 at 395 per Gibbs CJ.

101 *Van Beelen v The Queen* (2017) 262 CLR 565 at 575 [22] per Bell, Gageler, Keane, Nettle and Edelman JJ, citing *Mickelberg v The Queen* (1989) 167 CLR 259.

The manner in which these issues arise on this application

226 The manner in which the fresh evidence was relied upon by the applicant before the Court of Criminal Appeal was not crystal clear. On one view, the fresh evidence was led only to establish the possible effect on the jury if they had heard the evidence concerning Mr Carter's unreliability due to his schizoaffective disorder, given his acute psychosis and hypomania at the time of the assault that he described. On that view, the ultimate issue is, as it was in *Van Beelen v The Queen*[102], whether the Court considered that there was a significant possibility that the jury, acting reasonably, would have acquitted the applicant had the fresh expert evidence been before it at the trial.

227 The better view, however, is that the fresh evidence was relied upon to demonstrate error in the trial judge's direction to the jury concerning how they were to treat the evidence of Mr Carter. On that view, the ultimate issue is whether the error alleged had the capacity to affect the result of the trial and, if so, whether the Crown had shown that the applicant's conviction was nevertheless inevitable. This basis for leading the fresh evidence was clarified during oral argument in this Court. The Crown did not object to this clarification of the applicant's case on appeal. Importantly, senior counsel for the applicant emphasised that the fresh evidence of developments in medical knowledge of schizoaffective disorder was led to demonstrate that the trial judge's direction failed adequately to warn the jury about what use could be made of Mr Carter's evidence. Specifically, the applicant contended that the fresh expert evidence demonstrated that the trial judge should have directed the jury that Mr Carter's evidence could only be accepted if it were independently corroborated by other evidence. As we have explained, the trial judge did not so direct.

The different versions of the assault described by Mr Carter

228 The aspects of Mr Carter's evidence that are most relevant to this application concern his evidence about the assault on Mr Docoza. Some aspects of Mr Carter's evidence about events prior to the assault, or subsequent to the assault, were corroborated. Some were not. Some aspects appear to have been correct. Some appear plainly to have been wrong. But, for the reasons explained by the expert witnesses, and as set out below, the reliability or otherwise of Mr Carter's evidence about relatively mundane events preceding or following the assault provides no support for the reliability of his critical evidence about the details of the assault on Mr Docoza.

229 In the discussion that follows of the different versions of the assault that have been attributed to, or given by, Mr Carter, it is necessary to distinguish

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102 (2017) 262 CLR 565.

between two sources from which accounts of the assault are drawn. First, there are witness statements and other documents, such as police and hospital notes, that were prepared *before* the applicant's trial and which were not tendered or repeated at the trial. These statements, some of which were recanted or later altered, describe conversations with Mr Carter in which Mr Carter is said to have recounted details of the assault. Secondly, there is the evidence that was given *at* the applicant's trial. It is important to identify the relevance to the applicant's appeal of the first category of evidence that was led before the Court of Criminal Appeal.

230 As the applicant clarified during oral argument in this Court, the fresh expert evidence was led before the Court of Criminal Appeal to demonstrate that the trial judge's direction failed adequately to warn the jury about what use could be made of Mr Carter's evidence given recent developments in medical knowledge of schizoaffective disorder. In short, the error by the trial judge was failing to direct the jury that every essential aspect of Mr Carter's evidence required substantial corroboration. Both the question of whether that fresh expert evidence was highly probative "in the context of the issues in dispute at the trial of the offence" and the question of whether any established error in the trial judge's direction occasioned a substantial miscarriage of justice are therefore questions that require consideration of the evidence *at trial*. The only relevance of the first category above—the hearsay evidence of pre-trial statements given by, or attributed to, Mr Carter—therefore lies in their use for a non-hearsay purpose: that is, as a foundation for the fresh expert evidence as evidence of Mr Carter's state of mind[103], evidence demonstrating Mr Carter's psychiatric condition, or evidence of esoteric knowledge which demonstrates that Mr Carter may have been present at, or that he perpetrated, the assault on Mr Docoza[104]. Those matters are central to issues in dispute at the trial which concern the reliability of Mr Carter's account by which the applicant allegedly perpetrated the assault on Mr Docoza.

231 Nevertheless, before the Court of Criminal Appeal, the Crown sought to rely upon evidence of pre-trial hearsay allegedly from Mr Carter as though that evidence provided independent support for the reliability of Mr Carter's evidence at trial that the applicant perpetrated the assault. In circumstances in which there was no dispute that Mr Carter was a witness to an assault on Mr Docoza, the pre-trial hearsay could only support Mr Carter's reliability if, in a self-levitating way, Mr Carter's evidence at trial could somehow become more reliable because he had repeated it before trial. Even if the hearsay statements could be used in this way (which they cannot and which the Court of Criminal Appeal did not assert), the

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103 See *Walton v The Queen* (1989) 166 CLR 283 at 301-302 per Wilson, Dawson and Toohey JJ.

104 See *Kamleh v The Queen* (2005) 79 ALJR 541 at 545 [16] per Gleeson CJ and McHugh J; 213 ALR 97 at 101.

submission is flawed on its own terms. Some of the hearsay versions of what Mr Carter said before trial were retracted or altered. And, in important respects, the pre-trial statements were not consistent with Mr Carter's evidence at trial.

Mr Carter's alleged statements to Ms J Carter in the early hours of the morning (4 April 1984)

232 The first version of the assault that was said to have been given by Mr Carter appears in evidence given by Mr Carter's sister, Ms J Carter. Ms J Carter was also the former partner of Mr Karpany, having separated from him towards the end of March 1984. She had previously reported Mr Karpany for assaulting her but on 9 or 10 April 1984 she went to court to have the charge dropped.

233 Ms J Carter initially provided statements which were typed by the police and tendered at the applicant's committal proceedings. In a statement taken on 14 April 1984, Ms J Carter said that on Tuesday, 3 April 1984 (which she later corrected to Wednesday, 4 April 1984), between 4.30 am and 5.00 am, Mr Carter came to the front door of her house and "seemed to be confused like he didn't know what was going on". He told her: "Me and [Mr Karpany] was on the way home, but he jumped out the taxi and went with [the applicant]. Sis, I saw [Mr Karpany] and [the applicant] bash this fellah, then I told them 'Eh that'll do—I don't want to be no witness to a murder'".

234 There were difficulties with Ms J Carter's statements. It appears from her cross-examination at trial that her first statement, typed by police, had been shown to her but that she had not signed it and that she was not provided with a copy of it by the police. A second statement, again typed by police, was also unsigned. In cross-examination at trial she said that she had not read her statement (although it is unclear whether she was referring to one or both statements).

235 In any event, Ms J Carter departed from the content of those earlier statements in her oral evidence at the committal hearing. At that hearing, she said that Mr Carter had told her that something terrible had happened but that he did not say anything about this terrible thing and did not give her any idea about what it was about. But she then added that Mr Carter had said to her that "I don't want to be no witness to no murder" and that she asked Mr Carter "who was the fellow that he bashed up". Also in cross-examination at the committal hearing, Ms J Carter said that on that day when Mr Carter had come home, he told her that he had been with "Ringo and [the applicant]" and had seen "something terrible". It was agreed that "Ringo" was a reference to Mr Karpany. Ms J Carter said that Mr Carter told her "I don't want to be—no matter". She then confirmed that this was all that Mr Carter had said to her. In re-examination, Ms J Carter reiterated that Mr Carter had *not* mentioned anything about a bashing on 4 April 1984. Rather, she had "gathered it was a bashing because [Mr Carter] said to [her] 'I don't

want to be no witness to a murder'". She said that Mr Carter told her "I saw something terrible, Sis" but that "he didn't say what he saw".

236 At trial, Ms J Carter distanced herself even further from her written statements made before the committal hearing. She gave evidence that she was "confused when [she] would have made that [police] statement". She said that she saw Mr Carter at her house on Wednesday, 4 April 1984 between 5 am and 6 am. In examination in chief, she gave no evidence about any conversation with her brother other than to say, in response to a question about whether they talked, that Mr Carter was "muttering" and that Mr Carter spoke to her father. Under cross-examination, she said that she could not hear them talking.

237 Ms J Carter also gave evidence at trial of admissions by Mr Karpany, several days later on 8 April 1984 and on 9 or 10 April 1984, discussed below. The trial judge properly directed the jury that those admissions by Mr Karpany were not evidence against the applicant.

Mr Carter's alleged statements to Ms B Carter at 9.30 am (4 April 1984)

238 The next of the possible versions of the assault attributed to Mr Carter concerned a written statement given by another of Mr Carter's sisters, Ms B Carter, and tendered at the applicant's committal hearing. That version was said to derive from a conversation that she had with Mr Carter at around 9.30 am on Wednesday, 4 April 1984. She said that Mr Carter "was really disturbed—he was ranting and raving really loudly, he was running around the house and carrying on". She continued, saying that Mr Carter said "I seen it last night. I seen [Mr Karpany] and [the applicant] kill that boy". Her statement continued saying that Mr Carter told her that when he was walking back from a caravan:

> '"... I seen [Mr Karpany] and [the applicant] fighting with the young lad.' And [Ms B Carter] said [to Mr Carter] '...—what do you mean—were they trying to rape him?' as they are both like that. He said 'They were far away and I run up and tried to stop them' and then he just stopped right in the middle of this sentence and he wouldn't say anything more and he kept on saying 'They're the devil—they're the devil. They are really going to get it this time.'"

239 Notably, this appears to be the first suggestion that the applicant and Mr Karpany might have been trying to rape Mr Docoza. Ms B Carter's witness statement appears to suggest that the possibility of "rape" came from her, and was not a detail that was independently volunteered by Mr Carter to Ms B Carter. The significance of this is discussed later in these reasons in the context of the experts' evidence on suggestibility.

240 The transcript of Ms B Carter's oral evidence at the committal hearing was not available on this application. But at trial, the Crown conceded that it would not lead any evidence of a conversation between Ms B Carter and Mr Carter. At trial, therefore, Ms B Carter gave no evidence of any conversation with Mr Carter.

Mr Carter's statements to Father Pearson at 2 pm (4 April 1984)

241 Mr Carter saw Father Pearson at his church at around 2.00 pm on 4 April 1984. Father Pearson gave a police statement in which he said the following:

> "When I spoke to him on his arrival, he was talking about being possessed by the devil. He said he had drunk blood the night before. He also made mention of saving a man from being beaten on the River Torrens. He was raving about a lot of things which I can't remember, mainly because it was quite obvious that he was mentally unstable."

242 This conversation was not part of the evidence given by Father Pearson at trial. At trial, Father Pearson was asked only whether Mr Carter had said things to Father Pearson during that interaction that indicated that Mr Carter was not well. Father Pearson agreed.

Mr Carter's statements at Hillcrest Hospital

243 On the afternoon of 4 April 1984, Father Pearson drove Mr Carter to a psychiatric institution, Hillcrest Hospital. Notes made by the hospital staff on 4 April 1984 included the following:

> "Wants to play football for Port Adelaide this year because he is a top footballer. Yesterday saved a drug addict's life—by intervening when he saw 2 Aboriginal men beating up a drug addict & throwing him in the river. [He] said he is planning to ring the director [sic] of the Advertiser to tell him about it, & the story will be on the front page tomorrow.
>
> He also described being 'psychic' by which he meant that he could put me to sleep & walk out of the room. However, he decided not to do this.
>
> He had a fight at home yesterday—he says because his mother has been popping pills & taking his money. This argument became heated, & his brother punched him."

244 In subsequent interviews at Hillcrest Hospital on 5, 6 and 7 April 1984, social workers and nurses recorded Mr Carter's repeated statements that: he was a millionaire; that he had saved a drug addict from drowning and had fought off attackers of a young man; that he had fought off two men by using "nun chukas" that he had taken from his bag; that the two men were trying to rape the young man

and that the two men had raped the young man. Mr Carter would later tell a nurse that he was "unsure of how [the] victim was undressed".

245 On 10 April 1984, a psychiatric nurse recorded statements made to him by Mr Carter on that day as follows:

> "Today he asked me when the Police were coming to see him and he also told me that these men may have used a 50lb weight he had in his bag. He said they might have tied it about his feet or his throat to make him sink in the river."

246 None of these statements was in evidence at the trial.

Mr Carter's statements to the police (11 April 1984 and 18 April 1984)

247 On 11 April 1984, while at Hillcrest Hospital, Mr Carter gave a statement to Detective Peglar where Mr Carter said the following regarding the applicant ("Derek"), Mr Karpany ("John" or "Johnny") and Mr Docoza ("Stephen"):

> "John and Derek wanted to have sex with Stephen and Stephen didn't want any part of it. John and Derek started kicking and punching Stephen all over the body. I saw that Stephen had blood all over his face. He was saying 'leave me alone, leave me alone.' Stephen was crying out for help. I told them to lay off him and leave him alone. The next thing I saw was that somebody, I'm not sure who, started hitting him with a barbell. The one I had in my bag. They were sort of dropping it on him, not actually bashing him with it. I didn't want any part of it so I left and went back to the pie car[t] on North Terrace, under the Morphett Street Bridge. The bloke there knows me, and he gave me a glass of water. I then went up the steps, got onto the bridge and walked along the bridge. When I go to the River, I could see Derek and John, but I couldn't see Stephen.
>
> When Derek initially got angry at Stephen because Stephen wouldn't give him sex, somebody produced a knife and they started cutting his trousers off. I told them to lay off him then they put the knife away and just pulled his trousers off. I saw them throw the trousers into the river just where they were bashing him. He was wearing black trousers, and he had fawn like desert boots."

248 At trial, Detective Peglar referred to a conversation that he had had with Mr Carter but gave no evidence about any of the contents of the conversation. He said only that, as a consequence of the conversation, a search of the river was conducted at the location of the assault. He said that following that search he conducted a search of Mr Carter's premises where a dumbbell was located which formed part of a pair with the dumbbell found in the river.

249 On 18 April 1984, while still at Hillcrest Hospital, Detective Zeuner and Detective Sergeant Thomas conducted a further interview of Mr Carter. They noted: "Carter very unstable of mind and would not be capable of being a witness". In a police action message it was said: "Spoke to Gary Carter at Hillcrest. Nothing further. Cannot be used." No evidence was given at trial of this conversation.

Mr Carter's evidence at trial on 7 March 1985

250 It is necessary to set out in full the relevant part of Mr Carter's evidence at trial by which he gave an account of the assault that was far more detailed than any account that he had given in the previous 11 months. In evidence in chief, he described the assault as involving the applicant ("Derek"), Mr Karpany ("John" or "Johnny") and Mr Docoza ("Stephen"):

> "Q. When you got down to the river, you sat down. Did you all sit down.
>
> A. Yes.
>
> Q. What happened then.
>
> A. Then Stephen was there and Derek asked him for sex and Stephen said no and Derek started bashing into him and then Johnny joined in and then he rolled down the bank and they ducked his head underneath the water and I helped him up and I said 'Leave him alone' and [they] was frightening me and I pulled him up on the bank and then Derek got the weight and started hitting him with the weight and he was going unconscious and that and he was screaming out 'Leave me alone leave me alone' and I freaked out and I ran back towards the Pie Cart.
>
> Q. Did you see Stephen Docoza alive again, or at all again after you ran away.
>
> A. When I left, no. After, I didn't see him at all after.
>
> Q. You said that Derek started getting into him. What was Derek doing to him.
>
> A. Punching him, kicking him.
>
> Q. Whereabouts was he punching and kicking him.
>
> A. On the body, all over the place.
>
> Q. You said John joined in; what did John do.
>
> A. He was punching and kicking too.

Q. Whereabouts did he punch and kick.

A. All over the body.

Q. You said that Stephen ended up—I think you said he rolled.

A. Yes.

Q. He actually rolled into the river.

A. That's right.

Q. What did they do to him; what happened when he actually rolled into the river.

A. He fell in the water and he come up to his neck in the water and they were ducking his head underneath the water.

Q. Who was doing that.

A. Derek.

Q. What was John doing while Derek was ducking his head underneath the water.

A. He was standing there.

Q. How did Derek duck Stephen's head under the water.

A. By the shoulder and the head.

Q. You told us that you got Stephen out.

A. Yes.

Q. And that Derek used the barbell.

A. Yes, that's right.

Q. When you left, was Stephen out of the water or in the water.

A. In the water.

Q. What was happening to him.

A. He was in agony and pain and he's shouting—

Q. Derek saw the barbell and started using it. Where did he hit Stephen with the barbell.

A. On the body and face and head.

Q. How did Stephen come to go into the water for the second time; how did he get in there the second time.

A. They still got stuck into him.

Q. You said that when you left you freaked out and you left and Stephen was in the water.

A. That's right.

Q. Did anyone have hold of him; what were they doing—were they doing anything to him when you left when he was in the water.

A. Derek was ducking his head underneath the water.

Q. This time, how was he doing that.

A. With his hand, grabbed his head and ducking it underneath the water.

Q. At that time, when you left, was Stephen making any noise or was he unconscious or what.

A. No, he was conscious and then he was saying 'Leave me alone' and that.

Q. When you went down the river that night, can you remember what Stephen was wearing.

A. I can't remember.

Q. Did he have some sort of trousers and some sort of top on.

A. Yes.

Q. As you went down there, did he have some type of clothing on.

A. I think he had a shirt on and trousers and sort of desert boots.

Q. When they were bashing him, did anything happen to his clothing.

A. Derek and Johnny stripped him naked.

Q. How did they take his clothing off.

A. With a knife—Derek had a knife.

Q. What part of the clothing did he use the knife on.

A. The trousers.

Q. Did he take the trousers right off.

A. Yes.

Q. Can you remember now how they got the shoes off and the shirt off.

A. No, I don't.

Q. You have told us that Mr Docoza the first he went into the water, he rolled in and he was in the water again when you left.

A. That's right.

Q. When did they take his clothes off.

A. When they started bashing him first, when Derek and Johnny joined in—when Johnny joined in.

Q. What happened to your weight.

A. I think that fell into the river."

251 During examination in chief, Mr Carter marked the spot where he said that the applicant held Mr Docoza's head underwater on a photograph of the river bank and timber landing. Mr Carter indicated the location as at the end of a timber landing at the edge of the water, which was in front of the Australian National Railways rowing shed. The edge of the timber landing nearest to the water had a step down to a wooden ledge. Under cross-examination, Mr Carter distanced himself from the assault by saying that he did not go down to the timber landing when pulling Mr Docoza out of the water. He said that he also did not stand on the step from the landing to the wooden ledge. When further pressed, and shown the photograph which he had marked during examination in chief, Mr Carter said that he could not remember whether he walked on to the landing. Later in his cross-examination, Mr Carter said that he *had* stood on the platform, and that he had pulled Mr Docoza out of the water from the platform without entering the water himself.

252 While describing the assault, Mr Carter gave evidence that he saw the Devil after Mr Docoza fell into the river and said that he (Mr Carter) was "freaking out" and was looking for his cassette case. Mr Carter said that the Devil spoke to him but he said that he did not know what the Devil said.

253 Mr Carter gave evidence that he had not been drinking alcohol before he went to the river but that the applicant "was pretty drunk" and was the drunkest of all of them, staggering around and slurring his speech. In cross-examination, Mr Carter reiterated that the applicant had cut the trousers off Mr Docoza with a knife and that Mr Docoza had been stripped completely naked. He agreed that there was no doubt in his mind about that. He said that Mr Docoza had no jumper on but was wearing a shirt, which was removed. He agreed that he was "quite sure" that the shirt was removed ("came off"). He also agreed with the suggestion that the blows with the dumbbell were "hard blows" while Mr Docoza was lying on the ground and he described and demonstrated those blows to the jury.

254 As will be explained below, significant details of Mr Carter's account of the assault were wrong, and significant other details were likely to be wrong.

255 Towards the conclusion of his cross-examination, Mr Carter accepted that he was feeling "a bit confused" and that, when he was watching the events occur, he had a feeling that it was all unreal. As noted, Mr Carter said that shortly after seeing the assault he also saw the Devil inside his head. He accepted that he had been confused and agitated at the time and that it was likely that his brain was "all tight and tense" because that was how things were when he was sick.

Errors and inconsistencies in Mr Carter's accounts of the assault

The pre-trial hearsay

256 The pre-trial hearsay of things Mr Carter himself allegedly said cannot be used to bolster Mr Carter's own reliability and, in effect, to militate against the fresh expert evidence concerning developments in medical knowledge of schizoaffective disorder. There are three insurmountable obstacles to any reliance upon this material. Each obstacle is independently sufficient to require the pre-trial hearsay to be disregarded.

257 **First**, the pre-trial hearsay evidence is not fresh evidence. Its value is only as foundational material upon which the experts could express an opinion about Mr Carter's state of mind.

258 **Secondly**, and in any event, some of the pre-trial hearsay statements were recanted, some were altered either before trial or during trial, and some were irrelevant or inconsistent with Mr Carter's evidence at trial. An example of the shifting nature of some of those pre-trial hearsay statements is the hearsay of Ms J Carter which changed from her first statement to her second statement, and

then from her second statement to her oral evidence at the committal hearing, and then from her oral evidence at the committal hearing to her evidence at trial.

259 **Thirdly**, the pre-trial hearsay concerning Mr Carter's accounts of the assault positively undermines the reliability of Mr Carter's accounts of the assault with the potential to cast doubt upon the jury verdict, even if it had been admissible for the limited purposes described above. In particular:

(i) The jury were not aware that the first suggestion that the applicant and Mr Karpany had attempted to rape Mr Docoza may have been made initially by Ms B Carter, not by Mr Carter. This could have been significant in light of the expert evidence discussed below about the suggestibility of persons with schizoaffective disorder.

(ii) The jury were not aware that, in Mr Carter's earlier statements, he claimed to have defended Mr Docoza with nun chukas. There was no evidence that Mr Carter had any nun chukas, still less any nun chukas with him at the time of the assault.

(iii) The jury were not aware that Mr Carter had made earlier statements asserting that the applicant and Mr Karpany might have tied Mr Carter's dumbbell to Mr Docoza's feet or throat. The forensic evidence at trial was contrary to such assertions.

(iv) The jury were not aware that prior to trial Mr Carter had told a nurse at Hillcrest Hospital that he was "unsure of how [the] victim was undressed". Mr Carter's evidence at trial had been that Mr Docoza's trousers had been cut off by the applicant, using a knife.

(v) The jury were not aware of Mr Carter's earlier statements in which he denied any knowledge of the person who had hit Mr Docoza with Mr Carter's dumbbell. These statements were contrary to Mr Carter's evidence at trial that the applicant had hit Mr Docoza with Mr Carter's dumbbell.

(vi) The jury were not aware that one of the nurses at Hillcrest Hospital recalled a statement by Mr Carter that he had "saved [Mr Docoza's] life by putting some drugs in his mouth". This statement was contrary to Mr Carter's repeated assertions during the trial that he had given Mr Docoza three or four pills (which he thought were "Panadol" or "[h]eadache pills") on the way down to the River Torrens because Mr Docoza "wasn't feeling well". In these accounts, Mr Carter asserted that he had handed pills to Mr Docoza, not that he had himself put pills "in [Mr Docoza's] mouth" or that the pills were at all intended to "save" or provide any kind of emergency medical relief to Mr Docoza.

(vii) Although the jury were aware that Mr Carter had seen the Devil and had described himself as a professional footballer wanting to play for Port Adelaide, the pre-trial hearsay evidence included other fantasies, such as Mr Carter being a millionaire, his professed psychic abilities, and his drinking of blood.

260 One of the most remarkable aspects of the various accounts of the assault given by Mr Carter is that the account that he gave in his evidence at trial was, by a long way, the most detailed and comprehensive account. As one of the psychologists who gave expert evidence before the Court of Criminal Appeal observed, the detail of Mr Carter's evidence at trial, albeit sometimes contradictory and containing inconsistencies and errors, contrasted starkly with the lack of detail about events before and after the assault.

The significant inconsistencies and errors in Mr Carter's evidence at trial

261 As to the evidence that Mr Carter actually gave at trial concerning the assault, the trial judge correctly said to the jury that "[t]here is no doubt that in some important respects he [was] mistaken".

262 **First**, contrary to Mr Carter's evidence about his sobriety and the applicant being drunk at the time of the assault, a police officer, Constable Griggs, who spoke with them both shortly after the assault gave evidence that he did not think that the applicant was affected by alcohol. But Constable Griggs said that Mr Carter was affected by alcohol in light of "the way he spoke and by his actions".

263 **Secondly**, Mr Carter's evidence concerning the manner in which the dumbbell had been used to strike Mr Docoza was put to Dr Manock, a forensic pathologist, in nearly identical terms. Dr Manock agreed that the injuries that he examined were "totally and absolutely inconsistent with the description" given by Mr Carter. The trial judge told the jury that Mr Carter "was clearly mistaken in believing that [the applicant] laboured [Mr Docoza] with the barbell", offering an alternative that the applicant "picked it up, that [Mr Docoza] may have been struck [with] one or more glancing blows, but the fact remains that Dr Manock's evidence undoubtedly proves that Carter was mistaken as to the use made by [the applicant] of the barbell".

264 **Thirdly**, Mr Carter's evidence that Mr Docoza's trousers were cut off with a knife was not supported by any other evidence. Despite a search by police divers, no knife was located. There was no other evidence that Mr Karpany or the applicant was carrying a knife at any stage that day. Indeed, Mr Carter was the only person said to have been carrying a bag (which had contained Mr Carter's dumbbell and which Mr Carter had said also contained nun chukas). But no knife was located in that bag. There was no evidence of any cuts on Mr Docoza's legs that could have supported the cutting of Mr Docoza's trousers with a knife.

265 **Fourthly**, Mr Carter's evidence of Mr Docoza being stripped naked of all his clothes, evidence about which he said there was no doubt in his mind, was wrong. Mr Docoza's body was found wearing a "collared shirt and a Windcheater with a turtle neck, long sleeved". As the trial judge told the jury, Mr Carter was "clearly mistaken, you may well think, in believing that all of [Mr Docoza's] clothes were removed".

266 **Fifthly**, Mr Carter's evidence that the first occasion that Mr Docoza rolled down the embankment into the water and came "up to his neck in the water and they were ducking his head underneath the water" may be inconsistent with the evidence of the shallow water at that point on the embankment close to the edge of the timber decking.

267 **Sixthly**, Mr Carter gave inconsistent accounts during his evidence in chief and cross-examination as to whether he pulled Mr Docoza out of the water while standing on the "lawn" or from the timber landing itself. Relatedly, and notably, Mr Carter gave evidence that he pulled Mr Docoza out of the water after Mr Docoza rolled down the embankment. Mr Carter said that he did this by "putting [his] arms underneath [Mr Docoza's] arms and help[ing] him out by the shoulders". In response to a question in cross-examination as to whether he got wet while pulling Mr Docoza out of the water, Mr Carter replied "No, I'm not quite sure". Mr Carter's clothes remaining dry appears to contradict his other recollections that Mr Docoza was laying on his back in the river, was conscious and was "pretty heavy".

268 **Seventhly**, Mr Carter said that after he pulled Mr Docoza out of the water the applicant struck Mr Docoza with Mr Carter's dumbbell and Mr Docoza went back into the water at the timber landing where the applicant began pushing his head under water again. Shoes that were identified as those owned by Mr Docoza and the dumbbell were found close to that timber landing. Once again, Mr Carter's account is inconsistent with the depth of the water at the landing. On 13 April 1984, a police diver found the dumbbell in the water, positioned such that half of it was directly underneath the end section of the timber landing. He was able to retrieve the dumbbell from the bottom by placing his arm in the water. He could not recall if he even needed to stand on the step down from the timber landing, above the water to retrieve the dumbbell from the bottom. Another police diver gave evidence that even two metres out from the landing, where Mr Docoza's boots were found, the water was only two to three feet deep (approximately 60 to 90 cm deep).

269 **Eighthly**, Mr Carter's evidence regarding the applicant ducking Mr Docoza's head repeatedly underwater on two separate occasions while Mr Docoza was "screaming out" appears to be inconsistent with Dr Manock's finding from the autopsy that "there was no swallowed water at all". The evidence that Mr Docoza did not swallow any water infects many of the critical aspects of

Mr Carter's account of the assault, and not merely his statement that Mr Docoza was "screaming out". For instance, Mr Carter also described the applicant as "holding [Mr Docoza] down for a while and bringing him up and then go[ing] back down again", and Mr Docoza "shouting '[l]eave me alone, leave me alone'" when he came out of the water.

Mr Karpany's alleged admissions and their irrelevance to these proceedings

270 On 19 April 1984, Ms J Carter gave a typed police statement about what Mr Karpany had said to her on Sunday, 8 April 1984, which was about four days after the assault. This statement sought to "add the following" detail to the statement provided on 14 April 1984. She described how Mr Karpany had said that Mr Carter ("Beau ... my brother Garry [sic]") had "*also* hit [Mr Docoza] on the back with the dumb bell" (emphasis added), and that "they", which presumably included Mr Carter, picked Mr Docoza up and threw him in the river.

271 At trial, Ms J Carter said that she had asked Mr Karpany "Who is the fellow you bashed" and that Mr Karpany had said "Beau [Mr Carter] had to open his mouth". Ms J Carter said that Mr Karpany then said that "Derek [the applicant] was hitting the bloke" and that Mr Karpany had seen him and "just joined in". Ms J Carter said that Mr Karpany said that they had bashed "[j]ust one white bloke" and that "they chucked the bottom half of his trousers for fingerprints, they chucked it in the water". Ms J Carter said that when she asked Mr Karpany why they had done it, Mr Karpany responded that "they had bashed him that much that they were looking at five years so they just went all the way" and that the applicant "wanted to have sex with [Mr Docoza]".

272 Importantly, at trial, Ms J Carter repeated the assertion contained in her police statement of 19 April 1984 that Mr Karpany had said "that [Mr Carter] had hit [Mr Docoza] a couple of times on the back with a dumbbell". Ms J Carter said that Mr Karpany had indicated that Mr Carter had struck Mr Docoza on the upper part of the spine towards the neck. Under cross-examination, it was put to Ms J Carter that this conversation did not take place. She disagreed and insisted that it did.

273 This version of the assault was denied by Mr Karpany but it was admissible against Mr Karpany. It would not have been admissible against Mr Carter if Mr Carter had been charged. Nor was it admissible against the applicant. Nevertheless, it is notable that although the Crown in this application relied upon Mr Karpany's admissions as supporting the reliability of Mr Carter's account of the assault at trial, Mr Karpany's admissions involved Mr Carter, and not the applicant (as Mr Carter claimed), attacking Mr Docoza with the dumbbell. On this application, no explanation was forthcoming as to why the police never treated Mr Carter, in respect of whom there appears to have been an arrest warrant for a previous assault, as being a possible suspect.

274 Before the Court of Criminal Appeal, evidence was led of an interview on 4 June 1989 between a private investigator and Ms J Carter. In that interview, Ms J Carter allegedly recanted parts of her evidence at the committal hearing about the conversation that she had with Mr Karpany on Sunday, 8 April 1984[105]. The parts that Ms J Carter was said by the private investigator to have recanted were all the parts (not given by her at the trial) in which she said that Mr Karpany had referred to the applicant's involvement in the assault. Ms J Carter allegedly said to the private investigator:

> "[Mr Karpany] told me that he and [Mr Carter] were there, but he did not say anything about [the applicant].
>
> [Mr Karpany] did not say that [the applicant] had been there.
>
> I can't remember if he said anybody else was there.
>
> He said that he bashed a white fellow up.
>
> He did not say why he was bashed up."

275 The reliance on this evidence and its admissibility are addressed in greater detail below[106].

The nature of the case concerning the assault and the directions

The Crown case against the applicant

276 There were two central aspects to the Crown case against the applicant at trial. The first aspect was to establish that the applicant was at the scene of the assault so that he had the opportunity to commit the assault. At trial, the applicant gave an unsworn statement from the dock asserting that he was not present at the scene. Mr Carter's evidence was only one component of this aspect of the Crown case.

277 There was undoubtedly evidence which provided some corroboration of Mr Carter's evidence that the applicant was at, or close to, the scene of the assault at the time it took place. That evidence is considered below in the context of an assessment of whether the fresh evidence was compelling. In broad terms, it included: identification evidence of various witnesses; evidence of possible blood on the applicant's person and clothing; and evidence from Ms M Bromley (the wife of the applicant's step-brother) that on the morning of 4 April 1984 she noticed dry

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105 *R v Bromley* [2018] SASCFC 41 at [355], [428] per Peek, Stanley and Nicholson JJ.

106 See below at [387]-[394].

mud on the applicant's trousers and that the applicant washed his clothes and shoes, which had mud on them, and when asked why he was doing so he replied "it gives me something to do".

278 The second aspect to the Crown case was to prove that the applicant took part in an assault on Mr Docoza. It is that aspect that is central to this appeal. The Crown case was that the applicant was a principal and a participant in a joint enterprise to murder Mr Docoza. The only evidence in the Crown case against the applicant which could establish that the applicant was a principal or a participant in a joint enterprise was the evidence of Mr Carter. The evidence that placed the applicant at, or around, the scene of an assault does not provide substantial corroboration of the evidence of Mr Carter as to how the assault occurred or who committed it. If the evidence of Mr Carter needed to be substantially corroborated in every important respect, the evidence that supported the applicant's presence at, or about, the scene of an assault cannot provide that corroboration.

The trial judge's direction

279 The relevant part of the trial judge's charge to the jury concerning Mr Carter's evidence was as follows:

> "Whilst on the subject of witnesses, I want to say something about Gary Carter. He undoubtedly has a mental illness; undoubtedly, as [counsel for the applicant] said, he was more affected by that illness on the night in question than he was when he gave evidence before you. You must, therefore, approach Gary Carter's evidence with considerable caution, especially bearing in mind as the Crown ... put to you, that his evidence is so crucial to the Crown case. You must scrutinise his evidence with special care. It is open to you to act on his evidence if you are convinced of its accuracy, and you should not do so without first giving careful heed to the warning that I am now giving you. There is no doubt that in some important respects he is mistaken. I say 'mistaken' because I do not think that anyone seriously suggests that he was lying. He was clearly mistaken, you may well think, in believing that all of Docoza's clothes were removed. He was clearly mistaken in believing that the accused, Bromley, laboured Docoza with the barbell. You may decide that he was right in saying that Bromley picked it up, that he may have been struck one or more glancing blows, but the fact remains that Dr Manock's evidence undoubtedly proves that Carter was mistaken as to the use made by Bromley of the barbell.
>
> Counsel mentioned other matters as well and you will bear them in mind when considering whether you can accept any part of Carter's evidence. [The Crown] argued that notwithstanding all that the defence has put to you, and some of which I mentioned, Carter was supported by independent evidence to a substantial extent, and I direct you that if after scrutinizing his

> evidence, and bearing in mind the warning I have just given you, if that support, if you find it exists, persuades you to accept some or a great deal of what he has said, you may do so".

280 Although the trial judge gave a fair warning to the jury about the reliability of Mr Carter's evidence, the most notable part of this direction was that it permitted, possibly even encouraged, the jury to accept Mr Carter's evidence of the assault if the jury were satisfied that other aspects of Mr Carter's evidence were corroborated to a substantial extent.

281 The adequacy of the foregoing direction was the subject of an appeal and then a further application for special leave to appeal to this Court in 1986. The application for special leave was heard over two days by a bench of five judges who reserved their decision for several weeks before delivering reasons refusing special leave to appeal[107]. The argument before the Court was similar to that presented on this occasion with one very large difference: although the applicant impugned the adequacy of the direction in the 1986 application it was not submitted at that time that the jury should have been told that Mr Carter's evidence concerning the assault was required to be corroborated in every significant respect. The submission was only that the jury should have been directed that it was dangerous to convict the applicant without substantial corroboration of Mr Carter's evidence in every respect. Thus, Gibbs CJ, with whom Mason, Wilson and Dawson JJ agreed, noted[108]:

> "In support of the applications for special leave it was argued that the fact that Carter was a schizophrenic made his evidence so inherently unreliable that it was necessary for the learned trial judge to direct the jury that it would be dangerous for them to act on it unless it was corroborated and to explain to them what evidence was capable of amounting to corroboration."

282 Gibbs CJ accepted that an "appropriate" warning to the jury might be justified in the case of a witness suffering from a mental disability. His Honour said[109]:

> "If it appears that a witness whose evidence is important has some mental disability which may affect his or her capacity to give reliable evidence, common sense clearly dictates that the jury should be given a

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107 *Bromley v The Queen* (1986) 161 CLR 315.

108 *Bromley v The Queen* (1986) 161 CLR 315 at 318.

109 *Bromley v The Queen* (1986) 161 CLR 315 at 319.

> warning, appropriate to the circumstances of the case, of the possible danger of basing a conviction on the testimony of that witness unless it is confirmed by other evidence. The warning should be clear and, in a case in which a lay juror might not understand why the evidence of the witness was potentially unreliable, it should be explained to the jury why that is so. There is no particular formula that must be used; the words used must depend on the circumstances of the case."

283 Nevertheless, Gibbs CJ reviewed the warning given here by the trial judge and found that it was "sufficient"[110]. Brennan J was of the same opinion. His Honour said[111]:

> "In the absence of expert evidence, the jury might have given too much emphasis to his appearance in the witness-box without having regard to the possible effect of his condition in his capacity to observe and recollect. But his Honour gave the jury a warning, directing their attention precisely to the danger of acting on Carter's evidence where it was unsupported by other evidence. No more was needed."

284 In evaluating the sufficiency of the trial judge's direction this Court then had no expert evidence before it concerning the nature of Mr Carter's psychological impairment. Sufficiency was assessed without any medical evidence whatsoever. As Brennan J noted[112] "[t]here was no medical evidence as to the nature, severity and significance of Carter's mental disorder".

285 For the first time that expert evidence has now been provided. The question is whether it mandates a different conclusion. In particular, in light of the expert evidence the issue is not merely whether the jury should have been directed as to the dangers of convicting by reference to any evidence of Mr Carter that was not corroborated. The issue is whether the jury should have been told that they *must not* convict in the absence of substantial corroboration of any aspect of Mr Carter's evidence upon which reliance was placed.

286 This application has not been argued on the basis that Mr Carter's evidence should have been excluded in its entirety, although it may very well have been excluded at a trial conducted in 2023 rather than one conducted in 1985. The applicant's contention is that the fresh expert evidence establishes that the direction that should have been given is that Mr Carter's evidence must have been

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110 *Bromley v The Queen* (1986) 161 CLR 315 at 320.

111 *Bromley v The Queen* (1986) 161 CLR 315 at 326.

112 *Bromley v The Queen* (1986) 161 CLR 315 at 325.

corroborated in any respect upon which it was relied, in particular each aspect of his account of the assault which was central to the finding of the applicant's guilt.

The fresh expert evidence concerning reliability of Mr Carter

287 The Court of Criminal Appeal relevantly summarised the fresh expert evidence as follows[113]:

> "Since 1984 there has been an expansion of knowledge and understanding in relation to the condition of schizoaffective disorder. It is now well recognised that cognitive impairment in memory functioning may be associated with schizoaffective disorder and that patients so affected are much more likely to have memory defects than was appreciated at the time of the trial in 1985, although the existence of such cognitive deficits was known in 1985. The consensus of expert opinion is that most persons suffering from schizoaffective disorder are unreliable historians due to impairment in memory function and the difficulty they experience in distinguishing between real events and delusions when they are psychotic. Accounts given by persons suffering schizoaffective disorder *may* not be reliable absent independent corroboration."

288 Senior counsel for the applicant agreed with the accuracy of the foregoing save for the last sentence. He contended that the fresh expert evidence supported the proposition that accounts given by persons suffering acute symptoms of schizoaffective disorder are not "reliable" unless corroborated in almost every respect. If that proposition is correct, then the direction given by the trial judge was inadequate; the warning was too weak. Senior counsel for the Crown very properly agreed that if Mr Carter's evidence required this level of independent support there would have been no case that could have been put to a jury. Whilst there was independent evidence that placed the applicant in the vicinity of the crime on the night in question, some identification evidence which placed the applicant with Mr Carter, Mr Karpany and Mr Docoza on the same night, and some other circumstantial evidence that suggested that the applicant might in some way have been involved with the assault, the only evidence that the applicant had in fact assaulted Mr Docoza was Mr Carter's recollection as an eyewitness. That *particular* recollection had no real independent support from any evidence before the jury. In fact, as discussed previously, aspects of the evidence were directly contradicted by the forensic evidence led at trial.

289 For the foregoing reasons, the proposition advanced by senior counsel for the applicant is a more accurate statement of the effect of the fresh expert evidence.

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113 *R v Bromley* [2018] SASCFC 41 at [38(1)] per Peek, Stanley and Nicholson JJ (emphasis added).

The proposition that accounts given by persons suffering acute symptoms of schizoaffective disorder are not "reliable" unless corroborated in almost every respect is supported by the fresh evidence of every expert before the Court of Criminal Appeal. Importantly, although every expert accepted that Mr Carter, like other persons with schizoaffective disorder, was capable of giving reliable evidence, and although evidence given by Mr Carter might have been reliable, it was not possible to know which aspects of Mr Carter's evidence were reliable. No expert suggested that it was possible to extrapolate from a conclusion that some evidence given by Mr Carter about mundane events was accurate to conclude that Mr Carter's specific evidence about the critical assault was reliable. The expert evidence, when properly considered in context, was to the opposite effect.

A 1985 report from Dr Barrett

290 The fresh expert evidence made reference to a very brief report by Dr Barrett dated 8 February 1985 and a short statement from Dr Barrett dated 6 August 1984, neither of which had been tendered in evidence at the applicant's trial. Dr Barrett was a psychiatrist at Hillcrest Hospital who treated Mr Carter. He observed that at the time that Mr Carter was admitted to Hillcrest Hospital on 4 April 1984, Mr Carter's mood was "extremely elated, euphoric and expansive. This constellation is commonly referred to in psychiatric terms as a hypo-manic phase of a psycho-affective disorder". Dr Barrett observed that Mr Carter's illness was "difficult to control" and that Mr Carter "remained hypomanic for several weeks and could not be adequately controlled with major tranquillisers". He was not discharged until more than four months later on 9 August 1984.

291 Dr Barrett expressed the view that the deterioration that led to Mr Carter's condition was not wholly caused by witnessing the assault. Indeed, in the Court of Criminal Appeal, the Court was not prepared to accept, or to reject, the conclusion that witnessing an assault had precipitated the deterioration of Mr Carter's condition[114]. Dr Barrett observed that the deterioration that led to Mr Carter's admission had commenced four weeks earlier when Mr Carter had ceased taking his medication and had been using alcohol and illicit drugs. Dr Barrett added:

> "Furthermore, Mr Carter's concerns about the legal implications of his position, and particularly his fear of reprisal if he were to provide evidence concerning the assault, perpetuated his psychosis."

As explained below, it is notable that the fresh evidence of Dr Brereton, Dr Hook and Dr Sugarman all made reference to the possibility of Mr Carter's involvement

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114 *R v Bromley* [2018] SASCFC 41 at [168] per Peek, Stanley and Nicholson JJ.

in the assault, or at least a fear that he would be suspected to have been involved, as enhancing the unreliability of Mr Carter's account of the assault.

292 In relation to the ability of Mr Carter to give evidence at trial Dr Barrett concluded his 1984 statement as follows:

> "In my opinion his mental state has stabilized sufficiently to enable him to understand the proceedings of the court and to competently give evidence to the court. It is also my opinion that a distinction in quality can be drawn between his delusional beliefs and the account which he gave of events which allegedly took place on the date of his admission. Where as the former are characterized by the grandiose belief that he is someone who has exceptional power and qualities, the latter account is not. That is to say it is my [opinion] that his description of events was not a product of delusional thinking or of hallucinated experience."

293 To varying degrees, that conclusion was disputed by every expert who gave evidence before the Court of Criminal Appeal, with the benefit of 35 years of advances in medical knowledge and understanding of schizoaffective disorder.

The fresh expert evidence of Dr Brereton

294 First, there is the expert evidence of Dr Brereton, who was instructed by the Crown. He is a consultant forensic psychiatrist, a clinical lecturer at the University of Adelaide, and the "Head of Unit" for prison mental health with the forensic mental health services in South Australia. He described in detail how there have been "substantial advances in the state of knowledge regarding the effects of schizophrenia on cognition and memory between 1984 and today". In particular, in his evidence in chief he described the advances in understanding of cognitive impairments and schizophrenia and how it was now (but not in 1984) "[v]ery much the consensus" that even after other symptoms of schizophrenia or schizoaffective disorder were treated, cognitive deficits "remain fairly persistent".

295 Dr Brereton's evidence in his report was that by the time of the offence Mr Carter's mental state had been deteriorating for several weeks and that Mr Carter was "acutely psychotic". He was of the opinion that being "grossly affected" by his illness, "this would have influenced [Mr Carter's] perception, interpretation, memory and account of the actual events he witnessed and participated in. ... His illness would have affected his cognitive functioning globally and so it would not be possible to distinguish some aspects of his recollections and assertions as unaffected by his mental illness and therefore accurate." Whilst Dr Brereton accepted that Mr Carter was capable of providing an accurate account of what happened, there was nonetheless "no way of determining an accurate recollection from an inaccurate one" and the "likelihood he was inaccurate is extremely high".

296 Subject to what Dr Brereton described as an "academic" disagreement regarding the characterisation of Mr Carter's symptoms (an issue that was said to be "not that clinically relevant" to the issue of reliability), Dr Brereton expressed agreement with Professor Coyle's contention that that Mr Carter was a "very unreliable witness" and that there was "simply no way of knowing what he claimed to have seen did occur". Thus, "[a]lmost the entirety of Mr Carter's evidence would need to be corroborated before [Dr Brereton] would consider his reliability had been sufficiently demonstrated".

297 Dr Brereton was instructed that "[t]here were aspects of Mr Carter's evidence that were independently corroborated". Critically, for the purposes of his report, Dr Brereton was asked the following questions:

> "What effect would independent support of the account given by Carter as to the events of 3 to 4 April 1984 have on your opinion as to the reliability of his evidence at trial? What types of support do you consider are significant to the question of reliability of a person suffering such a mental illness? Is it possible to answer such a question?"

298 This was the answer given by Dr Brereton in his report:

> "Essentially, I believe Mr Carter's evidence is so inherently unreliable that almost the entirety of his account would have to be corroborated to begin to consider him reliable. Even in these circumstances I would have grave concerns about relying in any significant way on aspects of his evidence that were uncorroborated. *For example, evidence from a pathologist might precisely confirm Mr Carter's account of the nature of an assault but I would still not consider him a reliable witness in identifying who had produced the injuries*. Essentially, in practical terms, I believe it would be very difficult to reach a point where Mr Carter could be considered as a reliable witness and still require him as a witness other than to strengthen an existing case."
>
> (emphasis added)

299 Dr Brereton's concern about "who had produced the injuries" is a matter of some significance. In particular, Dr Brereton expressed his agreement with Dr Barrett's 1985 opinion that "Mr Carter's ongoing concerns about the legal ramifications of the offence, and a fear of reprisal, perpetuated his psychosis".

300 But Dr Brereton disagreed with Dr Barrett's 1984 opinion, and explained that Dr Barrett was "incorrect" when Dr Barrett said (as Dr Brereton paraphrased) that "it was possible to draw a distinction between Mr Carter's delusional beliefs and his description of the offence, and [Dr Barrett's] assertion that the latter was not related to the former". Dr Brereton said that he "would have grave concerns

about relying in any significant way on aspects of [Mr Carter's] evidence that were uncorroborated".

301 Dr Brereton did not depart from any of this reasoning in his oral examination in chief or in cross-examination by counsel for the applicant. In cross-examination he accepted, as he had in his report, that some individuals with schizoaffective disorder might have an accurate recall of events in which they participated. They might be able to get all details correct. He explained that whether an individual suffering from schizoaffective disorder would be able to do so might depend on factors such as: (i) the nature and severity of their symptoms; (ii) the amount of sleep when manic "would be very relevant"; (iii) the use of drugs or alcohol "would also be very relevant"; and (iv) it was possible that "if you were asking something that was simple and concrete and emotionally neutral, you could expect to get a more reliable account".

302 Four areas of exchange in Dr Brereton's cross-examination must be understood in the context that Mr Carter fell into the category of person who satisfied every one of Dr Brereton's factors designating an inability to give a reliable account of an event that was not emotionally neutral.

303 **First**, there were exchanges where Dr Brereton confirmed that it was possible for people with schizoaffective disorder to give accurate and reliable accounts of events. Plainly, Dr Brereton was speaking, in the abstract, about people for whom the factors he described were not present or did not have effect. Even then, those cases were said to be rare:

> "Q. In people that you have seen, even when they're still in the acute phase, so where they are suffering from grandiose delusions, still suffering from the symptoms of schizoaffective disorder, they are still able to give an accurate recall of events to which they have been a participant or that they have seen.
>
> A. No.
>
> Q. They have never been able to do that.
>
> A. They have sometimes, but frequently, and I would say more often than not, it would be inaccurate."

304 **Secondly**, there were exchanges in cross-examination where Dr Brereton recognised that a person with schizoaffective disorder might have improved cognition a year after the event. But he insisted that the reliability of that account would depend upon its substantial corroboration:

> "Q. So, to look at whether Mr Carter himself suffered cognitive deficits it would then be important to look at what he was able to recall one year later,

> and what of that was supported by other people, which would tend to suggest its accuracy.
>
> A. Yes, absolutely, *in the parts that were supported by other people*. I suppose my concern that I tried to put in the report is that despite that any parts that aren't confirmed you must regard with suspicion."
>
> (emphasis added)

305 **Thirdly**, there were exchanges where Dr Brereton recognised that although it was impossible from a purely clinical perspective to know whether any account given by Mr Carter was accurate or not, the accuracy of that account could, of course, be determined by reference to other corroborating information. But that accuracy would be limited to those matters for which the information was corroborated. The following was an exchange in response to a question from the Court of Criminal Appeal:

> "Q. Is this the proposition, a person suffering from a schizoaffective disorder gives evidence about two events, X and Y. The fact of the occurrence of Y is independently corroborated. What does that say about the reliability of the account of event X.
>
> A. When—I think you have to come down to the fact that when somebody is so unwell that what they're saying is inherently unreliable about X, even if you've got—even if you're shown that Y is correct."

Dr Brereton accepted that the independent corroboration of Y could support the reliability of X if X and Y involved the same set of events and differed only in "matters of small detail" but he added that "when you start to try and join the dots like we're doing with X, Y and Z, that is—that's fundamentally broken down by the process of psychosis in the first place".

306 **Fourthly**, there were exchanges where Dr Brereton was asked, in the abstract, about a person who was shown "to be accurate in many different aspects". In those exchanges it was not put to Dr Brereton that, even if Mr Carter's inaccuracies about mundane events were disregarded and only his accuracies were considered, the accuracy of recall of mundane events supported the accuracy of recall of an emotionally charged event. Nor was it put to Dr Brereton that if the person was shown to be significantly inaccurate in relation to important details of an emotionally charged event, the occurrence of other details of that same event could be accepted. And even in relation to the abstract example, Dr Brereton said that evidence of many accuracies of the account of the person with schizoaffective disorder only "points in [the] direction" of accuracy on other matters and that "it's still hard to say unless you've got some explicit testing, but I agree with what you're

saying, I just don't think it's as straightforward as that. I agree it's an indication, it points in that direction, but I wouldn't want to extrapolate too far from that."

The fresh expert evidence of Dr Hook

307 Dr Hook is another qualified psychiatrist who had previously worked full time for five years in schizophrenia treatment, rehabilitation and research. He has been a Fellow of the Royal Australian and New Zealand College of Psychiatrists since 1991. He worked for a period at a rehabilitation facility with approximately 200 inpatients with long-term psychiatric disabilities and he was directly responsible for about half of those patients. In his report, Dr Hook referred to Dr Barrett's statement and report where Dr Barrett described Mr Carter as being "overtly psychotic, delusional and hypomanic".

308 Like Dr Brereton, Dr Hook disagreed with Dr Barrett's assertion in Dr Barrett's 1984 statement, with Dr Hook saying that "it is simply not possible to make a clear-cut distinction between psychotic manifestations and 'rational' thinking in [the case] of an individual who is acutely psychotic". He explained that "[s]ome statements may be obviously delusional, but frequently there is also confusion between objective reality and fantasy, and misinterpretation of objective events". Like Dr Brereton, Dr Hook confirmed that "[e]ven once an acute psychotic phase has passed, this does not mean that the individual is now able to accurately recollect and/or reality-test material that emerged whilst psychotic". One of the reasons for this is that there "may [be] distortions in recall due to confabulation" or "'delusional memory', which is a false recollection held with delusional intensity".

309 In Dr Hook's opinion, "expert evidence would have been essential to assist the jury in making a proper assessment of Mr Carter as a witness". In his report he said that it was arguable that the direction of the trial judge was "insufficient". Dr Hook accepted that a person suffering from schizoaffective disorder who is in remission "may be capable of [giving accurate evidence]" but (also like Dr Brereton) Dr Hook considered that all factors needed to be considered, including the severity of the illness and how the information was elicited, and Dr Hook therefore agreed that a witness in that position might be reliable about some things but not others. Dr Hook was of the view that Mr Carter's evidence was of "low reliability" because when he witnessed the assault he was suffering from schizoaffective disorder.

310 Dr Hook also agreed that Mr Karpany's admissions or statements to Ms J Carter "would be some corroboration" of what Mr Carter witnessed. Plainly, however, Dr Hook was speaking of corroboration in a colloquial sense. Mr Karpany's admissions could not corroborate Mr Carter's account of the assault

in evidence against the applicant because those admissions were not admissible against the applicant[115].

311 As to the effect of Mr Carter's involvement in the assault upon his evidence, Dr Hook said:

> "The presence of psychosis does not necessarily mean that there is no awareness of actions or of potential consequences. If Mr Carter was a perpetrator, or involved in a way that he perceived he might be criticized, he may well have become very alarmed by his own actions and sought the safety of hospitalisation. In this context, the creation of a story that he was merely a witness to the assault could reduce any sense of horror or guilt he might have experienced regarding his actions, and redirect attention to other suspects."

Dr Hook also observed that "it is also possible that with increasing awareness of his situation over time he was keen to minimise his involvement as far as possible".

312 Once again, the evidence of Dr Hook in cross-examination must be understood in the context of the whole of his evidence.

313 **First**, when Dr Hook agreed in cross-examination that grandiose delusions are a different type of event than recounting a bashing, the expressed premise of the question was to assume that Mr Carter's circumstances did not apply: "putting to one side for a moment that he saw the devil and heard the devil talking to him".

314 **Secondly**, much of Dr Hook's other evidence in cross-examination was also given in the abstract when he observed that people in the acute stages of schizoaffective disorder are capable of recalling their own acts and that, following recovery from psychosis, some people will be able to recognise "an event that they previously saw" but which they now understand as having been "misinterpreted or misunderstood", whereas others will be unable to do so. Dr Hook agreed that whether a patient maintained a fixed, inaccurate belief after remission of other symptoms of schizoaffective disorder "will depend on many different variables" and explained that the "best guide is their history to date, so [that] if a person has a longstanding history of, say, a chronic disorder without full remission, you are not expecting them to go into full remission". Dr Hook confirmed in re-examination that none of the matters raised in cross-examination changed his view about the low reliability of Mr Carter's evidence at trial.

315 **Thirdly**, although Dr Hook said that he saw no evidence that Mr Carter was confabulating when giving his testimony in court, Dr Hook also explained that his

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115 See below at [387]-[394].

concern about the low reliability of Mr Carter's evidence was based mostly on the fact that Mr Carter's presence at the assault was while he was suffering from psychosis, rather than on the inconsistencies in Mr Carter's statements and evidence.

The fresh expert evidence of Dr Furst

316 Next, there is the fresh expert evidence of Dr Furst who is a consultant forensic psychiatrist.

317 It was Dr Furst's opinion that Mr Carter was probably psychotic and manic for several weeks after 4 April 1984, including when Mr Carter was interviewed by the police, and that most forensic and general psychiatrists would advise against such a person being examined in that state. Given that Mr Carter was delusional and manic at the time, in Dr Furst's view, it would be "difficult to determine with any degree of certainty or reliability what events really took place and what memories were based on delusional interpretations, hallucinations and/or false memories".

318 Dr Furst was also of the opinion that the trial judge's direction was insufficient because "it probably fail[ed] to convey the extent to which Mr Carter was mentally impaired/mentally ill on the night in question, especially having regard to his florid symptoms of psychosis and mania observed in Mr Carter after his admission to the Hillcrest Hospital". Dr Furst said that "when the jury have seen a person almost a year later who's looking apparently stable and intact it is very hard for a lay person to imagine, if you will, how floridly manic and pressured and psychotic Mr Carter would have been the previous year".

319 Dr Furst also gave evidence that although it was a remote "possibility" that a true memory could return after a psychotic episode had concluded and the person was medicated, he did not think that this possibility would occur. He said that this return of true memory would depend upon factors such as the person's capacity to remember what they were believing at the time as well as any residual cognitive deficits. Dr Furst said that the medication that Mr Carter was given "probably doesn't have much bearing on sorting out real from not real".

320 Nothing in the cross-examination of Dr Furst detracted from this evidence. Once again, the cross-examination of Dr Furst must be understood in its context. For instance, in cross-examination Dr Furst agreed that his opinion about Mr Carter's unreliability did not take into account any independent corroboration of some of Mr Carter's evidence and he accepted that "a trier of fact would be entitled, notwithstanding [Mr Carter's] schizoaffective disorder, to look at other evidence that supports him and find that he was in fact reliable". But that was not assent to the proposition that Mr Carter could be found to be reliable *beyond* the matters for which there was other evidence that supported him. It plainly was not

assent to a proposition that pointing to some corroboration of Mr Carter's evidence of a mundane event was sufficient to make Mr Carter's evidence about an emotionally charged event reliable.

321 Indeed, very shortly before Dr Furst accepted the proposition that other evidence could support the reliability of Mr Carter, Dr Furst made it clear that this support was limited to the content of that other evidence. He said that the inconsistencies were enough to demonstrate the risk of unreliability of Mr Carter's evidence and that "the other aspects of the independent information ... would be, in my view, of more value to the court to determine what happened than the evidence given by Mr Carter".

322 In cross-examination, Dr Furst also confirmed that he could not identify any aspect of Mr Carter's evidence as confabulation but Dr Furst also said that "you could have real memory and real events with a delusional event with delusional memory that could be there by itself or implanted by an hallucination telling someone that something has happened, and then other gaps can be confabulation".

The fresh expert evidence of Professor Coyle

323 The next fresh expert evidence came from the first of the two psychologists. Professor Coyle practises as a forensic and clinical psychologist and psychopharmacologist. He holds a position as Professorial Associate or Adjunct Professor at four Australian universities and is a consultant expert in medico-legal psychology at the International Criminal Court in The Hague. Professor Coyle's practice includes diagnosis of persons with schizoaffective disorder although he has also been involved, in conjunction with psychiatric colleagues, in the treatment of patients with schizophrenia. The importance of Professor Coyle's evidence concerned his expertise concerning diagnosis, and symptoms, rather than treatment. Of all of the experts, Professor Coyle's answers were the most precise and carefully expressed.

324 In his expert report, Professor Coyle said that "[i]t is beyond any doubt whatsoever that there have been extraordinary advances since 1985 in knowledge with respect to memory, cognition, interrogative suggestibility in individuals generally and more specifically those suffering from psychotic disorders such as schizoaffective disorder". He continued:

> "In the light of these profound advances in scientific knowledge since [the applicant's] trial I cannot conceive of an appropriately qualified forensic psychologist or forensic psychiatrist now accepting that Mr Carter's evidence was in any way reliable."

325 Professor Coyle said that in the cases that he could recall observing since 1975, some of the individuals' accounts:

> "... have been complete fabrications, monstrous fabrications. With others, there has been a germ of truth, with others there has been a bit more than a germ of truth. Nonetheless, there ha[ve] been embellishments in all of those cases".

In referring to "fabrications", Professor Coyle clarified that this means an "unconscious fabrication" or "confabulation".

326 Professor Coyle was of the view that the trial judge's direction to the jury was "not adequate" having regard to the current knowledge concerning memory deficits and schizoaffective disorder. He said that at the time that Mr Carter allegedly witnessed the murder of Mr Docoza "his capacity to discriminate between actual events and hallucinations must have been profoundly compromised. There is simply no way of knowing what he claimed to have seen did occur or whether it was a hallucination." He gave the example of the "vivid description" by Mr Carter "of Mr D[o]coza being bludgeoned with a barbell" and said that the "manifestly wrong" nature of this description "brings into question virtually everything Mr Carter claims to have recalled on the night in question".

327 Professor Coyle accepted that Mr Carter was not incapable of being accurate and noted that there seemed to be collateral evidence that some of what he said was supported. But Professor Coyle explained that Mr Carter's ability to recall what he saw would have been grossly affected and that it was not possible to be certain about anything he claimed to have observed. He said that the very "definition of psychosis" is that the person "can't tell reality from fact" and he added "[i]f they can't tell reality from fact, how can we be certain that what they are saying was reality or was delusions? We can't. We don't know. There is no way of knowing."

328 In cross-examination, Professor Coyle was asked whether independent corroboration of Mr Carter's answers could prove that the answers were reflective of accurate recall. Like the other experts, Professor Coyle accepted this proposition but qualified it by saying that "it is not perceived from that because some answers are accurate, that other parts of his recall had not been altered, affected or replaced". He concluded his cross-examination with the following answer to the question of whether he agreed that Mr Carter might be accurate in areas where there was no independent corroboration:

> "No, I don't. What you are conflating there is that how do you determine if someone's accurate? By having collateral information. If you don't have collateral information you can't determine if they are accurate or not. The way to approach that is to rephrase the issue and say was he capable of having some accuracy in recollection? Yes. What parts were accurate? I don't know. Some parts are clearly inaccurate, some parts have changed and so on. It's not a question that you can ask and get a simple answer in this

> situation. Clearly, all the factors that I've tried my best to explain to assist the court, interacted in this case. The end result being that it's just quite clear that schizoaffective disorder would have affected his recall, we know that from the literature, we know that, but that does not tell us how badly it affected his recall in all areas. Some areas are almost certainly going to be affected more than others, but on what basis and how, we can't tell at this point in time."

The fresh expert evidence of Dr Sugarman

329 The other psychologist to give fresh expert evidence was Dr Sugarman. Dr Sugarman is a conjoint senior lecturer at the Department of Psychiatry at the University of New South Wales and a registered psychologist who has practiced in clinical neuropsychology and clinical psychology since 1990 and who has held numerous senior positions.

330 Dr Sugarman described how since the late 1980s "[n]eurocognitive impairment, namely [the] difficulty in reliably processing information, especially abstract concepts, resulting in concreteness and suggestibility" has come to be recognised "as a core feature of [psychotic] disorder[s]". He explained that "verbal learning and memory are the most impaired cognitive characteristics in these [psychotic] patients and these tend to be long lasting impairments".

331 Dr Sugarman said that there was "a significant chan[c]e" that Mr Carter's recall was unreliable due to his suggestibility, confabulation, psychosis and described cognitive incapacity. In Dr Sugarman's opinion Mr Carter was clearly delusional with command hallucinations and grandiosity.

332 Dr Sugarman accepted that some of Mr Carter's evidence might be correct. But Dr Sugarman said that Mr Carter had been delusional or at least ill for at least four weeks before the assault, and certainly confused, so that "one wouldn't be able to determine what was real and what was not". He described how despite improvements in Mr Carter's symptoms of psychosis, such as delusions and hallucinations, by the time of trial other aspects stayed impaired: despite "the improvement in their presentation and appearance unfortunately the underlying brain didn't show, from our point of view, much improvement".

333 Dr Sugarman was particularly concerned about Mr Carter's interview with police, in light of Mr Carter's suggestibility, his level of agitation, and Mr Carter's level of worry about a warrant for his arrest for an assault that he had previously committed. Dr Sugarman concluded that "there is a significant chan[c]e [Mr Carter's] recall would be unreliable and subject to both suggestibility and confabulation". He also said that "if a patient acquire[d] information while acutely unwell" the information can still be retained a year later and if the "system recovers ... most cognitive deficits don't ... So the fact they retain th[e] information ... doesn't

tell me that there is veracity to it. In fact, false memories are remarkably detailed and real."

334 Dr Sugarman also emphasised the difference between Mr Carter's professed recall at trial of (i) the more mundane events prior to, or subsequent to, the assault that Mr Carter described, and (ii) the assault itself. Dr Sugarman set out pages of examples where Mr Carter's evidence about the more mundane events prior to or subsequent to the assault involved uncertainty or lack of recall and contrasted that with the detail of Mr Carter's account of the assault. Dr Sugarman denied that the ability to give more detail was indicative of reliability. He explained that "details especially, even false details will make us believe what we see is true or what we said is true". Dr Sugarman said in his report:

> "... I am interested only in [Mr Carter's] ability to recall the events of the murder with increasing clarity it seemed, but not much else surrounding these events from what I can read here. His lack of insight or recall of the more florid delusions at the time while on the stand would indicate he was severely ill and processing information poorly at the time of his witnessing whatever occurred at the Torrens."

335 Dr Sugarman's conclusions were aptly described in his answers in cross-examination when he agreed that he would not act on things that Mr Carter had told him unless he were able to confirm aspects of what Mr Carter told him from other sources or other people. The only "caveat" (as he described it although it was no caveat at all) was that "[Mr Carter] may in fact incorporate information from other people which isn't his immediate recall or his recall but what he has heard and incorporated to fill gaps in his memory".

The fresh expert evidence concerning suggestibility of Mr Carter

336 A separate aspect of the reliability of Mr Carter's evidence arose from uncertainty about whether any of his evidence had been the production of suggestion. Although Mr Carter's suggestibility was not at the forefront of the applicant's submissions on this application, it is notable that there was significant expert evidence concerning the problems caused by suggestibility of individuals suffering from schizoaffective disorder.

337 Dr Sugarman said that there is a significant chance Mr Carter's recall would be subject to suggestibility. Dr Sugarman noted that when Mr Carter was interviewed by police, Mr Carter was generally "ingratiating, grandiose, compliant, psychotic and suggestible". Mr Carter told police that "he wanted to join them because he couldn't cheat them". He said that the Devil told him to run for "a light at the end of the tunnel". Dr Furst gave evidence that Mr Carter's psychotic and manic state when he was interviewed by police "could have made him more susceptible to the authority of police, such as suggestions and prompting,

and he may have been trying to 'please them'". He added that Mr Carter "would probably also have struggled to contain his thoughts, think logically and think clearly about questions put to him as a consequence of thought disorder, disinhibition and pressure of speech". Professor Coyle said that "Mr Carter was clearly prone to interrogative suggestibility—as anyone suffering from a psychotic condition in which they cannot distinguish fact from hallucination must be since they have no firm basis on which to judge real memories from hallucinations".

338 Dr Furst accepted that people with schizoaffective disorder can pick up cues in quite a subtle way unrelated to the intentions of others around them. Although Dr Furst was unable to identify any particular evidence that had been the product of suggestion by the police to Mr Carter, Dr Hook did so. He raised doubt about Mr Carter's witness statements to the police. He described the witness statements as reporting "events in a reasonably clear sequence, without the digressions and irrelevancies that would be expected if a person were thought disordered" and he noted the curiosity that "there is no mention of any psychotic content in any of his statements (particularly the appearance of the devil which Mr Carter refers to at trial)".

339 Dr Hook considered that Mr Carter's statements to police did not reflect his spontaneous utterances at the time but "were structured to a significant degree by the interviewer" which may "have created a false impression of rationality and accuracy". Dr Hook said that "I don't amaze easily but I think I would be pretty amazed if [Mr Carter were able to start at the beginning and finish at the end in the way that this statement has unfolded]".

340 Dr Hook's observations are further reinforced by another curiosity concerning Mr Carter's "reasonably clear" statement to Detective Peglar on 11 April 1984, which was taken while Mr Carter was still acutely hypomanic. A week later, on 18 April 1984, following Mr Carter's interview with Detective Zeuner and Detective Sergeant Thomas, they observed: "Carter very unstable of mind and would not be capable of being a witness". Dr Furst's and Dr Hook's reliance upon Mr Carter's statement to the police is relevant to the compelling nature of their fresh evidence.

341 Dr Hook also gave evidence that "delusions regarding homosexual advances are a long-recognised risk factor for violence in psychosis, so it is of some interest that this theme emerges in his version of events". Although it likely would further have enhanced his concerns about the role of suggestion in Mr Carter's accounts, Dr Hook does not appear to have been instructed that the first mention in any of Mr Carter's accounts of the applicant attempting to rape Mr Docoza came as a suggestion from Ms B Carter.

Summary and effect of the expert evidence

342 There were significant areas of agreement between all of the expert witnesses.

343 **First**, there was general agreement in the expert evidence that the state of knowledge about schizoaffective disorder had substantially increased since 1984. Professor Coyle was the clearest about the nature of the increased knowledge, referring to the well-established understanding that has developed since 1984 that "not only are there defects in cognition with schizo-affective disorder, but memory defects are almost universal to that condition, and that is the thrust of the literature".

344 **Secondly**, each of Dr Brereton, Professor Coyle, and Dr Sugarman explained that there was no way of knowing whether anything that Mr Carter claimed to have seen had occurred or was a hallucination absent independent corroboration. Dr Furst did not express the proposition quite as strongly although he thought that it would be difficult to determine the accuracy of anything Mr Carter claimed to have seen with any degree of reliability. And Dr Hook thought that a person with schizoaffective disorder would be capable of giving accurate evidence while in remission but all the factors needed to be considered including the severity of the illness. In Mr Carter's case, Dr Hook thought that Mr Carter's evidence was of "low reliability".

345 In particular, none of the experts suggested that an accurate recall of some (but not all) events by a person with schizoaffective disorder would generally corroborate, and provide support for the accuracy of, the person's account of other events. The general tendency of the expert evidence was to treat accurate accounts on one matter by a person with schizoaffective disorder as irrelevant to accounts on another matter where that other matter is known to involve inaccuracies.

346 Even in the abstract where it is not known that a person with schizoaffective disorder is inaccurate about any matter, the relevant factors to consider in determining whether accuracy on one matter could support accuracy on another were described by Dr Brereton as including: (i) the nature and severity of the person's symptoms; (ii) the amount of sleep; (iii) the use of drugs or alcohol; and (iv) whether or not the matters recalled were emotionally neutral.

347 Relevantly, in the early hours of the morning following the assault described by Mr Carter, Mr Carter had had little sleep, he presented as hypomanic, and, according to Dr Barrett, Mr Carter had used illicit drugs and alcohol. And the relevant part of Mr Carter's account (unlike the mundane events preceding or following the assault) was the assault on Mr Docoza, which was neither simple nor emotionally neutral. It is notable that the only point in Mr Carter's narrative of

events during which he said that the Devil appeared and spoke to him was at the time that Mr Carter allegedly witnessed the assault.

348 **Thirdly**, the expert evidence, and particularly that of Dr Brereton, supports the conclusion that in Mr Carter's case the independent corroboration of Mr Carter's account concerning mundane events has little relevance for the reliability of Mr Carter's account concerning the emotionally charged events of the assault.

349 **Fourthly**, as a consequence of what is, at best, the low reliability of Mr Carter's evidence due to his psychosis, each of Dr Hook, Dr Furst and Professor Coyle expressed concern about the adequacy of the trial judge's direction in encapsulating the extent of the psychological impairment under which Mr Carter was labouring.

350 **Fifthly**, although some of the pre-trial hearsay was not provided to the experts, the alleged statements of Mr Carter that were provided as part of those pre-trial hearsay accounts undermine Mr Carter's reliability rather than support it. As set out above, the statements alleged to have been made by Mr Carter prior to his police statements were to Ms J Carter, Ms B Carter, Father Pearson, and medical staff at Hillcrest Hospital. The account of Ms J Carter changed substantially across her statements from before the committal hearing, at the committal hearing, and at trial. The account provided by Ms B Carter involved what appears to be her suggestion to Mr Carter of the possibility of an attempted rape and Mr Carter's description of the applicant and Mr Karpany as the Devil. The account provided by Father Pearson that is attributed to Mr Carter concerned the Devil and drinking blood. And the account recorded in the Hillcrest Hospital staff notes contained numerous inconsistencies with Mr Carter's evidence at trial.

351 **Sixthly**, and importantly in light of Dr Barrett's report in 1985 about Mr Carter's concerns regarding the legal implications of his position which perpetuated his psychosis, each of Dr Brereton, Dr Hook and Dr Sugarman expressed concern about the reliability of Mr Carter's account of the assault if Mr Carter had been involved, or if he feared being accused of being involved, as a perpetrator and not merely a witness. Without corroboration of the details of the assault, the possibility that Mr Carter might have been involved in the assault itself, or even merely concerned about his involvement in the assault, renders his account of the assault even more unreliable in light of his schizoaffective disorder. Dr Sugarman noted the particular concern that Mr Carter was under an arrest warrant for a previous assault.

352 **Seventhly**, the fresh expert evidence also points to the dangers of suggestibility. It can be accepted that it was not positively established that any of Mr Carter's beliefs were the product of suggestion. Indeed, absent independent evidence or sudden insight by Mr Carter, it would be extremely difficult ever to

prove that any of the evidence of Mr Carter or any of the details that he gave of the assault were caused by a suggestion. For instance, although Mr Carter accepted the suggestion first made by Ms B Carter of an attempted rape, it could never be known whether that suggestion had played a part in his account unless Mr Carter came to a realisation that his recollection of the account had been shaped by that suggestion. Dr Sugarman also speculated, but could not know, that Mr Carter's suggestibility may have contributed to the apparent "increasing clarity" of Mr Carter's recall of events at the time of the assault, especially when contrasted with the lack of detail concerning events before and after the assault.

353 Ultimately, the absence of any positive demonstration that any of Mr Carter's evidence was the product of suggestion does not remove the element of unreliability that arises from the degree of suggestibility of persons suffering from schizoaffective disorder and the possibility that Mr Carter had incorporated suggestions into his account of the assault. That possibility further enhances the unreliability of Mr Carter's evidence.

354 All of the foregoing evidence supports a conclusion that the trial judge's direction to the jury was insufficient. Indeed, three of the five experts expressly said so. More than "considerable caution" was needed in assessing Mr Carter's evidence. Instead, all aspects of Mr Carter's evidence concerning the assault needed substantial corroboration by some form of independent support. Although it was possible that Mr Carter's evidence on this important and emotionally charged matter of the assault could have been accurate, the only way that there could be any confidence that the account on this matter was accurate, given Mr Carter's psychotic and hypomanic condition at the time the assault took place, was if the details of Mr Carter's account were corroborated in all essential respects from sources other than Mr Carter. That is the effect of this fresh expert evidence and, had this fresh evidence been led at the applicant's trial, the trial judge would have been constrained to direct the jury in the manner contended for above, requiring substantial corroboration on every aspect of Mr Carter's account in order to convict the applicant.

355 Accordingly, the fresh expert evidence establishes that the trial judge in this case misdirected the jury with respect to Mr Carter's evidence, being the evidence of the Crown's "central" or "principal" witness against the applicant[116].

The fresh expert evidence is "compelling"

356 Plainly the fresh expert evidence is compelling in the sense that it is highly probative of the key issue in dispute at the applicant's trial, namely Mr Carter's reliability and, as was raised in submissions in the absence of the jury, the

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116 *R v Bromley* [2018] SASCFC 41 at [3], [9] per Peek, Stanley and Nicholson JJ.

adequacy of the trial judge's direction on that issue. But does the independent evidence said to support Mr Carter's testimony require any different conclusion? Does it preclude characterisation of the expert evidence as compelling evidence? The Court of Criminal Appeal held that it did. They reached that conclusion on the basis that the experts were not taken to other independent evidence that supported Mr Carter's testimony. As the Court reasoned[117]:

> "Of present critical importance, each of the experts acknowledged that persons with this illness, even in the acute phase, have been able to recall events accurately and that Carter *was capable* of accurately recalling the subject event. In the present case, as it happens, there is considerable evidence supporting Carter's account and the experts conceded that they had not considered all of the evidence which could be said to support Carter's evidence; they conceded that if aspects of his evidence were supported by other evidence, this would be relevant to whether his recall was in fact essentially correct.
>
> Although the experts are not to be criticised on this account, the fact is that they were not provided with all of the evidentiary material to which we have referred above which supports Carter's account of events occurring on the banks of the Torrens on the night of 3 to 4 April 1984. In the particular circumstances here, this significantly diminishes the weight to be given to their opinions as to the reliability of Carter's trial evidence."
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> (emphasis in original)

357 It is notable that the independent evidence either (i) concerns events before or after the assault, which provides very little corroboration of the events of the alleged assault itself, or (ii) is pre-trial hearsay evidence that is inadmissible against the applicant as proof of the truth of its contents, although it may be admissible as further evidence of Mr Carter's state of mind that the experts *might have* considered but which, ultimately, can only provide further support for Mr Carter's unreliability.

358 None of the independent evidence, individually or collectively, provides substantial corroboration for the essential details of Mr Carter's account of the applicant's involvement in an assault on Mr Docoza. Most fundamentally, the pre-trial hearsay evidence concerning the state of mind of Mr Carter provides further support for the expert evidence about the unreliability of Mr Carter.

359 As explained earlier in these reasons, the independent evidence includes evidence led at trial and the unsworn hearsay accounts of what Mr Carter said to

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117 *R v Bromley* [2018] SASCFC 41 at [139]-[140] per Peek, Stanley and Nicholson JJ.

others after the assault, which were not adduced at trial. The evidence led at trial can be further separated into three categories: (i) the evidence of four witnesses who were in the city of Adelaide on the night of the assault; (ii) circumstantial evidence that supports Mr Carter's testimony that the applicant was at the scene of the crime when Mr Docoza was assaulted; and (iii) the evidence at trial of Ms M Bromley.

Categories (i) and (ii) of trial evidence: evidence supporting an assault and the presence of the applicant and Mr Carter at the scene

360 As to category (i) of the trial evidence, the four witnesses were a taxi driver, a plain-clothed railway officer and two members of the South Australia Police. On this application, there was much focus upon the problematic identification evidence of the applicant by the taxi driver on the night in question. Whilst there were evident difficulties with the taxi driver's identification of the applicant, his evidence was supported by his recollection that the applicant said that he had just been released from jail (the applicant had in fact been released from detention the day before the assault). More generally, the evidence of the four witnesses clearly places the applicant in the vicinity of the crime on the night in question. This evidence identified the applicant as: running away from the police when spotted; hiding in bushes; being found with a "fresh red splash, which appeared ... to be blood" on the shoulder of his shirt; being seen with a "stain on the front of his shirt which appeared similar to blood"; and, according to only a single railway officer, in an observation not made by either of the police officers who saw the applicant, having "some blood on his hands" and "some blood" underneath his lip.

361 The circumstantial evidence which supports Mr Carter's claim that he witnessed the attack on Mr Docoza was: that Mr Docoza's body was located near where Mr Carter said the assault took place; that Mr Docoza's trousers had been removed (although Mr Carter had recalled that Mr Docoza had been stripped of all his clothing); that Mr Carter had observed that Mr Docoza had been wearing desert boots, and shoes of this kind were located near where the assault had taken place; forensic evidence that the deceased had bruises to his forearm, forehead and scalp; and that Mr Carter's dumbbell was located in the river near where Mr Carter said the assault took place.

362 All of the foregoing plainly supports a conclusion that the applicant and Mr Carter may have been present at the scene of an assault on Mr Docoza. It also provides corroboration for Mr Carter's evidence to the extent that an assault on Mr Docoza occurred and that Mr Carter was present at, or may have been involved in, that assault. But it provides no substantial corroboration for Mr Carter's account of the applicant's involvement in that assault.

363 The strongest aspect of the evidence in support of the applicant's presence at an assault is the possibility of some blood on the applicant or his clothes. But

this evidence was inconsistent. It is noteworthy that the asserted observations of blood on the applicant were made at around 4 am at a time when police officers had been looking for people in the dark by "[s]hining [a] torch on to the bank". The inconsistent evidence of blood on the applicant was given by three people who saw the applicant at the same time: a railway officer (Mr Moyle) and two police officers (Constables Wilkinson and Griggs). A fourth person who was present, another railway officer (Mr Parker), was not called to give evidence by the Crown. The identification of the applicant, and the alleged observations of blood on him or his clothing, came after Constable Wilkinson had shone her torch in the bushes on the embankment and had seen a man whom she identified as the applicant stuck in some "prickle bushes" and who had to be "assisted out".

364 The railway officer (Mr Moyle) did not take any notes about this encounter. He did not notice any blood on the applicant's shirt, which he said was a "browny colour". He initially said that there was "some blood" on the back of the applicant's hands. He then said that the blood might only have been on one of the applicant's hands. He said that he also noticed blood underneath the applicant's lip. Mr Moyle could not recall any of the details of the conversation between the police officers and the applicant and he does not appear to have asked the applicant about the blood that he said that he had seen on the back of the applicant's hand or hands and underneath the applicant's lip. Mr Moyle said that he had not taken much notice of the applicant's clothing, although he said that the applicant was carrying a dark jacket or jumper.

365 Neither of the two police officers (Constable Wilkinson, whose surname was Burden at the time of trial, and Constable Griggs) gave any evidence of any blood on the applicant's hand or hands or underneath his lip. Constable Wilkinson said that the applicant was wearing a "light coloured shirt" which had "a fresh red splash, which appeared to [her] to be blood", and which she said was "at the top on the shoulder part". She later indicated a position described by counsel as "either on the left shoulder, or on the right shoulder on the front of the shirt". Constable Wilkinson's evidence was that she asked the applicant where "he got the blood from" and the applicant replied that he had been in a fight in a pub. Another police officer (Constable Griggs, who was accompanying Constable Wilkinson) said that the applicant was wearing a "light shirt" with "a stain on the front of his shirt which appeared similar to blood".

366 The evidence of Constables Wilkinson and Griggs has some curiosities. The Crown case, and almost all the evidence, was that the applicant was wearing a blue woollen jacket over his shirt. That blue woollen jacket was tendered in evidence. Mr Carter had described the applicant as wearing a "jumper". And Mr Carter's evidence was that after the applicant and Mr Karpany had run away from the police, and before Constables Wilkinson and Griggs had spoken with the applicant, a "policeman and police woman" (who could only have been Constables Wilkinson and Griggs) asked Mr Carter if he had "seen two

Aboriginals with jackets on". And in the applicant's unsworn statement to the jury from the dock, the applicant also described himself as wearing a light brown checked shirt and a blue jacket (which he had borrowed from his step-brother) on that evening. Ms M Bromley also described him as having left the house on the evening of the assault wearing the blue woollen jacket, which was new and had been borrowed by the applicant from her husband.

367 There was no explanation for how Constables Wilkinson and Griggs could have seen a stain on what they said was the applicant's "light coloured shirt" if the applicant was wearing a blue woollen jacket. Perhaps to avoid contradicting Mr Carter's evidence, or perhaps because Mr Moyle said that he "didn't take much notice of [the applicant's] clothing", the Crown did not rely on the evidence of Mr Moyle to suggest that the applicant was *carrying* a dark jacket so that Constables Wilkinson and Griggs could have seen the shoulder of what they said was the applicant's light coloured shirt. The closing address by the Crown instead misdescribed Constable Wilkinson's evidence, with the prosecution asserting that "[Constable Wilkinson] thought it was blood on his *jacket*" (emphasis added).

368 In the applicant's unsworn statement to the jury, he said that he got in an argument with a "white bloke" in a car park across the road from a pub that evening. The applicant said:

> "The white bloke took a swing at me and I hit him once. His mate stopped us and I left. I don't now know if there was blood on my jacket, but I do know that I had to wash it the next day because I had got it dirty with either food, booze or in the blue in the carpark, or in the bushes on Festival Drive and I wanted to give it back to my step-brother clean."

369 Even if the applicant's account of being in a fight were to be rejected, the evidence of Constables Wilkinson and Griggs about their observations at night (without suggestion of the use of a torch for those observations) would need to be transmogrified from (i) observations of a blood stain on a light shirt to (ii) observations of a blood stain on a blue woollen jacket. And even with that transmogrification, no forensic evidence was led at trial to confirm that what was suggested to be blood was in fact blood, or, if it was blood, whose blood it may have been, or how it got on the applicant. Indeed, even if it could be concluded that the stains on the blue woollen jacket had been caused by a small amount of blood, Dr Manock's evidence tends against the possibility that the blood was from Mr Docoza, consistently with the Crown case that the applicant had assaulted Mr Docoza in the close-range manner and for the extended period described by Mr Carter. Dr Manock's evidence concerning the injury to Mr Docoza's lip was that Mr Docoza would have bled "copiously".

370 As for the fact that Mr Docoza's body was found with no trousers or underpants and no shoes or socks, this provides only weak corroboration of

Mr Carter's evidence that Mr Docoza had refused to have sex with the applicant so the applicant had attempted to rape Mr Docoza by stripping him naked, using a knife to cut off Mr Docoza's trousers and then throwing the trousers in the river. There was no evidence of any cuts to Mr Docoza's legs, and certainly no evidence of any cuts that were consistent with a knife being used to cut off Mr Docoza's trousers during a struggle. No knife was ever recovered. No other witnesses ever gave evidence of seeing the applicant with a knife. Unlike Mr Carter, there is no evidence that the applicant carried a bag. And although Mr Docoza's shoes and a sock were recovered from the river, his trousers were never found.

371 In short, whether the applicant assaulted Mr Docoza causing his death, or was part of any joint enterprise to assault Mr Docoza and cause his death, on the Crown's case, could be proved only by Mr Carter's evidence. It is in this context that the fresh expert evidence remains compelling. On the critical issues of who assaulted Mr Docoza, and how the assault occurred, the jury should have been warned that they could not accept this particular, but critical, aspect of Mr Carter's evidence unless it was substantially corroborated in every particular respect.

Category (iii) of trial evidence: the evidence of Ms M Bromley

372 Ms M Bromley, the wife of the applicant's step-brother, saw the applicant when he was returning to her home in the early morning on 4 April 1984. She observed dry mud on the applicant's trousers and on his new shoes. She later saw the applicant using a washing machine to wash his clothes, including the shoes. When Ms M Bromley asked the applicant why he was washing his new shoes, he replied "it gives me something to do". Ms M Bromley also said that there was a stain of clay coloured material on a jacket the applicant had borrowed from her husband, and pointed out the stain to the jury when the jacket was tendered as an exhibit.

373 This evidence again provides some support for the presence of the applicant at the River Torrens in the early hours of the morning on 4 April 1984. But, again, it provides little or no corroboration for the essential details of the assault as described by Mr Carter. The fresh evidence concerning the unreliability of Mr Carter's evidence concerning those essential details remains compelling.

The unsworn hearsay evidence not adduced at trial

374 The Court of Criminal Appeal also relied on the unsworn pre-trial hearsay evidence of statements attributed to Mr Carter, on the committal hearing transcript of the cross-examination of some of the makers of those statements, and on notes

made by hospital staff[118]. Those matters have been addressed above. In short, even if they were admissible, these hearsay statements attributed to Mr Carter cannot corroborate Mr Carter's own evidence. The Court of Criminal Appeal was correct that not all of these statements were provided to the experts. But, for the reasons set out above, the opinion of the experts could not have been anything other than strengthened by the provision of any of these statements. As explained below, to the extent that the statements suggested esoteric knowledge by Mr Carter that placed him at the scene of an assault, that is a matter that the experts relied upon as enhancing the unreliability of Mr Carter's evidence and, in legal terms, requiring substantial corroboration in every essential respect. To reiterate, the presence at an emotionally charged event at a time when Mr Carter was suffering acute symptoms of psychosis and hypomania, combined with the possibility as noted by the some of the experts that Mr Carter might have participated in the assault, strengthens the conclusion that no aspect of Mr Carter's account of the assault could be accepted without substantial corroboration. Other aspects of those statements, including their factual inaccuracies and inconsistencies, and the delusions (such as describing the Devil and drinking of blood), further strengthen the reasoning of the experts.

The receipt of the fresh expert evidence is in the "interests of justice"

375 Below, the Court of Criminal Appeal relied upon the following example to permit the Crown to lead evidence, which did not satisfy the requirements of s 353A, to demonstrate that it was not in the interests of justice to order a new appeal, even assuming that the expert evidence was properly to be characterised as compelling. The Court reasoned[119]:

> "Of course, the correct construction of s 353A is not to be stated in terms of the illustrative example (a subsequent public confession) used by the High Court in *Van Beelen*; this merely speaks to an application of the statute to a particular set of facts. We consider that the correct construction of s 353A is that, even though fresh evidence proffered by an applicant may appear to satisfy each of the three requirements of 'compelling' in s 353A(6)(b), permission to appeal may nevertheless be rejected if the respondent places additional evidence before the Court which establishes that there is no significant possibility that a jury in the trial of the applicant, acting reasonably, would have acquitted the appellant had the totality of the evidence proffered *by both the applicant and the respondent* been before it.

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118 See *R v Bromley* [2018] SASCFC 41 at [176]-[185] per Peek, Stanley and Nicholson JJ.

119 *R v Bromley* [2018] SASCFC 41 at [388] per Peek, Stanley and Nicholson JJ (footnote omitted).

In these circumstances the appropriate conclusion is that it is not *in the interests of justice* that the applicant's evidence be considered on an appeal."

(emphasis in original)

376 The foregoing reasoning was relied upon to permit the Crown to adduce evidence of three classes: first, evidence said to be of esoteric knowledge held by Mr Carter; secondly, evidence said to be of esoteric knowledge held by Mr Karpany; and thirdly, propensity evidence based upon the applicant's prior conviction in 1981 of attempted rape. But for the reasons that follow, and with respect, that reasoning is incorrect.

Admission of responsive evidence "in the interests of justice"

377 Section 353A(1) of the CLC Act authorised the Full Court to receive and consider evidence which is both "fresh" and "compelling" in the sense in which these words are defined by s 353A(6). Section 353A(1) did not do so for the purpose of determining whether the conviction should be quashed but for the more easily satisfied purpose of determining whether there should be a hearing of a "second or subsequent appeal against conviction".

378 It can be accepted that s 353A is not limited to the tender by an applicant of evidence that is fresh and compelling. It can extend also to the tender of responsive evidence by the Crown that meets those requirements. But it does not authorise the Court to receive and rely upon any new or further evidence from the Crown which does not otherwise meet the express requirements of the provision itself. Section 353A is a gateway provision designed to limit the material that should be considered on a second or subsequent appeal. It would, in that respect, be entirely anomalous and illogical to place upon an applicant the burden of meeting s 353A in respect of fresh evidence, but not the Crown. The language and purpose of s 353A in this respect is supported by its statutory context and history[120].

379 Provision for the content of "fresh" evidence in s 353A(1) is made in s 353A(6), which relevantly states:

"For the purposes of subsection (1), evidence relating to an offence is—

(a) ***fresh*** if—

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120 See especially South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 28 November 2012 at 3952, referring to CLC Act, Pt 10. See also CLC Act, ss 332, 337 (as in force immediately before their repeal and re-enactment in *Criminal Procedure Act 1921* (SA), ss 142, 147).

(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".

380 The fresh evidence that the Crown seeks to tender on the second or subsequent appeal must also be "compelling" in the sense of being reliable, substantial, and highly probative in the context of the issues in dispute at the trial of the offence[121]. The highly probative nature of responsive evidence from the Crown might derive from its ability substantially to undermine the fresh evidence of an applicant. In rarer cases, responsive evidence from the Crown might have independent and highly probative force. An example of the latter is the circumstance of a recent public confession referred to in *Van Beelen v The Queen*[122], and relied upon by the Court of Criminal Appeal below.

381 Perhaps most fundamentally, the fresh and compelling evidence that the Crown seeks to tender as responsive evidence must also be admissible. The requirement for admissibility is not removed by s 353A(7), which provides that "[e]vidence 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". That subsection might arguably permit the Crown to tender fresh and compelling evidence that would not have been admissible under the rules of evidence at the time of trial but which would be admissible under the rules of evidence at the time of the appeal[123]. But it does not abolish the rules of evidence.

382 No substantive attempt was made by the Crown, short of "embrac[ing]" the reasons of the Court of Criminal Appeal, to suggest that any of the three classes of evidence upon which it relied met the requirements of s 353A. None do.

The asserted esoteric knowledge of Mr Carter

383 The esoteric knowledge of Mr Carter concerned his awareness of what had occurred when Mr Docoza was assaulted which was not available to be discovered

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121 CLC Act, s 353A(6)(b).

122 (2017) 262 CLR 565.

123 For discussion of the legislative background to equivalent provisions under the law of New South Wales, see *Attorney General for New South Wales v XX* (2018) 98 NSWLR 1012 at 1027-1032 [73]-[91] per Bathurst CJ, Hoeben CJ at CL and McCallum J. See especially at 1032 [88]-[90].

in the public domain. This knowledge was divided into what Mr Carter appears to have known before the first media publication of the murder, and the period thereafter. For the former period, the Crown relied upon the evidence given of Mr Carter's statements to Ms J Carter, Ms B Carter, Father Pearson and Hillcrest Hospital staff, shortly after the assault and described above. The second period related principally to the information given by Mr Carter to police which helped them locate the site of the assault.

384 We have discussed this pre-trial hearsay evidence above to the extent that it was relied upon by the Crown, and by the Court of Criminal Appeal, as evidence of Mr Carter's state of mind which had not been considered by the experts in their assessment of his psychiatric condition and as evidence of esoteric knowledge with respect to facts surrounding the assault. There was no objection in the Court of Criminal Appeal or in this Court to the use of that evidence for that purpose. Accordingly, we proceeded there on the assumption that the evidence was fresh and compelling when used for that purpose.

385 But, as explained earlier in these reasons, the same is not true of the evidence as evidence of esoteric knowledge tendered for proof of the truth of Mr Carter's identification of the applicant as one of the assailants. Even if we were to assume that the statements were admissible for that purpose, the problem remains that those statements are not fresh. And the statements were not compelling. Indeed, in Ms J Carter's case, the statements had changed over time until 1989 when she recanted them entirely to the extent that they implicated the applicant.

386 Finally, even if the pre-trial hearsay statements were admissible as responsive evidence concerning the interests of justice under s 353A, they do not undermine the cogent and compelling nature of the expert evidence. They establish only that Mr Carter's evidence can be accepted as reliable to the extent that he claims to have been present at the scene of an assault on Mr Docoza. But, as explained above, that matter only strengthens the premises relied upon by the experts for their reasoning that all aspects of Mr Carter's account of the assault that he witnessed or participated in should have been corroborated. The emotionally charged nature of the event at a time when Mr Carter was suffering acute symptoms of psychosis and hypomania, combined with the possibility that Mr Carter might have participated in the assault, strengthens the conclusion that no aspect of Mr Carter's account of the assault could be accepted without substantial corroboration.

The asserted esoteric knowledge of Mr Karpany

387 The esoteric knowledge of Mr Karpany comprised the statements that he had made to Ms J Carter admitting the assault and implicating the applicant. Ms J Carter gave evidence at trial about these admissions but it was led only

against Mr Karpany. As noted above, Ms J Carter also later recanted any suggestion that Mr Karpany had made any reference to involvement by the applicant in the assault.

388 The Crown did not contend that the esoteric knowledge of Mr Carter and Mr Karpany could directly prove that the applicant assaulted Mr Docoza[124]. Nonetheless, it was said that this evidence enhanced the reliability of Mr Carter's testimony, which included his allegation that the applicant had committed an assault. Thus, the Court of Criminal Appeal reasoned that the knowledge had two aspects. The first was that it contradicted any suggestion that Mr Carter's evidence was the product of suggestions from others. Insofar as it is relevant to the present application, the second aspect was described as follows[125]:

> "It proceeds in the following stages.
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> − First, the evidence before this Court of Carter's statements to a number of persons in April 1984, and of Karpany's statements to [Ms J Carter] on Sunday 8 April 1984, establishes the fact that both Carter and Karpany had knowledge that a young man had been violently assaulted on the bank of the River Torrens, that clothing had been removed from him, and that he had been thrown into the river.
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> − Second, that only a person who had been present could have had that knowledge.
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> − Third, the fact that Carter and Karpany had this esoteric knowledge founds an inference that Carter's evidence that there was an attack on the deceased participated in by Karpany is not wholly delusional or wholly unreliable; rather, the occurrence of an attack on the deceased in which Karpany participated is positively supported by that display of esoteric knowledge.
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> − Fourth, the above inference also strongly opposes the applicant's contentions that Dr Manock's findings that the deceased died at the hands of another and his exclusion of a natural cause of death are incorrect."

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124 *R v Bromley* [2018] SASCFC 41 at [406] per Peek, Stanley and Nicholson JJ.

125 *R v Bromley* [2018] SASCFC 41 at [405] per Peek, Stanley and Nicholson JJ.

389 The fourth stage quoted above from the Court of Criminal Appeal's description is not relevant to the present application before this Court.

390 Even assuming that the alleged hearsay statements attributed to Mr Karpany are admissible to show these aspects of esoteric knowledge[126], it was never submitted by any counsel in the Court of Criminal Appeal, and never suggested by the Court of Criminal Appeal, that these alleged hearsay statements attributed to Mr Karpany could be used beyond the extent to which they were esoteric. The statements could be used against the applicant, the Court of Criminal Appeal said, "because first, [they tend] to demonstrate that Carter's evidence that there was an assault on the deceased participated in by Karpany is not wholly delusional; and second, [the statements] strongly oppose[] the applicant's contentions that Dr Manock's exclusion of a natural cause of death, and his findings that the deceased died at the hands of another, are incorrect"[127].

391 If there were any doubt about the unavailability of the hearsay evidence of Mr Karpany's alleged admissions to be used otherwise against the applicant, such doubt was removed by the Court of Criminal Appeal correctly accepting the Crown's concession that Ms J Carter's statement about Mr Karpany's alleged admissions could not be used as evidence that the applicant participated in an assault on Mr Docoza (even apart from the evidence that Ms J Carter had recanted that aspect of her statement in 1989). In this Court, the Crown properly did not take any issue with that reasoning of the Court of Criminal Appeal.

392 The reason that the Court of Criminal Appeal was correct to conclude that the alleged hearsay statements attributed to Mr Karpany could not be used to support Mr Carter's account of the applicant's participation in an assault on Mr Docoza, and the reason that the Crown was correct not to take any issue with that reasoning in this Court, is because that aspect of the statements attributed to Mr Karpany is neither esoteric knowledge nor does it satisfy any other exception to the hearsay rule. If hearsay evidence of Mr Karpany's alleged admissions were admitted to corroborate Mr Carter's evidence of the applicant's involvement in an assault on Mr Docoza, then that corroboration could only be founded on the basis that the admissions are proof of the truth of that involvement. No such exception exists. No party suggested that one existed or should be recognised. This Court should not now recognise an exception, at least not without any submissions on the point.

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126 cf *Kamleh v The Queen* (2005) 79 ALJR 541 at 545 [16] per Gleeson CJ and McHugh J; 213 ALR 97 at 101.

127 *R v Bromley* [2018] SASCFC 41 at [424] per Peek, Stanley and Nicholson JJ.

393 Ms J Carter's hearsay evidence (later recanted) of Mr Karpany's alleged statements about the applicant's involvement in the assault could not be used in evidence against the applicant: the general proposition that applies is that "[w]hat is said out of court and not in the presence of the co-accused is not evidence in the trial of the other accused"[128]. To admit the statements as corroboration of Mr Carter, assuming the truth of the contents of the statements, would be to allow evidence to be admitted through the back door when it could not be admitted through the front. To apply the remarks of Professor Tapper to this context[129]:

> "The reception of such later assertions as testimonial evidence of their truth would have been an obvious infringement of the hearsay rule, and it may have been felt, much as was argued in *Blastland*, that it would be anomalous to allow in the declarations of intention to prove indirectly what more direct assertions were not allowed to prove."

394 Once the basis upon which the Crown sought to rely upon the hearsay evidence of Mr Karpany's admissions is thus understood, that evidence suffers the same obstacles as the evidence of Mr Carter's esoteric knowledge. It is not fresh. It is not compelling. And, even if admitted, it contradicts part of the evidence of Mr Carter and thus strengthens the conclusions, and the compelling nature, of the fresh expert evidence.

The asserted propensity evidence

395 The asserted propensity evidence comprised the applicant's conviction in 1981 for attempted rape of a 15-year-old boy in the city of Adelaide. For the purpose of assessing this evidence, the Court of Criminal Appeal summarised the narrative of events at this earlier trial as well as the trial judge's summing up. The Court also received copies of the applicable information, trial transcript and sentencing remarks. In addition, the Crown relied upon affidavits or sworn statements from witnesses who had given evidence at the trial in 1981. The Court of Criminal Appeal briefly described the content of three of these witnesses' affidavits. It also relied upon an affidavit of the then Director of Forensic Science SA who confirmed as correct the evidence given at the trial by a Dr Scott concerning certain blood grouping evidence.

396 The Crown also relied upon an affidavit of Ms Nelson QC who, as Presiding Member of the Parole Board of South Australia, gave evidence that the

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128 *Bannon v The Queen* (1995) 185 CLR 1 at 22 per Dawson, Toohey and Gummow JJ.

129 Tapper, *Cross and Tapper on Evidence*, 11th ed (2007) at 613-614, referring to *R v Blastland* [1986] AC 41, see especially at 53 per Lord Bridge.

applicant had admitted that he had committed the crime for which he had been convicted in 1981.

397 All of this evidence was said to demonstrate that the applicant had a propensity comprising the following three interrelated components:

> "(a) a disposition or proclivity to demand sex from males in public places; and
>
> (b) a disposition or proclivity to become frustrated or angry if the sexual advance is rebuffed, and to act on that anger/frustration by physically assaulting the person notwithstanding the advances are made in a public place and there is a risk of detection; and
>
> (c) a willingness to act upon that disposition, particularly after the consumption of alcohol and when he is, or notwithstanding he is, in the company of Mr Karpany".

398 If this evidence were admissible propensity evidence, about which we entertain serious doubt, it would have been evidence that could have been, but was not, adduced at the original 1985 trial of the applicant. For that reason, the evidence is not fresh. Nor is it compelling, in the sense of being highly probative in the context of the issues in dispute at the trial of the offence. Much of the probative force of the asserted propensity evidence depended upon an acceptance of the accuracy of the evidence of Mr Carter's descriptions of the assault. But, as previously noted, there is a real possibility that Mr Carter's evidence concerning a sexual advance by the applicant was itself the product of a suggestion by Ms B Carter which, in turn, might itself have been prompted by the applicant's prior conviction. Ms B Carter's evidence was that it was her who had raised with Mr Carter the possibility of an attempted rape by the applicant and Mr Karpany, with her saying that "they are both like that". The admission of the asserted propensity evidence was not highly probative.

Conclusion on the interests of justice

399 It follows that none of the responsive evidence should have been relied upon by the Court of Criminal Appeal in determining what was in the interests of justice. And, for the reasons set out earlier, the hearsay evidence of pre-trial statements attributed to Mr Carter was admissible only as evidence concerning his state of mind. The fact that the expert witnesses did not consider all of that material does not weigh against the applicant, because that material only provided further support for the experts' conclusions about the extremely unreliable nature of Mr Carter's evidence.

400 It was, therefore, plainly in the interests of justice that the fresh and compelling expert evidence be considered for the purposes of s 353A in a second or subsequent appeal.

Substantial miscarriage of justice

401 Given the concession properly made by the Crown that if Mr Carter's evidence did need to be corroborated in almost all respects then no case could have been put to a jury, it follows that the trial judge's direction was inadequate. The Crown was quite correct to assume that such an error had the capacity to affect the result of the trial and that it could not be shown that the applicant's conviction was nevertheless inevitable.

402 Even if this case had required demonstration of the higher threshold—that there be a significant possibility that the jury, properly instructed, acting reasonably, and armed with the expert evidence, would have acquitted the applicant[130]—then that threshold would have been satisfied. The Crown was correct to concede in oral submissions that the case "would never get to the jury" if it had been known that the evidence of Mr Carter needed to be corroborated in every respect. The absence of any substantial corroboration of Mr Carter's evidence on the essential facts which the jury needed to accept in order to convict the applicant, as opposed to merely "matters of small detail"[131] of mundane events, plainly establishes that the applicant's conviction was a substantial miscarriage of justice. There is "a significant possibility ... that an innocent person has been convicted"[132].

Relief

403 For the foregoing reasons there must be a grant of special leave.

404 There was no dispute that this Court is in the same position as the Court of Criminal Appeal and capable of making any order "as ought to have been [made]" by the Court of Criminal Appeal, including orders by the Court of Criminal Appeal

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130 *Van Beelen v The Queen* (2017) 262 CLR 565 at 575 [22], 578 [32], 591 [75] per Bell, Gageler, Keane, Nettle and Edelman JJ.

131 See the evidence of Dr Brereton described above.

132 *Pell v The Queen* (2020) 268 CLR 123 at 165 [119], 166 [127] per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ. See also *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 531 per Gibbs CJ and Mason J; *Chidiac v The Queen* (1991) 171 CLR 432 at 444 per Mason CJ; *M v The Queen* (1994) 181 CLR 487 at 494 per Mason CJ, Deane, Dawson and Toohey JJ.

granting permission to appeal and disposing of the appeal[133]. Indeed, the jurisdiction of this Court is to pronounce the judgment which the Court of Criminal Appeal should have pronounced[134]. We would therefore order that: special leave to appeal be granted; the appeal be allowed; the order of the Court of Criminal Appeal of the Supreme Court of South Australia be set aside and, in lieu thereof, an order be made that permission to appeal be granted; the appeal to the Court of Criminal Appeal be allowed; and the applicant's conviction be quashed pursuant to s 353A(4) of the CLC Act.

405 In all the circumstances, including, for example, the death of Ms J Carter, the loss of the original exhibits, and the time spent by the applicant in prison since 1984, there could be no suggestion of an order for any new trial. None was suggested. In circumstances in which a new trial is not appropriate there should be an order for an acquittal[135].

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133 *Judiciary Act 1903* (Cth), s 37.

134 *Craig v The King* (1933) 49 CLR 429 at 444 per Evatt and McTiernan JJ; *Pantorno v The Queen* (1989) 166 CLR 466 at 475 per Mason CJ and Brennan J.

135 See *R v A2* (2019) 269 CLR 507 at 565-572 [175]-[192] per Edelman J.