

# THE STATUTORY RIGHT TO SECOND OR SUBSEQUENT CRIMINAL APPEALS IN SOUTH AUSTRALIA AND TASMANIA

BIBI SANGHA<sup>†</sup>

In Australia, the criminal appeal rights were enacted by each state and territory based upon those which had been implemented in the UK in 1907. Their interpretation led to some difficulties. It was said that they allowed for only one right of appeal. If it subsequently appeared that the person had been wrongly convicted, the only remedy was to obtain permission from the Attorney-General for a further appeal. It was seldom granted.

The Australian Human Rights Commission took the view that the appeal system in all states and territories may well have been in breach of international human rights obligations. The suggestion was that it did not adequately protect the right to a fair trial or the right to an effective appeal.

In May 2013, following a recommendation from a parliamentary committee South Australia passed legislation to create a new right to a second or subsequent appeal. This was followed in November 2015 by similar legislation in Tasmania.

Two appeals have now been heard in South Australia. Both were successful with one involving the overturning of a conviction where a person had been imprisoned for 20 years.

This article discusses the potential problems which arise with regard to the interpretation of the new legislation and suggest that the judiciary's approach in the most recent case is an encouraging step in the right direction.

## I INTRODUCTION

In Australia, the right to an appeal in criminal cases is derived from statute and based on similar rights which had been introduced in Britain in 1907. They have been called 'common form' provisions in

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<sup>†</sup> Bibi Sangha BA (Hons) (Law), LL.M (LSE), Senior Lecturer in Law, Flinders University of South Australia. Email: [bibi.sangha@flinders.edu.au](mailto:bibi.sangha@flinders.edu.au).

Australia, because until recently, all states and territories had enacted appeal rights in substantially similar terms. Over the 100 years or so since they were introduced in Australia they have remained substantially unchanged.

The appeal provisions allowed for a person to have a right to only one appeal. If after that some exceptional circumstance indicated that a person had been wrongfully convicted, there was a special statutory procedure by which they could obtain a further review of their case. This involved the submission of a petition which went to the Governor and then to the Attorney-General. In an appropriate case the Attorney-General could then refer the case to the Court of Criminal Appeal and it would then be heard as a further appeal.<sup>1</sup> Over the years, very few cases were referred to the appeal court in this way.

Then, in May 2013, South Australia introduced a new statutory right of appeal. It allowed for a second or further appeal where there was fresh or compelling evidence that there had been a substantial miscarriage of justice. This was followed in November 2015 by Tasmania which passed similar legislation. In both states, the new right of appeal was passed into law without a single dissenting voice or vote.

This article explains why the appeal rights were suddenly changed after such a long delay. It advocates the adoption of similar changes by all other states and territories so as to restore a common position in this important area.

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<sup>1</sup> NSW and the ACT also have ancillary powers for post-conviction reviews by way of judicial inquiry through the application to the executive or the Supreme Court. See *Crimes (Appeals and Review) Act 2001* (NSW) pt 7; *Crimes Act 1900* (ACT) pt 20. For detailed discussion of these provisions see Bibi Sangha and Robert Moles, *Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia* (LexisNexis, Butterworths, 2015) 3.5.

## II THE STANDARD APPEAL PROVISIONS

### A *The Right to Appeal Means Only One Appeal*

The statutory right to appeal is usually expressed in the following terms:

- (1) A person convicted on indictment may appeal under this Act to the court:
- (a) against the person's conviction on any ground which involves a question of law alone, and
  - (b) with the leave of the court ... on any ground of appeal which involves a question of fact alone, or question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal.<sup>2</sup>

The provision has been interpreted to mean that a person has a right to only one appeal. The intermediate courts and the High Court have maintained a consistent position. The principle of finality is important in litigation and there are no appeal rights beyond those granted by the relevant statute.<sup>3</sup> It is said that the appeal court 'should not attempt to enlarge its jurisdiction beyond what Parliament has chosen to give'.<sup>4</sup>

The cases justify this position by reference to the statutory executive power of referral to the appeal court by the Attorney-General to deal with any exceptional cases which may arise. As the court said in *R v Edwards (No 2)*, to otherwise allow the reopening of appeals would lead to 'manifest inconvenience and possibly great

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<sup>2</sup> This example is from the *Criminal Appeal Act 1912* (NSW) s 5. The legislation for jurisdictions with similar provisions is as follows: *Criminal Code Act* (NT) sch 1 pt x div 2 s 410; *Criminal Code Act 1899* (Qld) s 668D(1); *Criminal Law Consolidation Act 1935* (SA) s 352(1); *Criminal Code Act 1924* (Tas) s 40(1). In Victoria since 2009 and Western Australia since 2004, leave is required for all appeals: see *Criminal Procedure Act 2009* (Vic) s 274; *Criminal Appeals Act 2004* (WA) s 27(1).

<sup>3</sup> See *Burrell v R* (2008) 238 CLR 218; *R v GAM (No 2)* (2004) 146 A Crim R 57.

<sup>4</sup> *Edwards* [1931] SASR 376, 380.

absurdity’.<sup>5</sup> Once an appeal has been determined, that is the end of the matter, and the person cannot appeal again from time to time thereafter whenever a new fact is alleged to have come to light.<sup>6</sup>

As was said in *R v GAM (No 2)*, once the decision has been ‘perfected’ (properly recorded on the relevant court documents or computer system) there is no further jurisdiction to reopen the appeal or to hear a second appeal.<sup>7</sup>

However, the legislation does not expressly state that there is to be only one appeal. It merely states that a person ‘may appeal’. This could as easily be interpreted to mean that the person may have an *effective* appeal or may have an appeal when there is a proper foundation for it. This is particularly relevant where the defect in the trial, such as a significant non-disclosure, is not revealed until after a first appeal has been heard and rejected. It has been said that it is inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words.<sup>8</sup>

### B *The High Court Cannot Assist*

Without the ability to gain jurisdiction for a second or further appeal, the only decision which can be obtained from the intermediate appellate court is one which refuses the application to either re-open the appeal or to hear a second appeal.<sup>9</sup> It is clear that an attempt to appeal that refusal to the High Court will be unsuccessful.<sup>10</sup> However there is one further difficulty.

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<sup>5</sup> Ibid.

<sup>6</sup> *R v Grierson* (1937) 54 WN (NSW), 144a.

<sup>7</sup> *R v GAM (No 2)* (2004) 146 A Crim R 57, [11] (Winneke P).

<sup>8</sup> *Shin Kobe Maru v Empire Shipping Co Inc* (1994) 68 ALJR 311 cited in *Eastman v DPP (ACT) (No 2)* (2014) 9 ACTLR 178, [54].

<sup>9</sup> In *R v Keogh* [2007] SASC 226, it was described as ‘an application to “re-open” the appeal’.

<sup>10</sup> Transcript of proceedings, *Keogh v R* [2007] HCATrans 693.

Even on a regular appeal to the High Court, it has taken the view that it has no jurisdiction to receive fresh evidence:

The applicants sought to place before this Court additional evidence which was not before the Court of Criminal Appeal. Over the years this Court has consistently maintained that it has no power to receive fresh evidence in the exercise of its appellate jurisdiction.<sup>11</sup>

This is because the appellate jurisdiction of the High Court has been conferred by s 73 of the *Australian Constitution*.<sup>12</sup> It has been interpreted to exclude any original jurisdiction falling within state judicial power. The reception of fresh evidence requires ‘an independent and original decision’ which comes within the state judicial power and not the appellate power.<sup>13</sup>

It has been suggested that the High Court, instead of rejecting fresh-evidence appeals, could work around the issue.<sup>14</sup> It has a general power to remit certain matters to other courts.<sup>15</sup> It enables the High Court to remit any matter to a federal, state or territory court and for that court to deal with the matter subject to any directions from the High Court. It would therefore be possible for the High Court to remit the matter to the state appeal court to determine the evidence, and having done so, return the matter to the High Court to continue the appeal.<sup>16</sup> It could also change the common law interpretation of the appeal right so as to enable a second or further appeal which would allow the appeal court to determine the appeal on the remitter.

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<sup>11</sup> *Mickelberg v R* (1989) 167 CLR 259, 264 (Mason J).

<sup>12</sup> *Australian Constitution* s 73.

<sup>13</sup> *Mickelberg v R* (1989) 167 CLR 259, 298 citing *Werribee Shire Council v Kerr* (1928) 42 CLR 1. However see dissenting judgment of Kirby J in *Eastman v The Queen* (2000) 203 CLR 1, [240]-[243].

<sup>14</sup> Sangha and Moles, above n 1, 3.3.2.

<sup>15</sup> *Judiciary Act 1903* (Cth) s 44.

<sup>16</sup> A similar strategy was undertaken by the Court of Criminal Appeal in New South Wales when the matter was remitted to the District Court for the determination of the factual issues on the appeal: see *R v Roseanne Catt* [2005] NSWCCA 279.

Michael Kirby, whilst a justice of the High Court, said extra-judicially:

The rule [prohibiting the High Court from receiving fresh evidence] means that where new evidence turns up after a trial and hearing before the Court of Criminal Appeal are concluded, whatever the reason and however justifiable the delay, the High Court, even in a regular appeal to it still underway, can do nothing. Justice in such cases, is truly blind. The only relief available is from the Executive Government or the media - not from the Australian judiciary.<sup>17</sup>

He also said in his judicial capacity:

By the authority of [the High Court of Australia] such fresh evidence, even if it were to show a grave factual error, indeed, even punishment of an innocent person, cannot be received by this court exercising its appellate jurisdiction ... [the prisoner] would be compelled to seek relief from the Executive.<sup>18</sup>

As we will see shortly, this emphasis upon executive intervention in such cases has been found by the Attorneys-General of at least two states to be unacceptable.

### C *The Petition Pardon Power*

All Australian jurisdictions have statutory provisions which allow for a petition for mercy to be submitted to the Governor for the exercise of the Governor's power to grant a pardon.<sup>19</sup> The pardon power does not remove the conviction but will 'simply remove from the subject of the pardon, all pains penalties and punishments whatsoever that

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<sup>17</sup> Michael Kirby, 'Black and White Lessons for the Australian Judiciary' (2002) 23 *Adelaide Law Review* 195, 206.

<sup>18</sup> *Re Sinanovic's Application* (2001) 180 ALR 448, 451.

<sup>19</sup> *Crimes (Appeal and Review) Act 2001* (NSW) ss 76-82; *Criminal Code Act* (NT) sch 1 pt x div 2 s 431; *Criminal Code Act 1899* (Qld) s 672A; *Criminal Law Consolidation Act 1935* (SA) s 369; *Criminal Code Act 1924* (Tas) s 419; *Criminal Procedure Act 2009* (Vic) s 327; *Sentencing Act 1995* (WA) ss 137-40.

from the said conviction may ensue'.<sup>20</sup> It may, for example, allow a person who has a terminal illness to be released from prison in their final days to be with their family.<sup>21</sup>

The important conceptual distinction between a pardon and an acquittal was put as follows:

At common law the pardon 'is in no sense equivalent to an acquittal. It contains no notion that [the person] to whom the pardon is extended never did in fact commit the crime, but merely from the date of the pardon gives [that person] a new credit and capacity'. In England it has been held that at common law, 'the effect of a free pardon is such as, in the words of the pardon itself, to remove from the subject of the pardon, "all pains penalties and punishments whatsoever that from the said conviction may ensue," but not to eliminate the conviction itself'. This type of outcome is not the outcome which a person convicted of a crime and claiming to be innocent of it would desire.<sup>22</sup>

This is why Lindy Chamberlain in Australia pursued her appeal to have her conviction overturned after she had been granted a pardon<sup>23</sup> as did Derek Bentley's family in the UK.<sup>24</sup>

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<sup>20</sup> *R v Foster* [1985] QB 115, 118.

<sup>21</sup> In the Legislative Council of Tasmania the Attorney-General reported a case from 2002 where a prisoner who had undergone major neurosurgery had the remainder of his sentence remitted by the Governor on a petition for mercy because the medical advice was that 'maintaining the man in prison would put him at extreme risk': see Tasmania, *Parliamentary Debates*, Legislative Council, 15 October 2015, (Dr Vanessa Goodwin, Attorney-General). This was the second reading of the Criminal Code Amendment (Second or Subsequent Appeal for Fresh and Compelling Evidence) Bill 2015 (No. 42) Second Reading.

<sup>22</sup> *Eastman v DPP (ACT)* (2003) 214 CLR 318, [98] (Heydon J) citing *R v Cosgrove* [1948] Tas SR 99, 106. This was approved by the English Court of Appeal in *Foster* at QB 128 (Watkins and May LJ, Butler-Sloss J); cf *Ex parte Garland* 71 US 333 (1866), 380.

<sup>23</sup> *Re Conviction of Chamberlain* (1988) 93 FLR 239. In 1987 the Morling Royal Commission had found that the prosecution evidence at trial was so fundamentally flawed that the jury should have been directed to acquit: see Northern Territory, Royal Commission of Inquiry into Chamberlain Convictions, *Report* (1987).

<sup>24</sup> *R v Bentley (Deceased)* [2001] 1 Cr App Rep 307. Bentley was convicted of the murder of a policeman and hanged in 1952. Following a long campaign by his

### D *The Petition Referral Power*

It is clear that a person who has been wrongly convicted would not be satisfied with a pardon.<sup>25</sup> However, the legislation also provides that, ‘on the consideration of any petition for the exercise of Her Majesty’s mercy’, the Minister or Attorney-General has the power to refer the matter to the Court of Appeal to be heard as an appeal.<sup>26</sup>

The difficulty here is that it has been said that the petition statutory referral power provides no legal rights to the petitioner.<sup>27</sup> It is said that the power operates in an area beyond the scope of legal rights. The Attorney-General has a complete,<sup>28</sup> ‘uncontrolled’ or ‘unfettered’ discretion which does not have to be exercised at all.<sup>29</sup> It is also said that the decision-making process of the Attorney-General is not subject to judicial review.<sup>30</sup> There may be some subtle distinctions to be drawn between those jurisdictions which depend upon common law powers of judicial review and those which have statutory judicial review powers, but the ability to gain judicial

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family, he was granted a posthumous pardon in 1993. After yet further campaigning by his sister, his case was investigated by the CCRC and referred to the Court of Criminal Appeal which overturned his conviction in 1998.

<sup>25</sup> It should be noted that after the Splatt Royal Commission in South Australia Mr Splatt was given a pardon on 2 August 1984 instead of having his conviction set aside by the appeal court as recommended by the Commission: see Tom Mann, *Flawed Forensics: The Splatt Case and Stewart Cockburn* (2009) ch 19 <<http://netk.net.au/Splatt/Splatt21.asp>>. On 19 March 2012 Mr Splatt applied to the Attorney-General to refer his case to the Court of Criminal Appeal so that his conviction could be set aside as recommended by the Royal Commission. The request was refused.

<sup>26</sup> This example is from the *Criminal Law Consolidation Act 1935* (SA) s 369.

<sup>27</sup> *Von Einem v Griffin* (1998) 72 SASR 110, [120].

<sup>28</sup> *Ibid* [121]: ‘[t]he discretion is granted without qualification. The discretion is entirely unconfined’ and at [156]: ‘it would be inappropriate for this Court to review an unfettered discretion of the executive for the purpose of compelling the executive to bring a matter before the Court’.

<sup>29</sup> *Ibid* [150].

<sup>30</sup> *Ibid* [151]: ‘It would follow logically that the powers under s 369 are not subject to review’.



review of a decision where the decision-maker is not obliged to provide reasons for such decisions, is at best very difficult.<sup>31</sup>

Indeed, Danielle Noble of the Australian Human Rights Commission took the view that the failure to provide written reasons for the rejection of a petition might well constitute a breach of the provisions of the International Covenant on Civil and Political Rights (ICCPR):

... the procedural aspects of the criminal review process in Australia could amount to a violation of the requirements of Art 14 (5). The individual, discretionary power given to the Attorney-General to consider or dismiss a petition for review of conviction or sentence may potentially be a violation of the requirement to provide the same level of procedural rights at all stages of appeal. This potential violation could, however, be remedied if the decision maker, most often the Attorney-General were required to provide written reasons for their decision to dismiss or refer the petition.<sup>32</sup>

However, as the Chief Justice of the High Court has stated:

... [a]ll legal powers, even a constitutional power, have legal limits. The notion of a subjective or unfettered discretion is contrary to the rule of law.<sup>33</sup>

He also added: ‘no law can confer upon a public official unlimited power’.<sup>34</sup>

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<sup>31</sup> See Sangha and Moles, above n 1, 4.5.1, 4.5.2 for discussion of these differences.

<sup>32</sup> Danielle Noble, ‘The right to a fair trial and avenues for criminal appeal in Australia’ (2011) 8 *Direct Link* 9, 105; *Wainohu v NSW* (2011) 243 CLR 181 as discussed in Sangha and Moles, above n 1, 4.9.

<sup>33</sup> Chief Justice Robert French AC, ‘The Rule of Law as a Many Coloured Dream Coat’ (Speech delivered at the Singapore Academy of Law 20th Annual Lecture, Singapore, 18 September 2013), 13 <[www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj18sep13.pdf](http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj18sep13.pdf)>. See also Sangha and Moles, above n 1, ch 2 for general discussion of the rule of law issues.

<sup>34</sup> See also Sangha and Moles, above n 1, 4.9 discussing the view of Gleeson CJ to the effect that an ‘unconfined discretion’ is repugnant to the rule of law:

Where any assessment process lacks transparency and is claimed to be entirely discretionary it is bound to give rise to concerns that it is influenced by political considerations or factors other than legitimate legal and factual considerations of the case. Indeed, the Attorney-General of Tasmania in considering this issue stated:

The current system of petitioning for the exercise of the royal prerogative of mercy has been criticised by legal commentators on a number of grounds, including the lack of formal process and transparency, and a perception that political rather than legal matters may be determinative.<sup>35</sup>

It is clear that government legal advisors may be much less inclined to support a reference which could reflect poorly on the prosecution or the state itself.<sup>36</sup> Indeed, there is a potential conflict of interest in so far as the areas of forensic sciences, prosecutions and the courts often come within the Attorney-General's portfolio.

The Tasmanian Attorney-General stated: '[t]his process is open to criticism as lacking transparency, accountability and independence'.<sup>37</sup> The Attorney-General of South Australia stated that the petition procedure was 'very, very mysterious' because innocent people may be 'languishing in gaol, they have no right of appeal' and the decisions about their predicament take place 'behind closed

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Murray Gleeson, 'Courts and the Rule of Law' (Speech delivered at the The Rule of Law Series, Melbourne University, 7 November 2001) <[www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj\\_ruleoflaw.htm](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_ruleoflaw.htm)>.

<sup>35</sup> Matt Smith, 'Attorney-General Vanessa Goodwin releases draft appeal rights Bill', *The Mercury* (Tasmania), 31 March 2015 quoting the Attorney-General.

<sup>36</sup> Rosemary Pattenden, *English Criminal Appeals 1844–1994: Appeals Against Conviction and Sentence in England and Wales* (Clarendon Press, 1996); Hannah Quirk, 'Prisoners, Pardons and Politics: *R (On the application of Shields) v Secretary of State for Justice*' (2009) Crim LR 648.

<sup>37</sup> Goodwin, above n 21. This point was repeated in Tasmania, *Parliamentary Debates*, House of Assembly, 22 September 2015, (Mr Hodgman, Premier).

doors'. He said the proper procedure should involve the public forum of a court.<sup>38</sup>

Indeed, the Australian Human Rights Commission had previously criticised the appeals process in all states and territories of Australia. It said in a submission to the Legislative Review Committee (LRC) of the South Australian parliament that:

The Commission is concerned that the current systems of criminal appeals in Australia, including in South Australia, may not adequately meet Australia's obligations under the ICCPR in relation to the procedural aspects of the right to a fair trial. More particularly, the Commission has concerns that the current system of criminal appeals does not provide an adequate process for a person who has been wrongfully convicted or who has been the subject of a gross miscarriage of justice to challenge their conviction.<sup>39</sup>

No doubt that helped the LRC with their recommendations for change.

### III THE 'COMMON FORM' APPEAL RIGHTS

The pre-existing criminal appeal arrangements had been in force in Australia for over 100 years, and were based upon the *Criminal Appeal Act 1907* (UK). Whilst the UK had introduced a number of significant changes to their appeal rights over that time, the Australian appeal rights had remained substantially unchanged. Apart from some offences which come within the federal jurisdiction, the substantial part of the criminal law is enacted and administered by each state and territory. For obvious reasons, the criminal appeal rights had been enacted in 'common form' so, apart

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<sup>38</sup> South Australia, *Parliamentary Debates*, House of Assembly, 7 February 2013, (John Rau, Attorney-General) on the Statutes Amendment (Appeals) Bill 2013 (SA).

<sup>39</sup> Australian Human Rights Commission, Submission to Legislative Review Committee, Parliament of South Australia, *Inquiry Into Criminal Cases Review Commission Bill 2010*, 25 November 2011, [2.6].

from very minor variations in wording, they have been substantially similar in all jurisdictions.<sup>40</sup>

The grounds of appeal state that an appeal may be allowed where:

1. the verdict of the jury is unreasonable and cannot be supported having regard to the evidence;
2. the judgment should be set aside on the ground of a wrong decision on any question of law; and
3. on any other ground there was a miscarriage of justice.<sup>41</sup>

In certain circumstances, there can be some confusion about the ground which is most applicable. It has been said that grounds two and three are ‘expressed in very general terms and it is sometimes difficult to draw a clear distinction between them’.<sup>42</sup> It has also been said in relation to the first ground that it really means that ‘notwithstanding the verdict, there has been a “miscarriage of justice”’, which could also bring the issue within the third ground.

However, the main point to note is that all three grounds are concerned to identify a miscarriage of justice.<sup>43</sup> This becomes an important pre-condition for the exercise of the proviso, which states:

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<sup>40</sup> They have been described as ‘analogues, or virtually analogues’: *Grey v R* [2001] HCA 65, [25]; *Evans v R* [2007] HCA 59, [115].

<sup>41</sup> *Criminal Appeal Act 1912* (NSW) s 6; *Criminal Code Act* (NT) s 411; *Criminal Code Act 1899* (Qld) s 668E; *Criminal Law Consolidation Act 1935* (SA) s 353; *Criminal Code Act 1924* (Tas) s 404(1); *Criminal Code Act Compilation Act 1913* (WA) s 689; *Supreme Court Act 1933* (ACT) s 370. In Victoria, the *Criminal Procedure Act 2009* (Vic) s 276 removes the proviso and incorporates the requirement of establishing a substantial miscarriage of justice in the substantive grounds of appeal.

<sup>42</sup> Hugh Donnelly, Rowena Johns and Patrizia Poletti, *Conviction Appeals in New South Wales*, Monograph No 35 (Judicial Commission of New South Wales, 2011) 29.

<sup>43</sup> *Heron v R* [2003] HCA 17, [39] where Kirby J said: ‘the common concern of all of the grounds mentioned is “miscarriage of justice”’. See also *Whitehorn v R* (1983) 152 CLR 657, 685 where it was said that ‘an error of law or a verdict which is unreasonable or cannot be supported on the evidence will amount to a miscarriage of justice’.

... the court may dismiss the appeal if, notwithstanding that the point raised in the appeal might be decided in favour of the appellant, the court considers that no substantial miscarriage of justice had actually occurred.

For a point raised in the appeal to be decided in favour of the appellant means a miscarriage of justice must have occurred. The proviso then operates to provide that if the prosecution can establish that the miscarriage of justice is not ‘substantial’, then the conviction can be upheld.

This is unfortunate because the Chief Justice of the High Court has recently stated that: ‘[i]n the second edition of the *Oxford English Dictionary* “miscarriage of justice” is defined as “a failure of a court to attain the ends of justice”’.<sup>44</sup> It seems incongruous to say that whilst the court has failed to attend the ends of justice, a conviction can nevertheless be upheld.

It has been suggested that the proviso was introduced in Australia in error.<sup>45</sup> When the proviso was introduced in the UK, there was no power to order a retrial in the event that a conviction was overturned. This meant that if it was necessary to overturn a guilty verdict because of a significant technical error at trial, but there was nevertheless compelling evidence against the accused, the overturning of the verdict would still have the effect of an acquittal.<sup>46</sup> The proviso provided a compromise in those circumstances. If there was technical error which could not have affected the verdict, then the courts could uphold the conviction.

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<sup>44</sup> *Cesan v The Queen; Mas Rivadavia v The Queen* [2008] HCA 52, [66].

<sup>45</sup> See Sangha and Moles, above n 1, 5.6, 5.7 for development of this argument.

<sup>46</sup> See Sangha and Moles, above n 1, 5.5 for development of this argument where it was said that the previous practice of the courts, under the old Exchequer rule, was to set aside the conviction where there ‘was any departure from trial according to law, regardless of the nature or importance of that departure’; *Evans v R* (2007) 235 CLR 521, [40] citing *Weiss v R* (2005) 224 CLR 300, [13], [18]. See also Pattenden, above n 36, 182; Roger Traynor, *The Riddle of Harmless Error* (Ohio State University Press, 1970).

In Australia, the situation was different. There was always a power to order a retrial, and so the proviso was unnecessary. This meant that the cumbersome distinction between a miscarriage of justice and a substantial miscarriage of justice could have been avoided if the proviso had not been transferred into the Australian legislation.

#### IV THE SIMPLIFICATION OF UK APPEAL RIGHTS

In 1964 the UK introduced a limited power to order a retrial based upon fresh evidence presented at appeal,<sup>47</sup> and in 1988 it provided an unconditional power to order a retrial.<sup>48</sup> In the meantime, there had also been ongoing reviews and amendments to the grounds of appeal. In 1968 the idea of ‘unsafe or unsatisfactory’ verdicts had been introduced along with the idea of a ‘material irregularity in the course of the trial’.<sup>49</sup>

In 1993, the Runciman Royal Commission concluded that a single concept could be adopted, and recommended that the court should only have to determine whether the conviction is or maybe ‘unsafe’. That recommendation was implemented by the *Criminal Appeal Act 1995* (UK) which states that an appeal will be allowed if the court thinks that the conviction is ‘unsafe’.<sup>50</sup> At the same time the proviso was abolished.

So, at the present time, all Australian jurisdictions work with the unreasonable jury verdict / error of law / miscarriage of justice / substantial miscarriage of justice criteria for first appeals which are

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<sup>47</sup> *Criminal Appeal Act 1964* (UK) s 1.

<sup>48</sup> *Criminal Justice Act 1988* (UK) s 43.

<sup>49</sup> *Criminal Appeal Act 1968* (UK) s 2(1) before its amendment in 1995.

<sup>50</sup> *Criminal Appeal Act 1968* (UK) s 2(1) as amended by *Criminal Appeal Act 1995* (UK).

the only appeals allowed in all states and territories apart now from South Australia and Tasmania.

In order to overcome the difficulties outlined above, South Australia and Tasmania have now introduced a statutory right to a second or subsequent appeal.

## V A BILL TO ESTABLISH A CRIMINAL CASES REVIEW COMMISSION

In 2010 a Bill to establish a Criminal Cases Review Commission (CCRC) was introduced into the South Australian parliament by the Independent Member of the Legislative Council, Anne Bressington.<sup>51</sup> The Bill was based on the legislation which established the UK CCRC which had been in operation since 1997.<sup>52</sup> The UK CCRC has investigative teams to inquire into possible miscarriage of justice cases. They have a statutory right to obtain any documents or materials which were held by any public authority which included the police and prosecutors' offices.<sup>53</sup> They can appoint police officers with their normal police powers to assist with investigations.<sup>54</sup> They have the power, in effect, to grant leave to appeal to the Court of Appeal, because cases referred by them to the court had to be heard as an appeal. At that time referrals by the CCRC had resulted in over 300 convictions being overturned — the figure now is nearly 400. This includes around 100 murder

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<sup>51</sup> The Bill is available at <<http://netk.net.au/CCRC/CCRCBill.pdf>>. This and the subsequent submissions, parliamentary statements, media comments and further legislative developments are available at Networked Knowledge, *Appeals and Post-Conviction Reviews Homepage* <<http://netk.net.au/AppealsHome.asp>>.

<sup>52</sup> The *Criminal Appeal Act 1995* (UK) provided for the establishment of the CCRC as an independent, non-departmental public body on 1 January 1997. For discussion of the CCRC see Bibi Sangha, Kent Roach and Robert Moles, *Forensic Investigations and Miscarriages of Justice* (Irwin Law, 2010) ch 10.

<sup>53</sup> *Criminal Appeal Act 1995* (UK) s 17.

<sup>54</sup> *Criminal Appeal Act 1995* (UK) s 19.

convictions and four cases in which those convicted had been hanged.<sup>55</sup>

In previous years, there had been growing concern in South Australia about a significant number of possible wrongful conviction cases and the inability, for reasons previously explained, to get them back to the courts.<sup>56</sup> Attorney's-General had refused petitions even in cases where there appeared to be overwhelming evidence and arguments to support them.<sup>57</sup>

The CCRC Bill was referred to the South Australian Legislative Review Committee (LRC), which sought public submissions. The Australian Lawyers Alliance said in its submission that the current procedures were 'cumbersome, long-winded and out-dated', and 'archaic'.<sup>58</sup> The Law Council of Australia was critical of the current procedures at both Commonwealth and state levels.<sup>59</sup> Michael Kirby, former Justice of the High Court, said that: 'Australian law on possible miscarriages of justice is defective in many ways, as the courts themselves have acknowledged'.<sup>60</sup>

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<sup>55</sup> The cases were *R v Derek Bentley (Deceased)* [1998] EWCA Crim 2516 - hanged 1952; *R v Mahmoud Mattan* [1998] EWCA Crim 676 - hanged 1952; *R v George Kelly and Charles Connolly* [2003] EWCA Crim 2957 - Kelly hanged 1949. Timothy Evans was hanged in 1950, pardoned in 1966 and compensation was paid to his family in 2003. They were refused a referral to the Court of Appeal by the CCRC: *Westlake v CCRC* [2004] EWHC 2779.

<sup>56</sup> See, eg, the cases set out in Robert Moles, *A State of Injustice* (Lothian Books, 2004); Robert Moles, *Losing Their Grip – the case of Henry Keogh* (Elvis Press, 2006). The full text of both books is available at Networked Knowledge <<http://netk.net.au>>.

<sup>57</sup> See, eg, Networked Knowledge, *Petitions [Legal Submissions]* <<http://netk.net.au/Reports/Petitions.asp>> for the various petitions for Derek Bromley, Henry Keogh and David Szach.

<sup>58</sup> Anthony J Kerin (Australian Lawyers Alliance), Letter to the Editor, *The Advertiser* (Adelaide), 7 March 2012; Australian Lawyers Alliance, 'ALA Applauds Criminal Appeals Review Process' (Media Release, 21 March 2013).

<sup>59</sup> Law Council of Australia, *Policy Statement on a Commonwealth Criminal Cases Review Commission* (Law Council of Australia, 21 April 2012).

<sup>60</sup> Michael Kirby, 'Welcome New Hope for the Wrongly Convicted', *Australian Financial Review*, 2 May 2013.



The Human Rights Commission took this opportunity to point out that the Australian appeal arrangements may be in breach of the provisions of the ICCPR.

When the LRC issued its report, it did not recommend the establishment of a CCRC.<sup>61</sup> It instead recommended that consideration be given to:

1. The introduction of a statutory right to a second or subsequent appeal.
2. The establishment of an inquiry into the use of expert evidence in criminal trials.
3. The establishment of a forensic science review panel to enable the testing or re-testing of forensic evidence, and for appropriate cases to be referred to the appeal court.

The South Australian Government decided to implement the first recommendation but not the other two. The Hon J A Darley, who had been an independent member on the LRC, noted that this was disappointing because ‘the recommendations were supported unanimously by the committee, which is constituted by a majority of government members’.<sup>62</sup>

The Statute Amendment (Appeals) Bill 2012 was published for consultation as a government Bill, and the previous CCRC Bill was withdrawn. This was an important transition, because the CCRC Bill introduced by an independent member in the Legislative Council had little prospect of being passed by the parliament. On the other hand, a government-sponsored Bill for the new right of appeal had every chance of being passed. The new Bill was passed, and came into

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<sup>61</sup> Legislative Review Committee, Parliament of South Australia, *Report of the Legislative Review Committee on its Inquiry into the Criminal Cases Review Commission Bill 2010* (2012).

<sup>62</sup> South Australia, *Parliamentary Debates*, Legislative Council, 7 March 2013, (Hon J A Darley) on the Statutes Amendment (Appeals) Bill.

effect on 5 May 2013.<sup>63</sup> Not a single dissenting voice was raised during the passage of the Bill through the Parliament. Since then, a similar provision has been passed by the Tasmanian parliament.<sup>64</sup> Again, it was not only passed without dissent, but many of those who spoke took the opportunity to state that the prospect of a person who had compelling evidence that they were wrongly convicted but without access to the courts was totally unacceptable.

Upon releasing the draft Bill in March 2015, the Tasmanian Attorney-General said:

Currently, once a convicted person's appeal rights before the courts have been exhausted, the only option that person has is to petition the Attorney-General and the Governor to exercise the royal prerogative of mercy ... It is the Government's view, and that of many in the community, that this is not the right process. Appeal decisions should be made by the courts, not executive government. The current system of petitioning for the exercise of the royal prerogative of mercy has been criticised by legal commentators on a number of grounds, including the lack of formal process and transparency, and a perception that political rather than legal matters may be determinative.<sup>65</sup>

Under the new legislation in South Australia and Tasmania, a person who has fresh and compelling evidence to show that they were wrongly convicted will always have a right of access to the courts, irrespective of any earlier failed appeals. We should bear in mind that Graham Stafford in Queensland had his wrongful conviction for the murder of a young girl overturned on his fifth appeal following a referral under the petition procedure.<sup>66</sup> David Eastman in the Australian Capital Territory had his wrongful conviction for the murder of an Assistant Police Commissioner overturned after he had

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<sup>63</sup> *Statutes Amendment (Appeals) Act 2013* (SA) enacting s 353A of the *Criminal Law Consolidation Act 1935* (SA).

<sup>64</sup> *Criminal Code Act 1924* (Tas) s 402A inserted by *Criminal Code Amendment (Second and Subsequent Appeal for Fresh and Compelling Evidence) Act 2015* (Tas).

<sup>65</sup> Smith, above n 35.

<sup>66</sup> *R v Stafford* [2009] QCA 407.

endured 11 failed appeal procedures.<sup>67</sup> Given that the appeal procedures in all states and territories had been in ‘common form’ for over 100 years, it might now be appropriate for the other states and territories to adopt similar provisions.

## VI THE NEW STATUTORY RIGHT OF APPEAL

The additional right of appeal in South Australia provides for a second or subsequent appeal where there is ‘fresh and compelling’ evidence which might give rise to a finding that there has been ‘a substantial miscarriage of justice’:<sup>68</sup>

(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.

...

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

Evidence on an appeal is:

- (a) ‘fresh’ if —
  - (i) it was not adduced at the trial of the offence; and
  - (ii) it could not, even with the exercise of reasonable diligence, have been adduced at the trial; and
- (b) ‘compelling’ if —
  - (i) it is reliable; and
  - (ii) it is substantial; and
  - (iii) it is highly probative in the context of the issues in dispute at the trial of the offence.

<sup>67</sup> *Eastman v Director of Public Prosecutions [No 2]* [2014] ACTSCFC 2 considering the report of the Board of Inquiry which reported on 29 May 2014. For a comprehensive review of this case see David Hamer, *The Eastman case: Implications for an Australian Criminal Cases Review Commission* in this issue.

<sup>68</sup> *Criminal Law Consolidation Act 1935* (SA) ss 353A(1), (3). The ‘Full Court’ is usually comprised of three judges. The Tasmanian provisions were explicitly based on the South Australian provisions, so we will use the South Australian Act as our principal guide to these provisions.

### A *Permission for Leave Procedural Issues*

An applicant will need to obtain permission from the appeal court for an appeal to proceed.<sup>69</sup> Such permission may be granted by a single judge of the Supreme Court.<sup>70</sup> However, if permission to appeal is refused, then the applicant is entitled to have the application heard before the Full Court.<sup>71</sup> In the case of Adrian Drummond, he was refused leave to appeal by a single judge who determined that none of the criteria were satisfied on a ‘reasonably arguable’ basis.<sup>72</sup> On his subsequent appeal against that decision, the Full Court not only granted leave him to appeal but (by a majority) also allowed the appeal.<sup>73</sup> The judgment provided an important explanation of what was meant by ‘fresh and compelling’ evidence, which we will explain shortly, and which might allay many of the concerns<sup>74</sup> which had previously been raised about the demanding nature of the test.

### B *Combining the Leave and Substantive Appeal Hearings*

There is also a provision which states that ‘[t]he Chief Justice may determine that the Full Court is to be constituted of only two judges for the purposes of any appeal to the Full Court under this Act’. However if the two judges are divided in opinion, the matter will have to be reheard by three judges and, where practicable, including the two judges who initially heard it.<sup>75</sup>

During the parliamentary debate on the Bill, it was said that the provision would allow the leave application and the substantive

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<sup>69</sup> *Criminal Law Consolidation Act 1935* (SA) s 353A(2).

<sup>70</sup> *Supreme Court Act 1935* (SA) s 48(3).

<sup>71</sup> *Supreme Court Act 1935* (SA) s 48(4).

<sup>72</sup> *R v Drummond* [2013] SASCF 135.

<sup>73</sup> *R v Drummond* (No 2) [2015] SASCF 82.

<sup>74</sup> Bibi Sangha, Robert Moles and Kim Economides, ‘The new statutory right of appeal in South Australian criminal law: problems facing an applicant – unanticipated interpretive difficulties’ (2014) 15(1) *Flinders Law Journal* 145.

<sup>75</sup> *Criminal Law Consolidation Act 1935* (SA) ss 357(3), (4).

appeal to be heard together before two judges, ‘to eliminate a step’ from the criminal appeal process.<sup>76</sup>

No doubt this was thought to reflect the current procedures followed in states such as Queensland, Victoria and New South Wales where the leave application and the substantive appeals are heard together. In Queensland it was said that the practice was to ‘disregard the requirement for leave’ and to hear the appeal on the merits.<sup>77</sup> In Victoria, the court will hear full argument of the case, and if the grounds are without merit it refuses the application.<sup>78</sup> In New South Wales the court makes the decision about leave after hearing the merits of the appeal; ‘It rarely refuses leave to appeal’.<sup>79</sup> On a first appeal, the court has to address the question as to whether the grounds of appeal are ‘reasonably arguable’. Hearing the full argument about the grounds of appeal complements but does not conflict with any decision that might have to be made about the question of leave to appeal.<sup>80</sup> However, different considerations now apply to a second or subsequent appeal.

### C *Permission for Leave Substantive Issues*

In an application for leave for a second or subsequent appeal, the court has to determine first whether it has *jurisdiction* under the statute to hear the matter, and then it has to consider whether it will grant *permission* for the appeal to proceed.

The factors mentioned in the Act have been described as ‘pre-conditions to the conferral of jurisdiction’.<sup>81</sup> They involve whether it is reasonably arguable that there is ‘fresh evidence’, that there is

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<sup>76</sup> South Australia, *Parliamentary Debates*, House of Assembly, 7 February 2013, 4309 (Vickie Chapman, Deputy Leader of the Opposition).

<sup>77</sup> *R v Upson (No 2)* (2013) 229 A Crim R 275, [11] (Fraser JA).

<sup>78</sup> *R v GAM (No 2)* (2004) 146 A Crim R 57, [4] (Winneke P).

<sup>79</sup> New South Wales Law Reform Commission, *Criminal Appeals*, Report No 140 (2014) [10.19].

<sup>80</sup> See Sangha and Moles, above n 1, 6.5.3, 6.5.4 for more detailed discussion.

<sup>81</sup> *R v Keogh (No 2)* [2014] SASFC 136, [76].

‘compelling evidence’ and that it is in the ‘interests of justice’ for that evidence to be considered on the appeal:<sup>82</sup>

Any one piece of evidence relied on to found jurisdiction must satisfy all three requirements. It may be that there is only the one essential condition comprised of these three elements. We will refer to this one essential condition under section 353A(1) as the ‘jurisdictional fact’.

At the leave stage, the applicant has to establish that this jurisdictional fact is reasonably arguable<sup>83</sup> ‘on the balance of probabilities’.<sup>84</sup> It is clear that ‘jurisdiction’ must first be established before the court can consider whether to grant permission for the appeal to proceed:

[I]t makes practical sense for the permission filter to embrace both the jurisdictional fact and the single ground of appeal [whether there has been a substantial miscarriage of justice] on a reasonably arguable basis.<sup>85</sup>

The Act provides that the court may hear a second or subsequent appeal ‘if the Court is satisfied’ that there is fresh and compelling evidence to be considered.<sup>86</sup> At the leave stage, being ‘satisfied’ means that the court accepts that it is ‘reasonably arguable’ that there is fresh and compelling evidence to be considered. However, it is important to bear in mind the additional requirement that it is also ‘in the interests of justice’ for that evidence to be heard on the appeal:<sup>87</sup>

Notwithstanding that a court might be satisfied of the existence of fresh and compelling evidence, jurisdiction to hear a second or subsequent appeal will not arise unless that fresh and compelling evidence is such that it should, in the interests of justice, be considered on an appeal.

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<sup>82</sup> Ibid [80].

<sup>83</sup> Ibid [89].

<sup>84</sup> Ibid [80].

<sup>85</sup> Ibid [88].

<sup>86</sup> Ibid [76].

<sup>87</sup> Ibid [115].

As the court explained, there may be circumstances where, even though there is fresh and compelling evidence, the case will not merit another appeal. The appeal provision is not limited to just a second appeal, but allows for the possibility of yet more appeals after that. An applicant may have fresh and compelling evidence which has been heard on an appeal, but where the evidence was not thought to be such that the appeal should be allowed. On a subsequent application for a further appeal, based upon the same evidence, there would plainly be fresh and compelling evidence because the existence of it was affirmed on the earlier appeal. However, without more, it would not be appropriate to hear another appeal, because the matter has already been determined by the earlier hearing of the appeal and ‘it could not now be reasonably arguable that there was a substantial miscarriage of justice’.<sup>88</sup>

As the court in *Keogh (No 2)* stated:

The requirement of the Court to be satisfied that any fresh and compelling evidence relied upon is such that it is in the interests of justice to consider it on appeal will enable such apparently futile applications to be cut short either at the permission stage or on appeal without the need for a full hearing on the merits.<sup>89</sup>

#### D *Fresh Evidence*

The new appeal right defines ‘fresh’ evidence as that which was not adduced at the trial and could not, even with the exercise of reasonable diligence, have been adduced at the trial. This is to be contrasted with ‘new’ evidence which is that which was not known about (by the accused or their legal advisors) at the time of the trial, but which could have been discovered by them upon reasonable inquiry. The statutory definition embodies the previous common law stipulation of these concepts.<sup>90</sup> However, putting them on a statutory basis alters their status and function.

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<sup>88</sup> Ibid [89], [117].

<sup>89</sup> Ibid [117].

<sup>90</sup> Ibid [98] citing *Ratten v R* (1974) 131 CLR 510, 516–7.

The interplay between them becomes most important for this new right of appeal. Before the new Act, the cases said that evidence on an appeal had to be ‘fresh and cogent’<sup>91</sup> meaning that it must be ‘capable of belief’<sup>92</sup> or have the potential to affect the jury verdict.<sup>93</sup>

The key issue here is to recognise a possible conflict between the procedural requirements of a fair trial and the substantive goal of avoiding a miscarriage of justice. Under the common law and the statutory test, the applicant must show that they exercised ‘reasonable diligence’ in seeking exculpatory evidence at the time of the trial. So, what is to be done where the person has identified evidence indicative of innocence, but which on one view could possibly have been sought out at the time of the trial?

The key is to be found in the passage from *R v Ratten* which played an important role in both of the cases decided in South Australia under this new statutory provision. The court said that:

Great latitude must of course be extended to an accused in determining what evidence by reasonable diligence in his own interests he could have had available at his trial, and it will probably be only in an exceptional case that evidence which was not actually available to him will be denied the quality of fresh evidence.<sup>94</sup>

In *Keogh (No 2)*, the court noted that *Ratten* had held that where evidence is only new, but not fresh, if it nevertheless gives rise to such a doubt that the verdict of guilty cannot stand, the court will quash the conviction, even though there had been a fair trial.<sup>95</sup>

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<sup>91</sup> *Chamberlain v R* (1983) 46 ALR 493, [499].

<sup>92</sup> *Ratten v R* (1974) 131 CLR 510, [21] (Barwick CJ); *Gallagher v R* [1986] 160 CLR 392, [4] (Gibbs CJ).

<sup>93</sup> *Ratten v R* (1974) 131 CLR 510, [5] citing *Craig v R* (1933) 49 CLR 429 (Rich and Dixon JJ).

<sup>94</sup> *Christie v R* [2005] WASCA 55, [237] (Le Miere and Jenkins JJ) citing *Ratten v R* (1974) 131 CLR 510, 517–8 (Barwick CJ).

<sup>95</sup> *R v Keogh (No 2)* [2014] SASFC 136, [99] citing *Ratten v R* (1974) 131 CLR 510, 517–8.



The real issue is what the court should do where there is real evidence to indicate a possible wrongful conviction, but the indications are that the accused person, or their legal advisers could have done more to identify it at the time of the trial. A pragmatic approach was taken by the Privy Council in *Lundy v R*<sup>96</sup> where it noted that in *R v Bain* it was said:

... the Court cannot overlook the fact that sometimes, for whatever reason, significant evidence is not called when it might have been. The stronger the evidence is from the appellant's point of view, and thus the greater risk of a miscarriage of justice if it is not admitted, the more the Court may be inclined to accept that it is sufficiently fresh, *or not insist on that criterion being fulfilled*.<sup>97</sup>

The Privy Council accepted the view expressed in *Bain* that the new evidence should be admitted 'if the interests of justice' require it.<sup>98</sup> Under the new legislation, the fresh evidence requirement is also linked to what is required 'in the interests of justice'.

In *Pora v R*<sup>99</sup> the Privy Council also set aside the conviction where the evidence on the appeal was not fresh, but there was a reasonable explanation as to why it had not been obtained earlier.

The key in these cases is to be found in the expressions by the Privy Council to the effect that where there is a 'greater risk of a miscarriage of justice' then 'the more the Court may be inclined to accept that it is sufficiently fresh'. The court then added: 'or not insist on that criterion being fulfilled'.<sup>100</sup> This last option is not

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<sup>96</sup> *Lundy v R* [2013] UKPC 28.

<sup>97</sup> *Lundy v R* [2013] UKPC 28, [117] citing *R v Bain* [2004] 1 NZLR 638, [22] (Tipping J) (emphasis added).

<sup>98</sup> David Bain served over 13 years imprisoned for the murders of his parents and siblings in New Zealand before the Privy Council overturned his conviction on the basis of fresh evidence. On a subsequent retrial he was acquitted of all charges.

<sup>99</sup> *Pora v R* [2015] UKPC 9, [40].

<sup>100</sup> *Lundy v R* [2013] UKPC 28, [117] citing *R v Bain* [2004] 1 NZLR 638, [22] (Tipping J) (emphasis added).

available to the court under the new right of appeal because the criteria have now been established as a statutory requirement which the judges are not at liberty to ignore. However, the previous practice does allow for some ‘interpretive adaptation’ which is what is found in the Drummond appeal.

### E *R v Drummond (No 2)*

Adrian Drummond’s case was the second appeal to be determined under the new statutory provision in South Australia.<sup>101</sup> It was claimed that the forensic evidence at trial had limitations which were not fully disclosed.<sup>102</sup> The case involved an alleged attempted abduction. However, no traces were found of transferred DNA between the alleged perpetrator and the alleged victim. Evidence was given at trial that physical contact with a person may only leave a significant DNA trace in about 10 percent of cases. On the first appeal it had not been recognised to what extent this figure was in error. The appeal was unsuccessful.<sup>103</sup> On the second appeal, it was claimed that further studies had revealed this figure to be significantly inaccurate and to have created a misleading impression.

In allowing the appeal, Peek J noted the difference between the flexibility of the common law principles concerning fresh evidence and the mandatory requirement for fresh evidence under the new statutory right of appeal. He accepted that: ‘[a]t common law, the “reasonable diligence” requirement may be entirely dispensed with

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<sup>101</sup> *R v Drummond (No 2)* [2015] SASCFC 82.

<sup>102</sup> *Ibid* [90] (Gray J): The evidence was in some respects ‘incorrect’ and gave rise to ‘misunderstandings’. However, Gray J took the view that the issues were effectively qualified and addressed at trial, and therefore the evidence on the appeal was not fresh or compelling. He said he would refuse leave to appeal. The other judges (Peek and Blue JJ) determined that the errors were more serious, and allowed the appeal.

<sup>103</sup> *R v Drummond (No 2)* [2015] SASCFC 82, [151] where Peek J pointed out that only one of the four major errors in the expert witness evidence had been recognised and pursued in the first appeal.

on a common form criminal appeal where the evidence is sufficiently strong'.<sup>104</sup>

He then stated that: '[i]t seems clear that the relatively rigid structure of s 353A of the Act means that this first common law principle *cannot* be applied to the "fresh evidence" proffered to engage a second appeal under s 353A(1) and (2)'.<sup>105</sup>

However, Peek J's subsequent analysis appears to have found a way of reconciling, at least to some extent, the statutory and common law rights in so far as they concern prosecutorial non-disclosure and breach of expert witness duties.

He went back to the common law principles dealing with due diligence and noted how they provided for 'great latitude' to be extended to an appellant when considering that issue in the context of a criminal appeal.<sup>106</sup> He then referred to *Re Knowles* and the discussion there of the *Ratten* principle. It was said in *Knowles*:

Amongst the various defects or omissions which may lead a trial to become unfair and to amount to a miscarriage of justice are circumstances which may be treated as vitiating the volition or choice by an accused or his lawyers to follow or refrain from following some course at the trial. *Some factors capable of amounting to vitiating factors, which are mentioned in the cases, are fraud, mistake, surprise, malpractice and misfortune, and, with particular reference to defence lawyers, inexperience, remissness, defect of judgment or neglect of duty*  
...<sup>107</sup>

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<sup>104</sup> *R v Drummond (No 2)* [2015] SASCFC 82, [166]. He also referred to *Gallagher v R* [1986] 160 CLR 392, 396 where it was said that in some cases, the evidence might 'justify interference with the verdict, even though that evidence might have been discovered before the trial'.

<sup>105</sup> *R v Drummond (No 2)* [2015] SASCFC 82, [167] (emphasis in judgment).

<sup>106</sup> *Ibid* [168] citing *Ratten v R* (1974) 131 CLR 510, 517 as noted above in the discussion of *Christie v R* [2005] WASCA 55.

<sup>107</sup> *R v Drummond (No 2)* [2015] SASCFC 82, [169] citing *Re Knowles* [1984] VR 751, 770 (emphasis added in judgment).

He then stated that:

It was accepted by the court in *Keogh (No 2)* that this important principle of ‘great latitude being extended to an accused’ *does* apply to a ‘second appeal’ under s 353A(1) and (2).<sup>108</sup>

Peek J said that the authorities of *Grey v R*, *Mallard v R (Mallard)* and *Wood v R (Wood)* under the common form appeal oblige the prosecution to disclose all relevant evidence.<sup>109</sup> There is no obligation upon the accused to seek out information which the prosecution is obliged to disclose. He noted that the application before him was under the new right of appeal which did require the evidence to be ‘fresh’ and was linked to the requirement for due diligence. He explained the connection as follows:

... the above authorities are relevant to that question [of fresh evidence under the new appeal provision] because, when assessing whether defence counsel used reasonable diligence, one must take into account that counsel is entitled to assume that the prosecution will disclose to the defence relevant evidence and material and, *a fortiori*, that the prosecution will not lead false or misleading evidence as part of its case. Further, when making an assessment of whether there was reasonable diligence, the court will extend to an accused great latitude.<sup>110</sup>

Peek J had stated in relation to the common form appeal cases that:

The effect of such authorities is that where the evidence sought to be adduced on a common form appeal is evidence that should have been disclosed by the prosecution at trial, miscarriage of justice may be demonstrated directly by reference to the failure to disclose rather than by the route of satisfaction of a ‘fresh evidence’ test.<sup>111</sup>

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<sup>108</sup> *R v Drummond (No 2)* [2015] SASCFC 82, [170] (emphasis added in judgment) citing *R v Keogh (No 2)* [2014] SASCFC 136, [100]–[101].

<sup>109</sup> *R v Drummond (No 2)* [2015] SASCFC 82, [172]–[174] citing *Grey v R* [2001] HCA 65, [23]; *Mallard v R* (2005) 224 CLR 125, [16]–[17]; *Wood v R* (2012) 84 NSWLR 581, 615–6.

<sup>110</sup> *R v Drummond (No 2)* [2015] SASCFC 82, [174].

<sup>111</sup> *Ibid* [172].

It would appear from this analysis that the discovery of a failure by the prosecution to disclose relevant evidence, or the identification of evidence by the prosecution which has been false or misleading, may satisfy the fresh evidence test under the new statutory right of appeal.

Peek J concluded that the new evidence was fresh within the meaning of the Act.<sup>112</sup> Whilst he said that he had approached the issue through an examination of the prosecutorial duties, he noted that Blue J had arrived at the same conclusion by examining the duties of the expert witness, an analysis with which he agreed.

#### F *Compelling in the Context of the Issues in Dispute at the Trial*

The requirement for the evidence to be compelling means that it must be ‘reliable’, ‘substantial’ and ‘highly probative’ ‘in the context of the issues in dispute at the trial of the offence’.

In *Keogh (No 2)*, the court took the view that ‘reliability’ directs attention ‘to the quality of the evidence itself and the person or means, documentary or otherwise, through or by which the evidence is produced’.<sup>113</sup> It said that ‘substantial’ means being ‘of substance’, which merits substantial evidence being accorded weight in consideration of the issues arising. It noted that the idea of evidence being ‘substantial’ may add little beyond the ideas of it being ‘reliable’ and ‘highly probative’.<sup>114</sup> The requirement for evidence to be ‘highly probative’ means that it must have a ‘real or material bearing on the determination of a fact in issue’ which ‘may rationally affect the ultimate result in a case’.<sup>115</sup>

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<sup>112</sup> Ibid [175].

<sup>113</sup> *R v Keogh (No 2)* [2014] SASFC 136, [105]. It is interesting to note that the court accepted that all of the evidence sought to be relied upon by the applicant in *Keogh (No 2)* was regarded as ‘reliable’ for the purposes of the definition of ‘compelling’ in that appeal.

<sup>114</sup> Ibid [106].

<sup>115</sup> Ibid [109].

An important issue arose in *Keogh (No 2)* in connection with the requirement for the fresh and compelling evidence to be highly probative ‘in the context of the issues in dispute at trial’. The court pointed out that this must mean more than just the issue of guilt or innocence — or the bare legal elements of the criminal offence. If no more than that was meant, then there would be no work for the words of the Act to do. On the other hand, it said, the words ‘in the context of’ allow for a more expansive view to be taken of what issues are regarded as being in dispute at the trial. On the *Keogh* appeal, the Director of Public Prosecutions argued that because certain elements of the prosecution case were not challenged at trial, fresh evidence could not be introduced on the appeal to challenge them, because they did not relate to what had been ‘issues in dispute at the trial’. The court referred to the parliamentary speech on behalf of the Attorney-General to note that one should not take ‘an unduly narrow view of the phrase’.<sup>116</sup> It noted that: ‘[i]t is trite but appropriate to observe that an identification of the issues in dispute at trial will turn on the facts and circumstances of the particular case as prosecuted and defended’.<sup>117</sup> It then referred to the comments by the Minister:

Concern was expressed that the phrase ‘the issues in dispute at the trial’ was too narrow and may not cover fresh evidence that would open up an entirely new and substantial line of defence that was previously not apparent at the original trial. Though it will be for the courts to apply the test for fresh and compelling evidence on a case by case basis in accordance with established rules of statutory construction and case law on the point, this appears to be an unduly narrow view of the phrase ‘the issues in dispute at the trial’. One would think that one issue in dispute at the trial will always be that the defendant committed the alleged crime.<sup>118</sup>

For the court to cite such an observation, with apparent approval, might suggest that it will be less concerned with technical arguments about how the issues had been handled at trial, and more concerned

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<sup>116</sup> Ibid [113].

<sup>117</sup> Ibid [112].

<sup>118</sup> Ibid [113] quoting South Australia, *Parliamentary Debates*, Legislative Council, 19 February 2013, 3164–8 (Gail Gago) on the Statutes Amendment (Appeals) Bill 2013 (SA). Minister Gago was speaking on behalf of the Attorney-General, who is a member of the lower house, the House of Assembly. The Bill was being discussed on its second reading.

with the question as to whether there had been a substantial miscarriage of justice.

However, it should be noted that in *Drummond (No 2)*, the judges on the appeal differed in their assessment of the significance of the evidence being adduced. It concerned the identification of an error or a misunderstanding in the forensic evidence which had been given at trial.<sup>119</sup> The majority thought the new evidence, exposing the error, was fresh and compelling. The dissenting judge Gray J, who had taken a leading role in *Keogh (No 2)*, thought otherwise. He said that in view of the way in which the trial had been conducted, defence counsel had had every opportunity, in the exercise of due diligence, to challenge the evidence at trial or to adduce further evidence after the trial but did not do so.<sup>120</sup> The majority thought that defence counsel should have been entitled to rely upon the fact that the prosecution's duty of disclosure<sup>121</sup> and the obligations attaching to the expert witness<sup>122</sup> meant that it was not necessary for counsel to seek out information which might have led to the conclusion that the evidence was misleading.<sup>123</sup> Peek J said:

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<sup>119</sup> *R v Drummond (No 2)* [2015] SASFC 82, [90] (Gray J): The dissenting judge said that whilst the substance of the opinions given at trial was correct, there was 'a misunderstanding about aspects of those studies and their significance'. Peek J as part of the majority said that there were 'substantial flaws' in the evidence, and that part of the evidence was 'very substantially in error' at [150]. He later said that the court was dealing with a situation which involved 'the giving of evidence by a prosecution expert witness that has subsequently been demonstrated to be incorrect' at [171].

<sup>120</sup> *Ibid* [78]: 'In my view, reasonable diligence would have resulted in all or, at the very least, substantially all of the evidence now before this Court being available to tender at trial'. Gray J said that counsel could have objected to the evidence or called for further studies but did not do so. He said this was because 'the cross-examination had fundamentally undermined the weight of the evidence'.

<sup>121</sup> See Sangha and Moles, above n 1, ch 8 for discussion of this.

<sup>122</sup> *Ibid* ch 9.

<sup>123</sup> *R v Drummond (No 2)* [2015] SASFC 82, [172]: Peek J said that the due diligence obligation had to be understood in the context of the prosecution's duty of disclosure. He pointed to Blue J's concurrence in emphasising the expert witnesses' obligations with which Peek J agreed at [174]–[175].

I entirely disagree with any suggestion that: defence counsel recognised any more than a partial aspect of the flaws in the prosecution case; or that his cross-examination or address to the jury was telling.<sup>124</sup>

He made much of the fact that defence counsel had only been told about the technical evidence which was to be led moments before the witness was called.<sup>125</sup> Defence counsel's lack of understanding of the flaws in this evidence helped to explain why his final address to the jury on this topic would have taken 'less than a minute to say'.<sup>126</sup> It appears that a *failure* to dispute an issue at trial can amount to an issue in dispute at a trial, if there is a satisfactory explanation for that lack of engagement.

### G *Substantial Miscarriage of Justice*

The new statutory provision provides that '[t]he Full Court may allow an appeal under this section if it thinks that there was a substantial miscarriage of justice'. *Keogh (No 2)* referred to this as 'the single available basis for allowing the appeal'.<sup>127</sup> It said the words 'under this section' make it clear that the court 'on the hearing of the appeal' will need to satisfy itself that the jurisdictional fact has been made out 'on the balance of probabilities'.<sup>128</sup> This means that the requirement to establish the existence of some element of fresh and compelling evidence now moves from being 'reasonably arguable', as it was at the leave stage, to being actually established, albeit on a balance of probabilities, at the hearing of the appeal.

### H *The Broader Evidential Opportunities on the Substantive Appeal*

So, how does the requirement for fresh and compelling evidence relate to the determination as to whether there has been a substantial

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<sup>124</sup> *Ibid* [128].

<sup>125</sup> *Ibid* [129].

<sup>126</sup> *Ibid*.

<sup>127</sup> *R v Keogh (No 2)* [2014] SASCFC 136, [119].

<sup>128</sup> *Ibid* [118].



miscarriage of justice? This will depend upon what other evidence is allowed in at the appeal stage.

In *Keogh (No 2)* the court considered that the expression ‘substantial miscarriage of justice’ in the context of the proviso in a first appeal requires the *prosecution* to demonstrate that there has been no substantial miscarriage of justice. The new appeal right on the other hand requires the *appellant* to establish that there has been a substantial miscarriage of justice. The court accepted that there is no single universally applicable criterion to determine those issues.<sup>129</sup>

*Keogh (No 2)* found that sufficient guidance could be gained from the High Court decision in *Baini v R*<sup>130</sup> dealing with the revised appeal provision in Victoria which states:

- (1) On an appeal ... the Court of Appeal must allow the appeal against conviction if the appellant satisfies the court that —
- (a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or
  - (b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or
  - (c) for any other reason there has been a substantial miscarriage of justice.<sup>131</sup>

The South Australian second appeal right states:

The Full Court may allow an appeal under this section if it thinks that there was a substantial miscarriage of justice.<sup>132</sup>

In *Baini*, the High Court pointed out that previous decisions of the court in relation to the negative expression in the proviso cannot be applied to the positive form in the Victorian provision. If this is

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<sup>129</sup> Ibid [123].

<sup>130</sup> *Baini v R* (2012) 246 CLR 469.

<sup>131</sup> *Criminal Procedure Act 2009* (Vic) s 276.

<sup>132</sup> *Criminal Law Consolidation Act 1935* (SA) s 353A(2).

meant to imply that there is some significant difference in the interpretation of the two provisions, it would not be problematic in Victoria, because the new provision *replaced* the proviso. However, the situation is different in South Australia where the new right of appeal (for a second or further appeal) applies in *addition* to the common form appeal (for a first appeal). If there is a significant difference between the two, that could prove to be problematic.

### I *Substantial Miscarriage of Justice in Baini*

The Victorian provision makes it clear that a ‘substantial miscarriage of justice’ includes:<sup>133</sup>

- a jury verdict which cannot be supported;
- an error or irregularity in relation to the trial — where the court cannot be sure that the error did *not* make a difference to the outcome; or
- a serious departure from the proper processes of the trial.<sup>134</sup>

Any assessment may be affected by the strength of the prosecution case at trial; there may have been properly admissible evidence which, despite the error, required the guilty verdict.<sup>135</sup> But there will be many cases where an appellate court will not be in a position to decide, given that it will be proceeding ‘on the record’ of the trial, with the ‘natural limitations’ which that brings with it.<sup>136</sup> However, there will be no substantial miscarriage of justice where it finds that the guilty verdict was ‘inevitable’. This does not reintroduce the proviso or impose some onus to prove innocence.<sup>137</sup> A finding that a

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<sup>133</sup> The discussion here is taken from *R v Keogh (No 2)* [2014] SASFC 136, [125]–[127].

<sup>134</sup> *Baini v R* (2012) 246 CLR 469, [26].

<sup>135</sup> *Ibid* [28].

<sup>136</sup> *Ibid* [29].

<sup>137</sup> *Ibid* [30].

guilty verdict was inevitable will not conclude the issue as to whether there was a substantial miscarriage of justice.<sup>138</sup>

Where it is claimed that a guilty verdict was inevitable, the appellant merely has to show that without the error, the jury might have entertained a doubt about guilt. A distinction has to be drawn between a guilty verdict being *inevitable* and a guilty verdict being *open*. In cases where evidence has been wrongly admitted or excluded, the Court of Appeal cannot fail to be satisfied that there has been a substantial miscarriage of justice unless it finds that it was ‘not open’ to the jury to entertain a doubt as to guilt.<sup>139</sup>

This means that the expression ‘substantial miscarriage of justice’ includes errors which *possibly* affected the result of the trial, together with ‘serious departures’, where the impact of the departure cannot be determined. These considerations acknowledge the role of trial by jury and the fact that the prosecution must establish guilt beyond a reasonable doubt. Only the *inevitability* of conviction (in the absence of significant procedural error) will warrant the conclusion that there has not been a substantial miscarriage of justice.<sup>140</sup>

*Keogh (No 2)* has established that the court on a second appeal will consider the ‘fresh and compelling’ evidence necessary for the grant of leave to appeal, in addition to any ‘fresh and cogent’ evidence which would be admissible on a first appeal.

The expression ‘substantial miscarriage of justice’ as used in the proviso on first appeals is broad enough to include considerations as to whether the jury verdict was unreasonable, or whether there was an error of law. Could those same factors be raised on a second appeal under this new provision despite the fact that they were not specifically mentioned in the Act as sub-grounds of appeal?

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<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid* [32].

<sup>140</sup> *Ibid* [35].

### J *The Range of Evidence for a Second or Subsequent Appeal*

*Keogh (No 2)* said that the only statutory guidance to the court was that it may allow an appeal where there had been ‘a substantial miscarriage of justice’.<sup>141</sup> As long as the jurisdictional fact component is satisfied, the nature of the appeal is ‘not otherwise expressly qualified’. The appellant submitted that the fresh and compelling inquiry is only relevant to the jurisdictional fact requirement, and that once that is satisfied, the court may hear any other evidence which is relevant to whether or not there has been a substantial miscarriage of justice.

The Director of Public Prosecutions maintained that only fresh and compelling evidence can be heard on the appeal. He said that evidence which is new but not fresh, even if it is compelling, and even if it is probative of guilt or innocence, can never be received on a second appeal. His position was that the new appeal right is not an opportunity to revisit a failed appeal on the basis of additional evidence which could have been adduced at the trial. As the court pointed out, the real issue is whether evidence is ‘fresh’ or ‘not fresh’ according to the statutory definition.<sup>142</sup> Evidence which is not compelling is unlikely to have much impact.

The court took the view that the expectation appears to have been that once jurisdiction is established, the appeal is to proceed ‘in the same way’ as an appeal in an ordinary case. The court pointed to the speech of the Attorney-General in the second reading of the Statutes Amendment (Appeals) Bill:

The procedure in the Bill to determine a renewed defence appeal against conviction *will depend upon the procedure that is usually employed to determine appeals from that court*. If the Court of Criminal Appeal in an application in respect of a conviction in a higher court finds that the evidence is both ‘fresh’ and ‘compelling’, *it will possess the usual*

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<sup>141</sup> The discussion in this section is from *R v Keogh (No 2)* [2014] SASFC 136, [129]–[143].

<sup>142</sup> *Criminal Law Consolidation Act 1935* (SA) s 353A(6)(a).

*powers set out in s 353(2) of the Criminal Law Consolidation Act 1935 on a normal appeal against conviction ...*<sup>143</sup>

The court looked at the statutory power of referral to an appeal court under the petition referral procedure in Western Australia, which allowed for ‘the whole case to be heard and determined as if it were an appeal’. It noted that according to *Mallard*, the statutory requirement to hear the whole case included ‘the whole of the evidence properly admissible, whether “new”, “fresh” or previously adduced, in the case’.<sup>144</sup> It noted that the statutory reference power in the South Australian legislation also states that the Attorney-General may refer ‘the whole case’.<sup>145</sup>

The court pointed out, under the new appeal right in South Australia, there is no reference to the court hearing ‘the whole case’. It said: ‘[t]he admission of fresh evidence on an ordinary appeal against conviction does not, of itself, allow “the whole case” to be reviewed notwithstanding *Mallard*’.<sup>146</sup> However, we should bear in mind that whilst there is no explicit reference to the hearing of ‘the whole case’ on a first appeal, the High Court did say in *Weiss v R*, that ‘the appellate court [on an ordinary appeal] must itself decide whether a substantial miscarriage of justice has actually occurred’ and ‘the appellate court’s task must be undertaken on *the whole of the record of the trial* including the fact that the jury returned a guilty verdict’.<sup>147</sup> A similar position seems to have been arrived at for second or subsequent appeals.

The court in *Keogh (No 2)* pointed out that trying to distinguish between that which is fresh evidence according to the ‘strict statutory

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<sup>143</sup> *R v Keogh (No 2)* [2014] SASCFC 136, [133] citing South Australia, *Parliamentary Debates*, House of Assembly, 28 November 2012, 3952 (John Rau, Attorney-General) on the Statutes Amendment (Appeals) Bill 2013 (SA) (emphasis added in Court of Criminal Appeal judgment).

<sup>144</sup> *R v Keogh (No 2)* [2014] SASCFC 136, [135] citing *Mallard v R* (2005) 224 CLR 125, [10].

<sup>145</sup> *Criminal Law Consolidation Act 1935* (SA) s 369(a).

<sup>146</sup> *R v Keogh (No 2)* [2014] SASCFC 136, [138].

<sup>147</sup> *Weiss v R* (2005) 224 CLR 300, [39], [43] (emphasis added).

definition’ and that which is fresh ‘*or otherwise admissible new evidence*’ according to the common law approach ‘will be seen as artificial and not workable in practical terms’.<sup>148</sup>

The court said that in considering the facts as they emerged on appeal, whatever descriptive term the evidence might be given: ‘[i]t is elementary that some matters may assume an entirely different complexion in the light of other matter and facts either ignored or previously unknown’.<sup>149</sup>

The court took the pragmatic view that once some items of fresh and compelling evidence were admitted, then further ‘fresh or otherwise admissible evidence’ must also be allowed in. Once that happens, then opinions held at the time of trial ‘assume a much greater potential significance than might have thought to have been the case at trial’ because ‘the evidentiary landscape has changed significantly’; other possibilities ‘assume a greater importance’.<sup>150</sup> In *Keogh (No 2)*, four expert opinions obtained by the prosecution and the defence took the view that the forensic evidence indicated that the death was most likely the result of an accident rather than a homicidal attack.

The court said:

To ignore the full extent of these opinions would be quite artificial. In our opinion, they demonstrate that there was a substantial miscarriage of justice at trial. To ignore the full extent of these opinions would serve to perpetuate any such substantial miscarriage of justice.<sup>151</sup>

The court summed up its position by stating that an applicant must establish jurisdiction by demonstrating that there is fresh evidence according to the statutory definition. Once jurisdiction is established,

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<sup>148</sup> *R v Keogh (No 2)* [2014] SASCFC 136, [139] (emphasis added).

<sup>149</sup> *Ibid* [139].

<sup>150</sup> *Ibid* [140]–[141].

<sup>151</sup> *Ibid* [142].

then the appeal can proceed ‘as a normal appeal against conviction’ and ‘according to the procedure usually employed to determine appeals from this court’. The court said that this means that the court on a second appeal can then receive fresh evidence subject to the flexibility provided for in *Ratten*.<sup>152</sup>

This is clearly a sensible and pragmatic resolution of a potentially difficult issue. If it were otherwise, it would mean that the substantive law to be applied for second appeals is different to the substantive law on first appeals and that would clearly be problematic from both a rule of law and international human rights perspective.

## VII THE INTERPRETIVE CHOICE FOR FUTURE APPEALS

### A *The Rhetoric and Logic of Equality*

It must be acknowledged that the argument which was first taken up by the parliamentary LRC in South Australia as to the need for equality between prosecutions and appeals has been very powerful. It has been replicated in all discussions on this topic both parliamentary and public. It contains a simple proposition which people can relate to and which reinforces their sense of fair-play. It gives David a fair chance against Goliath.

The proposition is that if the state asserts the right to have a further prosecution after a verdict of acquittal, then the individual should have the right to a further appeal after a first appeal has been refused.<sup>153</sup>

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<sup>152</sup> Ibid [143] citing *Ratten v R* (1974) 131 CLR 510.

<sup>153</sup> Legislative Review Committee, Parliament of South Australia, *Report of the Legislative Review Committee on its Inquiry into the Criminal Cases Review*

It can be seen from the LRC's report that the 'fresh and compelling' test is derived from the double jeopardy provisions which allow for the retrial of a person in respect of an offence for which they had previously been acquitted.<sup>154</sup> It said that if the prosecution was to make an inroad against the principle of finality by having a second *prosecution*, then it would only be fair to allow a convicted person to make a similar inroad against the principle of finality by having a second *appeal*. The wording of the statutory provisions exactly mirror each other. The double jeopardy provision enables a further prosecution to proceed upon the basis of fresh and compelling evidence of *guilt*.<sup>155</sup> The new right of appeal allows a second appeal where there is fresh and compelling evidence of *wrongful conviction*.

This has proven to be a powerful and compelling argument. It has been primarily responsible for the unanimous support which the new right of appeal has received both in parliament and in the community. This simple idea of fairness has been essential to achieving this historic breakthrough.

### B *Jurisprudential Logic in Reconciling the Difference*

It has previously been argued that the requirement for fresh and compelling evidence, in mirroring the double jeopardy provisions has been the product of faulty reasoning.<sup>156</sup> It is argued that the analogy is inappropriate, because the two situations are not comparable. They have quite different presuppositions and contexts. The conclusive effect of a verdict of acquittal is seen as an 'ancient and universally recognized constitutional right'.<sup>157</sup>

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*Commission Bill 2010* (2012) [3.10], referring to *Criminal Law Consolidation Act 1935* (SA) pt 10.

<sup>154</sup> Ibid.

<sup>155</sup> *Criminal Law Consolidation Act 1935* (SA) pt 10.

<sup>156</sup> See Sangha and Moles, above n 1, 6.5.10 for more detailed discussion.

<sup>157</sup> James Spigelman, 'The Common Law Bill of Rights' (Speech delivered at the McPherson Lecture Series on Statutory Interpretation and Human Rights, 10 March 2008). Spigelman referred to 'a common law bill of rights ... which operates in the absence of a clear indication to the contrary in the statute' at 23;



To offset that requires something fairly drastic. Any further prosecution for the same offence requires special permission from a three-judge court.<sup>158</sup> The Director of Public Prosecutions has to convince the court not only that there is fresh evidence to warrant such further proceedings, but that the evidence is ‘compelling’ and that it is ‘in the interests of justice’ for a further prosecution to take place. It is interesting to note that despite the urgency in changing the law on this issue, ‘[t]here have been no applications to have an acquittal quashed on the basis of ... fresh and compelling evidence’.<sup>159</sup>

However, there is no entrenched principle against correcting a possible wrongful conviction. Recognising an error at trial does not challenge any ancient rights or liberties. However, it does lead us to an interesting interpretive choice bearing in mind that the same words are used in these two quite different contexts. Jurisprudentially, one might want to advocate a strict interpretation of the words in the context of reversing acquittals and ordering retrials, so as to protect the value of the acquittal as a permanent termination of the proceedings except in the most exceptional case. At the same time, one might want to advocate a generous interpretation of the same words in the context of a wrongful conviction so as to better protect the rule of law, human rights and the integrity of the legal system.

One can see that a strict interpretation of the words in the context of wrongful convictions could virtually eliminate second or further

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the presumption that Parliament did not intend ‘to permit an appeal from an acquittal’ citing *Davern v Messel* (1984) 155 CLR 21 at 30–1, 48, 63, 66; and the ‘conclusive effect of a verdict of acquittal’ as an ‘ancient and universally recognized constitutional right’ at 27.

<sup>158</sup> *Criminal Law Consolidation Act 1935* (SA) s 337(1) provides that: ‘The Full Court may, on application by the Director of Public Prosecutions, order a person who has been acquitted of a Category A offence to be retried for the offence if the Court is satisfied that — (a) there is fresh and compelling evidence against the acquitted person in relation to the offence’.

<sup>159</sup> Marilyn McMahon, ‘Retrials of persons acquitted of indictable offences in England and Australia: Exceptions to the rule against double jeopardy’ (2014) 38 *Crim LJ* 159, 177 cited in Sangha and Moles, above n 1, 11.4.

appeals. This can be seen if the fresh evidence rule and the compelling evidence rule are read as complementary exclusionary rules. Compelling evidence requires that it be in the context of an issue which was in dispute at the trial. Any issue which is strictly fresh may not therefore be something which was in dispute at the time of the trial because the statute requires that it could not with reasonable diligence have been known about then. Anything which was in dispute at the time of the trial may not give rise to something which was convincingly fresh because it could be argued that it is nothing more than a variant of something which was known about at the time of the trial.

The other concern which was raised prior to *Drummond* was the possibility that the requirement for fresh evidence will exclude appeals where it is discovered that there had been an error at trial.<sup>160</sup> It is clear that those proposing the new right of appeal considered the fresh and compelling test to be a qualitative step in relation to all appeals where error at trial had occurred. They did not think about it as a rule which excluded certain types of appeals (error at trial) from consideration. That is why the Attorney-General of South Australia said that: ‘anybody who believes they have one of these cases is able to appeal, take the matter to a court in a public forum and say whatever they want to say in public’.<sup>161</sup> Similar sentiments were expressed throughout the debates in both of the parliaments of South Australia and Tasmania.

The thought was commonly expressed that it would be quite wrong for a person who is genuinely innocent of a crime but who has been wrongly convicted, not to be able to take their case to the courts to be heard. This is why the broader interpretation of the appeal right as set out by Peek and Blue JJ in *Drummond* ought to be followed in subsequent decisions. They have given us the tools to interpret the legislation sensibly in a manner which respects the rule of law and

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<sup>160</sup> See Sangha and Moles, above n 1, 6.5.8, 6.5.9 for further discussion of this issue.

<sup>161</sup> Rau, above n 38 (emphasis added).

the fundamental values which the law is intended to serve.<sup>162</sup> That development may come to be seen to be as important as the introduction of a CCRC.

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<sup>162</sup> See Sangha and Moles, above n 1, ch 2.