SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCR 2019 0232

JASON JOSEPH ROBERTS — Appellant

v

THE QUEEN — Respondent

JUDGES:	T FORREST and OSBORN JJA and TAYLOR AJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	23 June 2020
DATE OF JUDGMENT:	10 November 2020
MEDIUM NEUTRAL CITATION:	[2020] VSCA 277
JUDGMENT APPEALED FROM:	*DPP v Debs and Roberts* [2003] VSC 30

CRIMINAL LAW – Second or subsequent appeal against conviction – New statutory provision – Murder of police officers – Whether one or two offenders – Circumstantial case at trial – Dying declarations – Fresh evidence establishing non-disclosure of material evidence at trial bearing on reliability of dying declarations – Police misconduct and manipulation of evidence – Back-dating of police statement – Revision, non-retention and/or destruction of original police statements – Subsequent evidence from examinations before Independent Broad-based Anti-corruption Commission – Crown's duty of disclosure – Whether substantial miscarriage of justice as a result of non-disclosure – Potential breadth of concept of substantial miscarriage of justice – Whether limited to cases where fresh evidence establishes significant possibility that the jury, acting reasonably, would have acquitted the appellant had the fresh evidence been before it at trial – Whether fresh evidence establishes accused did not receive a fair trial due to a material error or irregularity in prescribed processes for trial – Whether conviction inevitable – Court satisfied there has been a substantial miscarriage of justice – Non-disclosure constituted a serious departure from the prescribed processes for trial – Alternatively, Court cannot be satisfied irregularity did not make a difference to the outcome of the trial – Conviction not inevitable – Appeal allowed – Convictions quashed – Retrial ordered – *Criminal Procedure Act 2009*, ss 326A, 326D – *Van Beelen v The Queen* (2017) 262 CLR 565, *Baini v The Queen* (2012) 246 CLR 469, *Wilde v The Queen* (1988) 164 CLR 365, *Lee v The Queen* (2014) 253 CLR 455, *Saricayir v The Queen* [2018] VSCA 319 considered.

APPEARANCES:	Counsel	Solicitors
For the Appellant:	Mr P J Matthews Mr P J Smallwood Ms K Ballard Ms A J Beech	Stary Norton Halphen
For the Respondent:	Mr B Ihle SC Ms S G Wallace	Ms A Hogan, Solicitor for Public Prosecutions

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Introduction

1 In the early hours of the morning of 16 August 1998, two officers of Victoria Police, Sergeant Gary Silk and Senior Constable Rodney Miller, were shot dead in the course of performing their duties in Cochranes Road, Moorabbin.

2 In 2002, Bandali Debs and Jason Roberts ('the appellant') were convicted of the murders of the two police officers at the conclusion of a four and a half month trial.

3 Upon his conviction, the appellant was sentenced by the trial judge, Cummins J, to life imprisonment with a non-parole period of 35 years.[1]

4 An appeal by both the convicted men was dismissed by the Court of Appeal on 6 April 2005.[2] In turn, special leave to appeal was refused by the High Court on 18 November 2005.[3]

5 Both the trial and the appeal were conducted on the basis of a joint defence on the part of the two alleged offenders (albeit with some different emphases). The central issue at the trial was whether the Crown could prove the identity of the offenders.[4]

6 Between August 2016 and November 2019, the appellant lodged three petitions for mercy with the Attorney-General, seeking to have his case referred to the Court of Appeal. The petitions included sworn statements in which the appellant both confessed to a series of circumstantial matters raised against him at

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1 *DPP v Debs and Roberts* [2003] VSC 30 ('Sentencing Reasons').

2 *R v Debs and Roberts* [2005] VSCA 66 ('Appeal Reasons').

3 *Debs v The Queen; Roberts v The Queen* [2005] HCA Trans 971.

4 The case put forward on behalf of the appellant at trial is summarised by Vincent JA in Appeal Reasons [179]–[197].

trial and deposed to evidence that Debs alone was the offender. The appellant's statements were supported by alibi evidence and expert reports which took issue with aspects of the Crown case at trial.

7 By letter dated 6 August 2018, the Attorney-General referred a point arising out of the second petition (noting that the second petition relied in part upon the first) to three judges of the Trial Division of the Supreme Court pursuant to s 327(1)(b) of the *Criminal Procedure Act 2009* ('*Criminal Procedure Act*'). The point referred was whether the new evidence as to the whereabouts of the appellant on the night of the murders was credible.

8 The Director of Public Prosecutions ('the Director') accepted the role of contradictor with respect to the referral to the Court, but a hearing of the matter did not proceed because the appellant sought to obtain further evidence and, in particular, evidence from the Independent Broad-based Anti-corruption Commission ('IBAC') arising out of ongoing investigations into the manner in which police statements were obtained and altered as part of the investigation of the murders.[5]

9 On 4 November 2019, the appellant lodged a third petition based upon material obtained from IBAC and further expert reports which had been obtained with respect to aspects of the Crown case. The IBAC material comprised transcripts and exhibits derived from a series of both private and public examinations of relevant witnesses.

10 The matters raised by reference to the IBAC material were said to cast doubt on the reliability of aspects of the police evidence at trial.

11 In November 2019, the Victorian Parliament passed the *Justice Legislation Amendment (Criminal Appeals) Act 2019*. That Act permitted a second or subsequent appeal against a conviction for an indictable offence subject to a strictly conditioned

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5 The IBAC investigations were prompted by a review of the case by Detective Senior Sergeant Ron Iddles and the production by a whistle-blower of an original police statement which was not included in the prosecution brief at trial.

requirement for the grant of leave to appeal. The appellant then lodged an application for leave to appeal which (as the Director accepts) effectively overtook the petition for mercy process which he had previously instituted.

12 On 25 March 2020, this Court granted leave to appeal against the convictions on the following grounds:

> There is fresh and compelling evidence that:
>
> 1.1: the original police investigation and the trial and appeals that followed were compromised by:
>
> 1.1.1: serious police misconduct, and/or
>
> 1.1.2: non-compliance with the duty of disclosure; and/or
>
> 1.2: witnesses who were important to the prosecution case at trial lacked credibility and/or were unreliable.

13 We summarised our reasons for doing so as follows:

> The grant of leave under the new appeal provisions is subject to strict preconditions intended to preclude unmeritorious repeat appeals. The Court of Appeal must be satisfied that there is fresh and compelling evidence that should, in the interests of justice, be considered on appeal.
>
> For the reasons we set out below, we have come to the conclusion in the present case that there is fresh and compelling evidence that should be considered on appeal in the interests of justice.
>
> A central issue at the applicant's trial was whether the prosecution could prove that there was more than one offender involved in the killings. In turn, a pivotal part of the Crown case on this issue was evidence of what Senior Constable Miller said to police officers whilst in a fatally wounded condition.
>
> As a result of evidence given by way of private and public examinations to the Independent Broad-based Anti-corruption Commission ('IBAC'), the applicant can now adduce evidence that an officer or officers of Victoria Police fabricated evidence relating to statements made by Senior Constable Miller.
>
> In particular, a written statement made by Senior Constable Pullin which was in fact made 10 months after the murders, was expressed to be, and subsequently adopted at the committal as, a statement made only some four hours after the events in issue.
>
> The trial proceeded on the basis that the statement recorded the substantially contemporaneous recollection of the witness.[6] The statement included

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[6] 4:25 am on Sunday, 16 August 1998.

material matters which were not included in an initial statement which was in fact made four hours after the relevant events.

The second statement was put forward in the prosecution brief without disclosure of its falsity as to the stated date of its making and without disclosure of the existence or contents of the original statement. Senior Constable Pullin also gave false evidence at the committal as to the date of the making of the second statement.

There is no dispute that the IBAC evidence with respect to these matters is fresh and, in our view, it is compelling. It is highly probative in the context of the issues at the trial in that:

(a) it raises a serious question as to the fairness of the trial; and

(b) it raises a serious issue as to the reliability of evidence of what Senior Constable Miller actually said by way of dying declarations.

In turn, we are satisfied that it is in the interests of justice that the applicant be granted leave to appeal.

The applicant also seeks to rely on evidence obtained as a result of examinations before IBAC to demonstrate that there was a multifaceted manipulation of the evidence bearing on the issue of Senior Constable Miller's dying declarations. It is submitted on behalf of the applicant that:

- evidence by a series of police officers as to the circumstances in which they made statements demonstrates that their evidence was manipulated;

- original documents relating to the preparation of evidence as to what Senior Constable Miller said are now unavailable and a number have been destroyed;

- the senior officer who oversaw the gathering of the evidence relating to this issue has been discredited and his account of the process of gathering evidence should be rejected as unsatisfactory.

Ultimately, the applicant's case in this regard crystallized in 12 allegations of misconduct which it was said gave rise to matters which could have been of real forensic utility to the defence.

Some aspects of the evidence relied on in respect of these allegations reinforce our conclusion relating to the fresh evidence concerning the statement of Senior Constable Pullin.

More particularly, there was evidence that officers were dissuaded from including evidence as to Senior Constable Miller's dying declarations in statements made on the morning of the murders; original statements were subsequently revised; records of that process were destroyed; and none of these matters were substantially disclosed at trial.[7]

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[7] *Roberts v The Queen* [2020] VSCA 58, [5]–[17] (citation in original) ('Leave Reasons').

14 Upon the hearing of the appeal, this Court's function is governed by s 326D of the *Criminal Procedure Act* which provides:

> **326D Determination of second or subsequent appeal against conviction**
>
> (1) On an appeal under section 326A, the Court of Appeal must allow the appeal against conviction if it is satisfied that there has been a substantial miscarriage of justice.
>
> (2) In any other case, the Court of Appeal must dismiss an appeal under section 326A.

15 In addressing this test, the parties have joined issue on five critical questions:

(1) What must the appellant establish to demonstrate a substantial miscarriage of justice?

(2) What is the significance of the fresh evidence upon which the appellant relies?

(3) Did a serious departure from the prescribed processes occur at the appellant's trial?[8]

(4) Alternatively, is the case one in which the Court of Appeal 'cannot be satisfied that the error or irregularity did not make a difference to the outcome of that trial'?[9]

(5) What is the appropriate disposition of the appeal?

16 Both on the leave application and upon the appeal, transcripts of both private and public examinations before IBAC were received as evidence by the Court without objection from the respondent.

17 It is not disputed that this fresh evidence establishes non-disclosure at the appellant's trial of matters which should have been disclosed to him.

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8 *Baini v The Queen* (2012) 246 CLR 469, 479 [26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) ('*Baini*').

9 Ibid.

18 In summary:

(a) The appellant contends that a substantial miscarriage of justice may be demonstrated by fresh evidence demonstrating procedural irregularity or by fresh evidence bearing on the question of substantive guilt. In turn, a procedural irregularity may constitute a substantial miscarriage of justice either if it constitutes a serious departure from the prescribed processes for trial or if the Court of Appeal cannot be satisfied that the irregularity did not make a difference to the outcome of the trial. The respondent contends that the sole test of substantial miscarriage of justice is whether there is a significant possibility that the jury acting reasonably would have acquitted the appellant had the fresh evidence been before it at trial.

(b) The appellant contends that the fresh evidence demonstrates the fairness of his trial was vitiated by non-disclosure of relevant evidence by the Crown and that the matters which were not disclosed cast substantial doubt upon the reliability of evidence which was significant to the Crown case. The respondent contends that, although non-disclosure occurred, it did not materially affect the weight of the evidence against the appellant.

(c) The appellant contends that the irregularity constituted by non-disclosure was so serious that without more it justifies the conclusion that a substantial miscarriage of justice has occurred. The respondent contends that the non-disclosure did not give rise to a fundamental miscarriage of the trial and did not result in a substantial miscarriage of justice.

(d) The appellant contends in the alternative, that having regard to the non-disclosure, this Court cannot be satisfied that the irregularity which occurred did not make a difference to the outcome of the appellant's trial. The respondent contends that conviction was inevitable.

(e) The appellant contends that his convictions should be quashed and that he should be acquitted. The respondent contends that the appellant's

convictions should not be set aside.

19 For the reasons set out below, we have come to the following conclusions:

(a) The circumstances in which a substantial miscarriage of justice may be demonstrated include (but are not limited to) both those where fresh evidence establishes that an accused did not receive a fair trial due to a material error or irregularity in the prescribed processes for trial, and those where fresh evidence establishes that there is a significant possibility that the jury, acting reasonably, would have acquitted the appellant had the fresh evidence been before it at trial.

(b) The fresh evidence in the present case demonstrates facts bearing on the reliability of evidence adduced by the Crown at trial going to a central issue in the case, namely whether the Crown could demonstrate beyond reasonable doubt that there was more than one offender.

(c) Irregularity in the appellant's trial, resulting from the non-disclosure of material evidence to the defence, gave rise to a serious departure from proper process affecting the fundamental fairness of the trial.

(d) Alternatively, this Court cannot be satisfied that the non-disclosure of material evidence did not make a difference to the outcome of the trial.

(e) The appellant's convictions should be quashed and an order made for a new trial.

20 In order to explain these conclusions we will address the following questions:

(1) What must the appellant establish by way of fresh evidence to demonstrate a substantial miscarriage of justice?

(2) What is the factual context in which the significance of the fresh evidence must be assessed?

(3) What was the duty of disclosure upon the Crown at trial?

(4) What is the nature of the non-disclosure established by the fresh evidence?

(5) Was conviction inevitable in any event?

(6) Was the non-disclosure a serious departure from the prescribed processes for trial resulting in a substantial miscarriage of justice?

(7) Alternatively, has an irregularity occurred which the Court of Appeal cannot be satisfied did not make a difference to the outcome of the trial resulting in a substantial miscarriage of justice?

(8) What is the appropriate disposition of the appeal?

(1) What must the appellant establish by way of fresh evidence to demonstrate a substantial miscarriage of justice?

21 Before allowing an appeal pursuant to s 326D, the Court of Appeal must be satisfied that there has been a substantial miscarriage of justice. That phrase falls to be understood having regard to its plain meaning, purpose and context.[10]

22 In *Baini v The Queen*,[11] the High Court considered the proper construction of s 276 of the *Criminal Procedure Act* which governs the determination of a first appeal against a conviction for an indictable offence in Victoria and provides:

> **276 Determination of appeal against conviction**
>
> (1) On an appeal under section 274, 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

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10 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46–6 [47]; [2009] HCA 41 (Hayne, Heydon, Crennan and Kiefel JJ). See also *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ); *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523, 539–40 [47] (French CJ, Crennan, Kiefel, Gageler and Keane JJ).

11 (2012) 246 CLR 469.

(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.

(2) In any other case, the Court of Appeal must dismiss an appeal under section 274.

23 The majority of the High Court[12] made some preliminary observations which are of guidance by analogy in the present case. First, this Court's essential task is construction of the statute:

> Whether there has been a 'substantial miscarriage of justice' within the meaning of s 276(1)(b) requires consideration of the text of the statute. As the Court said in *Fleming v The Queen*,[13] '[t]he fundamental point is that close attention must be paid to the language' of the relevant provision because '[t]here is no substitute for giving attention to the precise terms' in which that provision is expressed. Paraphrases of the statutory language, whether found in parliamentary or other extrinsic materials or in cases decided under the Act or under different legislation, are apt to mislead if attention strays from the statutory text.[14] These paraphrases do not, and cannot, stand in the place of the words used in the statute.[15]

24 Secondly, the use of the phrase 'substantial miscarriage of justice' in different contexts in earlier legislation does not govern its meaning in s 276.[16]

25 Thirdly, the concept of 'substantial miscarriage of justice' as adopted in ss 276(1)(b) and (c) is a protean one:

> Section 276 must be read recognising that miscarriages of justice may occur in many circumstances and may take many forms. As s 276(1)(b) contemplates, it will be possible sometimes to describe the cause of complaint as 'an error or an irregularity in, or in relation to, the trial'. That is a description which is apt

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12 French CJ, Hayne, Crennan, Kiefel and Bell JJ.

13 (1998) 197 CLR 250, 256 [12].

14 See generally *Catlow v Accident Compensation Commission* (1989) 167 CLR 543, 550 (Brennan and Gaudron JJ); *Bushell v Repatriation Commission* (1992) 175 CLR 408, 425 (Brennan J); 437 (Toohey J); *Marshall v Director-General, Department of Transport* (2001) 205 CLR 603, 632–3 [62] (McHugh J); *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259, 270 [31] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 265 [33]–[34] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Brennan v Comcare* (1994) 50 FCR 555, 572–3 (Gummow J); *Ogden Industries Pty Ltd v Lucas* (1968) 118 CLR 32, 39; [1970] AC 113, 127.

15 *Baini* (2012) 246 CLR 469, 476 [14] (citations in original).

16 Ibid 478 [21].

> to encompass any departure from trial according to law. But as s 276(1)(c) shows by its reference to '*any* other reason' (emphasis added), the description contemplated in para (b) is not exhaustive. When read together, paras (b) and (c) encompass any and every form of substantial miscarriage of justice. Yet the ultimate question will remain the same: has there been 'a substantial miscarriage of justice'?
>
> No single universally applicable description can be given for what is a 'substantial miscarriage of justice' for the purposes of s 276(1)(b) and (c).[17] The possible kinds of miscarriage of justice with which s 276(1) deals are too numerous and too different to permit prescription of a singular test. The kinds of miscarriage include, but are *not* limited to, three kinds of case. First, there is the case to which s 276(1)(a) is directed: where the jury have arrived at a result that cannot be supported. Secondly, there is the case where there has been an error or an irregularity in, or in relation to, the trial and the Court of Appeal cannot be satisfied that the error or irregularity did not make a difference to the outcome of the trial. Thirdly, there is the case where there has been a serious departure from the prescribed processes for trial.[18] This is not an exhaustive list. Whether there has been a 'substantial miscarriage of justice' ultimately requires a judgment to be made.[19]

26 As the majority explained, the alternatives elaborated in s 276(1) make clear that '"substantial miscarriage of justice" encompasses not only cases identified by inaccuracy of result but also cases identified by departure from process even if it can be shown that the verdict was open or it is not possible to conclude whether the verdict was open'.[20]

27 In the present case, the Director submits that the exclusive test of substantial miscarriage of justice upon a second or subsequent appeal is that formulated by the High Court in *Mickelberg v The Queen*[21] and applied by the High Court in *Van Beelen v The Queen*,[22] namely 'whether the court considers that there is a significant possibility that the jury, acting reasonably, would have acquitted the appellant had the fresh evidence been before it at the trial.'[23]

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17 Compare *Weiss v The Queen* (2005) 224 CLR 300, 317 [44] in relation to the proviso to the common form criminal appeal provision.

18 See, eg, *AK v Western Australia* (2008) 232 CLR 438, 456 [55]–[56]; *Handlen v The Queen* (2011) 245 CLR 282.

19 *Baini* (2012) 246 CLR 469, 479 [25]–[26] (emphasis in original) (citations in original).

20 Ibid 479–80 [27].

21 (1989) 167 CLR 259 ('*Mickelberg*').

22 (2017) 262 CLR 565 ('*Van Beelen*').

23 Ibid 575 [22] (Bell, Gageler, Keane, Nettle and Edelman JJ).

28 In consequence, it is submitted that even evidence of serious irregularity at trial will not of itself justify a conclusion of substantial miscarriage of justice. The Court must always form a judgment as to the effect of the fresh evidence upon the ultimate weight of the evidence going to the substantive question of the accused's guilt.

29 *Van Beelen* concerned the application of s 353A of the *Criminal Law Consolidation Act 1935* (SA). As we noted in the Leave Reasons in this matter, the provisions of the equivalent South Australian legislation are substantially analogous to those which we are required to consider in the present appeal.[24] The relevant power of the Court was expressed as follows:

> The Full Court may allow an appeal under this section if it thinks that there was a substantial miscarriage of justice.[25]

30 We entirely accept that for the purpose of establishing a substantial miscarriage of justice, the High Court's decision in *Van Beelen* states the test governing fresh evidence adduced on a second appeal following conviction in the first instance at a *fair* trial. In this regard, the High Court stated:[26]

> … Kourakis CJ was not persuaded that a properly directed jury would necessarily have convicted the appellant at a trial at which Dr Manock's dogmatic opinion as to the time of death was not in evidence.[27]
>
> As the respondent submits, the latter conclusion is suggestive of the application of a less stringent test than applies to the determination of an appeal on fresh evidence under the common form criminal appeal provision.[28] Nonetheless, his Honour's ultimate conclusion[29] was stated conformably with the test that commanded the support of the majority in *Mickelberg v The Queen*:[30] whether the court considers that there is a significant possibility that the jury, acting reasonably, would have acquitted the appellant had the fresh evidence been before it at the trial.

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24 Leave Reasons [36]–[37].

25 *Criminal Law Consolidation Act 1935* (SA) s 353A(3).

26 *Van Beelen* (2017) 262 CLR 565, 575 [21]–[23] (Bell, Gageler, Keane, Nettle and Edelman JJ) (emphasis added) (citations in original).

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

28 *Mickelberg* (1989) 167 CLR 259, 273 (Mason CJ); 288–9 (Deane J); 301 (Toohey and Gaudron JJ).

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

30 (1989) 167 CLR 259.

> It is not in issue that the Full Court was right to hold that the question of whether there has been a substantial miscarriage of justice for the purposes of s 353A(3) is answered by applying the *Mickelberg* test.[31] *As the majority observed, the presupposition for a second or subsequent appeal is that the accused has had a fair trial according to law on the available evidence*. There is no reason why an appeal under s 353A should be determined by applying a less rigorous test than applies to an appeal against conviction on fresh evidence under s 353 of the [*Criminal Law Consolidation Act*].[32]

31 *Van Beelen* was itself a case in which the fresh evidence raised a question concerning the reliability of expert evidence given at the trial. It did not raise any issue as to the fairness of the trial in the first instance. The issue on the appeal was whether the appellant had established on the balance of probability that in light of fresh expert evidence taken with the evidence adduced at the trial, there was a significant possibility that a jury, acting reasonably, would have acquitted.[33]

32 In our view, a substantial miscarriage of justice may also be established by demonstration of a material error or irregularity in the trial process. The decision in *Van Beelen* was not directed to this issue and there are a series of considerations which, taken together, overwhelmingly support this conclusion.

33 First, the term 'substantial miscarriage of justice' is, as a matter of ordinary language, apt to describe both procedural and substantive miscarriages of justice.

34 Secondly, the notion of miscarriage of justice has historically been understood to embrace both procedural and substantive miscarriages of justice. In *Davies v the King*,[34] the High Court addressed the concept as including:

> not only cases where there is affirmative reason to suppose that the appellant is innocent, but also cases of quite another description. For it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may

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31 *R v Van Beelen* (2016) 125 SASR 253, 273 [59] (Kourakis CJ); 297–8 [171]–[173] (Vanstone and Kelly JJ), citing (1989) 167 CLR 259, 273 (Mason CJ).

32 Ibid 298 [173].

33 *Van Beelen* (2017) 262 CLR 565, 578 [32] (Bell, Gageler, Keane, Nettle and Edelman JJ).

34 (1937) 57 CLR 170.

have been mistaken or misled.[35]

35 Thirdly, the very same piece of legislation as that which contains s 326D uses the phrase 'substantial miscarriage of justice' in s 276(1)(b) in respect of first appeals, as extending to miscarriages arising from 'an error or an irregularity in, or in relation to, the trial'.

36 Fourthly, there may be a substantial practical difficulty in forming a concluded view as to the net effect of the evidence at trial coupled with fresh evidence in terms of substantive proof of guilt if the reliability of the evidence at trial is materially undermined by evidence which establishes irregularity at or in relation to the trial. The fresh evidence may demonstrate that the evidence at trial was not properly tested and that, as a result, it is difficult to evaluate.

37 Fifthly, in some cases the fresh evidence may establish that there has in effect been no trial on the evidence by jury at all as a result, for example, of a juror being suborned, or the jury acting improperly by way of undertaking its own investigations or otherwise. Likewise, fresh evidence may potentially demonstrate that the trial has fundamentally miscarried in other ways, eg where it demonstrates that an accused was not fit to plead or fit for trial.

38 Sixthly, in the passage we have quoted from *Van Beelen*, the High Court reasoned by reference to the improbability of it being intended that a different ultimate standard should apply on a second appeal to that applicable on a first appeal. We can see no sensible reason in principle to ascribe a narrower ambit to the notion of substantial miscarriage of justice on a second or subsequent appeal from that appropriate to a first appeal.

39 If the Director is correct in her construction of s 326D then the same fresh evidence demonstrating a procedural irregularity could make out a substantial miscarriage of justice on a first appeal but fail to do so (through no fault of an appellant) upon a second or subsequent appeal. This would be an entirely

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[35] Ibid 180 (Latham CJ, Rich, Dixon, Evatt and McTiernan JJ).

anomalous outcome dependent upon the date on which the fresh evidence was discovered.

40 Seventhly, the South Australian Court of Criminal Appeal accepted in *R v Keogh (No 2)*,[36] that the majority judgment in *Baini* provides authoritative guidance as to the potential breadth of the meaning of substantial miscarriage of justice as a basis for allowing a criminal appeal under legislation analogous to that with which we are concerned. We take the same view.

41 Eighthly, when regard is had to its factual basis, the decision in *Van Beelen* does not require the notion of substantial miscarriage of justice to be read down as having a materially narrower meaning than that articulated by the majority in *Baini*.

42 Ninthly, in *Baini* the majority of the High Court accepted that the Second Reading Speech for the Bill which became the Act there in question was useful insofar as it confirmed s 276 took into account both questions of result and questions of process.[37] The same holds true here. In the Second Reading Speech introducing the provision for second and subsequent appeals, the Attorney-General, Jill Hennessy, stated:

> Even though a second or subsequent right of appeal is likely to be granted only in rare circumstances, I acknowledge that establishing a new avenue of appeal may cause distress and create further anxiety or trauma for victims in those cases. It is important that victims can have a sense of finality and certainty that a criminal case is over, and that the appeals process has come to an end. But this must be balanced against the risk that a person has been wrongfully convicted *or has not received a fair trial, which is the right of every accused person*.[38]

43 In the first instance, the appellant's case is that non-disclosure of relevant evidence deprived him of a fair trial. In our view, such a deprivation may constitute a substantial miscarriage of justice irrespective of the relative weight of the evidence as to guilt. It will do so without more if there has been a sufficiently serious

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36 (2014) 121 SASR 307, 341 [124] (Gray, Sulan and Nicholson JJ).

37 *Baini* (2012) 246 CLR 469, 482 [35].

38 Victoria, *Parliamentary Debates*, Legislative Assembly, 17 October 2019, 3689 (emphasis added).

departure from the prescribed processes for trial.[39] It will also do so if an error or irregularity occurs and the Court of Appeal cannot be satisfied that the irregularity did not make a difference to the outcome of the trial.[40]

44 Further, as the majority in *Baini* observed, a court's satisfaction that a guilty verdict was inevitable will not in every case be conclusive of the issue of whether there has been a substantial miscarriage of justice although it is a matter to be taken into account.[41]

(2) What is the factual context in which the significance of the fresh evidence must be assessed?

The basis of the Crown Case at trial

45 In order to understand the significance of the fresh evidence upon which the appellant relies, it is necessary to address the basis of the case at trial.

46 It is convenient first to summarise the sequence of events to which that evidence relates.

47 Immediately prior to the murders, Sergeant Silk and Senior Constable Miller were participating in a police operation known as Operation Hamada. This was directed to intercepting the perpetrators of a series of 10 armed robberies which had been performed by two men (who the appellant now admits were Debs and himself) ('the Hamada robberies').

48 Operation Hamada required a number of police to attend and observe potential target premises which were believed to have characteristics generally similar to those which had been the subject of the previous armed robberies. These characteristics included the fact that the premises were generally relatively isolated, located in the eastern and south-eastern suburbs of Melbourne, holding ready cash,

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39 *Baini* (2012) 246 CLR 469, 479 [26].

40 Ibid.

41 Ibid 480 [30].

and vulnerable to robbery at about the time of closure of business.

49 After first attending other premises, Sergeant Silk and Senior Constable Miller were directed to attend the Silky Emperor Restaurant in Cochranes Road, Moorabbin. Having arrived at the premises they placed the rear carpark under surveillance and observed a car enter the carpark and then exit into Warrigal Road before turning left into Cochranes Road a short distance away.

50 The police officers did not make radio contact with their base identifying the car as potentially containing the armed robbers. At trial, the appellant contended that this tended to support the inference that the car was observed to have only one passenger rather than to fit the profile of joint offending comprised in the Hamada robberies.

51 Sergeant Silk and Senior Constable Miller followed the car they had observed exit the restaurant carpark and intercepted it, requiring it to pull over to the side of Cochranes Road. They parked their own car a short distance behind the intercepted car. They then got out of the police car.

52 A short time later they were directly observed by the occupants of another police car, Senior Constables Bendeich and Sherren, who had been maintaining surveillance of the front of the Silky Emperor Restaurant from the opposite side of Warrigal Road. They followed the car occupied by Sergeant Silk and Senior Constable Miller into Cochranes Road, and passed by it at a slow speed, in order to provide potential support.[42] According to Sherren, he saw Sergeant Silk and Senior Constable Miller outside their vehicle. Sergeant Silk was near the driver's side door of the intercepted car talking to a standing male person whom, he assumed, was the driver, and Senior Constable Miller was positioned between the two cars, on the right side of the rear of the front car. Bendeich gave a similar description of the scene. The intercepted driver was wearing a flannel shirt and was described by

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[42] Sherren described the speed as 'walking pace', while Bendeich described it as between 30 and 40 kilometres per hour.

Bendeich as tall with shoulder-length black straight-ish hair.

53 The intercepted car was a small hatchback. Neither Bendeich nor Sherren saw a second occupant, a fact relied upon heavily by the defence at trial and by the appellant on this appeal as supporting the real possibility that there was only one offender.

54 After they drove past the stationary vehicles, Bendeich and Sherren drove on, executed a right turn, and took up a position on the opposite side of the road about 100 metres further on in a side street, facing into Cochranes Road.

55 Sherren then saw someone, whom he believed to be Sergeant Silk, move across the front of the intercepted vehicle. Very soon afterwards, he and Bendeich heard a volley of gunshots coming from the vicinity of the stationary vehicles.

56 Sherren immediately called for assistance on the police radio and he and Bendeich moved from their car in order to obtain ballistic vests from the boot. They then heard another volley of shots and determined that they should observe what was occurring. They saw the intercepted vehicle move along Cochranes Road at a normal speed. It passed them and continued on. They followed it in their own car but lost sight of it as it passed over the crest of a hill.

57 They then returned to the area where the other police car was parked. They found Sergeant Silk lying on the grass verge a short distance away and concluded that he was dead. There were indications that he may have been taking notes when he was shot. His pen was later found near his right foot and his notebook was missing. Sergeant Silk's police revolver was in its holder and the covering flap of the holder was buttoned down. He had been shot in the chest, pelvis and head.

58 A number of civilian witnesses gave evidence in relation to the intercepted vehicle that was pulled over by Sergeant Silk and Senior Constable Miller.

59 Stephen Price was returning from a concert in his Saab, with two passengers, Kimberley Connell and her husband Steven Sculli. Price gave evidence that he was

forced to slow to a speed of approximately 10–15 miles per hour when passing Sergeant Silk and Senior Constable Miller's police car and the intercepted vehicle, in order to negotiate the narrow passageway between their cars and the median strip. Price said that he was concentrating on the road and that his peripheral vision was limited due to an eye injury. Price gave evidence that as they were passing the intercepted vehicle, which he observed to have both front doors open, Connell yelled 'Oh no, he's got a gun' and something like 'Quick, get out of here', immediately following which he accelerated to approximately 60–70 kilometres an hour. Price did not see any person in either of the stationary cars.

60 Kimberley Connell, who sat in the front passenger seat of Price's car, gave evidence that she saw one male, standing stationary on the concrete adjacent to the police car, and that she thought the driver's door of the intercepted vehicle was open. Connell gave evidence that the male was holding a gun with two hands with arms outstretched, he was of skinny or medium build, and he was wearing a light shirt. Connell did not see any other person. Steven Sculli, sitting in the back passenger seat of the Saab, gave evidence that he did not see any person at all but saw that the driver's side door of the intercepted vehicle was open.

61 Julie Dietrich, a passenger in her husband William Dietrich's car, gave evidence that, in what must have been only a short time after the shooting, she saw a dark blue Hyundai sedan in Cochranes Road 'going fast'. She saw only a driver in the car and was unable to describe that person. William Dietrich did not see anything of the occupant or occupants in the car.

62 The Crown case (based on subsequent reconstruction from the circumstantial evidence) was that Sergeant Silk was shot by the appellant with a .38 handgun and that Senior Constable Miller, who had taken up a position behind the intercepted vehicle, then drew his police revolver and fired in the direction of the appellant.

63 Debs then fired at Senior Constable Miller through the rear hatch of the intercepted vehicle with a .357 Magnum handgun. One shot mortally wounded

Senior Constable Miller as he crouched forward behind the intercepted vehicle.

64 Senior Constable Miller also fired shots in the direction of Debs (being on the Crown case a different direction from the shots initially fired towards the appellant). Senior Constable Miller then managed to struggle away from the scene to seek help.

65 Debs went up to Sergeant Silk and shot him in the pelvis and then in the head, killing him instantly.

66 The offenders then fled the scene.

67 Shortly afterwards, Senior Constable Miller was found by other police officers in a fatally wounded condition in Cochranes Road near Warrigal Road. In a series of statements Senior Constable Miller described the offender(s)' car, described one offender in detail and referred to the presence of two offenders.

68 At the time of the killings, Debs was aged 45 and the appellant, 17. Subsequent investigations ultimately revealed that the car intercepted at the time of the murders was owned by Nicole Debs, the daughter of Debs and the then girlfriend of the appellant.

69 The way the Crown case was put at trial was summarised by Vincent JA at [155]–[178] of the Appeal Reasons. The prosecutor framed the Crown case by reference to five major areas of evidence addressing the jury within this framework both in his opening and closing addresses:

(a) the circumstantial evidence at the scene;

(b) the identification of Nicole Debs' Hyundai as the car used by the offenders;

(c) listening device and telephone intercept material;

(d) evidence as to the Hamada robberies; and

(e) records of interview and lies told by the accused.

70 The circumstantial evidence at the scene comprised two distinct components, namely physical circumstantial evidence and evidence of dying declarations made by Senior Constable Miller after he was discovered nearby in a fatally wounded condition. For ease of comprehension, we shall address in sequence the evidence relating to the Hamada robberies; the evidence relating to the offender(s)' car; the evidence relating to the use of two handguns; the dying declaration evidence; the evidence derived from covert recordings; and the evidence as to statements to police and lies told by the appellant.

(i) Evidence as to the Hamada robberies

71 A great part of the trial was concerned with the giving of evidence relating to the Hamada robberies and the calling of evidence demonstrating that the car used by the offender or offenders[43] was the Hyundai owned by Nicole Debs.

72 Both of these matters are now the subject of admissions made by the appellant in sworn statements lodged in support of his petitions for mercy.

73 There was some dispute before us as to whether the respondent could rely on this fresh evidence. In our view, it is open to the respondent to do so.

74 In *Van Beelen*, the High Court observed of the consideration of the interests of justice requirement which conditions the grant of leave to appeal in cases such as the present (the South Australian equivalent of the first element of s 326C(1) of the *Criminal Procedure Act*) as follows:

> Jurisdiction under s 353A(1) is further conditioned on the Full Court's satisfaction that it is in the interests of justice to consider the fresh and compelling evidence on appeal. Commonly, where fresh evidence is compelling, the interests of justice will favour considering it on appeal. Nonetheless, as the respondent submits, it is possible to envisage circumstances, such as where an applicant has made a public confession of guilt, where the interests of justice may not favour that course. Contrary to the analysis of the majority,[44] the circumstance that a conviction is long-standing does not provide a reason why, in the interests of justice, fresh and

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43 Hereafter 'offender(s)'.

44 *R v Van Beelen* (2016) 125 SASR 253, 295–6 [165].

compelling evidence should not be considered on a second or subsequent appeal.[45]

75 It would be an illogical outcome if fresh confessional material bearing on the interests of justice could be considered at the leave stage of a second or subsequent appeal but not upon the consideration of the ultimate question of substantial miscarriage of justice. It is not suggested that the admissions in issue are untrue, and to ignore them would result in an entirely artificial evaluation of the evidence admissible against the appellant as it now stands.

76 In our view, the respondent is entitled to rely on fresh evidence which has come to light since the appellant's trial and first appeal. Such evidence may be relied on to rebut or realistically assess inferences which might otherwise be drawn from the fresh evidence relied upon by the appellant in the same way as it could upon a first appeal. In *Ratten v The Queen*,[46] Barwick CJ observed that, upon the receipt of fresh evidence (on a first appeal), the appellate court 'will be entitled to receive evidence which tends to support, contradict or weaken the new evidence or the inferences which might be drawn therefrom'.[47] The same principle should apply in the present context.

77 This said, the same sworn statements relied upon by the respondent raise a case not only that a single offender acted alone (as was contended by the appellant at trial) but specifically that that offender was Debs. This contention is self-serving and the statements have not been tested in cross-examination but the Crown case must now be assessed by reference to it. The respondent cannot rely on the mixed statements made by the appellant without bringing this contention squarely before the Court.[48] Once again, to ignore the full content of the mixed statements would obscure the real issues in the case as they now appear.

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45 *Van Beelen* (2017) 262 CLR 565, 578 [30] (citation in original).

46 (1974) 131 CLR 510.

47 Ibid 518.

48 *Nguyen v The Queen* (2020) 94 ALJR 686, 695–6 [37]–[41] (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ).

78 The evidence as to the Hamada robberies demonstrates that the robberies were perpetrated by two men acting together as a team in confronting those they robbed. On each occasion one was armed with a handgun and on the majority of occasions both were observed to be so armed.[49] As we observed on the leave application,[50] the history of the Hamada robberies provided a circumstantial context for the assessment of the evidence as a whole going to the appellant's guilt, by demonstrating a consistent modus operandi involving two offenders; by explaining the presence of the police officers at the scene of their deaths; and as providing a possible motive for the killings.

79 Before this Court, the respondent contended:

> The importance of Hamada was central, it alone provided the compelling basis, irrespective of any dying declaration evidence, for concluding that there were two offenders.

80 This is not the way the Crown case was put at trial or on the first appeal. On the first appeal, Vincent JA (with whom Warren CJ agreed) analysed the Hamada evidence as follows:

> As earlier mentioned, Sergeant Silk and Senior Constable Miller were on duty in the vicinity of the Silky Emperor restaurant as part of an operation, designated Hamada, that had been mounted in an endeavour to apprehend two persons who, it was believed, were responsible for a spate of armed robberies that had been committed in the south eastern region of Melbourne in the preceding five months. In consequence, when attention came to be focused on the two applicants, the possibility of linking them with those robberies and thereby supporting the evidence connecting them with the deaths of the two police members was pursued. It would seem to be beyond dispute that the investigators reasoned that if the applicants had committed these offences, they could be seen to possess a powerful motive to avoid capture and additional support would be provided for the evidence identifying them as the perpetrators of the two shootings.
>
> It is important to bear in mind that, whilst the Hamada robberies provided the background and reason for the police activities on the night of the shootings, including the presence of Silk and Miller behind the Silky Emperor, the finding that the applicants had committed them could not of itself lead to the conclusion that they were responsible for the deaths of the

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49 A distinction was also drawn by some witnesses between the size of the firearm carried by the older offender (Debs) and the smaller calibre firearm carried by the younger offender (Roberts).

50 Leave Reasons [23].

two police members or were even in the vicinity at the time. Whilst the presence of the Debs car would have given circumstantial support for that inference, again it would not have provided an adequate foundation for a finding of guilt to be made against either man. As the summary set out earlier indicates, the case against each centrally rested upon the evidence of the forensic investigations and his own highly incriminating statements and conduct. This was made clear to the jury from the outset by the prosecutor who said in his opening:

> It is important for you to remember important to appreciate that you are not obliged to use any of the Hamada evidence in considering your verdicts on the murder charges. The Crown says that there is ample evidence even without the armed robbery evidence upon which you would be entitled to convict both the accused and you can do that as I said without even looking at the armed robbery evidence. Nevertheless it is led, it's there to assist you and is available for your use in some of the manners in which I have indicated to you.

I will address the uses to which the prosecution contended that the evidence could be put when later considering some of the appeal grounds. He repeated this general statement of the significance of the Hamada evidence at the commencement of his closing address:

> The manner in which you approach your task, including the order in which you consider the issues and the evidence, and the manner in which you use that evidence, is a matter entirely up to you. Indeed, this case can be resolved by you without having regard to all of the evidence which the prosecution has led in proof of the Crown case. For example, I said at the outset of the case that you can reach a state of satisfaction beyond reasonable doubt about the guilt of the accused without having regard at all to the armed robbery evidence. That remains true at the end of the case as well.
>
> Similarly, it would be conceptually possible for you to reach verdicts without having regard to the scientific evidence which we contend establishes beyond doubt that the Debs' Hyundai OJI-862 was the car that was used by the murderers of Sergeant Silk and Senior Constable Miller. You could reach your verdict by that route if you were satisfied that the admissions made by each of the accused on the listening devices were unequivocal admissions by them to their participation in the murders of the two police officers.

There can be little room for doubting that the position was appreciated by the counsel appearing for the respective applicants and the trial judge who directed the jury that a finding that the applicant, whose case they were considering was one of the perpetrators of some or all of the earlier robberies, could only provide circumstantial support for the inference that the particular person was a party to what occurred in Cochranes Road. It is sufficient, for present purposes, to state, however, that a considerable amount of evidence was adduced by the prosecutor and, in my view, grossly disproportionate attention was directed to the establishment of the guilt of each of the applicants of the Hamada robberies.[51]

81 Nonetheless, we accept that the consistent history of the manner in which the Hamada robberies were committed by Debs and the appellant raises a strong

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[51] Appeal Reasons [131]–[133].

probability that (absent other evidence) if the Hyundai car was present at the Silky Emperor for the purposes of robbery, then both men were present.

82 In turn, the Crown points to the appellant's admission that Debs had identified the Silky Emperor as a potential target. In his statement of 26 March 2013, the appellant stated:

> On 15th August Nicole and I went out to dinner to the 'Bear House' on the Frankston Cranbourne road. I cannot tell you the time but it would not have been late, as we did not eat late, it could have been around 6 O'clock. Went home to Nicole's house. Ben[52] wanted to go out, and I told him I had a couple of beers with dinner, and I wanted to stay home and arrange my 18th birthday which was the following week. I was looking to get a Limousine. Ben said he knew of a job that he could do on his own as he done the tiling there, and there would only be a couple of people there. Ben told me that he had done jobs on his own before and got heaps, he was trying to entice me to come out. I told him no, and he said then I would not get any of the proceeds.[53]

83 The appellant now contends that Debs went out alone after the appellant had refused to go with him, either intending to rob the restaurant alone or for the purpose of night reconnaissance.

84 Before leaving the topic of the Hamada evidence, it should be noted that an incidental consequence of this aspect of the Crown case was that the jury were required to consider and evaluate the cumulative weight of direct evidence concerning 10 armed robberies.

(ii) The evidence relating to the offender(s)' car

85 The car used by the offender(s) was a small dark blue Hyundai hatchback owned by Nicole Debs. It was described in general terms by Bendeich and Sherren and with some precision by Senior Constable Miller as he lay fatally wounded at the scene.

86 After initial error in the forensic scientific investigation, it was ultimately

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52 The nickname by which Debs was known to the appellant.

53 Debs had previously carried out tiling work at the Silky Emperor.

established that shattered glass left at the scene came from the Hyundai.

87 The identity of the vehicle was not admitted by the appellant at trial and was directly challenged on behalf of Debs by way of an allegation of fabrication of evidence. For reasons to which we shall return, it is necessary to give some idea of the complexity of the evidence relating to this issue with which the jury was confronted. Vincent JA summarised the evidence in the Appeal Reasons as follows:

> Scientific analysis established that:
>
> (1) The glass at the crime scene was consistent with having been deposited by Hyundai OJI 862, belonging to Nicole Debs;
>
> (2) Some of that glass showed indications of having come from the vehicle when a gun was discharged from within it;
>
> (3) Gunshot propellant particles, found on the clothing of Miller, and a small lead fragment, found embedded on the right side of his jacket, suggested that the projectile which had been fired at Miller, was a Winchester 0.357 magnum calibre.
>
> With regard to the question of the identity of the car used by the killers of Silk and Miller, scientific testing of the glass found at the crime scene, together with observations made by Bendeich and Sherren, justified the conclusion that:
>
> (1) The vehicle used by the perpetrators, was a three or five-door Hyundai Excel X3 model;
>
> (2) It was dark in colour;
>
> (3) It was fitted with silver mag-type wheels.
>
> In addition to those particular features, it was highly probable that the glass in the rear windscreen of that vehicle was manufactured in February 1997, that the vehicle itself was built in March or early April 1997, and that it had a low-profile spoiler on the rear.
>
> Based on this evidence, a comparison could be made between Nicole Debs' car and that present in Cochranes Road. Nicole Debs' vehicle was a three-door Hyundai Excel X3 model built in March 1997. It was fitted with rear spoiler, silver Race Alloy wheels and was Potomac Blue in colour.
>
> The body of scientific evidence adduced by the prosecution established further that:
>
> (1) The Debs car had bullet damage to the rear hatch and attempts had been made to seal or repair that bullet damage.
>
> (2) Gunshot residue, in the form of propellant and primer residues, were found in the Debs Hyundai and matched the gunshot residue found

on Miller's clothing.

(3) Gunshot residue was found on Debs rear hatch which was consistent with having come from a Winchester .357 magnum bullet and was the same as that found on Miller's clothing.

(4) Fragments of a bullet or bullets were found in the Debs' car, and glass adhering to some of it matched the glass found in Cochranes Road and on Miller. The bullet fragments found on the glass were deposited as a result of a bullet impact.

The prosecution advanced the possibility of two breakages in the back window. One when the bullet was fired through the windscreen by one of the accused at Miller. That bullet passed very close to him showering him with glass and then Miller fired back at the car, hitting the car in the rear hatch area, causing that damage to the car and blowing out bits of glass.

The evidence led inevitably to the conclusion that the bullet which penetrated Miller's jacket was fired from inside the Debs' car, passing through the rear windscreen, and that Miller had himself fired a bullet at the car which hit it, dislodged glass from the rear frame and damaged the rear hatch area.

Accordingly, based on this evidence, it was open to conclude, beyond reasonable doubt, that Nicole Debs' Hyundai OJI862 was the vehicle involved in the shootings of the two policemen.[54]

88 In summary, the Hyundai suffered damage to the rear window and rear hatch in the course of the exchange of gunfire at the time of the killings and received gunshot residue. These matters not only formed evidence linking Debs and the appellant to the scene but formed part of the further forensic evidence as to what occurred at the scene.

(iii) The circumstantial evidence at the scene as to the use of two handguns

89 The Crown adduced evidence as to the cause of death of each victim and further ballistic evidence as to the cartridges left at the scene and bullet damage caused both to surrounding structures and to the Hyundai. The evidence demonstrated that two handguns were used in the killings. The bullet damage suggested that Senior Constable Miller had also fired shots in two different directions. In consequence, the Crown invited the inference that he fired at two different targets. In addition, on the view of the evidence propounded by the Crown

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[54] Appeal Reasons [161]–[167].

relating to the damage to the Hyundai, at least one shot was fired by an offender from within the car used by the offenders and other shots fired close in time to that shot were themselves fired from outside the car. Each of these matters was relied on as supporting a conclusion that there were two offenders. Conversely, the defence contended that the ballistic evidence was explicable by reference to a scenario involving one offender.[55]

90 In our view, the most powerful aspect of this portion of the evidence is simply that two handguns were used. It adds to the evidence that the majority of the Hamada robberies were committed by two individuals, each separately armed with a handgun.

91 It follows that the combination of the Hamada, the Hyundai and the ballistics forensic examination evidence taken together supports the probability that there were two offenders, despite the fact that only one was directly observed. Nonetheless, it cannot be said that this combination of evidence entirely excludes the possibility of one offender in circumstances where only one was observed at the scene by direct witnesses.

(iv) The dying declaration evidence

92 An evaluation of the significance of the dying declaration evidence is critical to this appeal.

93 Once Bendeich and Sherren raised the alarm by radio, a number of police officers from different units attended the scene in a short time.

94 Senior Constable Miller was found by Senior Constable Clarke in a seriously wounded condition some distance from the point where the shootings occurred. Other police also came to his assistance and ultimately some 10 officers were in Senior Constable Miller's vicinity at various points in time during which he made

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[55] A further scenario was advanced on behalf of the appellant in the petition for mercy material lodged on his behalf.

statements. A number of police attending the scene immediately after the shootings heard Senior Constable Miller say words which indicated that there were two offenders. Some police who were present alongside Senior Constable Miller did not hear him say words referring to two offenders and at least one of them heard him refer to a single offender. Nonetheless, on the Crown case, there was essential consistency in the thrust of the evidence of five separate police officers.

- Senior Constable Clarke was told by Senior Constable Miller that there were two offenders: 'He said two, he repeated the word "two" and then said, "one on foot"'.

- Senior Constable Clarke and Senior Constable Pullin gave evidence that Pullin asked Senior Constable Miller 'Were they in a car or on foot?' and he responded 'They were on foot'.

- Senior Constable Poke gave evidence: 'The first thing I heard him say to me was "get them, I'm fucked". He kept saying "get them, I'm fucked". He then blurted out "two, one on foot. Six foot. Dark hair. Check shirt. Dark Hyundai".' She made notes of these statements on the night in her diary.

- Senior Constable Gardner heard Senior Constable Miller say 'two, one on foot' and made a note of this in his notebook on the night.

- Senior Constable Thwaites heard Senior Constable Miller say 'get them cunts'.

95 The evidence of the individual police witnesses was complemented by evidence recorded on the police Intergraph of transmissions from the scene. The transcript of the Intergraph transmissions included the following:

> (Time check: 00.32.30)
>
> …
>
> CHELTENHAM 206[56] Cheltenham 206, urgent.

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56 'Cheltenham 206' was Senior Constable Clarke.

INTERGRAPH	Cheltenham 206, go ahead.
CHELTENHAM 206	Cheltenham 206, we've found the second member. He's been shot in the stomach, he's about 100 metres south of Cochranes Road on Warragul Road.
INTERGRAPH	Cochranes, Cochranes on Warragul. And he's conscious at the moment and breathing?
CHELTENHAM 206	Conscious and breathing. He's been shot twice, once in the chest, once in the stomach. He said there's two offenders, there's two on foot. There's two on foot, at this stage no idea of direction of travel from here.
INTERGRAPH	Roger Cheltenham 206. Two offenders on foot, direction of travel not known. Have we got any descriptions at all?
CHELTENHAM 206	206, at this stage negative. And the job is not that old, he said it's only a couple of minutes. It happened before the other unit started whipping past.[57]

…

[Canine units were deployed to find 'a dog scent'.]

…

(Time check: 00.34.40)

…

CAULFIELD 252[58]	Caulfield 252, it's a new, possibly a 323. Similar to a Laser, hatchback, dark blue. It's got mags, crisscross pattern. One male has been sighted, he's possibly 6, 6 foot, black hair which is fairly long. Received?

…

(Time check: 00.36.20)

…

FRANKSTON 401[59]	It is possibly a dark coloured Hyundai. Repeat, a dark coloured Hyundai.

96 The respondent now submits that compared to the Intergraph recording the

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57 This statement differs from Clarke's evidence that Senior Constable Miller said 'one on foot' but tends to confirm Clarke's understanding at the time that Senior Constable Miller said there were two offenders.

58 'Caulfield 252' was Sergeant Chris Murray and another.

59 'Frankston 401' was Detective Senior Constable Alistair Hanson.

viva voce evidence as to dying declarations has less weight and impact.

97 We shall return to this issue below but we note that this is not the way the case was put to the jury. In final address, the prosecutor emphasised the cumulative evidence of a series of witnesses.

> Beyond that process of what we say logical reasons from the Hamada robberies which we will have to look at with you later, we say that there is other evidence in the case itself quite independent of Hamada which points to there being two killers at this scene on that night.
>
> What's the starting point? The dying declaration of Mr Miller. I don't want to go into this in detail, but you know that Mr Miller was mortally wounded lying on the footpath outside Silky Emperor. He is dying and he knows is he dying [sic]. He is a police officer. He wants to convey as much information as he possibly can in as short a time as he has to live, information that might assist his colleagues in finding the person who killed him and killed his partner. He tells Mr Clarke, I think the first person on the scene, if not the person, certainly one of the first people on the scene, 'two, one on foot'. 'Two, one on foot.' That was immediately relayed to Intergraph. Mr Gardner you might recall him, very tall thin officer, jammed his hand I think before coming into the witness box and spent most of the time bleeding in the box, was sitting by Senior Constable Miller as he lay on the footpath outside the Silky Emperor and was writing notes at the time. He wrote in his diary which is an exhibit in this case and was put up on the screen. He wrote 'two, one on foot'. Gardner was a very deliberate and precise witness. That phrase 'two, one on foot', was heard by very many police who attended Rod Miller that night. He went on to give other descriptions he felt could be of assistance, or may be of assistance to those who were going to hunt down the perpetrators of this terrible crime. Described one of the offenders being six foot, dark hair with a check shirt. He described the car as a dark Hyundai, and later said to another officer 'probably dark blue'. All the officers who attended Rod Miller and have given evidence in this court have said that he was lucid, he was responsive, he was giving coherent answers to questions put to him. There has been no challenge to this evidence.
>
> Doctor Shelley Robertson gave evidence that the bullet caused no nerve or neurological damage to Mr Miller. Certainly no damage that would have necessarily resulted in an immediate collapse. She suggested that the absence of any neurological damage strongly suggested that Mr Miller's cognitive functions were not impaired by his injuries. Thus you can accept, we say, that Miller's observations were accurate and they were reliable. More than that, it is supported by other evidence in the case. What did Senior Constable Miller mean when he said to these officers 'two, one on foot'? The answer that he gave, that answer which he gave was to the question 'how many were there'. 'How many were there?' 'Two, one on foot.' 'Two' we suggest to you was a clear reference to the two offenders. The two people who have been involved in the shooting. The 'one on foot' is a reference to the one shooter, the one offender who Miller saw out of the car and on foot and standing at the time of the shooting. That is a reference to Roberts. The 'one on foot' is reference to Roberts who was standing over on the grassy edge of the road with Gary Silk.

> Debs at the time the shooting commenced was inside the Hyundai firing out through the back window. At that time Debs was not on foot, he is, in fact, inside the car. Roberts was on foot being out of the car, and, of course, if he ran away after firing at Sergeant Silk, as we suggest probably happened, then it would have reinforced in Mr Miller's mind what he was dealing with, 'one on foot' who fired out the car and had run away, and the 'two' is a reference to Debs being inside the Hyundai firing out through the back window.
>
> *When you come to consider the dying declaration, as we call it in the law, of Rod Miller you will, of course, also remember that he told Pullen [sic], as he was gasping for breath, 'they were on foot', 'they' it is a plural, 'they were on foot', and finally he told Helen Poke 'get them, fucked'. She gave that evidence and was not cross-examined about that. 'Get them', and also 'they were on foot'. So there is a consistency running right throughout the evidence, right throughout the dying declaration evidence of Mr Miller that he had seen two people, one of them on foot being out of the car, one inside the car firing out through the back window, and 'on foot' perhaps being a further reference to having someone on foot having run away from the scene.*[60]

(v) Evidence as to covert recordings (listening devices and telephone intercepts)

98 Because of initial error in the investigation of the identity of the Hyundai, there was an extended period during which Debs and the appellant were not charged with murder but were under surveillance by Victoria Police.

99 During this period, in excess of 2,500 covert recordings were made of conversations involving Debs and the appellant, or one or other of them with other persons.

100 In determining the first appeal, Vincent JA set out in some detail 22 passages of transcript taken over 14 dates on which recordings were made. Nine of these passages record conversations when the appellant was present.

101 The evidence of covert recordings was relied upon at trial to demonstrate a series of matters including:

(a) a continuing close relationship between Debs and the appellant (buttressing the Hamada evidence);

(b) statements by Debs constituting direct admissions of presence at the murders;

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60 Emphasis added.

(c) statements by both Debs and the appellant demonstrating extreme hostility towards the police;

(d) discussions involving both Debs and the appellant concerning concealment of the damage caused to the Hyundai;

(e) discussions of the circumstances of the murders by both Debs and the appellant from which it might be inferred that they had direct knowledge of the murders; and

(f) statements by both Debs and the appellant indicating a very close interest in the progress of the investigation of the murders by police.

102 The respondent submits that the listening devices material includes admissions by the appellant comprising statements demonstrating an intimate knowledge of the events associated with the murders, his complicity in concealing them and his deep antipathy and callousness towards police. It is also submitted that they undermine his more recent suggestion that he was in a subordinate role to Debs. Attention is drawn in the respondent's written case to the following statements in particular:

(a)	B6	Appellant:	'The amount of units I saw'.
(b)	B27	Debs:	'Remember this set of lights?'
		Appellant:	'Oh fuck, yeah'
		Debs:	'Where they flew past wasn't it.'
(c)	B103	Appellant:	'Yeah, and I've seen two of their ways that they… think it happened and it's fuckin' backwards.'
(d)	B135	Appellant:	'Do you think he (referring to Debs) might have pulled one little murder attempt on it own?'
			(laughter)'
(e)	B151	Appellant:	'I didn't know that. I had so much fun. Fuckin hell.'
		…	

Appellant: 'You tell ...(inaudible)... but there's no problem about being, me being in the car. You know I don't give a fuck Ben.' [61]

103 Four observations may be made about this evidence. First, as counsel for the respondent accepted in the course of argument, none of the passages highlighted contained direct admissions by the appellant of the kind made by Debs in the course of conversations with his father, Malik. The following conversations took place at Debs's home in Narre Warren on 15 February 2000 and exemplify these admissions:

Bandali 'Straight away, soon as we drove in the car park they came behind, I told him.'

Malik 'Anywhere …(inaudible)…'

Bandali 'What happened they was watchin inside and I just drove in and then drove out and they come straight behind.'

Malik 'Right. …(inaudible)… '

Bandali 'What?'

Malik '…(inaudible)… '

Bandali 'Who?'

Malik 'Them.'

Bandali 'No, no those were the ones that were sittin' there, when we drove in just to quickly look, they seen us so they drove behind us, and drove down the street to stop us, they stopped us. Then it's not good.'

Malik 'It's not good.'

Bandali 'Yeah.'

Malik 'Before then, when everything finished.'

Bandali 'I mean everything was finished, nobody was anywhere, nobody seen anything.'

Malik 'But when you went, did you see anyone.'

Bandali 'No, nobody seen nothing, nobody was anywhere.'

Malik 'Other people see …(inaudible)… '

Bandali 'There was factory, there was nobody.'

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[61] B6, B27, B135, B151 do not appear in the Appeal Reasons.

Malik 'Are you sure, sometimes people do something …(inaudible)…'

Bandali 'No, but look …'

Malik 'They come, check out …(inaudible)… '

Bandali 'A few shots, it's no worries, a little thing.'

Malik 'That's when they search, hear something …(inaudible)…'

Bandali 'As soon as that happened we went. But then they came, after everything happened they come in one minute.'

Malik 'One minute ah.'

Bandali 'That means they had other cars, somewhere, listen one car we were goin' up another road, one car was goin' so fast, if it made one mistake, two die in the car, it was flying.'

Malik '…(inaudible)… '

Bandali 'That's the one that came straight away. No, no, no, but there was another car, already straight away there.'

Malik 'Ah.'

Bandali 'Oh yeah. Cause we heard it on this, we heard it on that, they said oh one is gone we can't find the other one. After we left they come in 30 or 40 seconds. 30 or 40 seconds they were there, that means they had a few cars in the area.'

Malik 'Oh, yeh …(inaudible)…'

Bandali 'You see, Malik, is anyone left, see nobody knows what happened, and they don't know what happened exactly. I talk, I talk, anybody can say anything.'

Malik 'Yeah?'

Bandali 'They can think, they want to know what happened so they can train the police and they train them, this happened …(inaudible)… they show 'em what can happen, when they can't show exactly, they don't know what to do. You understand?'

104 And further, on the same day:

Bandali: 'Yeah, he, it was all mixed up how we done it, it doesn't matter how much, they won't go over it, they don't know what happened.'

Malik: '…(inaudible)…'

Bandali: 'Yeah, that's what they want to work out, they don't know.'

Malik: '…(inaudible)… beside the car.'

Bandali: 'Oh no, he wasn't beside the car, he was right away from the car. He was from here, do you know the door, you know the back door there. From here to the back door away.'

Malik: '…(inaudible)…'

Bandali: 'He wasn't near the factory..'

Malik '…(inaudible)…'

Bandali: 'He called him away to talk to him.'

Malik: '…(inaudible)… shoot him.'

Bandali: 'He went …(inaudible)…'

Malik: '…(inaudible)…'

Bandali: 'But there's all the holes in the door of the factory, because the bullet goes through him and through the factory.'

Malik: '…(inaudible)… one shot, fired only one shot …(inaudible)…'

Bandali: 'And then he emptied his gun, six times, then, that's why they can't find the rest of them, when he's fired the rest of them up there, they'd have found one there on the top of the building, from there.'

Malik: 'On top of the building.'

Bandali: 'Yeah. You know where the roller door is, …(inaudible)…'

Malik: '…(inaudible)… first one, not good, that means, they think one was on the roof.'

Bandali: 'Yeah, (laughs)'

Malik: '…(inaudible)…'

Bandali: 'That's all mixed up. I'll tell you, when it went through him, it went through the fuckin' door, as well. You understand.'

105 At trial, the jury were strongly directed that this evidence (and other conversations to which the appellant was not a party which were overwhelmingly probative of Debs's guilt) were not admissible against the appellant. On the leave application and on this appeal, the respondent did not retreat from this position.

106 Secondly, in addition to the passages highlighted by the respondent above, the covert recording evidence as a whole undoubtedly demonstrated that the

appellant actively cooperated in concealing the use of the Hyundai in the murders. The recordings also demonstrated extreme hostility on the part of the appellant towards police.

107 Thirdly, there is some longstanding controversy as to the accuracy of transcripts and content of covert recordings relied upon at the trial.[62] That is of limited relevance for present purposes, but we note that the third recording now highlighted by the respondent (B103) was not put forward on appeal as commencing with the statement by Debs in the presence of the appellant, 'No one was there but us', as it appears in the original transcript. Other purported transcripts of recordings, which were relied upon by the prosecution at trial and are the subject of substantial controversy, were also not pursued by the respondent for the purposes of the appeal.[63]

108 Fourthly, we accept that the recordings relied upon as a whole are capable of sustaining the inference that the appellant had direct knowledge of the murders as part of the circumstantial case as a whole. Nonetheless, they do not lead inexorably to this conclusion.

109 In part, the passages highlighted by the respondent and referred to above might be understood to refer to the events associated with the Hamada robberies in which the appellant now admits he was involved, rather than the murders.

110 Other recordings of discussions in which the appellant participated concerning police investigations are susceptible of different interpretation reflecting either that the appellant knew that the murders were in fact committed by Debs alone, or alternatively, that he was jointly responsible for them.

111 The recording B103 relates to a conversation involving Debs, the appellant,

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62 The accuracy of the transcripts was challenged in part by expert evidence at the trial and by further expert evidence lodged in support of the appellant's petitions for mercy. The challenge formed part of the appellant's application for leave to appeal but was not ultimately pursued as a ground of appeal.

63 Including the statement 'I kill Ds' attributed to the appellant at trial and discussed by Vincent JA in the Appeal Reasons at [294].

Nicole Debs and Joanne Debs (another daughter of Debs) on 31 May 2000 and exemplifies these issues. It is on one view the most incriminating of those now highlighted. It took place against the background of the release to the public by the police of a statement that the police had received a telephone call from a witness to the murders. It included the following:

Bandali	'Oh, what did sh, ya know what did, did actually say, they, they reckon it could be somebody who seen whatever happened.'
Joanne:	'Yeah, as well like they.'
Bandali	'As well.'
Joanne:	'Or a relation or someone had seen it. ...(inaudible)...'
Bandali	'Yeah, but seen what happened. Now.'
Joanne:	'But an eye witness wouldn't actually know the identification of each person though.'
Jason:	'They'd have a number plate before they could see people in the dark.'
Joanne:	'Yeah, well that's it.'
Bandali	'So I'm fucked.'
Nicole:	'It's all, they're just contradicting themselves.'
Jason:	'…(inaudible)… and no-one was there though.'
Bandali	'Huh.'
Jason:	'No one was there.'
Bandali	'I'm not interested.'
Nicole:	'It's all just contradictions.'
	…
Jason:	'…Let me finish the sentence off, it's not being unco, I know the person, I'm not after the reward of anything, but I know it's ...(inaudible)... um, it's relations. Oh right. Um, bye. What about if it was this person, oh, I'll give you a ring back. If someone's gonna ring up they wouldn't ask 'em to ring back. Saying stuff like that, they'd finish the whole fuckin, whatever happened you know, to the cops. The cops are playin' with the public or someone from the public's playin' with the fuckin' cops. One of the two.'

Nicole:	'Yeah, it's either one of the two.'
	…
Jason:	'They want money.'
Bandali	'No, no, no, no what they're doin' is they're ringin' up or something like, every time, see when the cops say we need information for, this and that, cunts, cunts just ring up, oh, but, but one, one, one minute. This is what makes me laugh, they detail to the CP's that, how it happened and nobody can know that.'
Joanne:	'No. The person that rang up.'
Bandali	'Yeah.'
Joanne:	'Said that, said how it happened right, and it was consistent with the way the police thought it happened.'
Bandali	'So that means, somebody can.'
Joanne:	'Ya know what I mean.'
Bandali	'No. So.'
Joanne:	'No, the police have an idea, they think they know how it happened, of course.'
Jason:	'Yeah, and I've seen two of their ways that they…'
Joanne:	'And.'
Jason:	'…think it happened, and it's fuckin' backwards.'

112 It is open to infer from this conversation and, in particular, the statements that 'no-one was there' and its conclusion, that the appellant had direct knowledge of the circumstances in which the murders occurred because he was there and participated in them. The alternative hypothesis is that the appellant derived knowledge from Debs as to what occurred in the course of their close relationship by reason of conversations with Debs and observation of the damage to the Hyundai. On this view, the essential thing the appellant knew was that Debs alone was present at the murders and it was this that the police had wrong.

113 The passages relied on by the respondent fall to be assessed in part by reference to a context which demonstrates that both Debs and the appellant evinced a close ongoing concern as to the progress of the police investigation into the murders. The Crown was entitled to rely in part on acquiescence by the appellant in

statements made by Debs in this context.[64] Discussions in this regard extended to a series of conversations between Debs and the appellant concerning the possibility of killing another police officer in order to distract investigating police from the task of investigating the murders of Sergeant Silk and Senior Constable Miller.

114 It is undoubtedly correct, as Vincent JA observed on the first appeal, that:

> The inference that each of the applicants was implicated in the deaths of the two deceased can be seen to be strengthened by their respective responses to the investigation as they followed it in the newspapers.[65]

115 For completeness, we should add that on this appeal the respondent drew attention to a further listening device recording made on 7 July 2000 when Debs and the appellant were travelling in a car and observed a car accident which police officers were attending. This recording was the subject of a finding by Cummins J in his Sentencing Reasons in the course of his consideration of the question of remorse. His Honour was satisfied that the appellant 'paralleled [his] shooting of Sergeant Silk with extraordinary callousness'.[66]

> Ben: 'Oh, an accident. Look. Ya know ya just stop with boom, boom.'
>
> Jason: 'Yeah say, Excuse me. Yeah, mate I. Bang! Bang! Suck on that cunts!' (laughs)'
>
> Ben: 'I tell ya what it'd be on for young and old wouldn't it? They'll be goin' ballistic if it happens again. They'll go fuckin' ba- I wonder if they go through checkin' all the people who, from last time? .. fuck it they're still there. What, Subaru's are up and down here?'
>
> Jason: 'Yeah WRX's I seen one. Little cunt.'
>
> Ben: 'A grey one?'
>
> Jason: 'Yeah, I'll shoot the fuck out of him.'

116 We accept that this passage epitomises the callousness of the appellant in the course of reactive conversations with Debs and that this callousness and hostility to police was a relevant element of the Crown case.

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64 See Appeal Reasons [314] (Vincent JA).

65 Ibid [125].

66 Sentencing Reasons [14].

117 The trial judge's observations concerning this recording were, however, made in the context of the evidence at trial and the jury's verdict. The recording now falls to be assessed as part of the circumstantial case as a whole in the light of the fresh evidence.

118 Ultimately, the weight to be given to each of the covertly recorded conversations fell to be assessed in the context of the circumstantial evidence as a whole. Whilst statements by Debs amounted to direct confessions of involvement in the murders, the case against the appellant arising from the covert recordings was essentially inferential.

(vi) Statements to police and lies told by the appellant

119 The evidence demonstrates not only that the appellant made a series of false denials to police but that he actively cooperated in seeking to conceal the identity of Nicole Debs's Hyundai as the car used at the time of the murders.

120 Each of these matters was capable of being regarded by the jury as incriminating and their significance is underlined by the appellant's subsequent admissions.

121 The appellant's explanation for his false denials is now (but was not at trial) that he was seeking to assist Debs and that he did so in the context of a close and subordinate relationship with Debs at the time.

The Crown case as a whole

122 The Crown case fell to be assessed in accordance with the underlying principle stated by the High Court in *Chamberlain v The Queen (No 2)*:

> It follows from what we have said that the jury should decide whether they accept the evidence of a particular fact, not by considering the evidence directly relating to that fact in isolation, but in the light of the whole evidence, and that they can draw an inference of guilt from a combination of facts, none

of which viewed alone would support that inference.[67]

123 In turn, as explained by Dawson J in *Shepherd v The Queen*:

> Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately.[68]

(3) What was the duty of disclosure upon the Crown at trial?

124 As the respondent concedes, the fresh evidence on which the appellant relies demonstrates that a breach of the Crown's duty of disclosure occurred at the appellant's trial.

125 The evidence in issue bears on the reliability of the evidence given by Pullin and other officers at trial concerning Senior Constable Miller's dying declarations. The respondent does not dispute the fact of non-disclosure of relevant evidence but contends that the non-disclosure does not justify setting aside the appellant's convictions.

126 Before turning to the substance of the non-disclosure in greater detail and its consequences, it is necessary to reiterate the underlying importance of the duty of disclosure.[69]

127 In summary:

- The duty of disclosure ordinarily requires the Crown to disclose to an accused all material relevant to his or her defence.
- In the present case, the obligation arose first by reason of the statutory requirements which were at the relevant time imposed with respect to pre-trial disclosure contained in the *Magistrates' Court Act 1989*.[70]

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67 *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521, 536 (Gibbs CJ, Mason J).

68 *Shepherd v The Queen* (1990) 170 CLR 573, 580 (Dawson J with whom Mason CJ, Toohey and Gaudron JJ agreed).

69 See Leave Reasons [55]–[64].

70 Ibid [58].

- The statutory obligation reflected and gave effect to the common law rule endorsed by the plurality of the High Court in *Mallard v The Queen*[71] confirming that the decision in *Grey v The Queen*[72] stood as authority for the proposition that the prosecution must at common law disclose all relevant evidence to an accused and that a failure to do so may in some circumstances require the quashing of a verdict of guilty.

- The rationale for the duty of disclosure derives from the need to give an accused a fair trial in circumstances where the resources of the State and an accused are disproportionate and the State is charged both with the investigation of the offence and the prosecution of the trial for that offence.

- The duty is owed to the Court, not the accused.[73] It is an aspect of the prosecutor's function to assist in the attainment of justice between the Crown and the accused.[74]

- The duty is ongoing.[75]

- As such, the duty is an aspect of the fundamental right to a fair trial.[76] In *R v H*,[77] Lord Bingham of Cornhill characterised full disclosure as a golden rule:

> Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden

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71 (2005) 224 CLR 125, 133 [17] (Gummow, Hayne, Callinan and Heydon JJ) ('*Mallard*').

72 (2001) 75 ALJR 1708.

73 *Cannon v Tahche* (2002) 5 VR 317, 340–1 [58].

74 *Nguyen v The Queen* (2020) 94 ALJR 686, 695 [37] (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ) approving Dawson J in *Whitehorn v The Queen* (1983) 152 CLR 657, 675.

75 It subsists even after the appellate process has been exhausted. See *R v Ward* [1993] 1 WLR 619.

76 This right is now further buttressed by s 24(1) of the *Charter of Human Rights and Responsibilities Act 2006*.

77 [2004] 2 AC 134.

rule is that full disclosure of such material should be made.[78]

- Information material to the defence that was in the possession of investigating police at the time of trial should be regarded as in the possession of the Crown.[79]

- The duty of disclosure is subject to limitations not presently relevant.[80]

128 Three further matters deserve emphasis. First, the cases make clear that the common law duty of disclosure extends to matters affecting the assessment of the credibility and reliability of Crown witnesses. In *R v Brown (Winston)*,[81] Lord Hope of Craighead (with whom the other members of the House of Lords agreed) stated:

> But the common law rules are concerned essentially with the disclosure of material which has been gathered by the police and the prosecution in the course of the investigation process for use in the case to be made for the Crown. In the course of that process issues of fact will have been identified which may assist or undermine the Crown case. The prosecution is not obliged to lead evidence which may undermine the Crown case, *but fairness requires that material in its possession which may undermine the Crown case is disclosed to the defence*. The investigation process will also require an inquiry into material which may affect the credibility of potential Crown witnesses. Here again, the prosecution is not obliged to lead the evidence of witnesses who are likely in its opinion to be regarded by the judge or jury as incredible or unreliable. *Yet fairness requires that material in its possession which may cast doubt on the credibility or reliability of those witnesses whom it chooses to lead must be disclosed. The question whether one or more of the Crown witnesses is credible or reliable is frequently one of the most important 'issues' in the case, although the material which bears upon it may be, as Steyn LJ observed, [in the Court of Appeal in the present case], collateral*.[82]

129 Secondly, the observation that the question whether one or more of the Crown witnesses is credible or reliable is frequently one of the most important issues in a case, is borne out in a series of decisions summarised in *Eastman v Director of Public*

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78 Ibid 147 [14].

79 *R v Lucas* [1973] VR 693; *R v Blackledge (No 2)* [1996] 1 Cr App R 326; *R v Thomas (No 4)* (2008) 19 VR 214; *AJ v The Queen* (2011) 32 VR 614; *Eastman v DPP (No 13)* [2016] ACTCA 65; *R v Forrest* (2016) 125 SASR 319.

80 *R v Farquharson* (2009) 26 VR 410. The obligations are subject to the limitations set out at 464–5 [214].

81 [1998] AC 367.

82 Ibid 377 (emphasis added). See also *Mallard* (2005) 224 CLR 125, 153 [74] (Kirby J).

Prosecutions (No 13).[83] As the Australian Capital Territory Supreme Court there observed:[84]

> Various cases make clear that the Crown has a duty to disclose material bearing simply on the credit of a prosecution witness,[85] so that convictions have been quashed in circumstances where material significantly bearing on the credit of prosecution witnesses has come to light post-conviction.[86]

130 In this Court, the recent case of *Cvetanovski v The Queen*[87] further exemplifies such cases.

131 In *Mallard*, Kirby J, after canvassing authority across a series of jurisdictions, expressed the following view:

> The foregoing review of the approach of courts, in national and international jurisdiction, indicates the growth of the insistence of the law, particularly in countries observing the accusatorial form of criminal trial, of the requirement that the prosecution may not suppress evidence in its possession, or available to it, material to the contested issues in the trial. It must ordinarily provide such evidence to the defence. *Especially is this so where the material evidence may cast a significant light on the credibility or reliability of material prosecution witnesses* or the acceptability and truthfulness of exculpatory evidence by or for the accused.[88]

132 Thirdly, the fact that the foundation of the duty of disclosure is the notion of a fair trial necessarily means that, conversely, the failure to make proper disclosure may give rise to serious unfairness and substantial injustice as the result of the manner in which a trial is conducted. This does not of course mean that every non-disclosure of relevant evidence results in a substantial miscarriage of justice, but we repeat the observation made by Glidewell LJ in *R v Ward*[89] to which we referred in

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83 [2016] ACTCA 65 (Osborn, Whelan and Priest AJJ).

84 Ibid [336] (citations in original).

85 For example, *R v K* (1991) 161 LSJS 135; *R v Paraskeva* (1982) 76 Cr App Rep 162; *R v Garofalo* [1999] 2 VR 625 (prior convictions); *Grey v The Queen* (2001) 184 ALR 593 ('letter of comfort'); *R v Farquharson* (2009) 26 VR 410 (pending charges).

86 *R v CPK* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Clarke and Hulme JJ, 21 June 1995); *R v Lewis-Hamilton* [1998] 1 VR 630; *D v Western Australia* (2007) 179 A Crim R 377; *Greensill v The Queen* (2012) 37 VR 257.

87 (2020) VSCA 272 (Maxwell P, Beach and Weinberg JJA).

88 (2005) 224 CLR 125, 155 [81] (emphasis added) (citation omitted).

89 [1993] 1 WLR 619.

our Leave Reasons:

> Non-disclosure is a potent source of injustice and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defence.[90]

133 The difficulty referred to may be particularly acute when the non-disclosure goes to the credibility or reliability of evidence given at trial in ways which were not tested or advanced at trial. Further, where such a difficulty exists it may be a significant matter to deprive an accused of the right to make forensic choices and conduct his or her defence by reference to material which was not disclosed.

134 In the present case, the respondent conceded on the leave application that the non-disclosure to which we shall now come deprived the appellant of a legitimate forensic choice as to the approach which would be taken with respect to the evidence concerning Senior Constable Miller's dying declarations.[91]

(4) What is the nature of the non-disclosure established by the fresh evidence?

135 In the Leave Reasons we set out the context in which the evidence of Pullin and other Crown witnesses concerning Senior Constable Miller's dying declarations might be regarded as significant to the Crown case.[92]

136 In summary:

- In his response to the prosecutor's opening, senior counsel for the appellant identified as a threshold issue the question whether the jury could be satisfied that there were two offenders.

- In his final address, the prosecutor submitted to the jury that in addition to the conclusions that could be drawn from the Hamada evidence, the starting point for the resolution of this

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90 Ibid 642.

91 Leave Reasons [79].

92 Ibid [65]–[73].

question was evidence of what Senior Constable Miller said when found in a fatally wounded condition by other police officers.

- The prosecutor's emphasis reflected the emphasis of the evidence of Superintendent Sheridan, the officer who directed the investigation into the murders by what was called the Lorimer Taskforce. In the course of cross-examination, Sheridan gave the following evidence:

  Question — I take it that you have got a way of dismissing one person with two guns?

  Answer — In relation to this case, yes.

  Question — You had better tell us how you do that?

  Answer — The account, for a start, of Senior Constable Miller describes two offenders at the outset.[93]

- In turn, senior counsel for the appellant addressed aspects of the dying declaration evidence casting doubt on its overall probative effect.[94]

- The trial judge summarised the relevant evidence in some detail for the jury, reminding them of it as a necessary part of their considerations.

137 We remain of the view expressed in the Leave Reasons that the evidence as to Senior Constable Miller's dying declarations was not only proffered by the Crown as significant to the jury but may well have been accepted by them as such:

> The evidence as to Senior Constable Miller's dying declarations was on its face appealing in its simplicity and emotional force. The Hamada robberies evidence required the jury to assess weeks of detailed evidence about 10 armed robberies. The listening device evidence required the jury to assess many hours of covertly recorded material of variable quality and contentious content. The evidence relating to the offender(s)' car and as to ballistic matters was in part quite technical. By comparison, the force of the evidence of what Senior Constable Miller said as he lay on the ground knowing that

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[93] Sheridan went on to address the other elements of the evidence which supported his conclusion.

[94] Senior counsel did not mount a direct attack on the credit of the first responder dying declaration witnesses.

> Sergeant Silk was dead, and aware that he himself was seriously and potentially fatally wounded, was something the jury could readily appreciate and evaluate.[95]

138 We have already set out the terms in which the prosecutor's address to the jury characterised the dying declarations of Senior Constable Miller as the starting point, after consideration of the Hamada evidence, for resolution of the question of whether there were two offenders.[96] Two things should be noted. First, after referring specifically to Clarke's oral evidence and to the evidence of Gardner, the prosecutor ultimately emphasised the evidence of Pullin:

> When you consider the dying declaration, as we call it in the law, of Rod Miller, you will, of course, also remember that he told Pullin, as he was gasping for breath, 'they were on foot', 'they' it is plural 'they were on foot …'.

139 Secondly, after then also referring to the evidence of Poke, the prosecutor observed:

> So there is consistency running right through the evidence, *right through the dying declaration evidence of Mr Miller* that he had seen two people …[97]

140 It follows that the evidence of Pullin formed an important part of the evidence upon which the prosecutor relied not only because Pullin's account was emphasised in itself but as an element of what was said to be cumulatively consistent evidence.

141 At [73] of the Leave Reasons, we concluded:

> Senior Constable Pullin's evidence formed an important part of the evidence upon which the prosecutor relied because:
>
> (a) the evidence as to what Senior Constable Miller said is a composite derived from the evidence from different witnesses and Pullin's evidence formed a discrete element of this composite;
>
> (b) Pullin took a central role in speaking with Senior Constable Miller when he was found;
>
> (c) Pullin's evidence materially corroborated evidence of Senior Constable Clarke as to what Senior Constable Miller said; and

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95 Leave Reasons [72].

96 See [97] above.

97 Emphasis added.

(d) Pullin's evidence contributed to the 'consistent narrative' asserted by the Crown that Senior Constable Miller described two offenders. Whilst the defence sought to challenge the probative value of different statements attributed to Senior Constable Miller by different police officers, the cumulative effect of the evidence was, on the face of it, compelling.

We adhere to these conclusions.

142 We turn then to the non-disclosure which occurred with respect to Pullin's evidence at trial.

143 At the committal, Pullin adopted a statement which purported to have been made and acknowledged as true by him at 4:25 am on the morning of the Sunday of the murders (ie approximately four hours after the events which it describes). In fact, it was not made at this time. Evidence obtained from IBAC now establishes that:

- the statement in its current form was prepared, signed and witnessed approximately 10 months after the shootings;[98]
- Pullin did make an initial statement on the morning of the shootings but it did not contain the material matters which are emphasised below, including hearing the statement 'they were on foot', nor did it explain that at a subsequent time Pullin was not listening carefully to what Senior Constable Miller said to others but was concentrated on comforting him; and
- although a copy has been revealed by a whistle-blower since the appellant's trial, the original of Pullin's initial statement has disappeared.

144 In consequence, the appellant's defence was conducted on the basis of a mistaken belief that Pullin had made a statement as to what Senior Constable Miller had said in the immediate aftermath of the shootings. The mistaken belief was directly induced by the statement fabricated as contemporaneous some 10 months

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[98] It was probably signed around the time of Pullin's meeting with Detective Sergeant Buchhorn (a member of the Lorimer Taskforce) on 21 June 1999.

after the night in question.

145 On the application for leave to appeal, an agreed copy of the statement Pullin adopted at the committal was provided to the Court in coloured marked-up format, to assist the Court in understanding its evolution. The highlighting marked up 'minor changes' in green and 'additions' in red. For the purpose of publication of this judgment the colour scheme has been revised such that minor changes appear in underlined italics and additions appear underlined only.

> I am a Senior Constable of Police stationed at Malvern Police Station. On Sunday, 16th August, 1998, I was on duty at Malvern 311 divisional van with Senior Constable GERARDI.
>
> At approximately 12.15 am on the same date, we were patrolling the Chadstone Shopping Centre when I heard Moorabbin 406 come up on the air and request assistance at the intersection of Cochranes Road and Warrigal Road Moorabbin in relation to a member being shot. On this, we attended towards the scene south on Warrigal Road.
>
> Upon our arrival, I observed approximately 4 police units at that intersection, all of which were parked in Cochranes Road. I instructed S/C GERARDI to park our van approximately 10 meters south of Cochranes Road on Warrigal Road across the north bound carriageway. I alighted the van and placed *my ballistic vest on* and started to walk toward the other units on Warrigal Road. I began to walk across Warrigal Road approximately 1 minute after alighting the van. As I began to walk I heard a male voice yell 'Help. Help'. I looked further south on Warrigal Road and observed a person I know now to be S/C Rod Miller lying in the driveway of a premises at 477 Warrigal Road, approximately 100 meters south of Warrigal Road.
>
> I ran towards him and arrived at him with another member S/C CLARKE from Cheltenham Police Station. I observed a police issue firearm lying at his feet. I observed a small amount of blood on the left upper part of his t shirt and observed blood coming from a wound on the right side of his abdomen. I lifted his t shirt and observed a small hole on the left upper side of his chest. I told him to lie still and that an ambulance was on the way. He was conscious and said 'Silkies dead. Silkies dead.' I continued to calm him and he stated that he couldnt breath. I assisted him to move into a position whereby he felt comfortable. Other members were arriving and I opened the chamber of the police issue firearm and observed that approximately 4 shots had been fired from the firear*ms*. I said to him 'Did you hit him' and he replied 'I *don't* think so'. I also asked him 'Were they in a car or on foot?' and he replied 'They were on foot'. I asked him 'How long ago did it happen?' and he replied 'Couple of minutes'. MILLER was quite obviously in pain so I didnt ask him any more questions, I tried to comfort him. I closed the chamber of the firearm and replaced the firearm on the ground where I had found it. By this time a number of police were in attendance and were continually arriving.
>
> *I left MILLER to be* comforted by other members and myself, S/C HOWELL

from Caulfield Police Station and another member conducted a search in the lower car park of the premises at 477 Warrigal Road, Moorabbin. We did not locate anybody.

I returned to MILLER and again comforted him. Whilst I was with MILLER, he continued to repeat 'It hurts, get me an ambulance.' I was kneeling next to him and speaking with him trying keep him calm. During this time, a number of members were asking questions of MILLER as he lay on the ground. I dont recall exactly what he was being asked, but I believe the questions were similar to what I had asked him earlier. MILLER was answering some of these questions, the only answer I remember was that he didnt know where the offender was. I was mainly concerned with making MILLER comfortable. Upon the arrival of the ambulance several minutes later, myself and other members assisted him onto the stretcher and into the ambulance. I removed MILLERS's ASP baton and OC Spray from their holders prior to placing him on the stretcher. I placed the OC spray and ASP baton on the ground with the firearm. I did this at the request of the ambulance officers to remove all unnecessary items from MILLER. I instructed a Constable, whos name I do not know, to travel with MILLER in the ambulance to hospital and to take notes of anything MILLER said in the ambulance. MILLER was taken away in the ambulance with this member.

D/S/C HANSON had arrived at the scene earlier and I detailed my observations to him. I placed crime scene tape across both carriageways of Warrigal Road and allowed no unauthorised person to enter past these tapes. As I was placing the tapes, I observed 2 sets of recent tyre marks on the median strip on Warrigal Road. These tyre marks were approximately 150 metres further south of MILLER'S position. One set appeared to have come from a vehicle with large tyres and a limited slip diff, in that the tyre marks on the grass were even and constant. It appeared that the vehicle that caused these marks has been facing north on Warrigal Road and had done a U turn on the grass and travelled south on Warrigal road. The other set were approximately 10 metres further south of the first set. These tyre marks appeared to have been made by a smaller vehicle, due to the width of the tyre marks, and appeared to have a standard diff, as only one wheel had spun. These tyre marks appeared to have been made by a vehicle travelling south on Warrigal Road in the north bound carriageway from the vicinity of 477 Warrigal Road, and had crossed the median strip to the south bound carriageway and caused a skid mark on the concrete gutter of the median strip which continued for approximately 2 meters further south on Warrigal Road.

Upon the arrival of the Homicide Squad I detailed my observations to them. I was conveyed to the Moorabbin Police Station by D/S/*S* BEZZINA with S/C SHERREN and made this statement there.

[signed by Pullin]

I hereby acknowledge that this statement is true and correct and I make it in *behalf* that a person making /false statement in the circumstances is liable to the penalties of perjury.

[Signed by Pullin]

Acknowledgment made and signature witnessed by me at Moorabbin at 4.25 am on Sunday 16th August 1998.

[signed by Bezzina]

146 It can be seen that the subsequent inclusions included the conversation with Senior Constable Miller to the effect 'they were on foot'. It also contained an explanation as to why Pullin was not subsequently focussed upon conversations between Senior Constable Miller and other officers.

147 As we observed in the Leave Reasons, Pullin gave evidence at trial essentially in accordance with the statement he adopted at committal. He was cross-examined and re-examined by reference to the contents of this statement. The defence was not aware that Pullin's evidence might be susceptible to allegations of invention subsequent to the events in issue or unreliability as a result of delay in its making. The defence was not aware that the processes adopted by investigating police might be open to serious challenge. As we concluded on the leave application, it may be inferred that if the changes to the statement had been known to have been made 10 months after the initial statement, then the course of cross-examination may have been radically different. The fresh evidence discloses a line of defence which was not apparent at trial.

148 The manipulation of Pullin's statement and the non-disclosure of that fact falls to be considered in the context of further fresh evidence obtained in the course of IBAC examinations, bearing upon the way in which police statements relating to Senior Constable Miller's dying declarations were produced.

149 In summary, that evidence demonstrates:

(1) In the early hours of 16 August 1998, both Clarke and Thwaites were directed by Detective Sergeant Kelly to omit any statements by Senior Constable Miller from their police statements. Both Clarke and Thwaites complied with this direction. The fact of the direction was not disclosed at trial.

(2) At committal, Thwaites in evidence on oath concealed the making of a first statement on the morning of the murders. Again, this fact was not disclosed at trial.

(3) Detective Sergeant Buchhorn co-ordinated the production of police statements. He adopted a practice of requesting revision of initial police statements and including only the revised statements on the hand-up brief.[99] The existence of the original statements was, as a result, unknowable to both the prosecutor and the defence. The practice was not disclosed at trial.

(4) A number of original police statements were not retained.[100] In particular, potentially relevant original statements made by officers Thwaites, Poke, Adams, Gerardi and Pullin are now missing.

(5) The practices adopted did not meet the requirements stipulated in instructions given by Inspector Collins in the early months of the investigation.[101] It is open to conclude that they were adopted in the knowledge that they were not best or appropriate practice.

150 None of the above matters of themselves establish that the evidence given at trial by a particular police witness (including Pullin) was necessarily inaccurate as to the substance of Senior Constable Miller's dying declarations.

151 Conversely, however, it is plain that the reliability of the relevant police statements, and in particular that of Pullin, were susceptible of a different forensic attack from that made at trial and the appellant was deprived of a fair chance to make that attack. So much was conceded on the leave application.[102]

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99 See Leave Reasons [116]–[117].

100 On the leave application, the applicant outlined the evidential basis for eight instances where this occurred, apart from Pullin. He also highlighted three instances in which memoranda from Buchhorn to investigating police officers are intact. Without now reiterating the detail of the eight instances, the essential submission by the applicant was that there are eight missing statements, including a number from people in a position to hear the dying declarations.

101 Relevant instructions are set out in footnote 55 of the Leave Reasons.

102 Ibid [79].

152 The respondent nonetheless submits that the non-disclosure had no substantial impact on the issues at trial and, in particular, upon the weight of the evidence at trial.

153 First, it is submitted that the fresh evidence does not engage with the best, most objective and cogent evidence of Senior Constable Miller's dying declarations, namely the Intergraph recording.

154 Secondly, it is submitted that Pullin's evidence was not a significant component of the dying declaration evidence and that it can in effect be disregarded.

155 Thirdly, it is submitted that, irrespective of the dying declaration evidence, the Crown case was overwhelming. The fresh evidence does not detract from the weight of the evidence as a whole and conviction was inevitable.

156 These submissions seek to bypass the irregularity which occurred in the appellant's trial as a result of non-disclosure. In our view, the fresh evidence demonstrates that the appellant's trial was unfair because he was deprived of the opportunity to trace and challenge the evolution of the statements upon which police evidence was based. In consequence, the jury were not able to properly assess the reliability of important evidence.[103] As a result, the primary question to be resolved is whether the irregularity in the appellant's trial was such that, without more, his convictions should be set aside. In the alternative, the question arises whether the irregularity was such that this Court cannot be satisfied that the irregularity did not make a difference to the outcome of the trial.

157 Nonetheless, we accept that the question whether, despite evidence of irregularity, a conviction must be regarded as inevitable, may be relevant to the ultimate question of substantial miscarriage of justice even if the appellant's trial was attended by material irregularity.[104]

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103 Cf *Cvetanovski v The Queen* [2020] VSCA 272 [8].

104 See *Baini* (2012) 246 CLR 469, 480 [30].

158 In *Baini* the majority observed:[105]

> If it is submitted that a guilty verdict was inevitable, an appellant need not prove his or her innocence to meet the point. An appellant will meet the point by showing no more than that, had there been no error, the jury may have entertained a doubt as to his or her guilt. As a practical matter, it will then be for the respondent to the appeal to articulate the reasoning by which it is sought to show that the appellant's conviction was inevitable.
>
> … the inquiry to be made is whether a guilty verdict was *inevitable*, not whether a guilty verdict was *open*. (Whether the verdict was open is the question presented by s 276(1)(a).) If it is said that a guilty verdict was inevitable (which is to say a verdict of acquittal was not open), the Court of Appeal must decide that question on the written record of the trial with 'the "natural limitations" that exist in the case of any appellate court proceeding wholly or substantially on the record'.[106] That the jury returned a guilty verdict may, in appropriate cases,[107] bear upon the question. But, at least in cases like the present where evidence has wrongly been admitted at trial and cases where evidence has wrongly been excluded, the Court of Appeal could not fail to be satisfied that there has been a substantial miscarriage of justice unless it determines that it was not *open* to the jury to entertain a doubt as to guilt.[108] Otherwise, there has been a substantial miscarriage of justice because the result of the trial *may* have been different (because the state of the evidence before the jury would have been different) had the error not been made.

159 Accordingly, it is necessary to deal with the following evidentiary issues before expressing our final conclusions:

(1) Was conviction inevitable irrespective of the dying declaration evidence?

(2) Was Pullin's evidence properly regarded as of no real significance to the effect of the dying declaration evidence as a whole?

(3) Was the Intergraph evidence overwhelming evidence of Senior Constable Miller's dying declarations?

160 Each of these issues was identified by the respondent as going to the question of whether the fresh evidence impacts upon the probability of there being two

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105 Ibid 481 [31]–[32] (citations in original) (emphasis in original).

106 *Fox v Percy* (2003) 214 CLR 118, 125–6 [23] (footnote omitted).

107 See generally *Weiss v The Queen* (2005) 224 CLR 300, 317 [43]; *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92, 104 [28].

108 Cf *R v Grills* (1910) 11 CLR 400, 431 (Isaacs J).

offenders in Cochranes Road at the time of the murders.

(5) Was conviction inevitable in any event?

Was conviction inevitable irrespective of the dying declaration evidence?

161 The case against the appellant was, to use Professor Wigmore's metaphor, one of strands in a cable.[109]

162 The net effect of the circumstantial evidence as a whole upon which the Crown relied had to displace doubts arising from other circumstances. Most notably the failure by Bendeich and Sherren to identify more than one occupant of the Hyundai when they passed by observing it immediately prior to the murders.

163 Significant aspects of the Crown case are now squarely admitted by the appellant including his involvement in the Hamada robberies. The respondent now submits:

> The importance of the *viva voce* evidence as to the dying declaration at trial has been mischaracterised and Pullin's importance within that part, of the greater body of evidence, is overstated.
>
> The most significant issue at trial, and on appeal, was Hamada. That is because acceptance of Hamada — the fact that Debs and the Appellant were the Hamada armed robbers, that the Silky Emperor was a Hamada target — was proof of motive, of the involvement of the two and of their identities. Importantly, the Appellant now admits each of these limbs of the case advanced against him; it is the overwhelming conclusion that he disavows.

164 As we have already indicated, we accept that the evidence that the Hamada robberies were committed by Debs and the appellant raises a strong probability that (absent other evidence) if the Hyundai car was present at the Silky Emperor for the purposes of robbery, then both men were present.[110]

165 Nonetheless, as the trial judge directed the jury, evidence that the appellant

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109 John Henry Wigmore, *Evidence in Trials At Common Law*, vol. 9 (Little Brown, rev ed, 1981), vol 9, 412–14 [2497].

110 See [81] above. In oral argument, counsel for the respondent accepted at one point that the Hamada evidence was not sufficient on its own to prove the involvement of two offenders.

was one of the perpetrators of the Hamada robberies could only provide circumstantial support for the inference that the appellant was a party to the murders.

166 It was presumably precisely for this reason that after referring to the Hamada evidence, the prosecutor, in final address, turned to the dying declaration evidence as the 'starting point' for the further resolution of the question whether there was more than one offender. It cannot be said that the Hamada evidence either alone or in combination with the use of the Hyundai rendered the appellant's conviction inevitable.

167 The further evidence as to the use of two handguns and gunshots materially added to the Crown case, but an explanation for it consistent with one offender shooting both handguns was advanced at trial and it was open to the jury to have doubts as to its ultimate weight.

168 Likewise, for the reasons we have explained, the evidence of covert recordings admissible against the appellant (as against those admissible against Debs) was susceptible to explanation giving rise to reasonable doubt consistent with innocence.

169 The reality is that the case as a whole (disregarding the dying declaration evidence) was powerful but conviction was not inevitable.

170 The further reality is that the dying declaration evidence was put to the jury as an integral if not pivotal component of the case supporting the conclusion that there were two offenders.

Was Senior Constable Pullin's evidence of no real significance to the dying declaration evidence as a whole?

171 In the alternative, it is submitted that Senior Constable Pullin's evidence did not negatively impact upon the appellant's position at trial and hence the non-disclosure which occurred could not alter a jury's view of the effect of the evidence

as a whole.

172 The respondent's written case summarises the matters relied on as follows:[111]

> The second Pullin statement included additions which in substance did not negatively impact on the Appellant's position at trial. For example:
>
> (i) It included '*he didn't know where the offender* (singular) *was*'.
>
> (ii) Both statements contained '*did you hit him* (singular)'.
>
> The additional aspect, '*they were on foot*', is on its face equivocal, and must be taken along with the additions referred to at (i) and (ii), above. This issue was highlighted at both the committal and trial.
>
> At committal Pullin gave evidence that 'they' could have referred to the singular or plural. He further gave evidence that if he had heard 'offenders' (plural) he would have put it in his statement, which he did not. The ultimate position of his evidence at trial was even more innocuous.[112] This was noted by Senior Counsel for the Appellant in his closing.[113]

173 In turn, it is submitted:

> First, as identified, the evidence Pullin actually gave did not advance the prosecution case: At best it was inherently neutral; at worst, it was consistent with the defence case.
>
> Secondly, parts of the recording containing the description of the male (evidence which suited the Appellant) was relied upon by him at trial. In doing so he implicitly accepted at least those aspects of Miller's dying declaration.
>
> Thirdly, whilst full disclosure of the circumstances of the making of Pullin's statement may have led to cross-examination, credit attacks and possible misconduct allegations, the disclosure of these circumstances could not have led to more favourable evidence as to the dying declaration. Nor could it have rationally undermined the other aspects of the Crown case.

174 We do not accept these submissions:

(1) The prosecutor unequivocally emphasised the importance of Pullin's evidence in his final address.

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111 Respondent's Written Case, [72]–[74] (emphasis in original) (omitting transcript references).

112 In the sense that it did not advance the Prosecution case.

> He was answering some of the questions that were being asked of him, but the one answer that you remember was that he didn't know where the offender was? --Yeah, I believe that was said a couple of — a few times at least.

113 '*Pullin, "What's **he** look like?" The description*'.

(2) This is not surprising because (as we shall explain further below) Pullin was a significant participant in the conversations with Senior Constable Miller as he lay in a fatally wounded condition.

(3) Pullin's evidence was, on one view, important not simply because it attributed words to Senior Constable Miller which were indicative of two offenders, but more significantly because it directly corroborated a significant aspect of Clarke's evidence, namely the statement attributed to Senior Constable Miller that 'they were on foot'.

(4) The prosecutor was correct to direct the jury to the cumulative effect of the evidence and the question whether the jury should accept that it was essentially consistent despite the attribution of different words to Senior Constable Miller by different witnesses. Again, for reasons which we will elaborate below, this was a question which was not free from difficulty.

(5) The appellant may be said to have implicitly accepted parts of the evidence as to Senior Constable Miller's dying declarations (such as reference to an offender in the singular and the subsequent detailed description of only one offender) but those parts which he accepted cast doubt upon the question whether Senior Constable Miller referred to or intended to refer to two offenders.

(6) The proposition that disclosure of the fresh evidence could not have led to more favourable evidence as to the dying declarations is entirely speculative. Disclosure must at least have raised fresh issues as to the reliability of evidence upon which the Crown relied. Before IBAC, the Crown witnesses as to the dying declarations did not materially depart from their evidence at trial as to the substance of Senior Constable Miller's statements. But the matters uncovered at IBAC raise a sequence of possibilities why their evidence might not be regarded as truthful and reliable.

175 It must be squarely kept in mind that the non-disclosure extended well

beyond the failure to disclose the true date of the making of Pullin's second statement. Amongst other things, the IBAC evidence demonstrated that both Pullin and Thwaites gave false evidence on oath at the committal.

176 It would be open to a jury to reject their subsequent evidence as unreliable for this reason alone. Further, the evidence as to the circumstances in which Pullin and other police officers came to make the statements relied upon as the basis for their evidence at trial also raised more general questions as to their reliability. These included the roles of Detective Sergeants Kelly and Buchhorn in the production of the statements and, in particular, the limitation of scope, the delay in making, and the editing, amplification and revision of those statements.

177 In this regard, the respondent submitted that the fresh evidence could only be of real significance if it established a conspiracy to fabricate substantive evidence. We do not accept this submission either. From the defence point of view, it would be sufficient to raise a reasonable doubt that the evidence in issue was reliable.

178 This is not of course to say that the dying declaration evidence lacked any force. We accept that despite the fresh evidence, it remains capable of supporting the conclusion that there were two offenders, but we do not accept that it compels that conclusion.

179 In order to better explain why this is so, it is necessary to address the dying declaration evidence in further detail and the characterisation of it advanced by the respondent on appeal.

Was the Intergraph evidence overwhelming evidence of Senior Constable Miller's dying declarations?

180 The respondent submits that the Intergraph recording was the most critical aspect of the dying declaration evidence, and that, compared to the Intergraph recording, the vive voce evidence as to the dying declarations, and more specifically Pullin's part of that evidence, was of less weight and import.

> The dying declaration evidence as a body of evidence was made up of multiple pieces of evidence. It was only a small part of the overall evidence proving two offenders. On any view, the contemporaneous recording was the most compelling element of the dying declaration evidence. It stands alone, then and now, as the most cogent evidence of the content of Miller's dying declaration.

181 On the hearing of the appeal, counsel for the respondent argued that the appellant's conviction was inevitable because nothing arising from the fresh evidence touches the evidence as to the contemporaneous Intergraph recording of Senior Constable Miller's dying declarations.

182 Whilst we fully accept that the Intergraph recording is capable of being regarded as powerful evidence of the presence of two offenders at the time of the murders, we are not persuaded that it is so powerful as to make that conclusion inevitable. This is so for four major reasons.

183 First, what Clarke said on the Intergraph ('He said there's two offenders, there's two on foot') does not accord with his own evidence of what Senior Constable Miller actually said, or the evidence of any other person present as to what Senior Constable Miller said. None of the evidence otherwise supports the view that Senior Constable Miller said 'There's two on foot'.

184 Secondly, the circumstances in which Clarke relayed information over the Intergraph raise questions as to its reliability. More particularly, they raise the possibility that what he said may have been the product of misunderstanding of what Senior Constable Miller said or meant to say.

185 Thirdly, two minutes after the Intergraph transmission indicating that Senior Constable Miller had said that there were 'two offenders, there's two on foot', the Intergraph records a description of a car similar to a 323, a statement 'One male has been sighted' and a detailed description of only one offender (and no reference whatsoever to a second offender). Two minutes later again there is a specific identification of a dark blue Hyundai which the evidence otherwise shows came from Senior Constable Miller (and no correction of the reference to only one

offender).

186 Fourthly, the Intergraph transmission forms part of a series of differing, and to some extent, contradictory accounts of what Senior Constable Miller said.

187 In order to explain the way in which each of the matters qualifying the force of the Intergraph evidence emerges, it is necessary to set out in some detail the sequence of accounts which Clarke and other witnesses have given concerning the dying declarations.

(i) Evidence of Senior Constable Clarke

188 Senior Constable Clarke's evidence raises a number of questions as to who was the first officer who attended Senior Constable Miller, who was the first officer to ask him about the number of offenders, how that question was asked and how its answer came to be relayed by Clarke over the Intergraph. The various notations, written statements and oral evidence given by Clarke are considered in a largely chronological order below.

189 Clarke's first statement, made at 6:35 am on Sunday 16th August 1998 (the night of the murders), details his arrival at the scene and provides one version of the unfolding course of events. It stated in part as follows:

> I went up to him and knelt down next to him. He was laying on his back and he had both his hands beside his head. I placed my hand on his shoulder and I said to him,
>
> I said, 'What's your name mate.'
>
> He said something to me but I couldn't make out what it was. He then continued to call out,
>
> He said, 'Help me, help me.'
>
> I then used my portable radio and I called over the air that I had found another police member and he appeared to be hurt. I gave out my location and by this time other police had arrived. I then observed blood on the right side of his Tee-shirt near his waist and I lifted up his tee-shirt and I saw he had sustained a wound to the right side of his waist. There was a lot of blood around but it didn't appear at that time that he was bleeding from this wound. I then lifted his tee-shirt up further to see if there was any more

wounds or injuries. I observed a wound just under his left armpit on the side of his chest. This wound was also not bleeding at the time. I didn't roll him over or touch him further. I figured that he had been shot.

Other members placed their jackets over his body to keep him warm. I used a radio from a police car, which had parked nearby, to update our position and request an ambulance. We were actually directly outside number 477 Warrigal Road which was a restaurant of some kind. Senior Constable PULLIN, who had arrived shortly after me, was now kneeling next to the Police member on the ground. I instructed Senior Constable PULLIN to ask what had happened and was the person who shot him in a car or on foot.

PULLIN
said, 'Where have *they* gone? Were *they* in a car or on foot?'
He said, '*They* were on foot.'

PULLIN
said, How long ago?'
He said, Couple of minutes before the police cars came past.'

I then heard another police member ask what his name was . I heard him say MILLER. I don't recall hearing him say his first name. At this stage he was being comforted by a number of police members. I then heard another unknown police member ask MILLER if he fired any shots. He replied three or four. I passed on this information to Intergraph.[114]

190 This account appears to substantially accord with the notations in Clarke's daybook which contains the following:

I S Where are you hit

H S Help me Help me.

Call on radio.

Flag down u/m s/w.[115]

Used radio

Urgent ambos.

I asked S/C PULLIN ask where they went what happened. Car or on foot.

I heard him reply. They were on foot.

I S How long ago

H S 'Couple of minutes.

I heard an u/k member ask his name.

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114 Emphasis added.

115 Unmarked Station Wagon.

191 It may be noted that, as recorded after Clarke's initial question, Pullin is the central interrogator of Senior Constable Miller in both Clarke's initial statement and his notes. Further, the statement 'They were on foot' was elicited after Clarke went to the parked police car to use the radio and Clarke's notes indicate it was Clarke who instructed Pullin to ask 'where they went what happened'.

192 At the committal, Clarke gave evidence that his notes were recorded on his return to the Moorabbin police station in the early hours of that morning, prior to his first statement being taken by a member of the homicide squad.[116] He gave evidence that the scene around Senior Constable Miller was 'dynamic' with around 8 to 10 police officers around him in a very short space of time. He said that when he was using the radio in the unmarked police car, the distance between him and Senior Constable Miller was approximately two metres.

193 In his second statement, dated 5 May 2000 (more than 20 months after the murders) and obtained as part of a broader process of revision of police statements, Clarke gave the following account:

> I asked Senior Constable MILLER questions relating to what had occurred. Senior Constable MILLER was having difficulties in breathing, and was only able to speak in short sentences. … Due to the difficulties he was having in breathing he was hard to understand at times. I then asked him how many offenders there were. He told me 'Two'. I then asked him if he knew where they had gone. He said he didn't know. I asked if the offenders were in a car or on foot. He said 'On foot'. I think Senior Constable MILLER also used the word 'Chased', but I am unsure of the context of what he was saying. I then asked Senior Constable MILLER how long ago it happened. He said 'Not long, just before the cars went past.' I asked him if he meant the Police cars with their lights and sirens and he said, 'Yeah'. I then relayed this information over the Police radio.

194 No doubt due in part to the inconsistency between these two statements, Clarke was questioned at the committal to better explain the question-and-answer sequence. He said:

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116 Later evidence at trial and IBAC was that some notes had been made at the scene sitting in a police vehicle and some upon return to the police station.

> …[I]t was more of a case of 'Can you ask him this?', and then once it started, it flowed. There was not a – 'I will ask you a question, you will ask him', it was not detailed as an instruction like that. It was just 'Can you ask him this?', and then the replies and questions continued.

195 Earlier in his committal evidence, Clarke had provided further context for the question-and-answer process, as follows:

> What was happening when I first arrived and I'm trying to inform Intergraph and the other police units as to what was happening, I had a portable radio that was sitting up here. Because of the low wattage or the low output of that radio, I was unable to transmit out because of the high volume of radio traffic. Rod Miller was found on the footpath on the median strip and there was a police car that was parked in the gutter. I've moved to the police car and whilst I'm asking Senior Constable Pullin questions, to ask Rod Miller and there's a reply coming back, I'm also listening for dead space on the radio to then come up and say, 'This is what I've heard.' So I 'm listening at two things at once.

196 Clarke confirmed that Pullin was the chief person asking Senior Constable Miller questions and it was Pullin who was the main person relaying the bulk of the answers to Clarke for transmission. He also said that other members were having conversations with Senior Constable Miller, some of which were of an inquiring and others of a reassuring nature. He said that when he asked Senior Constable Miller if the offenders were in a car or on foot it was meant for him directly, but his questions and the answers to them were sometimes repeated by Pullin or others. He said he heard the answer to that specific question himself. He said that Senior Constable Miller was having difficulty breathing, was coughing and not all of what he said was audible. He said that sometimes Senior Constable Miller would try to say a sentence and it would come out broken or disjointed.

197 At trial, Clarke's evidence was that he was the first to find Senior Constable Miller and that one of his first questions to him was 'How many were there?' and then 'How long ago?'. He said that Miller responded 'two, he repeated the word "two" and then said, "one on foot"'. Despite Senior Constable Miller's laboured breathing, he had no difficulty understanding this answer. He said that he could not recall Senior Constable Miller using the words 'two offenders' but he could remember him using the word 'two'; 'he has used the singular words "two, two, one

on foot"'.

198 During cross-examination by counsel for Debs, Clarke further explained that the key questions were asked by both himself and Pullin:

> Mr Dane: Were you both saying the same question, were you?
>
> Senior Constable Clarke: Yes, we were. I've got there moments before Pullin and I've started asking questions, but due to Miller's difficulty in breathing what isn't reflected in the statement there is how we've paused to try and let him answer, then repeating things back, then as Pullin has arrived he is trying to encourage an answer and he has also asked the same question.

199 During cross-examination by counsel for the appellant, Clarke said that the reason why, if he had heard Senior Constable Miller say there were two offenders, he did not include it in his notes and first statement made on the night, was because of 'distress, tiredness … not confusion'. He said that his second statement made on 2 May 2000, which included the 'two, one on foot', was made after refreshing his memory by looking at the Intergraph transcript.

200 During re-examination, the prosecutor questioned Clarke in relation to the inconsistency between his written statements, notes, oral evidence, and what was actually transmitted over the Intergraph, including the following exchange:

> Mr Rapke: How did it come about that the information you received was one on foot and that got transmitted as two on foot?
>
> Senior Constable Clarke: I was probably rushing my words to try and get it out on the air.

201 At Clarke's first IBAC examination in 2015 (many years after the event), his evidence as to the timing of his move to the unmarked police car and when he heard Senior Constable Miller's dying declarations was inconsistent. At different points his evidence seemed to suggest both that he had been unsuccessful and successful in making the initial call asking for help over his portable radio, and that he had both himself asked the questions which elicited the dying declarations before moving to use the radio in the unmarked police car, and that the dying declarations had occurred later through questioning from the 'group' or Pullin once Clarke was at the police car.

202 Clarke said that he found with both of the gentlemen who took his statements that it was 'hard to communicate sometimes clearly of how I put that in the statements and how to get it written down to describe how dynamic that was.'

203 After having the portion of his first statement dealing with him instructing Pullin to ask what had happened put to him and being asked whether it was correct, Clarke said 'approximately'. He continued:

> [T]here was a number of police members gathered around. I wouldn't have said, 'Hey, Glen, ask this,' or, 'Senior Constable Pullin ask this,' I would have just said, 'Ask him,' to the group... And they're as far away from here to – to that desk away.

204 In respect of the parts of his second statement which stated that Clarke asked the key questions of Senior Constable Miller himself directly, the follow exchanges took place:

> MS AUSTIN: '*I then asked him how many offenders there were, he told me two.*' So could that have either been you making a direct question - - -
>
> MR CLARKE: That would have been - - -
>
> MS AUSTIN: - - - or the - --
>
> MR CLARKE: - - - the group conversation.
>
> MS AUSTIN: - - - the group conversation that we've - - -
>
> MR CLARKE: Yes.
>
> MS AUSTIN: - - - ascertained. Okay.
>
> MR CLARKE: Yes.
>
> MS AUSTIN: *'He said he didn't know. I asked if the offenders were in a car or on foot, he said on foot.'* Again the group conversation?
>
> MR CLARKE: Yes.
>
> …
>
> MR KIRKHAM: Just so I completely understand, what you're saying there in the statement is when you say, 'I asked him how many offenders there were,' you asked that question. It may have been passed on by another member of the police force, but it would still be in your mind you asking the question. Is that the way - - -
>
> MR CLARKE: Yes. And – and I believe that every time I've asked the question Rod would have been able to hear me, but then at the same time, as I say,

with other people talking over the top of him, someone else – someone's then chosen that moment to repeat the question.

205 In Clarke's second IBAC examination in 2018, Clarke said that he moved to the car radio after finding that he could not use his portable radio to say that he had found Senior Constable Miller. It was after that that he both spoke to Senior Constable Miller directly and heard others speak to him.

> MR RUSH: Yep. There was some discussion questioning – and just to clarify that, there was a police officer there. Do you recall now whether you relayed questions to – to Mr Miller or whether that was done through a – a – a – a third party?
>
> MR CLARKE: It was very dynamic and I was on a police radio – hand-held radio, a portable radio, which does not have the wattage or the output capability of one of the vehicle-mounted radios. So initially I'm with Mr Miller, I've actually lifted his shirt and I've seen the bullet holes. I've tried to come out on the – on the radio to say, 'Hey, we've found him and we've found the missing member,' but I wasn't able to do that. So I've stepped the same distance from Mr Rush and myself or – or, sir, yourself and I, from where Mr Miller is. It's a wide nature strip to where there was a police car that had pulled up on the – on the road-way there and I've opened up the door and asked for the radio and I'm making radio calls there. So to answer your question, sir, when I'm asking, 'Which way did they go? How many were there?' those sorts of questions, it was quite audible to Mr Miller.
>
> MR RUSH: Yep.
>
> MR CLARKE: Now, some people – Glenn Pullin for example – may have repeated that, others have, 'Oh, yeah, that's prompting him to ask questions.' Mr Miller's laying there in distress calling out, 'I'm fucked, I'm fucked,' and all that sort of thing but I'm trying to direct his thoughts–
>
> MR RUSH: Yep.
>
> MR CLARKE: – 'How many were there? How long ago was it?' And that was where he replied, 'It was not long ago, just after the police cars came whizzing past,' but he's saying that with gasped breath but my questions were audible to him and they're being repeated by different people–
>
> MR RUSH: Yeah.
>
> MR CLARKE: – and his answers were audible to me although his voice was broken and distressed.

206 Notwithstanding the fact that this was a scene of great distress and it is not surprising that the understanding and recollection of what was said may not be straightforward, the inconsistencies in Clarke's notes, sequential statements and evidence — such as the form and manner in which questions were asked and by

whom, what was said as opposed to what was transmitted, as well as his own physical location in relation to Senior Constable Miller at critical points — are not easily resolved by examining the Intergraph recording. Because the Intergraph recording attributes words to Senior Constable Miller which do not accord with Clarke's notes, sequential statements and evidence and because the Intergraph recording was made in dynamic and difficult circumstances, it does not resolve the issue of what Senior Constable Miller actually said.

(ii) Recollections of other first-responders

207 It is necessary to further briefly compare the evidence of other first responders in order to appreciate the varying evidence in relation to the form of the questions-and-answers said to identify descriptions of the number of alleged offenders.

208 Constable Bradley Gardner, made a statement at 4:39 am on the morning of the murders,[117] whilst in the waiting room of the hospital to which he had accompanied Senior Constable Miller. It states that he arrived at the scene with his shift partner Clarke, and that the first person to ask Senior Constable Miller about what had happened was another police officer, then unknown to him. The question was 'What happened'. The reply was '2, one on foot'.[118] The next question was 'any vehicle' to which Senior Constable Miller replied, 'dark Hyundai'.

209 At the committal, Gardner gave evidence that he was 'concentrating on Senior Constable Miller and trying to comfort him'. Gardner was not able to say who asked Senior Constable Miller the question that elicited the descriptions in issue, other than it was a male Senior Constable. Gardner gave evidence that he was 'sure' that Senior Constable Miller said the word 'two' and that, while he was speaking in 'short, sharp, quick, speech', Gardner was 'able to understand everything he said'. He said that he had his notebook out at the time and took down what Senior Constable

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117 Gardner made a further statement on 20 May 2000 regarding accompanying Senior Constable Miller to hospital and what was done with Senior Constable Miller's clothing. Its contents did not traverse the identity of the offender(s).

118 Both the handwritten version and typed version were produced to the Court.

Miller said 'exactly as he said it'. His notes contain the words '0038 2,1on foot dark hyundai'.[119] He said that at the time those words were spoken the police officers present were: '[himself], two others, one of which was the Senior Constable asking the question, and Senior Constable Clarke who was a couple of metres away on the radio'. Gardner said he was present with Senior Constable Miller from his arrival at the scene until Senior Constable Miller was taken into surgery at the hospital, aside from approximately 90 seconds when he was asked to investigate faces seen looking out a window of the Silky Emperor restaurant. His absence was after Senior Constable Miller had said 'two, one on foot'.

210 At trial, Gardner gave substantially consistent evidence that he had heard Senior Constable Miller say 'two, one on foot' and as to the circumstances in which he heard it. He said that he did not hear the exchanges with Intergraph — rather, he 'heard noise coming over [his] radio but [he] didn't distinguish or understand what it was all about'. He had not heard Senior Constable Miller give any indication of direction of travel and either did not know or could not remember whether Senior Constable Miller had given another description of the car before 'Dark Hyundai'. He was not aware of any members of 'Caulfield 252' being present at the scene, despite that unit transmitting the detailed description of the offender just minutes after Clarke transmitted there were two offenders, 'two on foot'. He also did not hear Caulfield 252's transmission or any correction of it by Senior Constable Miller.

211 As we have noted, in his first statement, Pullin did not refer to what he asked Senior Constable Miller, nor any responses from the injured officer in relation to the offender(s) or a description of them. At committal, Pullin said that he did not take contemporaneous notes as his notepad was back in the van which had been 'crime scened off' and as such he 'just had to make do with [his] statement'. He also said that he had taken on a 'welfare' role in respect of Senior Constable Miller.

212 In his second statement and in his viva voce evidence at both committal and

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[119] The text in the written document is cramped.

trial, Pullin said that he asked, 'Were they in a car or on foot?'. The reply was, 'They were on foot'. The second statement also indicated that he had heard Senior Constable Miller say that he didn't know where the offender was. At trial, Pullin was questioned by the prosecutor about why this observation was not put in quotation marks. He answered: 'It is probably not exactly what he said.' At committal, when asked about the use of the word 'offender' singular, he had said, 'At the time it may have been nothing more than a typo. I don't know, I can't remember'. But he then agreed that if Senior Constable Miller had said 'offenders' he would probably have recorded it in his statement.

213 At trial, Pullin was questioned by Mr Hill, counsel for the appellant:

> Mr Hill: Mr Pullin, at the stage where you picked up the firearm, it's quite clear you were playing a role as a police officer investigating this matter at this very early stage?
>
> Senior Constable Pullin: Yes
>
> Mr Hill: You were doing that when you said to him, 'Did you hit him?', and when you followed that up with the questions, 'Were they in a car or on foot?'
>
> Senior Constable Pullin: Yeah, I had opened the revolver and said that.
>
> Mr Hill: You wanted to find out information?
>
> Senior Constable Pullin: Yes.
>
> Mr Hill: Of course at that stage you did not know whether there was one or more offenders?
>
> Senior Constable Pullin: No, as I said, there was obviously at least one.
>
> Mr Hill: And your choice of the word 'they' was meant to convey, what, that you believed that there were more than one offender?
>
> Senior Constable Pullin: - - -When I asked him the question?
>
> Mr Hill: Yes?
>
> Senior Constable Pullin: I don't recall why I asked it in that particular manner.

214 At committal, Pullin had agreed that at the time he asked the question he had no information as to whether there was more than one offender ('Yes, I didn't know, there could have been 50, I don't know') and when asked why he chose to use the

word 'they', he said, 'It's just the way it came out'.

215 It follows from the above exchanges that Pullin's evidence was that he was the first person to use the pronoun 'they', potentially inferring more than one offender in his questions to Senior Constable Miller. Further, Senior Constable Miller may have used this pronoun in response. The fact that the question was asked this way is not insignificant. A jury might infer that this utterance may well have informed — subconsciously or otherwise — the radio transmissions of Clarke, and statements of others.

216 Clarke was also questioned on the construction of these initial questions. At committal, he conceded that, in an ideal situation, it would be preferable to ask 'How many were there?' before asking, 'Were they in a car or on foot?'.

217 Senior Constable Helen Poke did not make a statement on the night of the murders. In her first statement, dated 11 April 2000, she recorded:

> I then knelt down at the head of the member, Senior Constable CLARKE was to my right. The injured member was wriggling around, and trying to talk. I spoke to him. I said, 'It's OK., try and stay still?' I then took hold of his arms, as he was waving them around, I was trying to keep him calm and still. Senior Constable CLARKE then lifted the members T shirt. I could see that he had been shot in the right side near his waist area. There was not a lot of blood coming from this wound. I also saw another bullet wound near his left armpit, this was also not bleeding. I remained at the head of the member just talking to him and trying to keep him calm, he kept saying 'I'm fucked, just get them,' 'I'm fucked, help me' I tried to reassure him, but he was insistent with trying to tell us everything he knew. I asked him his name, I didn't catch his Christian name, just his surname MILLER.
>
> I remember MILLER saying they were on foot, 'two of them, one on foot, checked shirt, dark Hyundai.' MILLER kept repeating this and saying 'Get them, I'm fucked'. When MILLER spoke it was not in full sentences but in bursts like he was gasping for breath. The ambulance arrived and an oxygen mask was placed on his face. MILLER kept pulling the mask off to speak to us. He kept repeating 'Get them, checked shirt, I'm fucked'. I asked him to calm down and told him it was alright and that we had it under control. I placed the oxygen mask back on his face and comforted him the best I could. Ambulance officers then placed MILLER on the stretcher, I held the top end of the stretcher when this happened. I remained at the head of the stretcher and continued to speak to MILLER to reassure him. He kept trying to remove the oxygen mark and was waving his arms around. I placed his arms down by his side, and he said again, 'I'm fucked, get them.' MILLER was then placed in the rear of the ambulance, Constable GARDNER of Cheltenham 206

accompanied MILLER in the ambulance to the Monash Hospital.

218 Poke had made the following notes in her diary shortly after Senior Constable Miller was taken away by ambulance on the night in question:

> H/S 'I'm Fucked, Help Me'
> H/S 'on Foot, 2 1 x Foot 6' 1
> # Shirt Dark Hyundai ,D/HR[120]
> H/S I'm Fucked Get Them'
> Repeated over/over.[121]

219 The copy of Poke's first statement on the brief was not signed. A version of that first statement, apparently omitting the words 'two of them, one on foot, checked shirt, six foot one, with dark hair, dark Hyundai', had been signed and acknowledged but had subsequently been accidentally shredded.[122]

220 Her second statement, which was signed on 12 January 2001, added '6'1", dark hair' to the description attributed to Senior Constable Miller such that it read '…two of them, one on foot, checked shirt, 6'1", dark hair, dark Hyundai'. Before the second statement was tendered at the committal, this line was further amended such that it read 'two of them, one on foot, checked shirt, six foot, one with dark hair, dark Hyundai'. These changes were said to be consistent with what was noted in her diary on the night.

221 At committal, Poke gave evidence that Senior Constable Miller had said, '"I'm fucked, help me." He said, "On foot, two, one on foot, six foot, one check shirt, dark Hyundai, dark hair." He said, "I'm fucked, get them." He repeated this over and over.' Similarly, at trial she said she heard Senior Constable Miller say, 'Get them, I'm fucked'. She then asked his name. He kept saying 'Get them, I'm fucked' and then 'blurted out "Two, one on foot. Six foot. Dark hair. Check shirt. Dark Hyundai".' She said he kept repeating the description and 'get them'.

222 Senior Constable Graham Thwaites, the partner of Poke, who arrived on the

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120 Dark Hair.

121 There was some controversy over the punctuation of this note at the committal.

122 The destruction of this document was known at the time of the committal.

scene with her, made a statement dated 23 October 1998, in which he stated that he heard Senior Constable Miller say, '"Get them cunts", which implied to [him] that there was more than one offender involved'.

223 Poke gave evidence at committal that Thwaites had prepared the 'patrol duty running sheet', that is, the notes made during their shift. The running sheet was tendered through Poke at committal, but was not referred to or tendered at trial. One particular section of it reads:

> 2 M ['M' is circled] OFF(S) – 1 ON FOOT POSSIBLY
> 2ND POSS – HYUNDAI
> MAZDA 323 NFD.[123]
> 1 OF OFFs SAID TO BE
> 6'1/6'2 LONG DK HAIR 3-4
> DAY GROWTH BLUE CHECKED SHIRT
> BLUE JEANS NFD.

The source of this information is unclear.

224 At committal, when asked if he took any notes on the night in order to assist him with making his statement, Thwaites answered 'no'.[124] He was not questioned about the running sheet. He said he did not know why his statement was not taken for such a long period of time. Later evidence from both Thwaites and Poke before IBAC revealed that an initial signed statement from Thwaites had been made but had disappeared. The fact of its existence was thus concealed by Thwaites on oath at the committal.

225 Senior Constable Lou Gerardi was the partner of Pullin. He made a statement dated 25 October 1998 and maintained the crime scene log of names and numbers of anyone entering or leaving the scene (as distinct from the running sheet maintained by Pullin) but did not recall keeping his own notes. At IBAC, he said he did not know why he was not asked to go to Moorabbin to make a statement on the night.

226 His viva voce evidence was that he arrived at the scene and put on his ballistic

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123 No Further Details.

124 At IBAC, Thwaites said that 'most of the notes were made on the running sheet as it sort of occurred'. He said he did have a notebook but it had been destroyed by fire and would have contained scant detail 'probably more time, place, date than any conversation or anything'.

vest, taking approximately 60 to 90 seconds, and radioed for an ambulance. He then ran to Senior Constable Miller, who had other police officers around him, arriving one or two minutes after Pullin[125] but before Clarke, and remained at his side, holding him and cradling his head until he was placed in an ambulance. He said that the 'only thing he concentrated on' was Senior Constable Miller, and that he was listening all the time as to what he was saying. He agreed that from his point of view, he was in the best position to hear what Senior Constable Miller said during the time he was with him.

227 Gerardi heard Pullin ask, 'What's he look like? Can you give us a description?'. On his account, Senior Constable Miller said 'Ohh fuck I don't wanna die, I don't wanna die' repeatedly and was coming in and out of consciousness. He did not hear Senior Constable Miller say anything about any offender or vehicle or anything to do with the offence itself. At committal, he said that if Senior Constable Miller had said anything of that nature he would have put it in his statement. Gerardi also said during his IBAC examination, 'If I heard a description mentioned by Rod, I would have put it in my statement, but I didn't, and that's why I didn't put anything in my statement.' An initial statement made by Gerardi has also disappeared.

228 Senior Constable Francis Adams, who was present on two occasions for very short periods, did not hear Senior Constable Miller say anything about the offender(s). At trial, he said on the first occasion he was with Senior Constable Miller 'there was a conversation going on in regard to a motor vehicle and a description but I didn't hear all of that information clearly. I am not sure who was saying it.' He heard mention of a dark Hyundai but he wasn't sure if Senior Constable Miller said it. On the second occasion, there were people having conversations with him and 'he was saying other things' but the only thing he can clearly remember Senior Constable Miller saying was 'I can't breathe, I can't

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125 At trial he said there could have been a gap of between one and maybe two minutes but he couldn't be sure.

breathe'. An initial statement made by Adams has also been destroyed.

229 Detective Senior Constable Craig Small made a sworn statement dated 16 August 1998, and gave evidence at committal and trial, that he heard Senior Constable Miller say '[m]ale offender on foot' and that someone had said the vehicle was a dark coloured car, a Hyundai. His notes contained a note to this effect.

230 Detective Senior Constable Corey De Silva attended the scene with his partner Detective Senior Constable Brian Howard, and had been involved in Operation Hamada. In his statement dated 4 September 1998, he recorded that he heard Senior Constable Miller say, 'It was definitely a dark coloured Hyundai coupe or hatch, maybe dark blue', and that Howard immediately gave that information to other members present. At committal, he said he was not close enough to hear any other conversation around that. De Silva did not hear Senior Constable Miller say anything else in relation to the offence or any offender.

231 Detective Senior Constable Howard gave evidence that he and his partner, De Silva, arrived on the scene after two uniform members and that a number of other uniform and plain clothes officers arrived within short compass. He was with Senior Constable Miller for approximately two minutes. In his statement dated 31 August 1998, Howard stated: 'At that time I had a Police portable radio with me and description was broadcast to keep a look out for an Asian style small car. Senior Constable MILLER heard this broadcast and in an immediate response to the broadcast said to me: "It was definitely a dark coloured Hyundai coupe or hatch, maybe dark blue". I then yelled this information to HANSON[126] who informed Intergraph of same.' At committal, he said that during the time he was with Senior Constable Miller he did not say anything else about an offender or offenders, and he did not correct the description of the male offender.

232 Detective Senior Constable Alistair Hanson's statement, made at 4:55 am on 16 August 1998, recorded that he had heard 'the injured member answer "a dark

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126 Hanson is Frankston 401 in the Intergraph excerpt at [95] above.

Hyundai coupe or hatch"' and then notified Intergraph of same. His location at the time of broadcast was clarified at trial as having been the front passenger seat of the police car used by him and Small. At committal, Hanson confirmed that he did not hear Senior Constable Miller say anything about an offender or offenders.

(iii) The circumstances in which Senior Constable Clarke used the Intergraph

233 It seems clear that Senior Constable Clarke first attempted to use his portable radio to communicate the finding of Senior Constable Miller. He then moved to an unmarked police car, some two to three metres away, to use its radio.

234 Gardner, however, maintained throughout his evidence at both committal and at trial that Clarke was about two or three metres away, using his portable radio to relay information. Gardner did not see Clarke using the radio in a nearby police vehicle, and did not hear the broadcast in question.

235 At trial, Poke gave evidence that, after inspecting a vacant allotment on Cochranes Road with Sherren and observing the body of Sergeant Silk, she went back to the divisional van to put on her ballistics vest. At about this time she heard a transmission on the radio saying that the second member had been found and she then drove to the scene. Clarke said in his committal evidence that Poke had already arrived at the scene when Pullin was asking questions of Senior Constable Miller, and Clarke had moved to the car and was relaying them over the radio including, he believed, when Senior Constable Miller said 'they were on foot'. Both Poke's statement dated 11 April 2000 and her trial evidence stated that, when she arrived at the scene, Clarke was next to Senior Constable Miller, and shortly thereafter pulled up his shirt to check for injuries.

236 Thwaites who arrived with Poke, recorded in his statement that while attending to the scene of Sergeant Silk's murder he 'heard Cheltenham 206 unit with Senior Constable CLARKE request urgent assistance in Warrigal road directly outside 477 Warrigal Road. He stated that he had located the second missing

member and that this member had been shot in the lower torso area. POKE and I immediately jumped in the van and drove to the second crime scene.' He gave evidence at committal that he 'could not recall anything like that' in respect of whether anyone was relaying things said by Senior Constable Miller to a radio or to a member with a radio during the time he was there.

237 Pullin gave evidence at the committal that he did not have a memory one way or another about Clarke having a portable radio or using a radio from a nearby police car. Pullin agreed that he was relaying messages to Clarke, but said of his proximity, 'by the same token, Colin Clarke was also fairly close.' Before IBAC in 2019, Pullin said the following on the position of Clarke at the time of the key broadcast:

> That was all the discussion on the – like, when we were around Miller. There was two offenders; if I'm not mistaken, there was one in a car and one on foot. We – I believe – well, I'm – that was broadcast, I remember Colin Clarke – I remember the circumstances in which it was broadcast. I was kneeling next to Miller, Colin Clarke had – Al Hanson had pulled up his police car right next to Miller; Colin Clarke basically just opened the passenger door – in unmarked cars the radios are in the glove box – opened the glove box, grabbed the speaker and just started yelling what I was telling him; he was conveying what Miller was telling me, and I was telling him and he was broadcasting it; that's how I remember it.

238 Gerardi gave evidence in his statement and at trial that he arrived before Clarke, and recalled Clarke kneeling down in front of him to inspect Senior Constable Miller's injuries but did not make any further observations with regards to Clarke's whereabouts. At trial, he said that he 'wasn't present when information was given to other officers' by Senior Constable Miller. When questioned at IBAC in 2018, he recalled that Clarke 'just rolled him on one side and then he broadcast it over the air or stated that there was a bullet wound – just described the wounds in general' but had no recollection of Clarke asking about, or Senior Constable Miller describing, offenders. On the question of Clarke's account of using the car radio, Gerardi said it was 'very possible' but he had no recollection.

239 Officers Adams, Small, Hanson, De Silva and Howard did not give evidence bearing on the question whether Senior Constable Clarke used the police car radio.

240 It follows from the above analysis of the evidence of the first responders that what Clarke said over the Intergraph does not accord entirely with any of the varying accounts of what Senior Constable Miller actually said and that there are material differences in the accounts of what Senior Constable Miller actually said. There are also material differences in the respective roles attributed to Clarke and Pullin in the relevant conversations, and evidence that Clarke was to some extent physically removed from Senior Constable Miller after he moved to the unmarked police car in order to use the Intergraph.

241 When the evidence as a whole is considered, it raises the possibility that the Intergraph transmission by Clarke was the product of composite hearsay, misunderstanding, or the product of a leading question using the plural pronoun 'they'. It also raises the possibility that the understanding of some witnesses of what Senior Constable Miller said was derived from what they heard Clarke say. It was undoubtedly a dynamic and rapidly evolving scene, perhaps best described by Gerardi as 'mayhem'.

242 For completeness, we place little weight on the fact that the Intergraph recording shows the police response on the night included requests for assistance from the canine units and the air wing to search for an offender(s) on foot in circumstances where the Hyundai had left the scene. As the appellant submitted, a precautionary approach is hardly surprising.

(iv) The Intergraph descriptions of one offender only

243 The Intergraph transmission of Clarke's description of what Senior Constable Miller said is followed only two minutes later by an Intergraph transmission of the description of a car and an offender by another unit. It is notable that not only there is a description of only a single offender, but that it is detailed. Just a few moments after 00:34:40,[127] Caulfield 252 offers the first visual description of an offender:

> Caulfield 252, it's a new, possibly a 323. Similar to a Laser, hatchback, dark

[127] The time as recorded on the Intergraph transcript.

> blue. It's got mags, crisscross pattern. One male has been sighted, he's possibly 6, 6 foot, black hair which is fairly long. Received?

244 That first description is broadcast by the Intergraph operator to all units as follows:

> Roger. VKC to units, we're looking for a new 323, similar to a hatchback or a Laser. Dark blue, mags that crisscross. One male, 6 foot, black hair.

245 Then, a few moments later after 00:36:20 (consistently with evidence that Senior Constable Miller identified a Hyundai), Frankston 401 (Hanson) gives further information on the vehicle: 'It is possibly a dark coloured Hyundai. Repeat, a dark coloured Hyundai.' No further information is provided in relation to the offender(s). Just prior to 00:37:50, the Intergraph operator provides the air wing with the following information:

> Air 492, we have a description. At this stage possibly a new Hyundai, or a new 323 or similar. A hatchback, dark blue with mags that crisscross. One male said to be on board. … One male, 6 foot with black hair said to be long. Dark coloured car like a hatch.

246 Just after 01:11:00, the Intergraph operator broadcasts the possibility of two offenders: 'It's a dark Hyundai, mag wheels. One or two heads on board, male heads on board.' It is followed up just before 01:15:20 with 'Two males, that's about all we've got I think at this stage. … One 6 foot, blonde hair. 251. Correction of that, one 6 foot with long hair. Both said to be males.' Caulfield 252 then relays the following description: 'from a DSG member, description I had was 6'1", 6'2", black thinning long hair, was unshaven. That's all I've got.'

247 Just prior to 01:35:00, the Intergraph operator updates the available description:

> Caulfield 265, your latest description of your offender. Approximately 6'1" to 6'7" [sic],[128] late twenties, early thirties. Black thin shoulder length hair, fairly straight. He's of thin build, unshaven, approximately four days growth. Possibly Greek or Italian in descent. Last seen wearing a blue flannelette shirt and blue jeans, received?

248 It is clear from the Intergraph transcript that other channels were being used

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128 This is corrected to '6'2"' over the Intergraph shortly thereafter.

to transmit information relating to the offender(s) and the suspect vehicle. Nonetheless, it is notable that, while the Intergraph operator broadcast the potential for two male offenders, a description of only one suspect is available. The juxtaposition between Clarke's 'two on foot' transmission and the subsequent descriptions given by other units underscores the equivocal nature of the Intergraph evidence. On one view, Senior Constable Miller gave a description of only one offender because he had only seen one.

(v) Conclusion as to the Intergraph evidence

249 In summary, the Intergraph recording does not resolve the question of what Senior Constable Miller said as to the number of offenders:

- It does not accurately reflect Clarke's evidence as to what was said.
- It was not relied upon at trial as accurately stating what Senior Constable Miller said.
- It forms part of a body of differing accounts of what Senior Constable Miller said.
- It may have been affected by the circumstances in which Clarke used the radio contained in the police car.
- Clarke's own evidence has varied as to the respective roles of Pullin and others in interrogating Senior Constable Miller.
- It appears that within four minutes of the Intergraph recording relied upon by the Crown referring to two offenders, Senior Constable Miller through Hanson (Frankston 401) gave a corrected description of the Hyundai car after hearing Caulfield 252 describe the offender(s)' vehicle as 'possibly a 323' and having heard the statement 'one male has been sighted'. Senior Constable Miller did not dispute or clarify this latter statement.

250 The better view is that the evidence must be weighed up as a whole and the

Intergraph does not necessarily resolve the question of whether Senior Constable Miller identified two offenders as present at the scene.

251 We should for completeness observe that it was of course open to the jury to prefer the evidence of a particular witness to the Intergraph evidence and reach a conclusion adverse to the appellant as to Senior Constable Miller's statements. Likewise, it was open to combine different elements of the dying declaration evidence and come to the same conclusion.

252 What cannot be concluded with any confidence however is what the jury would draw from the dying declaration evidence if it was deconstructed by reference to the fresh evidence, and central elements which were placed before the jury at trial were subjected to further scrutiny as to their reliability. It was simply not open to the defence to trace the evolution of the relevant evidence at trial in a careful and comprehensive manner because it was not aware of the fresh evidence. Bearing in mind the natural limitations that exist in any appellate court proceeding substantially on the record,[129] the cumulative effect of the non-disclosure upon the weight of the evidence as a whole is now inherently difficult to assess despite the exploration of these issues before IBAC. We do not accept that a jury would be compelled to conclude Senior Constable Miller positively identified that there were two offenders by way of dying declaration.

(6) Was the non-disclosure a serious departure from the prescribed processes for trial resulting in a substantial miscarriage of justice?

253 Earlier in these reasons we recorded that s 326D of the *Criminal Procedure Act* provides that the Court must allow an appeal in cases such as the present if it is satisfied that there has been a substantial miscarriage of justice.[130] Further, the concept of substantial miscarriage of justice includes cases of the kind elaborated by

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129 *Baini* (2012) 246 CLR 469, 481 [32].

130 See [14] above.

the majority of the High Court in *Baini*.[131] In particular, a substantial miscarriage of justice may be demonstrated by a serious departure from the prescribed processes for trial, or by an error or irregularity in, or in relation to, a trial in circumstances where the Court of Appeal cannot be satisfied that the error or irregularity did not make a difference to the outcome of the trial.

254 In *Saricayir v The Queen*,[132] this Court noted that the authorities cited in *Baini* in support of the proposition that a serious departure from the prescribed processes for trial will, without more, establish a substantial miscarriage of justice, were cases in which the relevant legislation was of the proviso kind.[133] The Court went on to review the authorities cited by the majority in *Baini*, and other authorities also, 'in order to better understand what is meant by "a serious departure from the prescribed processes for trial".'[134] The effect of these authorities is neatly encapsulated in *Wilde v The Queen*, where Brennan, Dawson and Toohey JJ said:

> The proviso has no application where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings. If that has occurred, then it can be said, without considering the effect of the irregularity upon the jury's verdict, that the accused has not had a proper trial and that there has been a substantial miscarriage of justice. … There is no rigid formula to determine what constitutes such a radical or fundamental error. It may go either to the form of the trial or the manner in which it was conducted.[135]

255 In *Lee v The Queen*,[136] the High Court approved this passage and endorsed the articulation by Deane J in *Wilde* of the fundamental concept of a fair trial according to law:

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131 *Baini* (2012) 246 CLR 469, 479 [26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

132 [2018] VSCA 319 ('*Saricayir*').

133 Ibid [61] (Kaye, T Forrest and Ashley JJA). See also *Lane v The Queen* (2018) 265 CLR 196, 209–10 [46]–[48] (Kiefel CJ, Bell, Keane and Edelman JJ); *GBF v The Queen* [2020] HCA 40 [27] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ).

134 Ibid [62]. The Court reviewed *AK v Western Australia* (2008) 232 CLR 438; *Wilde v The Queen* (1988) 164 CLR 365 ('*Wilde*'); *Quartermaine v The Queen* (1980) 143 CLR 595; *Tuckiar v The Queen* (1934) 52 CLR 335.

135 *Wilde* (1988) 164 CLR 365, 373 (citations omitted).

136 (2014) 253 CLR 455 ('*Lee*'). *Lee* was in a sense the obverse of the present being one in which the prosecution was armed with evidence to which it was not entitled, whereas the present case is one in which the defence was not armed with evidence to which it was entitled.

> Deane J[137] said that '[t]he fundamental prescript of the administration of criminal justice in this country is that no person should be convicted of a serious crime except by the verdict of a jury after a fair trial according to law', and the proviso did not negate this principle. In a case where impropriety or unfairness permeated or affected a trial to an extent where it ceased to be a fair trial according to law, an appeal court could not dismiss an appeal on the basis that there had been no substantial miscarriage of justice. In *Jago v District Court (NSW)*,[138] his Honour referred to the circumstance where irregularity in proceedings was such that the trial 'has been rendered unfair or has lost its character as a trial according to law'.[139]

256 In *Saricayir*, having reviewed relevant authorities, the Court concluded:

> The authorities to which we have referred demonstrate, we think, that although there is recognised as being a kind of case where there has been a serious departure from the prescribed processes for trial, for which reason there will be, in such a case, a substantial miscarriage of justice, nonetheless the circumstances which give rise to the application of the principle are a rarity. Moreover, even in circumstances of apparently serious error, there will not always be unanimity of opinion.[140]

257 With respect, we agree with these observations. The departure from the prescribed processes for trial must be fundamental to that trial; it must go to the essence or root of a fair trial according to law. It cannot be a departure of a lesser nature — if it is, it may attract the other relevant test contemplated in *Baini*.[141]

258 A central question confronting the Court in this appeal concerns the characterisation of the police misconduct in the preparation for, and at, the appellant's trial. After anxious consideration we have concluded that Pullin's undisclosed misconduct so corrupted the fairness of the appellant's trial as to poison it to its root. Whilst it will be a rare event where circumstances will arise that are sufficiently aberrant as to invoke the application of the principle, we consider that the combination of the following circumstances require that it be applied.

259 We are satisfied on the balance of probabilities that Pullin's destruction of his initial statement; the substitution on the police brief of a backdated statement (which

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137 *Wilde* (1988) 164 CLR 365, 375.

138 (1989) 168 CLR 23, 56.

139 *Lee* (2014) 253 CLR 455, 471–2 [47] (citations in original).

140 *Saricayir* [2018] VSCA 319, [74] (Kaye, T Forrest and Ashley JJA).

141 See above [25].

incorporated important additions to the relevant declarations of Senior Constable Miller); his perjury as to the provenance of the false second statement both in the acknowledgment on the document itself and at the committal; and his failure to disclose any of this course of conduct to the defence amounted to a gross and fundamental corruption of the trial process. The appellant was confronting a trial of extraordinary gravity. A central plank of his defence was that the jury ought not be satisfied that there was more than one offender. Senior Constable Miller's alleged dying declarations went directly to this issue and, as we have explained, Pullin's evidence bore directly on the weight of the dying declaration evidence. If the jury were satisfied that there was more than one offender, it was a short step to conclude that the second offender was the appellant. Due to Pullin's course of conduct, the appellant's trial counsel were denied the opportunity to challenge Pullin fairly on this important issue. In our view, this was not an incidental error or some moderate departure from the prescribed trial processes. Pullin's undisclosed dishonest sequence of conduct influenced the trial in the prosecution's favour and to the detriment of the appellant on a critical issue in the trial. Whilst there is 'no rigid formula' to determine what constitutes such a radical or fundamental 'departure from the essential requirements of the law that … goes to the root of the proceedings', we are comfortably satisfied that Pullin's course of conduct meets that very high test.

260 This is a case in which impropriety and unfairness permeated and affected the trial to an extent that it ceased to be a fair trial according to law.[142]

261 It follows that we consider that the trial miscarried as a consequence of Pullin's conduct, and that there is, strictly speaking, no need to resort to any analysis of whether this conduct made any difference to the outcome of the trial.

262 We are fortified in our view that there was a serious departure from the prescribed processes for trial by our conclusions concerning other aspects of police

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142 *Lee* (2014) 253 CLR 455, 471–2 [47].

conduct in the brief preparation process. These aspects also concern Senior Constable Miller's dying declarations.

263 At paragraph [148] and following of these reasons we set out the effect of evidence obtained in the course of the IBAC examinations concerning the manner in which other police statements dealing with Senior Constable Miller's dying declarations were produced. In summary and to recapitulate:

- Police witnesses[143] to Senior Constable Miller's dying declarations were directed by Detective Sergeant Kelly to omit any statements made by Senior Constable Miller from their initial police statements and they complied with that direction. This fact was not disclosed at trial.

- At the committal, Thwaites concealed the fact that he had made a statement on the morning of the murders.

- Detective Sergeant Buchhorn, some time after the murders, coordinated the production of police statements. He implemented a practice of requesting revision of initial police statements, and when those revised statements were received they were supplied as part of the hand-up brief. The original statements did not form part of the hand-up brief and were not disclosed to either the prosecution or the defence at trial.

- Initial, potentially relevant, police statements from police officers including Thwaites, Poke, Adams and Gerardi were not retained and are now missing.

- The practices adopted in relation to the making of statements failed to meet the requirements stipulated by Inspector Collins in the early months of the investigation.

264 Whilst each of the above irregularities considered in isolation may not constitute a serious departure from prescribed processes for trial, their combined force when considered with Pullin's established misconduct reinforces our

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143 Thwaites and Clarke.

conclusion that there was such a departure in the appellant's trial. The defence were precluded from properly exploring a central plank of the prosecution case. It was not possible to trace the evolution of relevant police statements, expose those matters which were not included in initial contemporaneous statements, and identify other material changes in the evidence. It follows that we are satisfied that a substantial miscarriage of justice has occurred.

(7) Alternatively, has an irregularity occurred which the Court of Appeal cannot be satisfied did not make a difference to the outcome of the trial resulting in a substantial miscarriage of justice?

265 If we are in error in characterising the irregularities we have cited as constituting a serious departure from the prescribed processes for trial, then the second category identified in *Baini* to which we have referred falls for consideration. It is clear from our reasons thus far that we are of the view that there have been material irregularities in relation to the trial. In the language of *Baini*, the question becomes: are we satisfied that the irregularity or irregularities did not make a difference to the outcome of the trial? If we are so satisfied then, under this second category, there will have been no substantial miscarriage of justice and the appeal will fail.

266 It is appropriate to repeat the following observations from the majority judgment in *Baini*:

> But, at least in cases like the present where evidence has wrongly been admitted at trial and cases where evidence has wrongly been excluded, the Court of Appeal could not fail to be satisfied that there has been a substantial miscarriage of justice unless it determines that it was not open to the jury to entertain a doubt as to guilt.[144] Otherwise, there has been a substantial miscarriage of justice because the result of the trial may have been different (because the state of the evidence before the jury would have been different) had the error not been made.[145]

267 The present case is equivalent to a case in which evidence was wrongly excluded.

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144 Cf *R v Grills* (1910) 11 CLR 400, 431 (Isaacs J).

145 *Baini* (2012) 246 CLR 469, 481 [32].

268 At paragraphs [142]–[149] of these reasons we have set out our summary of the irregularities in both Pullin's evidence and the broader evidence concerning the dying declarations of Senior Constable Miller.

269 At paragraph [161] and following we have considered the question of whether the appellant's convictions were inevitable irrespective of the dying declaration evidence. It will be recalled that we concluded that:

- This was a circumstantial case, of the 'strands in a cable' type.
- Significant aspects of the Crown case are now squarely admitted by the appellant, including his involvement in the Hamada robberies. This supported the hypothesis of two offenders, one of them being the appellant, although this was not determinative of that issue.
- The use of two handguns in the shots fired at the victims and the ballistic evidence as a whole also supported the hypothesis that there were two offenders, although again this is not determinative of that issue.
- The covert recordings admissible against the appellant supported the hypothesis that he was one of the offenders, albeit they are arguably susceptible to explanation consistent with innocence.
- The case as a whole (disregarding the dying declaration evidence) was powerful but conviction was not inevitable.
- The dying declaration evidence was integral to the Crown case as articulated at trial.
- The impugned evidence was in turn an integral part of the dying declaration evidence.

270 It follows that we are not satisfied that the irregularities we have identified did not make a difference to the outcome of the trial. Putting this in less cumbersome language, we are not satisfied that, absent the impugned irregularities,

convictions for murder were the inevitable consequence of the balance of the Crown case.

271 Accordingly, the appellant has established a substantial miscarriage of justice by reason of procedural irregularity on both of the bases we have analysed.

(8) What is the appropriate disposition of the appeal?

272 It follows from the above considerations that the appeal must be allowed.

273 Section 326E(1) further relevantly provides:

> (1) If the Court of Appeal allows an appeal under section 326A, it must set aside the conviction of the offence (***offence A***) and must—
>
> (a) order a new trial of offence A; or
>
> (b) enter a judgment of acquittal of offence A; …

274 The appellant submits that the fresh evidence discloses police misconduct which has so tainted the criminal process that it would not be in the interests of justice to order a retrial and that the appropriate disposition of the appeal is to order an acquittal.

275 The appellant further relies on the following circumstances:

> Undoubtedly, the gravity of the charges would — if it was the sole or determinative factor — support an order for a re-trial in this case. However, here, there are considerations that collectively support the entry of acquittals:
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> a) The appellant has been in custody since 15 August 2000, when he was 19 years old. Since March 2013 he has been imprisoned in the Acacia Unit at Barwon Prison, the highest security unit at the prison. This has entailed limited contact visits and telephone calls, limited time out of his cell, lockdown for 21 hours a day (involving confinement to his cell and a small rear yard), and highly restricted contact with other prisoners.
>
> b) The substantial miscarriage of justice that has occurred in this case did not arise from some kind of misdirection or non-direction. It did not arise from an innocent mistake. It resulted from significant police misconduct that involved:
>
> i) fabricated evidence;
>
> ii) reprehensible conduct committed by investigating police;

iii) similarly 'atrocious breaches of the sworn duty of every police officer to discharge all duties imposed on them faithfully and according to law without favour or affection, malice or ill-will' to those committed by officers who encouraged Nicola Gobbo to inform on her own clients.

c) That significant police misconduct was not revealed by Victoria Police or those individual members who perpetrated and were responsible for its occurrence, who presumably were content for the appellant to serve out the balance of the life sentence that had been imposed notwithstanding that his trial had been deliberately corrupted. This Court ought condemn and deter such deliberate misconduct and concealment, which undermines the foundations upon which our system of criminal justice stands and depends. It may never have been exposed but for the referral to and the work of the Independent Broad-based Anti-corruption Commission.[146]

276 The respondent submits that the Court should apply a two-stage test to inform the exercise of its discretion. First, the Court must consider whether the admissible evidence given at the original trial was sufficiently cogent to justify conviction, together with any fresh evidence supporting such conviction.

277 Secondly, the Court must take into account 'any circumstances that might render it unjust to the accused to make him stand trial again, remembering however that the public interest in the proper administration of justice must be considered as well as the interests of the individual accused'.[147]

278 The respondent further submits that, as the majority judgment in *R v Taufahema*[148] made clear, the public interest in the proper administration of justice has two significant aspects in a case such as the present:

(a) the public interest in the due prosecution of offenders in respect of serious offences; and

(b) the desirability, if possible, for the guilt or innocence of an accused to be finally determined by a jury.

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146 Footnotes omitted.

147 *DPP (Nauru) v Fowler* (1984) 154 CLR 627, 630 (Gibbs CJ, Murphy, Wilson, Deane and Dawson JJ). See also *R v Thomas (No 3)* (2006) 14 VR 512; *R v Tang* [2007] VSCA 144.

148 (2007) 228 CLR 232, 254–5 [49]–[51] (Gummow, Hayne, Heydon and Crennan JJ) ('*Taufahema*').

279 We accept that the first matter relevant to the disposition of the appeal is whether, despite the fresh evidence, there remains evidence upon which it would be reasonably open to convict the appellant. This question must be answered in the affirmative. Whilst, as we have said, we are not persuaded that conviction is inevitable, the Crown case remains strong.

280 Secondly, the Court must identify factors which might outweigh the obvious public interest in the due prosecution of offences as serious as those alleged in this case and the desirability for the guilt or innocence of an accused to be finally determined by the jury. In this regard, we note the following:

(1) Whilst reference to other cases helps to identify the relevant principles which we must apply,[149] each case must ultimately turn on its own facts.

(2) The non-disclosure forming the basis of our conclusions as to substantial miscarriage of justice relates to evidence which a jury would be well capable of evaluating in the context of the evidence as a whole upon a retrial.

(3) It is not submitted that the appellant has suffered irreparable prejudice in the presentation of his defence by reason of delay in the disclosure of the fresh evidence.

(4) Although the non-disclosure did not result from innocent mistake and reflects reprehensible conduct by police officers, we do not accept that the need to deter repetitions of such behaviour is of itself sufficient to justify an acquittal. The quashing of the appellant's convictions and the fact of a retrial will of themselves have a deterrent effect.

(5) The police misconduct in issue was both concealed at trial and thereafter. We accept that it may never have been exposed but for the actions of a whistle-blower and the investigations of IBAC. Nonetheless, we are not persuaded

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149 See *Taufahema* (2007) 228 CLR 232; *R v Maxwell* [2011] 4 All ER 941; *Eastman v DPP (No 13)* [2016] ACTCA 65.

that the evidence as to non-disclosure demonstrates that the integrity of the criminal justice system has been so prejudiced that a retrial cannot now proceed fairly and with the confidence of the community. In a fundamental sense, a retrial will vindicate the integrity of the criminal justice system.

(6) The fact that, as a result of a trial vitiated by a substantial miscarriage of justice, the appellant has suffered considerable personal hardship must be weighed in the balance. In this regard, we accept:

- the appellant has been in custody since 19 August 2000;
- the appellant was only 19 years of age when imprisoned;
- the appellant has been imprisoned under onerous conditions in high security; and
- protracted legal proceedings have and will involve significant stress.

281 Accepting that there are matters which weigh against a retrial, we are nonetheless of the view that the underlying public interest in the prosecution of the very serious offences here in issue and the desirability of the adjudication of the appellant's guilt by jury must predominate. In our view, the issues raised by the fresh evidence are quintessentially matters suitable for determination by a jury.

282 The proper approach is that taken by the majority of the High Court in *Taufahema*, which was itself an appeal concerned with the alleged murder of a police officer:

> The fact is that the trial which took place was a flawed one. The question is whether an order for a new trial is a more adequate remedy for the flaws in that trial than an order for an acquittal — that is, an order terminating the possibility of any investigation by a jury, in an unflawed fashion, of the accused's role in the circumstances leading to Senior Constable McEnallay's death. An order for acquittal conflicts with 'the desirability, if possible, of having the guilt or innocence of the [accused] finally determined by a jury which, according to the constitutional arrangements applicable in [New South Wales], is the appropriate body to make such a decision'.[150] In *Reid v The*

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150 *R v Anderson* (1991) 53 A Crim R 421, 453 (Gleeson CJ).

Queen[151] the Privy Council approved the following statement of the Full Court of Hong Kong:[152]

> It is in the interest of the public, the complainant, and the appellant himself that the question of guilt or otherwise be determined finally by the verdict of a Jury, and not left as something which must remain undecided by reason of a defect in legal machinery.

The reference to 'complainant' is to be explained by the fact that that case was one in which a doctor allegedly raped a patient. It is not only those who live to complain about crime whose interests are relevant, but also the relatives and friends of those who do not. The Full Court of Hong Kong described the case before it as one 'of peculiar heinousness', and so is this case. The question, then, is whether there is some good reason for not allowing a jury to decide whether the prosecution can prove its case, and for allowing the matter to remain undecided because of the defects in the first trial.[153]

283 We are not persuaded that in the present case adequate reason has been shown for not allowing a jury to decide whether the prosecution can prove its case upon a fair trial.

Conclusion

284 Accordingly, the appeal will be allowed, the appellant's convictions for murder will be quashed, and an order will be made for a new trial.

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151 [1980] AC 343, 350 (Lords Diplock, Hailsham of St Marylebone, Salmon, Edmund-Davies and Keith of Kinkel).

152 *Ng Yuk Kin v The Crown* (1955) 39 HKLR 49, 60 (Gould, Gregg and Wicks JJ).

153 *Taufahema* (2007) 228 CLR 232, 255 [51] (Gummow, Hayne, Heydon and Crennan JJ) (citations in original).