	Court of Criminal Appeal Supreme Court New South Wales

Case Name:	Attorney General for New South Wales v XX
Medium Neutral Citation:	[2018] NSWCCA 198
Hearing Date(s):	29 & 30 November 20171, 4, 5 & 6 December 2017
Date of Orders:	13 September 2018
Decision Date:	13 September 2018
Before:	Bathurst CJ; Hoeben CJ at CL; McCallum J
Decision:	Application dismissed.
Catchwords:	CRIMINAL PROCEDURE – application for retrial after acquittal under Crimes (Appeal and Review) Act 2001 (NSW) s 100(1) – three children disappeared over five month period – respondent acquitted of murders of two of the children at separate trials – evidence relating to disappearance of third child available but not admitted at either trial – whether evidence relating to disappearance of third child was “fresh and compelling” evidence in relation to the murders of the first two children CRIMINAL PROCEDURE – application for retrial after acquittal under Crimes (Appeal and Review) Act 2001 (NSW) s 100(1) – applicant ran case on basis that it was necessary to obtain an order for a retrial of the respondent for murders of both of the first two children – applicant submitted at conclusion of hearing that an order for a retrial of respondent for only one of the murders was sought in the alternative – whether applicant permitted to change the case run on the application

Legislation Cited:	Coroners Act 1980 (NSW) Crimes (Appeal and Review) Act 2001 (NSW) Crimes Act 1900 (NSW) Criminal Appeal Act 1912 (NSW) Criminal Appeal Act 2004 (WA) Criminal Justice Act 2003 (UK) Criminal Law Consolidation Act 1935 (SA) Evidence Act 1995 (NSW) Evidence Amendment Act 2007 (NSW) Evidence Regulation 2015 (NSW) Interpretation Act 1987 (NSW) Trade Practices Act 1974 (Cth)

Cases Cited:	Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) (2009) 239 CLR 27; [2009] HCA 41 Attorney General's Reference (No 3 of 1999) [2001] 2 AC 91 Bropho v Western Australia (1990) 171 CLR 1; [1990] HCA 24 Certain Lloyd's Underwriters v Cross (2012) 248 CLR 378; [2012] HCA 56 Chamberlain v The Queen (No 2) (1984) 153 CLR 521; [1984] HCA 7 Chippendale Printing Co Pty Ltd v Commissioner of Taxation (1996) 62 FCR 347; [1996] FCA 1259 Coco v The Queen (1993) 179 CLR 427; [1994] HCA 15 Commissioner for Railways (NSW) v Agalianos (1955) 92 CLR 390; [1955] HCA 27 Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594; [1990] HCA 17 Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63 Electrolux Home Products Pty Ltd v Australian Workers' Union (2004) 221 CLR 309; [2004] HCA 40 Federal Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503; [2012] HCA 55 Gallagher v The Queen (1986) 160 CLR 392; [1986] HCA 26 Garrett v The Queen (1977) 139 CLR 437; [1977] HCA 67 Green v United States, 355 US 184 (1957) Hoch v The Queen (1988) 165 CLR 292; [1988] HCA 50 Jago v District Court of New South Wales (1989) 168 CLR 23; [1989] HCA 46 Katsuno v The Queen (1999) 199 CLR 40; [1999] HCA 50 Lacey v Attorney-General (Qld) (2011) 242 CLR 573; [2011] HCA 10 Lee v New South Wales Crime Commission (2013) 251 CLR 196; [2013] HCA 39 Lee v The Queen (2014) 253 CLR 455; [2014] HCA

Category:	Principal judgment
Parties:	Attorney General for New South Wales (applicant) XX (respondent)
Representation:	Counsel: W Abraham QC with J Single and J D Williams (applicant) M Ierace SC with J Roy (respondent) P Singleton (Commissioner of Police and Commissioner of Corrective Services) Solicitors: Crown Solicitor's Office (applicant) Legal Aid NSW (respondent)
File Number(s):	2016/377234
Publication Restriction:	Restriction on publication under s 111 of the Crimes (Appeal and Review) Act 2001 (NSW) of any matter for the purpose of identifying or having the effect of identifying the respondent. Orders under the Court Suppression and Non-publication Orders Act 2010 (NSW) made by the Court of Criminal Appeal on 1 December 2017 in accordance with Short Minutes of Order.

HEADNOTE

[This headnote is not to be read as part of the judgment]

On 16 December 2016, the Attorney General for New South Wales made an application to the Court of Criminal Appeal under s 100(1) of the *Crimes (Appeal and Review) Act 2001* (NSW) for an order for a retrial of the respondent for the murders of Clinton Speedy and Evelyn Greenup. The purpose of the application was said to be to enable the respondent to be retried for those offences and for the murder of Colleen Walker at a single trial on the same indictment.

The application brought by the Attorney General arose out of the disappearances of Clinton Speedy, Evelyn Greenup and Colleen Walker from the town of Bowraville on the north coast of New South Wales over a five month period from September 1990 to February 1991. The remains of Clinton

Speedy were discovered on 18 February 1991 and the respondent was charged with his murder on 8 April 1991. The remains of Evelyn Greenup were discovered shortly after on 27 April 1991 and the respondent was charged with her murder on 16 October 1991. Items of clothing worn by Colleen Walker were recovered from a river, but no remains had ever been found and no charges had ever been laid for her murder.

Before the trial of the respondent for the murders of Clinton Speedy and Evelyn Greenup had commenced, a judge of the Supreme Court of New South Wales made an order that there be separate trials. The trial of the respondent for the murder of Clinton Speedy commenced first and the respondent was acquitted of that offence by a jury on 18 February 1994. After the acquittal, the prosecution of the respondent for the murder of Evelyn Greenup was discontinued.

After a reinvestigation by police, a coronial inquest into the death of Evelyn Greenup and the disappearance of Colleen Walker was held in 2004. At the conclusion of the inquest, while the Coroner found that Colleen Walker had been murdered, he did not find that there was sufficient evidence to satisfy a jury that a known person was responsible for her murder. However, the Coroner found that there was evidence capable of satisfying a jury that Evelyn Greenup was murdered by a known person. Following the conclusion of the inquest, the respondent was tried for the murder of Evelyn Greenup and was acquitted of that offence by a jury on 3 March 2006.

In the application brought by the Attorney General for an order under s 100(1), it was claimed that, if the evidence relating to each of the disappearances and deaths of Clinton Speedy, Evelyn Greenup and Colleen Walker was considered by a jury at a single trial, then that evidence would establish that “each of the children were murdered; they were murdered by the same person; and that person was [the respondent]” through “coincidence reasoning” based on the alleged similarities in the circumstances between each of the murders.

The Attorney General identified several categories of evidence which were said to be “fresh” such as to enable the Court of Criminal Appeal to make an order under s 100(1). The most important category of evidence said to be “fresh” was the evidence relating to the murder of Colleen Walker, most of which had not been put before the jury at either of the earlier trials. The Attorney General said that this category of evidence was “compelling” because it established similarities in the circumstances between each of the murders in a way which would not have been possible if the only evidence considered by the jury was that relating to the other two murders.

The main issues arising out of the application were:

1 Whether s 105(7) of the *Crimes (Appeal and Review) Act 2001* (NSW) required the Court to consider whether the evidence relating to the murder of Colleen Walker was “fresh and compelling” in relation to the murders of Clinton Speedy and Evelyn Greenup together or separately;

2 Whether the evidence relating to the murder of Colleen Walker (the Walker evidence) was “fresh” in relation to the murder of Evelyn Greenup for the purposes of s 102(2) of the *Crimes (Appeal and Review) Act 2001* (NSW);

3 Whether there was any other evidence which was “fresh and compelling” in relation to the murder of Evelyn Greenup; and

4 Whether it was open to the Court to consider whether an order for the retrial of the respondent for the murder of Clinton Speedy could be made even if no order was made in relation to the murder of Evelyn Greenup.

Section 105(7) of the Crimes (Appeal and Review) Act 2001 (NSW)

Where orders for the retrial of multiple offences are sought in an application and the Court finds that those offences “should be heard on one indictment” at any retrial, s 105(7) does not permit the Court to make orders for the retrial of all of those offences if there is evidence which is “fresh” in relation to only some of those offences. The Court must consider whether there is evidence which is "fresh" in relation to each of the offences separately, even if the offences "should be tried on one indictment" at any retrial: [168]-[172].

(ii) Where orders for the retrial of multiple offences are sought in an application, the Court finds that those offences "should be tried on one indictment", and evidence has been found to be "fresh" in relation to those offences, s 105(7) permits the Court to consider whether that evidence is "compelling" in the context of a future joint trial of those offences. For an order for a retrial to be made in relation to an offence, the evidence which has been found to "fresh" in relation to that offence must be the same evidence which has been found to be "compelling" in relation to that offence: [173]-[176].

Whether the Walker evidence was "fresh" in relation to the murder of Evelyn Greenup

(iii) Evidence satisfies s 102(2)(a) in relation to an offence only if it was not "tendered" or "brought forward" in the "proceedings in which the person was acquitted" of that offence irrespective of whether the evidence was admissible in those proceedings or not: [225].

R v Zhang (2005) 196 FLR 152; [2005] NSWCCA 437, considered.

(iv) Evidence satisfies s 102(2)(b) in relation to an offence only if it could not have been "tendered" or "brought forward" in "proceedings in which the person was acquitted" of that offence with "the exercise of reasonable diligence" irrespective of whether the evidence was admissible in those proceedings or not: [225], [249].

R v Zhang (2005) 196 FLR 152; [2005] NSWCCA 437, considered.

(v) The Walker evidence was available to be "tendered" or "brought forward" prior to the trial of the respondent for the murder of Evelyn Greenup. In these circumstances, the evidence was not "fresh" within the meaning of s 102(2):

[256].

Whether there was any other evidence which was “fresh and compelling” in relation to the murder of Evelyn Greenup

(vi) Most of the other categories of evidence relied on were also available to be “tendered” or “brought forward” prior to the trial of the respondent for the murder of Evelyn Greenup. In these circumstances, the evidence was not “fresh” within the meaning of s 102(2): [258].

(vii) The only evidence which was not available to be “tendered” or “brought forward” prior to the trial of the respondent for the murder of Evelyn Greenup were the statements made by the respondent in a recorded interview with a journalist in 2016. In these circumstances, this evidence was “fresh” within the meaning of s 102(2): [258].

(viii) Relying on the statements made by the respondent in the recorded interview as amounting to “implied admissions of guilt” would require proving the guilt of the respondent independently of these statements. In these circumstances, the evidence is not “highly probative” within the meaning of s 102(3)(c), and was therefore not “compelling” within the meaning of s 102(3): [260].

Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, applied.

Whether an order could be made in relation to the murder of Clinton Speedy even if no order was made in relation to the murder of Evelyn Greenup

(ix) The Attorney General did not seek to make a case for an order that the respondent be retried for the murder of Clinton Speedy without also being retried at the same time for the murder of Evelyn Greenup. The question of whether such an order should be made has not properly been raised for the determination by the Court: [267]-[280], [287].

(x) The Attorney General did not seek leave to amend the application to seek an order that the respondent be retried for the murder of Clinton Speedy without also being retried for the murder of Evelyn Greenup at the same time, and had leave been sought, it would not have been granted: [281]-[286].

R v SH [2014] NSWCCA 218, referred to.

Judgment

1 **THE COURT:** This is an application brought by the Attorney General of New South Wales (the applicant) under s 100(1) of the *Crimes (Appeal and Review) Act 2001* (NSW) (CARA) for orders that the respondent be retried for the murder of Clinton Speedy and the murder of Evelyn Greenup and for orders quashing the earlier acquittals of the respondent for those offences on 18 February 1994 and 5 March 2006 respectively. The application expresses its purpose to be to enable a retrial of the respondent for those offences jointly on an indictment for the murder of Colleen Walker. The power of the applicant to bring the application is contained in s 115(1) of CARA.

2 Ordinarily, a person who has been acquitted of an offence is protected by the principle of double jeopardy and cannot be tried again for that offence. However, this Court has power under s 100(1) of CARA to order that a person who has been acquitted of a “life sentence offence” such as murder be retried if the Court is satisfied that there is “fresh and compelling” evidence against that person in relation to that offence and that it is in the “interests of justice” for the order to be made.

3 This Court has come to the conclusion that it cannot be so satisfied and that the application must therefore be dismissed. We acknowledge that the deaths of Colleen Walker, Evelyn Greenup and Clinton Speedy were tragedies for their families and the Bowraville community and we recognise the distress that the deaths of these children and the subsequent investigations and proceedings have caused the families involved.

4 This application was not a retrial of the respondent for any of the charges of which he was acquitted; nor was it an appeal from such acquittals. This Court

was not required to form, and has not formed, any view as to the guilt or innocence of the respondent in respect of any of the deaths.

Background

5 The summary of the factual background below is sufficient to identify the circumstances in which this application was made.

6 On Thursday, 13 September 1990, Colleen Walker disappeared sometime after attending a party at a house at 4 Cemetery Road in an area known as “the Mission” in Bowraville. The respondent was also present at the party. The evidence tendered in support of the application showed that, on most accounts, Colleen Walker was planning to catch a train at 3:00am on the morning of Friday, 14 September 1990 from Macksville in order to travel to Goodooga via Sydney. She did not catch the train.

7 Colleen Walker’s remains were never discovered. However, on 17 April 1991, a person fishing in the Nambucca River near Macksville hooked a pair of jeans and a belt which were subsequently identified as clothing which Colleen Walker had worn. The police were notified. On 20 April 1991, police divers found plastic bags in the river containing rocks and items of clothing, some of which were also subsequently identified as having been worn by Colleen Walker.

8 There were various accounts as to Colleen Walker’s disappearance and her connection with the respondent, including her plans to travel to Goodooga the night after the party, allegations that the respondent was hassling her at the party, allegations that a “couple of months” prior to the party she had complained that the respondent touched her while she was sleeping over at his caravan, and accounts that she had been at the respondent’s caravan either on the Friday after the party or on the Wednesday before it with Adrian Jarrett, who is now deceased.

9 Evelyn Greenup disappeared on 3 October 1990. At the time, she was four years old and was the eldest of Rebecca Stadhams’ three children. She was living with Rebecca Stadhams’ mother, Patricia Stadhams, at 6 Cemetery Road at ”the Mission” in Bowraville. Her father, Ivan “Billy” Greenup, lived at 3

Cemetery Road at “the Mission”.

10 On 3 October 1990, a party was held at Patricia Stadhams’ house. The respondent was present at the party, as were Rebecca Stadhams’ three children. It appears from evidence tendered at the hearing of this application that Rebecca Stadhams and her three children went to bed at around midnight. It seems that, sometime the following morning, Evelyn Greenup was found not to be in the bedroom. One of the shoes that she was wearing the night before was found by Rebecca Stadhams after she went missing. However, Evelyn Greenup was not located.

11 On 27 April 1991, Evelyn Greenup’s remains were located in bushland off a track less than 100 metres from Congarinni Road, about 4 kilometres from Bowraville. A pink shoe was located about 12 metres from the remains, which matched the pink shoe found by Rebecca Stadhams.

12 The key pieces of evidence which were said to link the respondent to Evelyn Greenup’s disappearance were accounts that he was near the door of Rebecca Stadhams’ room on the evening in question, that he was looking through the window of the room in which Rebecca Stadhams and her children were sleeping, that Evelyn was crying inside the room and that there was a large thud after which she was quiet, and evidence that Rebecca Stadhams’ jeans and perhaps underwear had been pulled down during the night.

13 Clinton Speedy was sixteen years old at the time he disappeared. At the time he was in a relationship with Kelly Jarrett. On 31 January 1991, he attended a party at Alma Jarrett’s units at what were known as the “pensioner units” on Herborn Drive in Bowraville. It was asserted by the applicant that, in the early hours of 1 February 1991, the respondent asked Clinton Speedy and Kelly Jarrett to go to his caravan for a drink. It was alleged that they eventually fell asleep in his caravan.

14 Kelly Jarrett stated that, when she awoke the following morning, neither Clinton Speedy nor the respondent were in the caravan. Kelly Jarrett stated that Clinton Speedy’s shoes and socks were still in the caravan. She also said

that she found that her shorts and underpants had been removed. She said that she searched for her clothes and found them folded up on a table under a number of items of the respondent's clothing. She said that she spent the day looking for Clinton Speedy but she could not find him.

15 On 18 February 1991, Clinton Speedy's remains were found some 8 kilometres south of Bowraville. Upon examining the remains, a pathologist concluded that two injuries to the skull were consistent with Clinton having suffered trauma to the head, but was unable to determine the cause of death.

16 The key pieces of evidence which were said to link the respondent to Clinton Speedy's disappearance include evidence that Kelly Jarrett's underwear and pants were interfered with during the night, that the respondent left the caravan early in the morning and was away from 5:00am to about 6:00am, that Clinton Speedy's remains were found with one of the respondent's pillowcases in his pants, and that a blanket was found near Clinton Speedy's remains which was identified by some people as being from the respondent's caravan. It was also alleged the respondent had a sexual interest in Kelly Jarrett.

17 In an affidavit sworn on 16 December 2016, Detective Chief Inspector Gary Jubelin stated that the initial investigation into the children's disappearance was conducted by local officers from the Bowraville and Macksville Police Stations. He stated that the investigation was a "missing persons investigation", which differed from a homicide investigation since the focus of a "missing persons investigation" was to locate the person "safe and well at the earliest opportunity". He identified what he described as "three key differences" between a missing persons investigation and a homicide investigation. First, "identification evidence is treated differently", second, "crime scene management is a vital part of all homicide investigations", and third, "specialist resources are allocated to homicide investigations". It is not necessary at this point in the judgment to consider the effect of those differences.

18 Detective Chief Inspector Jubelin stated that, following the discovery of Clinton Speedy's remains, all three disappearances were treated as homicide investigations. Once again, it is unnecessary at this point in the judgment to

deal with the criticisms made by Detective Chief Inspector Jubelin of the adequacy of the initial homicide investigations. However, even at this stage, it is important to bear in mind the limited basis upon which Detective Chief Inspector Jubelin's affidavit was admitted. The evidence was objected to by the respondent, and was ultimately admitted for the limited purpose of establishing a reasonable basis for Detective Chief Inspector Jubelin's suspicion that the respondent had committed the offences, which is a necessary foundation of the present application under s 105(2) of CARA. The applicant accepted that the evidence is not relevant to the Court's determination as to whether the evidence in question is "fresh and compelling"

19 In those circumstances, the evidence cannot be used as evidence of the adequacy or otherwise of the initial police investigation into the disappearances of Colleen Walker, Evelyn Greenup or Clinton Speedy, and in particular, on the question of whether any material relied on by the applicant could have been adduced in the trials with the "exercise of reasonable diligence" for the purposes of s 102(2)(b) of CARA. However, having regard to the manner in which the applicant put his case, this may not be of particular importance.

20 On 8 April 1991, the respondent was charged with the murder of Clinton Speedy. On 16 October 1991, he was charged with the murder of Evelyn Greenup.

21 On 30 November 1991, an inquest was held into the disappearance of Colleen Walker, which was adjourned after one day and an "open" finding was made by the Coroner. On 29 September 1993, the inquest was re-opened for new evidence and the matter was then adjourned until 2 November 1994, when the Coroner found that there was insufficient evidence to pronounce Colleen Walker deceased.

22 The respondent sought an order pursuant to s 365(2) of the *Crimes Act 1900* (NSW) as then in force that the counts in relation to Clinton Speedy and Evelyn Greenup be tried separately. On 25 August 1993, Badgery-Parker J made that order. Badgery-Parker J also concluded that the proposed "similar fact" evidence relied on by the Crown connecting the two murders was not

admissible in either trial. The application was determined prior to the introduction of the *Evidence Act 1995* (NSW).

23 The similar fact evidence sought to be relied upon by the Crown in support of a joint trial was summarised in the judgment of Badgery-Parker J of 25 August 1993. The similar fact evidence was said to be that:

> "(a) Speedy and Greenup were residents of Bowraville, a town of approximately 1100 people including 350 [Aboriginal persons]..
>
> (b) Speedy and Greenup were [Aboriginal persons] aged respectively 16 years and four years.
>
> (c) Speedy and Greenup were known to the accused prior to their disappearance.
>
> (d) Speedy disappeared on or about 1 February 1991, Greenup disappeared on or about 4 October 1990.
>
> (e) Speedy and Greenup were at parties which were held the night prior to each of them disappearing, such parties were also attended by the accused.
>
> (f) The remains of Speedy and Greenup were found near tracks leading off Congarinni Road, a secondary gravel road running from Bowraville across a bridge over the Nambucca River then on the [sic] Macksville. Speedy's remains were found on 18 February 1991, Greenup's remains were found on 27 April 1991.
>
> (g) There was no apparent attempt to cover (eg. by burial) either Speedy or Greenup.
>
> (h) The remains of both Speedy and Greenup showed a penetrating injury to the skull and signs of having been struck with considerable force."

24 Badgery-Parker J's conclusion was in the following terms:

> "The question as to each circumstance relied upon is not whether, taken alone, it is capable of proving the fact in issue but whether the combination of circumstances proved can carry the proof. In my view, even when one brings to account all of the background circumstances, namely those set out in the Crown's list in paragraphs (a)-(e), the three points of suggested similarity are not capable of supporting an inference, beyond reasonable doubt, that both murders were committed by the same person. If there were additional circumstances available to be proved, such that in total the evidence was capable of carrying the proof to the point where, beyond reasonable doubt, it appeared that both persons were killed by the same persons, then the similar fact evidence might be held admissible notwithstanding that it alone could not carry the proof so far. But on the material before me, the similarity which can be seen between the two crimes as detailed in the Crown's paragraphs (f), (g) and (h) is not so striking as, coupled with the other circumstances available, to be capable of proving beyond reasonable doubt that both crimes were

committed by the same person."

25 None of the evidence relating to the disappearance of Colleen Walker was led in the Speedy trial and no application was made to do so.

26 On 18 February 1994, the respondent was acquitted of the murder of Clinton Speedy. On 4 March 1994, a nolle prosequi, being a formal notice that the prosecutor will not proceed with the charge, was entered with respect to the charge of murder of Evelyn Greenup.

27 On 6 January 1997, the Commissioner of Police established a "Strike Force" to reinvestigate the deaths of Clinton Speedy and Evelyn Greenup and the disappearance of Colleen Walker.

28 On 9 February 2004, the State Coroner opened an inquest into the death of Evelyn Greenup and the suspected death of Colleen Walker (the 2004 inquest). After hearing the evidence, the Coroner concluded on 10 September 2004 that Evelyn Greenup died on or about 4 October 1990 in Bowraville. As to the death of Evelyn Greenup, the Coroner was satisfied that there was evidence capable of satisfying a reasonable jury properly instructed that she was murdered and further that there was a reasonable prospect that that jury would convict a known person (presumably, the respondent) of her murder. Accordingly, his Honour terminated the inquest, as required under s 19 of the *Coroners Act 1980* (NSW). As to the death of Colleen Walker, the Coroner found that Colleen Walker died on or about 13 September 1990 near Bowraville as a result of homicide. However, his Honour was not persuaded that there was sufficient evidence to satisfy a jury that a known person was responsible for the murder.

29 Thereafter, an ex officio indictment was filed against the respondent for the murder of Evelyn Greenup and in February 2005 he was indicted to stand trial (the Greenup trial).

30 As the respondent had been acquitted of the murder of Clinton Speedy, no reliance was placed on evidence connecting him with that murder, on the basis that any attempt to lead it as coincidence evidence would inevitably have

traversed the acquittal: *R v Storey* (1978) 140 CLR 364 at 372, 383, 396-397; [1978] HCA 39; *Washer v Western Australia* (2007) 234 CLR 492; [2007] HCA 48 at [5], [32]-[33], [38]. However, as we indicate at [32] below, one piece of evidence relating to the murder of Clinton Speedy was sought to be tendered.

31 The respondent was not charged with the murder of Colleen Walker at the time of the Greenup trial, and with one exception, no attempt was made to rely on the additional evidence of her death which was gathered during the reinvestigation and put before the Coroner. That exception was that the prosecution sought to tender evidence that, in the words of the trial judge, “if accepted, suggests that the accused has interfered so as to remove or pull down clothing of two women, including underclothing, of two girls or women on occasions other than that with which this trial is directly concerned”. It was said to be relevant to the evidence of Rebecca Stadhams in the Greenup trial that, when she woke on the morning of 4 October 1990, which was the day that Evelyn was found to have disappeared, her pants and underpants had been pulled down to her knees.

32 The evidence sought to be adduced was first, evidence of Patricia Grainier, who said that Colleen Walker had told her that the respondent had “mauled me all night. He touched me down low and up the top as well. This morning I had to pull my pants up when I woke. He’d got them down during the night”. In addition, the judgment recorded that the Crown informed the Court that it would seek to introduce evidence of Kelly Jarrett of the nature of that to which we have referred at [14] above. The judge indicated that he regarded the probative value of the evidence as “slight”, and rejected it: *R v XX* (Unreported, Supreme Court of New South Wales, Hulme J, 22 February 2006). What should be noted for present purposes is that the evidence of Patricia Grainier concerning comments made to her by Colleen Walker in relation to the respondent was sought to be adduced by the Crown at the Greenup trial.

33 On 3 March 2006, the respondent was acquitted of the murder of Evelyn Greenup.

34 The provisions of CARA in Division 2 of Part 8 which permitted the present

application came into force on 15 December 2006. In June 2007, the Director of Public Prosecutions notified the police that, in his view, there was no “fresh and compelling” evidence to support an application under s 100(1) of CARA in respect of the acquittal of the respondent of the murders of Evelyn Greenup and Clinton Speedy. On 22 October 2010, the Attorney-General declined to refer the matter to this Court. A further request was made in June 2011 for the Attorney-General to consider making an application, and the Attorney-General again declined to do so on 8 February 2013. However, following a further request by the police, the Attorney-General made the present application on 16 December 2016.

35 On 15 December 2016, prior to the making of the application, in accordance with the process required by s 105(2) of CARA, the respondent was charged with the murders of Evelyn Greenup and Clinton Speedy.

The fresh evidence

a The Walker evidence

36 It is important, at the outset of this judgment, to state with some degree of precision what is said by the applicant to be evidence which is “fresh” . In considering this issue, it is also of importance to have regard to the manner in which it is said the evidence is “fresh”, both in relation to the murder of Clinton Speedy and the murder of Evelyn Greenup.

37 The applicant set out the evidence which was said to be “fresh” in his written submissions and summarised it in a note prepared immediately prior to the hearing of the application. Principal reliance was placed on the evidence relating to the disappearance of Colleen Walker (the Walker evidence), which he submitted was not adduced in either the trial for the murder of Clinton Speedy or that of Evelyn Greenup. He submitted that, once this evidence was considered, “the evidentiary matrix relating to the murders of Clinton Speedy and Evelyn Greenup is significantly altered”. He submitted that the “complexion” of “much of that evidence changes; that is, the probative value of that evidence significantly increases”. He submitted that the Walker evidence

would establish that “coincidence reasoning is permissible between the three murders”, and that “each of the children were murdered; they were murdered by the same person; and that person was [the respondent]”.

38 Part of the Walker evidence comprised the background material relating to her disappearance which we have summarised in [6]-[8] above. It also included the particular circumstances of Colleen Walker’s disappearance. Relevantly, the applicant referred to Colleen Walker’s planned trip to Goodooga, which he submitted was “widely known” throughout the community and referred to evidence that Colleen Walker had spoken “positively” about her plans.

39 The fresh evidence was also said to include evidence that Colleen Walker knew the respondent, who previously had been in what the applicant described as a “serious, but abusive relationship” with her aunt, Alison Walker. This evidence was derived from statements made by Alison Walker in 1991 and 1997, and evidence given by her at the 2004 inquest.

40 The fresh evidence was also said to include evidence that, during the night of the party on 13 September 1990, Colleen Walker was seen talking with the respondent, both inside the house in the lounge room and at a large tree located opposite the house. That evidence was based on a record of interview of Martin Greenup of 1991 and the evidence he gave at the 2004 inquest, and on the records of interview of David Ballangarry, Kelly Jarrett, Dallas Walker, Burke Stadhams, and Jason Buchanan of 1991, and of David Ballangarry and Michelle Flanders in evidence given at the 2004 inquest.

41 The fresh evidence was also said to include evidence that Colleen Walker had told various people at the party that the respondent was “harassing her” and “wanted to see her”, was “pressuring her” or was “putting it on her”. The evidence to the effect that Colleen Walker said that the respondent was “harassing her” was derived from evidence given by Maria Walker at the 2004 inquest, the evidence that she said that he was “pressuring her” came from the record of interview of Martin Greenup of 1991 and his evidence at the 2004 inquest, while the evidence that she said that he was “putting it on her” came from evidence given by Raymond West at the 2004 inquest.

42 Further, David Ballangarry, in his record of interview of March 1991, said that the respondent was pressuring Colleen Walker for sex because he heard Colleen Walker say “No, no” to the respondent and he “just knew what [the respondent] was doing”, while Michael West in his record of interview of 1991 and at the 2004 inquest, observed that Colleen Walker was upset during the evening. However, Jason Buchanan at the 2004 inquest also stated that Colleen was upset, but that this was because of Kelly Jarrett and Cathy Jarrett leaving her.

43 The fresh evidence was also said to include evidence that, around midnight on the night of the party, a number of persons stated that they saw the respondent, Colleen Walker and others standing around the large tree opposite Marjory Jarrett’s house, next door to Fred Buchanan’s house, where the party was taking place. That evidence was derived from records of interview of Kelly Jarrett, Jason Buchanan, David Ballangarry, Dallas Walker and Burke Stadhams of 1991, and evidence given by each of them at the 2004 inquest, with the exception of Burke Stadhams.

44 The applicant also relied on evidence to the effect that Colleen Walker told Kelly Jarrett that she was going to get two Centrelink forms located in Marjory Jarrett’s house that she had to give to Kelly before she left for Goodooga. That evidence was derived from records of interview of Kelly Jarrett, Jason Buchanan, Dallas Walker and Raymond West of 1991 and evidence given by David Ballangarry at the 2004 inquest. In his record of interview of 1991, Dallas Walker said that Colleen went to Marjory Jarrett’s house. David Ballangarry gave evidence at the 2004 inquest that he saw Colleen Walker cross the road heading towards Marjory Jarrett’s house, while Kelly Jarrett in her record of interview of 1991 and at the 2004 inquest, said she saw Colleen Walker walk across the road and down the side of the house. At the 2004 inquest, Kelly Jarrett stated that she did not see Colleen after that point.

45 The applicant also referred to the evidence of Patricia Stadhams. In her two records of interview of 1991, her record of interview of 1997 and at the 2004 inquest, she stated that at about midnight she saw Kelly Jarrett near the tree.

She said on each of these occasions she saw Colleen Walker walking in front of Marjory Jarrett's house and down the side of the house. There was evidence available, at least from the time of the Speedy trial, that the respondent's mother owned a red Gallant motor vehicle. Patricia Stadhams gave evidence she saw that car in Marjory Jarrett's driveway which was located at the back of Marjory Jarrett's house and able to be accessed via the laneway which ran down the side of Marjory Jarrett's house. She gave this evidence in her record of interview of 1997 and at the 2004 inquest.

46 Maria Walker gave evidence at the 2004 inquest, in a closed session on 18 February 2004, to the effect that she was sleeping in Marjory Jarrett's house and around midnight she heard people walking down the side of the house which was closest to Fred Buchanan's house, near her window. She said that she heard Colleen Walker's voice as well as a male voice and heard a car start and take off. It should be noted that Maria Walker had also given a statement of 1991 and at the 2004 inquest on 12 February 2004 that was significantly different, and in some respects contradictory, to the account given in the closed session. There was also evidence given by Margaret Jarrett in her record of interview of 1991 and at the 2004 inquest and by Thomas Duroux in his statement of 1991, that Colleen Walker was not seen thereafter despite Margaret Jarrett looking for her in Marjory Jarrett's and Fred Buchanan's houses around 1:30am.

47 In statements made by Maxine Margaret Jarrett and Kathleen Paton in 1997 and in evidence given by them at the 2004 inquest, they said that the respondent had made comments to Colleen Walker which suggested he was interested in her sexually.

48 Patricia Grainer gave evidence in 1991 and at the 2004 inquest. She said that, a "couple of months" before the party on 13 September 1990, she and Colleen Walker had gone to the respondent's caravan with the respondent and David Ballangarry after Colleen Walker and Patricia Grainer had been at a party. Patricia Grainer gave evidence that the respondent told the girls they could sleep on his bed which they proceeded to do. Patricia Grainer gave

further evidence that she woke up and heard the respondent say to David Ballangarry "Do you want to have sex with the girls?", to which David Ballangarry replied "No … Leave 'em alone". Patricia Grainer said that the respondent subsequently came and slept in the bed with them with Colleen Walker in the middle. Similar evidence was given by David Ballangarry in his record of interview of 1991 and, to a limited extent, at the 2004 inquest.

49 Patricia Grainer further said that, at about 5:00am she woke up and felt a hand running down her back from her shoulders to a bit below her waist. She stated that, a bit later, when she and Colleen Walker got out of bed, she saw that the respondent was still asleep on the bed. She said that in the morning Colleen Walker told her that the respondent "mauled me all night. He touched down below and up the top as well. This morning I had to pull my pants up when I woke, he'd got them down during the night".

50 The applicant also submitted that certain matters referred to in his written submissions in reply constituted fresh evidence. However, the paragraphs referred to did not refer to any additional evidentiary matters, but rather sought to rebut certain aspects of an analysis of the evidence tendered by the respondent for the purposes of this application.

51 One of the matters relied on by the respondent in his submissions was that there were multiple sightings of Colleen Walker in a white Commodore motor vehicle on the evening in question. The applicant in his submissions stated there was ample evidence to the contrary. Reference was made to the evidence of Maxine Mary Jarrett in her record of interview of 1991 that she was in the car and Colleen Walker was not.

52 In that context, the applicant also referred to the evidence of George Smith in a statement given in 1997 to the effect that he was the driver of the white Commodore, that he parked the car under the tree opposite the house at which the party took place, that he had travelled there in the car with Maxine Mary Jarrett, Cinnamon Jarrett and Aldo Wilson, that he did not get out of the car, although one of the girls did, and that he waited 15 minutes and, when the girls returned, he left. He said that he knew Colleen Walker and that she was not in

the car. In earlier interviews on 18 February 1991 and 19 March 1991 he had stated that he did not see Colleen Walker that night.

53 The applicant also referred in his submissions in reply to the evidence of David Ballangarry at the 2004 inquest to the effect that he heard the respondent make sexual references to Colleen Walker and that she had rebuffed him saying “no, no don’t touch me you go with my auntie you know you got kids to my auntie”. He had given evidence in 1991 that he heard Colleen say “no, no” to the respondent. In addition, he gave evidence to the 2004 inquest that, as he was walking home, he turned around and saw Colleen Walker cross the street and walk through the gate at the front of Marjory Jarrett’s house.

54 This review of the evidence demonstrates that most of the witnesses whose evidence is relied upon as fresh evidence relating to the death of Colleen Walker gave statements in connection with her death prior to the trial of Clinton Speedy, the principal exception being Maria Walker. Although Maria Walker did give a statement in 1991, she did not give evidence as to the events described at [46] above until 2004. Further, although there was significant elaboration of the evidence after the reinvestigation in 1997 and at the 2004 inquest, it was all available prior to the Greenup trial.

55 In an annexure to the note prepared by the applicant prior to the hearing which summarised the evidence said to be ‘fresh”, the applicant listed in tabular form the records of interview, statements and transcripts of evidence of various witnesses whose evidence was said to comprise the “fresh” Walker evidence. The table grouped the evidence under three headings. In relation to the first heading, which was “Last known movements of Colleen Walker”, all the witnesses listed except for two had given statements prior to the Speedy trial, while all the statements had been taken prior to the Greenup trial. That is, there is no statement later than 2004. The two exceptions were Ms Patricia Chapman, who gave a statement in 1997 outlining Margaret Jarrett’s movements on the night of the party, and Ian Lowe, who gave a brief statement in 1997 indicating that he had hired a white Commodore with George Smith

and travelled to Kempsey with him.

56 In relation to the second heading, which was “Location and identification of Walker clothing”, two of the witness statements were made prior to the Speedy trial, while the remaining five were made after the Speedy trial but prior to the Greenup trial. Of those five, two were given by the police divers who had retrieved the bags of clothing from the Nambucca River in 1991, one was given by Ronald Dayman who had found the jeans while fishing in 1991, and one was given by a DNA expert to the effect that certain bones did not match the DNA of Colleen Walker.

57 So far as the third heading was concerned, which was “Respondent’s relationship with Colleen Walker”, the evidence of Kathleen Paton in a statement of 1997 and at the 2004 inquest and the evidence of Patricia Grainer at the 2004 inquest was given after the Speedy trial but before the Greenup trial. The first statement of Patricia Grainer was undated, but refers to Colleen Walker’s disappearance “last year”, and is therefore from sometime in 1991, before the Speedy trial.

58 We have indicated above that the applicant contends that the Walker evidence was “fresh” as it “significantly altered” the “evidentiary matrix relating to the murders of Clinton Speedy and Evelyn Greenup”. It was submitted that, “on any interpretation” of the term “adduced” in s 102 of CARA, the Walker evidence was “fresh”, since it was neither relied upon nor admitted in either the Speedy trial or the Greenup trial.

59 The applicant submitted that the evidence was “fresh and compelling” by reason of the use which could be made of it as “coincidence evidence” pursuant to s 98 of the *Evidence Act 1995* (NSW). An annexure to his written submissions contained a coincidence notice made in accordance with s 99 of the *Evidence Act 1995* (NSW) and cl 6 of the *Evidence Regulation 2015* (NSW): see *R v Zhang* (2005) 196 FLR 152; [2005] NSWCCA 437 at [131] (*Zhang*). The applicant identified the circumstances relied upon and the evidence in support of each of the coincidences. We have appended a redacted version of the notice to this judgment, with the name of the

respondent removed. All the evidence relied upon to support these coincidences was in existence by the time of the Greenup trial.

b The "informer" evidence

60 The applicant also relied upon the evidence of four informers, Mr R, Mr K, Mr I and Mr M as "fresh". It is said that they informed police officers that the respondent had made admissions in relation to the offences.

61 Mr I's evidence related to admissions concerning the murder of Clinton Speedy. He gave the police the information in 1997, after the respondent had been acquitted of that murder.

62 Mr M's evidence concerned the murder of Clinton Speedy and a "four year old girl". He made statements to the police after the respondent was acquitted of the murder of Clinton Speedy but before he was tried for the murder of Evelyn Greenup. He gave evidence at the 2004 inquest and at the Greenup trial.

63 Mr K's evidence related to the murders of both Evelyn Greenup and Clinton Speedy. He spoke to the police in 1998, before the Greenup trial, but after the Speedy trial.

64 Mr R's evidence also related to the murder of Clinton Speedy. He first spoke to police in 1992, before both the Speedy and the Greenup trials.

c The "other admissions" evidence

65 Hilton Walker gave evidence in the Greenup trial about the respondent telling him about having bodies being buried in "Yarnie" crops. It appears the first statement to this effect was given after the Speedy trial but before the Greenup trial, although Hilton Walker was interviewed twice in 1991 in relation to the murder of Clinton Speedy.

66 Maxine Margaret Jarrett gave evidence about an altercation that occurred in April 1990, prior to any of the disappearances, with the respondent in which he threatened to strangle her and put her out in the "Yarni plants" on Congarinni Road. She provided a statement to police to this effect in 1991. Although this evidence was not led at the Speedy trial, it was led at the Greenup trial.

67 Mark Thompson gave evidence about the same altercation with the respondent, in which he said that the respondent threatened to strangle him, take him to Congarinni Road and use him as fertiliser. Mark Thompson gave evidence of this in the Greenup trial. He made a statement regarding the matter in 1991, but the evidence was not sought to be led in the Speedy trial.

d The "lies evidencing consciousness of guilt" evidence

68 The applicant seeks to rely on evidence of what are said to be "lies evidencing consciousness of guilt" as "fresh". The evidence relates first, to answers the respondent gave to a journalist, Dan Box of *The Australian* newspaper in May 2016, when he was asked questions about the deaths of Colleen Walker and Evelyn Greenup and second, part of his evidence in the Speedy trial.

69 It should be noted that the applicant accepted that the evidence relied upon as "fresh" which we have referred to under headings (b), (c) and (d) above would not either alone or in conjunction be sufficient to warrant an order under s 100(1) of CARA without the Walker evidence. Equally, it was submitted that the Walker evidence on its own would be sufficient to satisfy the requirements of the section.

The legislation

70 The relevant provisions of CARA are in the following terms:

> "**100 Court Of Criminal Appeal may order retrial – fresh and compelling evidence**
>
> (1) The Court of Criminal Appeal may, on the application of the Director of Public Prosecutions, order an acquitted person to be retried for a life sentence offence if satisfied that:
>
> > (a) there is fresh and compelling evidence against the acquitted person in relation to the offence, and
> >
> > (b) in all the circumstances it is in the interests of justice for the order to be made.
>
> (2) If the Court of Criminal Appeal orders an acquitted person to be retried, the Court is to quash the person's acquittal or remove the acquittal as a bar to the person being retried for the offence (as the case requires).
>
> (3) The Court of Criminal Appeal may order a person to be retried for a life

sentence offence under this section even if the person had been charged with and acquitted of manslaughter or other lesser offence.

(4) The Court of Criminal Appeal cannot order a person to be retried for a life sentence offence under this section where the person had been charged with and acquitted of the life sentence offence but had been convicted instead of manslaughter or other lesser offence.

….

102 Fresh and compelling evidence – meaning

(1) This section applies for the purpose of determining under this Division whether there is fresh and compelling evidence against an acquitted person in relation to an offence.

(2) Evidence is ***fresh*** if:

> (a) it was not adduced in the proceedings in which the person was acquitted, and
>
> (b) it could not have been adduced in those proceedings with the exercise of reasonable diligence.

(3) Evidence is ***compelling*** if:

> (a) it is reliable, and
>
> (b) it is substantial, and
>
> (c) in the context of the issues in dispute in the proceedings in which the person was acquitted, it is highly probative of the case against the acquitted person.

(4) Evidence that would be admissible on a retrial under this Division is not precluded from being fresh and compelling evidence merely because it would have been inadmissible in the earlier proceedings against the acquitted person.

…

104 Interests of justice – matters for consideration

(1) This section applies for the purpose of determining under this Division whether it is in the interests of justice for an order to be made for the retrial of an acquitted person.

(2) It is not in the interests of justice to make an order for the retrial of an acquitted person unless the Court of Criminal Appeal is satisfied that a fair retrial is likely in the circumstances.

(3) The Court is to have regard in particular to:

(a) the length of time since the acquitted person allegedly committed the offence, and

(b) whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in connection with the application for the retrial of the acquitted person.

105 Application for retrial – procedure

(1) Not more than one application for the retrial of an acquitted person may be made under this Division in relation to an acquittal.

(1A) An application may be made for a further retrial of a person acquitted in a retrial under this Part but only if it is made on the basis that the acquittal at the retrial was tainted.

(2) An application for the retrial of an acquitted person cannot be made under this Division unless the person has been charged with the offence for which a retrial is sought or a warrant has been issued for the person's arrest in connection with such an offence.

Note : Section 109 requires the Director of Public Prosecutions' approval for the arrest of the accused or for the issue of a warrant for his or her arrest.

(3) The application is to be made not later than 28 days after the person is so charged with that offence or the warrant is so issued for the person's arrest. The Court of Criminal Appeal may extend that period for good cause.

(4) The Court of Criminal Appeal must consider the application at a hearing.

(5) The person to whom the application relates is entitled to be present and heard at the hearing (whether or not the person is in custody). However, the application can be determined even if the person is not present so long as the person has been given a reasonable opportunity to be present.

(6) The powers of the Court of Criminal Appeal under section 12 of the *Criminal Appeal Act 1912* may be exercised in connection with the hearing of the application.

(7) The Court of Criminal Appeal may at one hearing consider more than one application under this Division for a retrial (whether or not relating to the same person), but only if the offences concerned should be tried on the same indictment.

(8) If the Court of Criminal Appeal determines in proceedings on an application under this Division that the acquittal is not a bar to the person being retried for the offence concerned, it must make a declaration to that effect.

106 Retrial

…

> (5) At the retrial of an accused person, the prosecution is not entitled to refer to the fact that the Court of Criminal Appeal has found that it appears that there is fresh and compelling evidence against the acquitted person or, as the case requires, that it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted."

71 The provisions present significant difficulties of construction, particularly in the circumstances of the present case. The parties were divided as to the manner in which the application should be dealt with having regard to the provisions of s 105(7), the construction of "fresh" evidence in s 102(2), the construction of "compelling" evidence in s 102(3), the construction of s 102(4), and the manner in which the "interests of justice" are to be taken into account for the purpose of s 100(1)(b).

72 Prior to dealing with these issues, it is convenient to set out the background and history of the legislation. It is also convenient at the outset to consider the equivalent legislation in the United Kingdom and the cases which have dealt with that legislation, as the applicant has placed considerable reliance on the approach of the courts in the United Kingdom, given the absence of any Australian authority on the construction of the CARA provisions.

The legislative background and history

73 In *R v Carroll* (2002) 213 CLR 635; [2002] HCA 55, the respondent was convicted of perjury for giving false evidence at his trial for murder at which he was acquitted. The Queensland Court of Appeal quashed the conviction and its decision was upheld by the High Court. It was held that the perjury indictment was an abuse of process as the prosecutor had sought to controvert an acquittal on the charge of murder, given that the charge of perjury raised the same ultimate issue.

74 In September 2003, following community concern about this decision, a consultation draft of the Criminal Appeal Amendment (Double Jeopardy) Bill 2003 was issued for comment (the 2003 Draft Bill). Earlier, in July 2003, the then Attorney-General had requested Acting Justice Jane Mathews to provide an advice on the proposed legislation, particularly on "whether the safeguards contained in the [2003 Draft Bill] adequately protect individual rights", and

"whether any further safeguards should be included to ensure adequate protection of individual rights".

75 The 2003 Draft Bill defined "fresh" evidence and "compelling" evidence in cl 9D(2) and cl 9D(3) in the same way as those expressions are now defined in s 102(2) and s 102(3) of CARA. In her advice, provided to the Attorney-General in November 2003 (the Mathews Advice), Acting Justice Mathews noted that the definitions were "identical or similar" to the parallel provisions in the Criminal Justice Bill 2002 in the United Kingdom (the UK Bill), which, at the time of the Mathews Advice, was before the House of Lords. Although the original draft of the UK Bill contained provisions which could be described as "identical or similar", the *Criminal Justice Act 2003* (UK) (the UK Act), as ultimately enacted into law, altered the definition of "new" evidence so that it was different to cl 9D(2) of the 2003 Draft Bill.

76 Her Honour also dealt with cl 9D(4) of the 2003 Draft Bill, which was the predecessor to s 102(4) of CARA. That clause, unlike its comparable provision in CARA, simply provided that, for the purpose of the section, it was "irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person". Her Honour stated that she assumed that the section was "intended to exclude from the purview of 'fresh evidence' any evidence which was not introduced in the earlier proceedings because it was, or was considered to be, inadmissible". Her Honour noted that submissions made in relation to the 2003 Draft Bill had expressed confusion about the operation of the provision and suggested that its scope and intention be clarified.

77 At the same time, in November 2003, the Model Criminal Code Officers Committee (the Committee) of the Standing Committee of Attorneys-General produced a discussion paper on a number of matters, including double jeopardy (the MCCOC Discussion Paper). That Discussion Paper extensively considered the provisions in the UK Bill, both in its original version prior to its amendment in May 2003, namely, that evidence was "new" if it "was not available or known to an officer or prosecutor at or before the time of acquittal",

and also in relation to the version which was ultimately enacted. In relation to the provision in its original form, the Discussion Paper noted that the United Kingdom Law Commission had recommended that "it should not be possible to apply for a retrial on the basis of evidence which was in the possession of the prosecution at the time of the acquittal but could not be adduced because it was inadmissible, even if it would now be admissible because of a change in the law".

78 The Committee came to the conclusion that an exception to the double jeopardy principle for "fresh and compelling" evidence was "justified". This conclusion was subject to conditions. These included that, first, the court must be "satisfied that there is fresh evidence which is both reliable and sufficiently compelling to call into question the safety of the previous acquittal". Second, the court must be "satisfied that fresh evidence was not available to be presented at the first trial and that the investigation was conducted with due diligence – and a change in the legal rules of inadmissibility since the acquittal allowing the evidence will not make that evidence fresh evidence for these purposes".

79 The Committee also dealt with the distinction between "fresh" evidence and "new" evidence. They made the following comments:

> "***'Fresh evidence' and 'New evidence'***: While it is common for people to refer to 'fresh evidence' and 'new evidence' interchangeably, it happens that there is a technical legal distinction between 'fresh' and 'new' evidence. In essence, the distinction is between evidence that could not have been brought to the primary trial (**fresh evidence**) and evidence that existed at the time of the primary trial but was not, for whatever reason, adduced at that trial (**new evidence**). There are sophisticated legal debates about the difference. The difference may be vital. The UK Bill opted for 'new evidence'. It says:
>
>> 72 New and compelling evidence.
>>
>> (1) The requirements of this section are met if there is new and compelling evidence against the acquitted person in relation to the qualifying offence.
>>
>> (2) Evidence is new if it was not adduced in the proceedings in which the person was acquitted (nor, if those were appeal proceedings, in earlier proceedings to which the appeal related).
>
> 'Fresh evidence' is more restrictive than that. This is a common definition. It is

the first of the three parts which is critical:

> ‘in general, three conditions need be met before fresh evidence can be admitted. These are: (1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (2) The evidence must be such that there must be a high degree of probability that there would be a different verdict; (3) The evidence must be credible.’

The difference is clear. If the ‘new evidence’ test is applied then, all else being equal, a defendant may be retried if a crucial piece of existing evidence was not presented at trial because of a mistake by police or prosecution. If a ‘fresh evidence’ test is applied, then there can be no retrial on that basis. The Committee is of the opinion that, given the departure from fundamental general principle being suggested here, it should recommend the more limited exception. The prosecution should not be allowed to retry the accused on the basis of the incompetence of its first effort. To do so would be to encourage sloppiness.”

80 In that context, they recommended that “fresh and compelling” evidence be defined in the same way as it now appears in s 102(2)-(3) of CARA. In making that recommendation, they made the following further remarks:

> “*Fresh*
>
> The distinction between ‘new’ and ‘fresh’ evidence is important. In essence, ‘new’ evidence is simply evidence that was not presented at the original proceedings (for whatever reason). ‘Fresh’ evidence is evidence that is ‘new’ with an additional condition: it could not have been presented at the original proceedings despite competent police and/or prosecution work. The United Kingdom double jeopardy reforms have opted for the lower threshold of ‘new’ evidence. The Committee believes that allowing retrials for all ‘new’ evidence is not appropriate given the departure from long-standing legal principle being suggested with these double jeopardy reforms. The evidence should not have been available, through the exercise of due diligence, at the time of the original acquittal – this is the essence of ‘fresh’. The New South Wales consultation Draft of the Criminal Appeal Amendment (Double Jeopardy) Bill 2003 adopts the higher threshold of ‘fresh’ evidence.”

81 In the second reading speech introducing the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006 (the 2006 Bill), the Premier made the following remarks:

> “I would like to deal first with the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill. This bill provides one of the most significant reforms to the criminal law enacted in Australia in recent times. The ancient rule of double jeopardy provides that a person may not be tried for the same offence twice. Its purpose is to ensure that criminal proceedings can be brought to a conclusion, and the result in a trial can be regarded as final. It protects individuals against repeated attempts by the State to prosecute. The rule encourages police and prosecutors to be diligent and careful in their

investigation and to gather as much evidence as possible against the accused. In this sense, it promotes fairness to the accused and justice for the victim and the community. However, the strengths of the double jeopardy rule also bring weaknesses and too rigid an adherence to the rule may bring the law into disrepute.

There will sometimes be cases where diligent police and prosecutors will still fail to find all the possible evidence. Perhaps it is being concealed from them deliberately, or perhaps developments in forensic technology will reveal new evidence or new conclusions to be drawn from existing evidence. In such cases, there may well be grounds to bring the accused back to trial. In fact, not to do so risks perpetrating a major injustice by allowing a guilty person to walk free even when there is compelling evidence of his or her guilt and this can bring the justice system into disrepute.

…

As honourable members will be aware, the Government first announced its intention to reform the ancient rule of double jeopardy in 2003. The Government released an exposure draft bill in 2004 and sought expert advice from Acting Justice Jane Mathews. We also considered models proposed by the national Model Criminal Code Officers Committee, as well as pioneering reforms already enacted in the United Kingdom. The community's views and the view of experts in the field have all been taken into account in drafting this bill.

…The first key provision is new section 100. This section allows the Director of Public Prosecutions to apply to the Court of Criminal Appeal for permission to retry an acquitted person if there is fresh and compelling evidence. The court can order a retrial under this section if it reaches the view that there is fresh and compelling evidence and it is in the interests of justice.

… Fresh evidence is defined by new section 102 to be any evidence that was not adduced at trial and could not have been adduced at trial with reasonable diligence. Compelling evidence is also defined under new section 102 to cover evidence that is substantial, reliable, and probative of the prosecution case in the context of the issues in dispute.

The new section 104 defines the interests of justice. This section will require the court to consider the amount of time elapsed since the offence was alleged to have been committed and whether there was any failure to act with due diligence on the part of the police or the prosecution. The court must also reach the view that a fair trial is likely. These tests will ensure that only strong cases proceed to retrial.

…

As a final note on this bill, honourable members may be aware that the Council of Australian Governments [COAG] has recently agreed to consider a national approach to double jeopardy reform. A COAG working group has been established, jointly chaired by the Commonwealth and New South Wales. The COAG working group will be considering this bill, as well as the model proposed by the Model Criminal Code Officers Committee. These two models differ in some details, but are broadly consistent in their structure and approach."

82 Although it cannot be used as an aid to the interpretation of the provision, the respondent placed reliance on the reasoning of the Honourable James Wood AC QC in a report into the relevant provisions of CARA, carried out by him in September 2015 at the request of the Attorney-General (the Wood Report). At the time that Mr Wood was preparing his Report, a Bill had been introduced into Parliament: the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2015 (NSW) (the 2015 Amendment Bill). The Bill sought to extend the definition of "fresh" evidence to include evidence which was "inadmissible in the proceedings in which the person was acquitted", and, as a result of "substantive legislative changes in the law of evidence since the acquittal, it would now be admissible if the acquitted person were to be retried". Mr Wood was asked to report on the desirability of an amendment to that effect.

83 In the executive summary of the Report, Mr Wood stated that the current definition of "fresh" evidence confined "applications under s 102 to evidence that was not tendered to the court in the original proceedings". He stated that he had examined "the ramifications of amending the provision so that only evidence that was *admitted* into evidence is excluded from the definition of 'fresh'", and the "merit of adding a further definition of 'fresh' evidence to the statute, so that evidence that was inadmissible at the time of the original proceedings that has since become admissible due to a change of law could come within the definition". He stated that it was "premature" to consider such amendments until this Court had an opportunity to consider the provisions.

84 Mr Wood stated that, in his view, "adduced" could not be understood "to mean anything other than tendered to the court". He said that it did not mean "admitted", but rather, that the two terms represent two different steps: "a party adduces (or tenders) evidence to the court and the court then either admits or rejects that evidence". He stated, referring to *Zhang* at [38], that this approach was supported by case law relevant to the meaning of the word "adduced" in the *Evidence Act 1995* (NSW).

85 Mr Wood noted that the central difference between the CARA provisions and their United Kingdom equivalents is “the use of the terms ‘fresh’ in NSW and ‘new’ in England and Wales”. He stated that “[t]here is a technical legal distinction between ‘fresh’ and ‘new’. Fresh evidence equates to evidence that could not have been brought to the primary trial. New evidence is evidence that may have existed at the time of the primary trial, but was not, for whatever reason, brought to that trial”. He referred to the acceptance of that difference by the Committee and noted that cases in the United Kingdom supported the proposition that “new” does not necessarily mean “newly-discovered”.

86 Mr Wood expressed the view that the differences between the definitions of “new” and “fresh” may “impact on the way ‘adduced’ is interpreted in the two jurisdictions”, but noted that the cases in the United Kingdom were the only available judicial guide to the interpretation of the provisions of CARA.

87 Mr Wood also considered the operation of s 102(4). He pointed to two possible interpretations. The first, which was adopted by the applicant in the present case, was that the subsection “permits evidence that was available but previously inadmissible to ground an application for a new trial”. The second was a more restrictive interpretation, being that the subsection “deals only with the question of admissibility at a retrial once fresh evidence is found to exist, and applies the current evidentiary rules to that evidence”. He concluded that the adoption of the word “fresh” by the New South Wales legislature led to the conclusion that “it is the second construction rather than the first that was intended”, as did the use of the phrase “is not precluded” in s 102(4), compared with the word “irrelevant” in the equivalent legislation in the United Kingdom.

88 In dealing with potential amendments to s 102, Mr Wood considered the question of whether the reach of s 102 should be widened by “redefining the word ‘adduced’ to expressly mean ‘admitted’, or by explicitly broadening the provision to enable an application to quash an acquittal where a change in law renders evidence that was previously available but inadmissible to now be admissible”. Mr Wood stated that he understood that such amendments would “clear the way for an application to quash an acquittal in three scenarios”. First,

where the court “wrongly rejects admissible evidence and as a consequence the accused is acquitted”. Second, where the prosecution “had evidence that was available but chose not to tender it because it was assumed not to be of probative value” and the accused is acquitted, but “the significance of this evidence changes and/or it later becomes admissible”. Third, where evidence is properly rejected as inadmissible and the accused is acquitted, but the evidence “becomes admissible at a later date as a result of a change in the law”. He expressed the view that, under CARA in its current form, an application to quash the acquittal would be rejected in all three scenarios.

89 Mr Wood said that amending the word “adduced” to “admitted” could “enliven an application under s 102 in relation to the second and third scenarios” to which we have referred to at [88] above. He came to the view that such an amendment should not be made. In that context, he repeated his view that there was “a deliberate choice” by the legislature to “confine fresh evidence to evidence arising through recent developments such as a post-acquittal confession, newly-discovered DNA evidence, or the emergence of an eyewitness whose existence was previously unknown”. He stated that this corresponded with “the selection of the word ‘adduced’, the natural meaning of which extends to evidence that was tendered or proffered to the court”.

90 Mr Wood also considered whether s 102 should expressly be amended to “extend to evidence that was previously inadmissible but made admissible due to a later change in the law”. He repeated his view that “s 102(4) conveys a clear legislative intention that focuses its application only in relation to the admissibility at a retrial of newly emerged evidence” and that it “seeks to do no more than to allow its admission at a new trial even though it may not have been admissible at the earlier trial”. He noted that it had “particular relevance in relation to the Bowraville cases”, in that the introduction of the tendency and coincidence evidence provisions of the *Evidence Act 1995* (NSW) could allow “evidence deemed inadmissible under ‘similar fact’ principles to be used in a retrial”. However, he noted that “such an amendment could have a much wider reach”, giving as an example changes in the hearsay rule which could

inadvertently produce “fresh” evidence.

91 The 2015 Amendment Bill to which we have referred at [82] above was rejected by the legislature following delivery of the Wood Report. It must be emphasised that neither the Wood Report nor the rejection of the 2015 Amendment Bill can be used as aids to interpretation: *Chippendale Printing Co Pty Ltd v Commissioner of Taxation* (1996) 62 FCR 347 at 360, 369; [1996] FCA 1259. Whether Mr Wood’s reasoning on the construction of the provisions of CARA is persuasive is a matter which must be considered by this Court itself, and it is dealt with subsequently in this judgment.

The United Kingdom legislation and judicial consideration of it by the Court of Appeal of England and Wales

a The legislative background

92 Because considerable reliance was placed by the applicant on the approach taken by the Court of Appeal of England and Wales to corresponding legislation to that contained in Division 2 of Part 8 of CARA, it is convenient to deal with that legislation and that Court’s consideration of it at this point of the judgment.

93 The equivalent sections to ss 102 and 104 of CARA are ss 78 and 79 of the UK Act. Those sections are in the following terms:

> “**78 New and compelling evidence**
>
> (1) The requirements of this section are met if there is new and compelling evidence against the acquitted person in relation to the qualifying offence.
>
> (2) Evidence is new if it was not adduced in the proceedings in which the person was acquitted (nor, if those were appeal proceedings, in earlier proceedings to which the appeal related).
>
> (3) Evidence is compelling if—
>
> > (a) it is reliable,
> >
> > (b) it is substantial, and
> >
> > (c) in the context of the outstanding issues, it appears highly probative of the case against the acquitted person.

(4) The outstanding issues are the issues in dispute in the proceedings in which the person was acquitted and, if those were appeal proceedings, any other issues remaining in dispute from earlier proceedings to which the appeal related.

(5) For the purposes of this section, it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person.

79 Interests of justice

(1) The requirements of this section are met if in all the circumstances it is in the interests of justice for the court to make the order under section 77.

(2) That question is to be determined having regard in particular to—

(a) whether existing circumstances make a fair trial unlikely;

(b) for the purposes of that question and otherwise, the length of time since the qualifying offence was allegedly committed;

(c) whether it is likely that the new evidence would have been adduced in the earlier proceedings against the acquitted person but for a failure by an officer or by a prosecutor to act with due diligence or expedition;

(d) whether, since those proceedings or, if later, since the commencement of this Part, any officer or prosecutor has failed to act with due diligence or expedition.

…"

94 The UK Bill on which the UK Act was based, in its original form, stated that evidence was "new" if it was "not available or known to an officer or prosecutor at or before the time of the acquittal". The relevant provisions of the UK Bill were in the following terms:

"**65 New and compelling evidence**

(1) The requirements of this section are met if there is new and compelling evidence that the acquitted person is guilty of the qualifying offence.

(2) Evidence is new if it was not available or known to an officer or prosecutor at or before the time of the acquittal

(3) Evidence is compelling if—

(a) it is reliable,

(b) it is substantial, and

(c) when it is considered in the context of the outstanding issues, it is highly probable that the person is guilty of the offence.

(4) The outstanding issues are the issues in dispute in the proceedings in which the person was acquitted and, if those are appeal proceedings, any other issues remaining in dispute from earlier proceedings to which the appeal relates.

(5) For the purposes of this section, it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person.

(6) In subsection (2) the reference to an officer or prosecutor includes a reference to a person charged with corresponding duties under the law in force elsewhere than in England and Wales.

(7) Where the earlier prosecution was conducted by a person other than a prosecutor, subsection (2) applies in relation to that person as well as in relation to a prosecutor.

66 Interests of justice

(1) The requirements of this section are met if in all the circumstances it is in the interests of justice for the court to make the order under section 64.

(2) That question is to be determined having regard in particular to—

(a) whether it is likely that a fair trial pursuant to the order would be possible;

(b) for the purposes of that question and otherwise, the length of time since the qualifying offence was allegedly committed;

(c) whether it is likely that the new evidence would have been available sooner (either in the earlier proceedings against the acquitted person or subsequently) but for a failure by an officer or by a prosecutor to act with due diligence;

(d) whether any officer or prosecutor has failed to act with due expedition since the new evidence became available or known to him or, if later, since the commencement of this Part.

(3) In subsection (2) references to an officer or prosecutor include references to a person charged with corresponding duties under the law in force elsewhere than in England and Wales.

(4) Where the earlier prosecution was conducted by a person other than a prosecutor, subsection (2)(c) applies in relation to that person as well as in relation to a prosecutor."

95 The UK Bill was amended in the House of Commons to, among other things, change the definition of new evidence to that which is now contained in s 78 of

the UK Act. The explanation given for the amendment by the relevant Minister before the Joint Committee on Human Rights was that it had "proved difficult to find a test which covered evidence which had existed before only where it could not have been found, or its significance could not have been understood at the time, even with reasonable diligence on the part of officers and prosecutors". In those circumstances, the Minister stated that the government had decided the best approach was to expand the meaning of "new evidence", and to rely on the need for it to be compelling, coupled with a new emphasis on the importance of officers and prosecutors having acted with due diligence and expedition to "weed out cases where the original investigation or prosecution had simply been conducted in a sloppy way": Parliament of the United Kingdom Joint Committee on Human Rights, 11th Report, 2003. There was a consequential amendment to cl 66(2)(c) of the Bill to the form it took in s 79(2)(c) of the UK Act.

b Judicial consideration

96 In *R v Dunlop* [2007] 1 WLR 1657; [2006] EWCA Crim 1354, the respondent was tried twice for murder and the jury failed to agree on a result on each occasion. The Crown then formally offered no evidence and a "not guilty" verdict was entered. Subsequently, the respondent stated that he was responsible for the death of the victim and had lied at the murder trial. He was subsequently convicted for two counts of perjury. After the provisions of ss 75-79 of the UK Act came into force, there was an application for an order quashing the acquittal and ordering a new trial.

97 There was no issue in that case as to whether the evidence was "new and compelling". The principal issue was whether, having regard to publicity and delay, it was not in the "interests of justice" to quash the acquittal. In relation to publicity, the Court stated at [22] that it was satisfied that there were accepted techniques of jury management by which "it should be possible to select a jury that is not prejudiced". The Court also rejected at [29] the submission based on delay, noting that the delay in that case (17 years) was not an uncommon delay between offence and prosecution in the case of historical sexual offences.

98 In *R v A* [2009] 1 WLR 1947; [2008] EWCA Crim 2908, the respondent was acquitted of two counts of indecent assault and one count of rape of a 15 year old complainant (SN). After the trial, the respondent's former wife contacted the police and told them that, long before the trial, the respondent had been arrested for indecent assault on three children when working at a school. Following an extensive police investigation, a 17-count indictment was preferred against the respondent comprising various sexual offences against seven different complainants.

99 The Lord Chief Justice, who delivered the judgment of the Court, stated that the evidence of these complainants was admissible to support SN's complaint. His Lordship stated at [19] that this was because it would "significantly undermine the contention at trial that [the respondent] was a man against whom no complaints had been made", and because "some of the details of the complaint bear significant similarities to SN's complaints and, if true, appear to establish a propensity by [the respondent] which was highly relevant" to the trial. His Lordship also noted at [20] that the respondent had made "a number of apparent admissions".

100 It was conceded that the evidence was "new" and the Lord Chief Justice noted at [33] that it was accepted by the respondent that the new evidence was "compelling" in the sense that, "taken cumulatively, it would provide compelling evidence, both in relation to what can continue usefully to be described as similar fact evidence, and as evidence of [the respondent's] propensities". The Lord Chief Justice also noted at [33] that the effect of s 78(5) would be that the application would be decided "in accordance with the rules of evidence which apply at the date of the hearing of the application". His Lordship also rejected at [36]-[37] the argument that the evidence had to relate directly to the offences in respect of which a retrial was sought, and stated at [41] that, in deciding whether a retrial was in the "interests of justice", the principles relating to double jeopardy could be taken into account. However, the Lord Chief Justice suggested at [42] that it was "open to the court" to take into account "problems posed by the complainant's evidence during the course of the earlier trial" and

“any apparent weaknesses in the prosecution case”.

101 *R v C* [2009] EWCA Crim 633 was an application in respect of a respondent who was acquitted of the murder and manslaughter of a young woman (CM). The murder took place at the victim’s mother’s house on 26 October 2001 and the murderer was apparently let into the house. The respondent, who was arrested the next day, said that he had been with CM for about three hours the previous evening, but that when he left, she was alive and well. The respondent was acquitted.

102 In the early hours of 11 February 2007, a young woman (KH) was attacked and beaten by someone who wielded a blunt object. The victim suffered catastrophic injuries. The respondent was a former boyfriend of the victim and there was evidence that he was in the vicinity of the flat where the attack had taken place shortly before the attack, and that he had made admissions that he had visited the building where the flat was situated that evening and pressed the buzzer. In addition, KH identified the respondent as the man responsible for the attack. KH also gave evidence of an admission by the respondent that he had assaulted CM.

103 The Crown argued that the evidence was “compelling” by reason of the similarities in the circumstances of the two direct physical attacks on two young women with whom the respondent had a sexual relationship, and that, on each occasion, the respondent had been at the house around the time the attacks took place.

104 The Court stated at [25], without elaboration, that the evidence of what was said to KH was not new evidence, but also said that they doubted “whether the most intensive police investigation into the murder of CM could reasonably have been expected to produce” that evidence. The Court quashed the acquittal.

105 The UK Act had been introduced following public disquiet surrounding the circumstances of the murder of Stephen Lawrence and the subsequent acquittal of persons charged with his murder. *R v Dobson* [2011] EWCA Crim

1255 was an application made under the UK Act to quash the acquittal of one of the alleged attackers. There are two versions of the judgment. The version to which we have principally referred below appears at the citation noted above, and the second version appears as *R v Dobson* [2011] EWCA Crim 1256. The second version was essentially a redacted version of the other version to permit its publication in a way which would not prejudice any subsequent trial of the respondent.

106 The crime involved a savage and apparently racist attack on a young man of Jamaican heritage, by four white youths. At the time of the original trial there was no evidence of any transfer of blood from Stephen Lawrence to any suspect. At the trial, identification evidence of a friend of Stephen Lawrence who was with him at the time of the attack was crucial. The evidence was flawed and held to be inadmissible. The Court of Appeal described the trial judge's conclusion as "unavoidable" at [15].

107 The Court made a number of general observations concerning s 78 at [20]-[21]. It noted that the expression "compelling evidence" was defined and did not mean that the evidence had to be "irresistible" or that "absolute proof of guilt" was required. The Court stated that the legislative structure did "not suggest that availability of a realistic defence argument which may serve to undermine the reliability or probative value of the new evidence must, of itself, preclude an order quashing the acquittal".

108 The Court described the original investigation of the murder as "marred by incompetence" at [36]. It referred to the description of the investigation in a report published in February 1999 by the "Stephen Lawrence Inquiry" which was chaired by Sir William Macpherson, and stated at [38] that the first police investigation was "palpably flawed and deserves severe criticism".

109 The new evidence on the application to quash the acquittal included DNA evidence. The Court described it as "new scientific evidence which by reference to Mr Dobson's grey bomber jacket … and the multi-coloured cardigan, closely links Dobson with the fatal attack" at [25]. The conclusion of the Court was as follows:

> "[78] Stripped to essentials, it comes to this. On the jacket found in Dobson's bedroom (LH/5) there were small blood flakes providing an incomplete DNA profile with Stephen Lawrence, and a very small bloodstain on the collar which provided a match of 1: billion. Within the package in which that jacket was contained, a blood flake with another DNA match of 1: billion, encasing two blue fibres linked with Stephen Lawrence's cardigan, deposited while the blood flake was at least partially wet, were found, together with a fibre linked to Stephen Lawrence's red polo shirt. The jacket was placed within the package and we have not found a shred of evidence to suggest that any other object was placed in the package at any time. We recognise the more limited conclusions which may be drawn in relation to the cardigan found in Dobson's parents' bedroom, but they are at the very lowest, consistent with the links between the jacket and Stephen Lawrence. However, viewed cumulatively, even allowing for the contentions advanced by Mr Roberts, this provides formidable evidence.
>
> [79] The potential significance of the material which we have examined can be readily understood. Is the newly discovered evidence reliable, substantial, and highly probative of the Crown's allegation that Dobson was a party to the attack on Stephen Lawrence? The new evidence demonstrates that the answer to that question is that there is a high probability that he was. Assuming that a new trial is ordered, it would be for the jury to decide whether his guilt was established to the criminal standard of proof, and if so whether of murder or manslaughter. For this purpose it would no doubt consider all the relevant and admissible evidence, including the clear and direct lie apparently told by Dobson when he was first asked to account for his movements on the fateful evening. On his own admission to the police when formally interviewed, that was untrue, but that falsehood was of relatively minor significance compared to the significance of the falsehood which would have been uttered if the jury were satisfied that the scientific evidence demonstrated that Dobson was indeed one of the group of assailants who attacked Stephen Lawrence."

110 In dealing with the "interests of justice", the Court described the extensive publicity attaching to the case. It noted at [83] that the respondent relied on "two strands to the publicity", the first of which involved "allegations of discreditable or criminal conduct or facts connected with one or other of the original suspects detrimental to them", and second, "expressions of opinion that they, or some of them, were indeed responsible for the attack on Stephen Lawrence". The Court concluded that the "vast publicity relating to this particular case" would nevertheless "not render the subsequent properly conducted trial unfair".

111 *R v Weston* [2010] EWCA Crim 1576 was another case where an acquittal on a charge of murder was sought to be quashed on the ground of newly-discovered DNA. The DNA was discovered on an examination of boots seized during the course of the original investigation. It was submitted that describing the evidence as “new” would be inaccurate, as the DNA had always been there, but had not been found. The Court rejected this submission, and said at [27] that, on the legislative definition of “new”, which the Court was bound to apply, it was plainly “new” as it had not been “adduced at the trial”. In dealing with s 79(2)(c), the Court concluded there was not a failure to act with “due diligence”.

112 *R v B* [2013] 1 WLR 320; [2012] EWCA Crim 414 is, perhaps, an extreme example of the application of the provision. The respondent was charged with rape. The trial judge rejected evidence of certain DNA samples. Thereafter, the prosecution offered no evidence and the respondent was acquitted. Subsequently, the House of Lords in *Attorney General’s Reference (No 3 of 1999)* [2001] 2 AC 91 determined that the trial judge was wrong and that the evidence was admissible. Thereafter, the application was made.

113 It was contended in writing prior to the hearing that the evidence was “adduced” when it “formed the basis of the trial judge’s ruling” and that “the ruling that it should not be admitted before the jury did not mean that it was not adduced in the proceedings”. The Court stated at [7] that the argument was, in effect, withdrawn “for good reason”. The Court expressed its conclusion in the following terms:

> “[8] For the purposes of sections 75 to 79 of the Criminal Justice Act 2003 the word ‘proceedings’ is not defined or explained. Reading these sections as a whole within their own context, it is clear that the word ‘proceedings’ is designed to cover the entire process which resulted in the original acquittal. However, as a matter of statutory construction it does not follow that all evidence which was available to be deployed in the earlier proceedings must fall outside the ambit of the ‘new’ evidence provision on which section 76 applications must, whether in whole or in part, be based. Subject to the interests of justice requirement found in s 79, evidence which was available to be used, but which was not used, may be ‘new’ evidence for the purposes of section 78(2). This provides the context in which to reflect that section 78(2) is concerned with evidence – that is admissible evidence capable of being deployed against a defendant in accordance with the rules of admissibility.
>
> [9] Evidence sought to be advanced by the Crown at the original trial was undoubtedly available to be considered by the trial judge when he was asked to decide whether the evidence could or could not be adduced in, or should be or should not be excluded from, the evidence to be placed before the jury. Without considering it, he could not provide a proper ruling on the question. However, once the judge ruled that it should not be admitted at the defendant’s trial, notwithstanding that it was available for his consideration, and indeed that

he considered it, it was not, in our judgment, 'adduced' in the proceedings.

…

[11] Since preparing his written submissions, Mr Coonan has reconsidered his submissions. His researches took him to the Parliamentary debates on the issues. We are grateful to him for drawing them to our attention. From these debates it is clear that the language of clause 65(2) of the original Bill (the predecessor to section 78(2) of the 2003 Act to the effect that, where at the original trial evidence was available in the broad sense, it should not be treated as new evidence) was deliberately amended to the current position that whether or not it was available, it is new evidence if it was not adduced in the proceedings."

114 *R v K* [2013] EWCA Crim 1820 involved allegations of sexual assault. The principal issue was whether the victim had consented. The respondent was acquitted. The new evidence was said to be that, following his release from custody, he carried out a series of sexual and physical attacks on women in the same area and that some of the features of the attacks bore "a striking similarity" to the complaint made in the original proceedings. The respondent argued that the new evidence was not "compelling". The Court concluded at [74] that it was.

115 The Court stated at [72] that "the new evidence upon which the prosecution relies need not be direct, it may be circumstantial" and "need not relate directly to the events which led to the respondent's acquittal". In a comment resonant of the submissions of the applicant in the present case, the Court stated at [73] that the new evidence placed "a wholly fresh complexion on the complainant's evidence".

116 *R v H* [2014] EWCA Crim 1816 involved a trial of the respondent for rape. The only evidence of the sexual activity having taken place without consent was that of the complainant. The complainant was not available at the time of the trial and the respondent was acquitted.

117 The complainant returned to the United Kingdom and, in those circumstances, the Crown submitted that there was new evidence which was available. The Crown also submitted that there was further evidence that the respondent had carried out an attack on two other women, one prior to the acquittal and one after the acquittal, in circumstances which were "strikingly similar" to the first

incident.

118 The Court rejected the submission that the evidence of the complainant had been “adduced” by “service of the papers” for the purpose of the earlier proceedings and by the Crown’s hearsay application to read the evidence of the complainant (which was rejected). The Court accepted at [20]-[22] the Crown’s submission that the evidence was not “adduced” because of the refusal of the judge to admit the hearsay evidence, but noted at [23] that, in any event, the evidence of the two further complainants was “undoubtedly new and compelling evidence on any view of the legislation”.

119 In *R v MH* [2015] EWCA Crim 585, the new evidence was said to be certain DNA evidence. The respondent had been tried and acquitted of the murder of an elderly woman. There were a number of wounds to her head, neck and shoulders. A marble rolling pin was found on the kitchen bench, broken in three places and covered in blood. The prosecution’s case principally relied upon a DNA analysis taken from the rolling pin. The jury were directed that, if they were not satisfied of the reliability of the DNA evidence, then they could not convict.

120 The new evidence was the result of a DNA examination, not previously undertaken, of the fibre tape lift removed from the left sleeve of the victim’s blouse while she was still where she was originally found in the house. It is unnecessary to go into detail of the process which followed which led to the application being made. The Court stated at [45] that it was necessary to decide the application “by adherence to the statutory language, without gloss or embellishment”. It was accepted by the respondent that the evidence was “new” in that it was not “adduced” in the original trial, and the Court concluded at [51]-[52] that it was also “reliable”, “substantial” and “highly probative”.

121 The applicant placed particular reliance on the construction placed by the Court of Appeal of England and Wales on the word “adduced”, while the respondent relied upon those decisions to support its construction of s 102(4). The submissions on these issues are considered subsequently in this judgment.

The admissibility of coincidence evidence – the evolving legislative framework

122 At the time of the Speedy trial the admissibility of "coincidence" or "similar fact" evidence was governed by the common law. Although the decision of the High Court in *Pfennig v The Queen* (1995) 182 CLR 461; [1995] HCA 7 (*Pfennig*) post-dated the Speedy trial, the principles laid down in that case may be taken to be those relevant to the admission of "similar fact" evidence at the time of that trial. The majority in *Pfennig,* applying *Hoch v The Queen* (1988) 165 CLR 292; [1988] HCA 50 at 284, stated at 481 that "the basis for the admission of similar fact evidence lies in its possessing a particular probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused in the offence charged" See also the further comments at 481-3.

123 Badgery-Parker J, with respect, correctly applied this principle in ruling that the evidence with respect to the murder of Evelyn Greenup was not admissible in the Speedy trial.

124 Section 98 of the *Evidence Act 1995* (NSW), in its original form, and as it existed at the time of the Greenup trial, was relevantly in the following form:

> "**98 The coincidence rule**
>
> (1) Evidence that 2 or more related events occurred is not admissible to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind if:
>
> > (a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence, or
> >
> > (b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.
>
> (2) For the purposes of subsection (1), two or more events are taken to be related events if and only if:
>
> > (a) they are substantially and relevantly similar, and
> >
> > (b) the circumstances in which they occurred are substantially similar.
> >
> > …"

125 Section 101 was in the same form as in the current legislation.

126 Section 98 was amended to its current form by the *Evidence Amendment Act 2007* (NSW), which was assented to on 1 November 2007. The effect of the amendment was to remove s 98(2) as it appeared in the original Act.

127 The reason for the amendment was to avoid the effect that, on a literal reading of the original section, events that did not fall within s 98(2) were not related events for the purpose of s 98(1) and thus, not subject to the exclusionary rule: see Uniform Evidence Law (ALRC Report 102) [11.18]-[11.31], referred to in Explanatory Memorandum, Evidence Amendment Bill 2007 (NSW), 8. Despite this literal reading, in *Zhang*, Simpson J (as her Honour then was), with whom Buddin J agreed, had interpreted the provision consistently with the view that evidence of events not meeting the threshold in s 98(2) would be inadmissible. Her Honour explained the position in the following terms:

> "[140] In the case of coincidence evidence, an anterior step is required by subs (2) of s98. It is necessary to determine whether the two or more events the subject of the tendered evidence are substantially and relevantly similar and whether the circumstances in which they (are alleged to have) occurred are substantially similar. Since admission of the proposed evidence depends upon the existence of relevant similarities, it is obvious that this assessment is to be made by the judge and not left to the tribunal of fact."

128 In a dissenting judgment, Basten JA noted at [36] the effect of the literal reading of s 98(2) but rejected it, pointing out that a literal reading would render s 98 anomalous.

129 We have dealt with this matter in some detail since, if the applicant were correct in contending that the word "adduced" means "admitted", the question arises whether the Walker evidence could have been "adduced" at the Greenup trial with "the exercise of reasonable diligence" pursuant to s 98 of the *Evidence Act 1995* (NSW) because it existed at the time of that trial. This was not a matter considered at the hearing, perhaps understandably having regard to the approach by the applicant in considering the questions raised holistically, without considering the requirements of s 102 separately in relation to each acquittal, and the approach of the respondent, which essentially contended that

none of the evidence was “fresh”, nor admissible under s 98 of the *Evidence Act 1995* (NSW), nor “compelling” in relation to either acquittal.

Principles of construction

130 Neither party made submissions in any great detail as to the relevant principles of construction which were to be applied in construing the relevant provisions of CARA. In his written submissions, the applicant placed particular reliance on what was said in the second reading speech, particularly the paragraph which we have set out at [81] above. He submitted that Part 8 of Division 2 of CARA aimed “to strike a balance between the right of individuals not to be tried twice for the same offence and the public interest in ensuring that serious offenders are brought to justice”. He said that “the latter in turn promotes public confidence in the criminal justice system, community safety, just outcomes and victim rights”.

131 The applicant noted that the legislation followed the introduction of Part 10 of the UK Act. He referred to the “Double Jeopardy and Prosecution Appeals” United Kingdom Law Commission Report which predated Part 10 of the UK Act. It stated that the proposed exception to “the double jeopardy principle” was consistent with the “spectre of public disquiet, even revulsion, when someone is acquitted of the most serious of crimes and new material (such as that person’s own admission) points strongly or conclusively to guilt”. The applicant pointed out that this undermined “public confidence in the criminal justice system”.

132 At the hearing, senior counsel for the applicant submitted that the principle of legality had no application in the present case as “the whole purpose of the legislation was to remove the principle of double jeopardy”. By contrast, senior counsel for the respondent emphasised the “fundamental nature of the rule against double jeopardy”, referring to what was said by McHugh J in *R v Carroll* at [128]. He submitted that, rather than abrogating the rule against double jeopardy, the legislature had qualified it. He submitted that, where there was “any doubt as to the meaning of particular words or provisions”, the principle of legality would assist in determining where the line was to be drawn.

133 Subject to these matters, there was little dispute between the parties as to the applicable legal principles of statutory construction. It is convenient to deal with these and then to deal with the extent to which, if any, the principle of legality impacts upon the approach to construction in the present case.

134 The relevant principles of statutory construction are well-established. As was said by McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [69] (*Project Blue Sky*), the "primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute", with the meaning of the provision to be "determined by reference to the language of the instrument viewed as a whole". Their Honours also referred to the statement of Dixon CJ in *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397; [1955] HCA 27 that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". They also emphasised at [71] that a court must strive to give meaning to every word of a provision.

135 In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27; [2009] HCA 41 at [47], the majority emphasised that the "language which has actually been employed in the text of legislation is the surest guide to legislative intention", but that the "meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy": see also *Thiess v Collector of Customs* (2014) 250 CLR 664; [2014] HCA 12 at [22]; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55 at [39]. In *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573; [2011] HCA 10 at [44], the majority emphasised that the "purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction".

136 However, as was emphasised in *SZTAL v Minister for Immigration and Border*

Protection (2017) 91 ALJR 936; [2017] HCA 34 (*SZTAL*), the text cannot be considered without regard to its context and purpose. The majority stated the principle in the following terms at [14]:

> "[14] The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected."

See also Gageler J at [35]-[39]; *Interpretation Act 1987* (NSW) s 33.

137 Reliance was placed by the applicant on what has been described as the "principle of legality". In *Potter v Minahan* (1908) 7 CLR 277 at 304; [1908] HCA 63 (*Potter v Minahan*), O'Connor J stated that it was "in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness", quoting from the 4th edition of *Maxwell on Statutes*. The effect of the principle was described by the majority in *Coco v The Queen* (1993) 179 CLR 427 at 437; [1994] HCA 15 (*Coco v The Queen*) in the following terms:

> "The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights."

See also *X7 v Australian Crime Commission* (2013) 248 CLR 92; [2013] HCA 29 at [86]-[87], [158] (*X7*); *Project Blue Sky* at [78]; *Lee v The Queen* (2014) 253 CLR 455; [2014] HCA 20 at [46]-[47]. Further, in *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309; [2004] HCA 40 at

[21] (*Electrolux Home Products*), Gleeson CJ described the principle of legality as "a working hypothesis, the existence of which is known both to Parliament and the courts, upon which the statutory language will be interpreted".

138 Nonetheless, the principle of legality must be applied with care and with regard to the context in which the question of construction arises. That was made clear by Gleeson CJ in *Electrolux Home Products*, where his Honour made the following remarks at [19]:

> "[19] Reliance was placed in argument upon what was said to be a general principle of construction that, where a statute takes away or interferes with common law rights, then it should be given, if possible, a narrow interpretation. The generality of that assertion of principle requires some qualification. It is true that courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. It is also true that there is a presumption, relevant for example to the construction of privative clauses, that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied. However, as McHugh J pointed out in *Gifford v Strang Patrick Stevedoring Pty Ltd* modern legislatures regularly enact laws that take away or modify common law rights. The assistance to be gained from a presumption will vary with the context in which it is applied."

139 In *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; [2013] HCA 39 (*Lee*), Gageler and Keane JJ, after reviewing the authorities, including *Potter v Minahan*, *Bropho v Western Australia* (1990) 171 CLR 1; [1990] HCA 24, *Coco v The Queen*, and *Electrolux Home Products*, explained the principle of legality in the following terms at [313]-[314]:

> "[313] Application of the principle of construction is not confined to the protection of rights, freedoms or immunities that are hard-edged, of long standing or recognised and enforceable or otherwise protected at common law. The principle extends to the protection of fundamental principles and systemic values. The principle ought not, however, to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature.
>
> [314] The principle of construction is fulfilled in accordance with its rationale where the objects or terms or context of legislation make plain that the legislature has directed its attention to the question of the abrogation or curtailment of the right, freedom or immunity in question and has made a

> legislative determination that the right, freedom or immunity is to be abrogated or curtailed. The principle at most can have limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked. The simple reason is that '[i]t is of little assistance, in endeavouring to work out the meaning of parts of [a legislative] scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve'."

140 Their Honours also pointed out at [324] that the "notion that any subtraction, however anodyne it might be in its practical effect, from the forensic advantages enjoyed by an accused under the general law necessarily involves an interference with the administration of justice or prejudice to the fair trial of the accused is unsound in principle". Crennan J agreed with Gageler and Keane JJ at [126], stating that, in some cases, "a legislative object may involve a public interest which cannot be pursued without some impairment of some private right or immunity". See also the observations of Basten JA in *McElwaine v The Owners – Strata Plan 75975* [2017] NSWCA 239 at [2]-[3].

141 The principle of double jeopardy is a principle which may be described as a "fundamental freedom or principle", in the language of Kiefel J in *X7* at [158]. In *Green v United States*, 355 US 184 at 187-188 (1957), Black J stated the principle in the following terms:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

142 Similar statements have been made in the courts of this country. In *Rogers v The Queen* (1994) 181 CLR 251; [1994] HCA 42, the question was whether evidence of a record of interview at a trial would constitute a "direct challenge" to a verdict of acquittal on previous charges. The majority held that it would. In the course of their judgment, Deane and Gaudron JJ made the following remarks at 273:

> "It was said by Fullagar J in *Jackson v Goldsmith* [(1950) 81 CLR 446] that res judicata or cause of action estoppel is "not … correctly classified under the heading of estoppel at all", but "is a broad rule of public policy based on the principles expressed in the maxims 'interest reipublicae ut sit finis litium' and

'nemo debet bis vexari pro eadem causa'". His Honour went on to say that issue estoppel was, in his view, "a true case of estoppel, analogous to estoppel by deed and estoppel by representation".

It will later be necessary to say something of the distinction drawn by Fullagar J. between issue estoppel and res judicata or cause of action estoppel. It is convenient, before doing so, to say something of the Latin maxims to which his Honour referred. The first expresses the need, based on public policy, for judicial determinations to be final, binding and conclusive. The second looks to the position of the individual and reflects the injustice that would occur if he or she were required to litigate afresh matters which have already been determined by the courts. It is correct to say that res judicata or cause of action estoppel derives from the principles embodied in those maxims, which principles are fundamental to any civilized and just judicial system. There is, however, another related principle, likewise fundamental, which is embodied in the Latin maxim res judicata pro veritate accipitur. That maxim gives expression to a rule of Roman law which has since been recognized as part of our common law. It expresses the need for decisions of the courts, unless set aside or quashed, to be accepted as incontrovertibly correct."

143 In *R v Carroll*, Gleeson CJ and Hayne J made the following remarks at [21]-[22] under the heading "Some fundamental underpinnings of the criminal law":

"[21] A criminal trial is an accusatorial process in which the power of the State is deployed against an individual accused of crime. Many of the rules that have been developed for the conduct of criminal trials therefore reflect two obvious propositions: that the power and resources of the State as prosecutor are much greater than those of the individual accused and that the consequences of conviction are very serious. Blackstone's precept 'that it is better that ten guilty persons escape, than that one innocent suffer' may find its roots in these considerations.

[22] Many aspects of the rules which are lumped together under the title 'double jeopardy' find their origins not so much in the considerations we have just mentioned as in the recognition of two other no less obvious facts. Without safeguards, the power to prosecute could readily be used by the executive as an instrument of oppression. Further, finality is an important aspect of any system of justice. As the New Zealand Law Commission said in a recent report dealing with the possibility of statutory relaxation of the rule against double jeopardy in the case of acquittals procured by perjury or perversion of the course of justice, the need to secure a conclusion of disputes concerning status is widely recognised, and the status conferred by acquittal is important. The Commission quoted what was said by Lord Wilberforce in *The Ampthill Peerage* [[1977] AC 547]:

> 'Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the

certainty of justice prevails over the possibility of truth … and these are cases where the law insists on finality.'"

144 Their Honours added a caveat to their remarks at [23]:

> "[23] It is, nonetheless, important to recall that the four considerations which we have mentioned (the imbalance of power between prosecution and accused, seriousness for an accused of conviction, prosecution as an instrument of tyranny and the importance of finality) are not the only considerations which find reflection in the criminal law system. At the very root of the criminal law system lies the recognition by society that some conduct is to be classified as criminal and that those who are held responsible for such conduct are to be prosecuted and, in appropriate cases, punished for it. It follows that those who are guilty of a crime for which they are to be held responsible should, in the absence of reason to the contrary, be prosecuted to conviction and suffer just punishment."

145 Notwithstanding this caveat, their Honours stated at [25] that until "very recently it had been accepted as a basal tenet of the law that no person who has been acquitted of an offence should be required to stand trial again for the *same* offence". They noted at fn 39 that "legislative inroads" on that proposition had been proposed in the United Kingdom.

146 In the same case, Gaudron and Gummow JJ made the following remarks at [84] and [87]:

> "[84] In Australia, 'double jeopardy' is not an independent doctrine of avoidance, which, for example, would found a demurrer to a count or a stay application. The law's aversion to placing an individual twice in jeopardy of criminal punishment for the one incident or series of events reflects a broader precept or value. This finds diverse application through doctrines of estoppel and merger, in the pleas of autrefois acquit and autrefois convict, and in principles respecting abuse of process, the admissibility of evidence, and sentencing. In some instances, as here, the precept finds expression in principles of statutory construction. An illustration is the settled rule that a general statutory provision should not ordinarily be construed as conferring or extending a prosecution right of appeal against sentence unless a specific intention to that effect is manifested by very clear language.
>
> …
>
> [87] There is competition between (i) securing truthful testimony, and hence protecting the integrity of the judicial process and public perceptions thereof and (ii) preventing successive criminal prosecutions in respect of what in substance may be the same elements of an offence for which an individual earlier has been acquitted. That competition is capable of legislative resolution in different ways and with various exceptions and qualifications detailed by statute. So much is illustrated by the recent and divergent recommendations of the Law Commission of England and Wales and the Law Commission of New Zealand."

147 McHugh J, quoting *Garrett v The Queen* (1977) 139 CLR 437 at 445; [1977] HCA 67, stated at [146] that it was a "fundamental rule of the common law that an acquittal of a criminal charge 'may not be questioned or called in question by any evidence which, if accepted, would overturn or tend to overturn the verdict'". In that context, citing *Coco v The Queen* at 437, his Honour stated that "general enactments do not abolish fundamental rights".

148 In our opinion, in these circumstances, it is appropriate to take into account the principle of legality in construing the provisions of CARA. This does not mean that the principle of legality can be used to frustrate the legislative intention behind CARA, which was clearly to abrogate the rule against double jeopardy in certain defined circumstances, but not generally. While the principle cannot be used to frustrate that intention, as noted in *Lee* at [314], it is, in our view, of assistance in determining the extent to which CARA was intended to abrogate the rule against double jeopardy where it does not otherwise appear clearly from the text or context of the statutory provisions.

Construction of s 105(7) of CARA

149 The parties disputed the manner in which s 105(7) required the proceedings to be conducted in circumstances where there were two acquittals on different charges occurring at different times. Because of the way the submissions were put before this Court, it is convenient to deal with the issue at the outset.

a The submissions

150 Each party took what might be described as an extreme position on the interpretation of s 105(7) and relied to a considerable extent on their submissions concerning the meaning of "fresh" for the purpose of s 102(2).

151 The applicant submitted that it was appropriate to first consider "the question of whether [the Walker evidence], combined with the evidence at the Speedy Trial and the Greenup Trial, satisfies s 98 of the *Evidence Act* such that coincidence reasoning is permitted between the three". He submitted that it was appropriate to consider whether s 98 would be so satisfied "at the outset" because "if the evidence would not be admissible under this section, then the

evidence is likely to be inadmissible in any retrial" and therefore not "compelling" for the purpose of s 102(3).

152 The applicant submitted that there was no basis for a submission made by the respondent that the applications in respect of each acquittal should be heard separately and that each application should be considered on the basis that the other acquittal still stands. The applicant stated that this submission "belies logic and would not fulfil the object or purpose of the CARA". He submitted that s 105(7) authorised the Court to hear applications to quash acquittals for more than one offence at the same hearing where those offences would be capable of being tried together on one indictment on a retrial.

153 The applicant submitted that, in practical terms, s 105(7) "could only have application in circumstances such as the present, where: there is more than one acquittal; and the evidence would enable any retrial with all counts properly joined on the one indictment". He submitted that s 105(7) "encompasses the factual scenario where offences which had previously been tried on separate indictments should, as a result of the fresh evidence, be properly charged on the one indictment".

154 The applicant then emphasised what was an overarching theme in his submissions, being that Part 8 of CARA was "directed at ensuring an outcome which is in the interests of justice", which he submitted included "preventing the injustice of allowing a guilty person to walk free even when there is compelling evidence of his or her guilt". Against that background, he submitted that it would be "illogical and artificial" not to have both applications heard at the same hearing in favour of having them heard separately.

155 The applicant accepted that the probative value of the fresh evidence would "decrease significantly" if the applications were dealt with separately. He submitted that, if the Walker evidence was considered separately in relation to the two acquittals, the applicant would "likely fail" and "justice would not be ensured". He submitted that a similar approach to the one proposed in his submissions had been adopted in the United Kingdom, although he acknowledged that no case under the UK Act had considered an application for

acquittals in separate trials to be quashed.

156 Senior counsel for the applicant submitted that the respondent's position that the applications must be dealt with separately was based "solely on the use of the singular" in the word "acquitted" in earlier sections of Part 8 of CARA and ignored s 105(7). She submitted that, quite apart from the fact that s 8(b) of the *Interpretation Act 1987* (NSW) states that "a reference to a word or expression in the singular form includes a reference to the word or expression in the plural form", s 105(7) must have some work to do. She submitted that the section was directed to a scenario where there were acquittals on separate indictments but "the fresh evidence results in the matters being able to be tried on the one indictment" because, for example, the fresh evidence permitted coincidence reasoning between the offences charged on the indictment.

157 During the hearing, it was put to senior counsel for the applicant that relying on the use to which the fresh evidence could be put at a joint retrial for the offences if both acquittals were quashed to determine whether the applications to quash both acquittals should be heard together involved an element of "circular reasoning". She rejected the proposition that the use to which the fresh evidence could be put on a retrial only fell for consideration when considering whether that evidence is "compelling" for the purpose of s 102(3) and only after any determination of whether the applications should be heard together under s 105(7) had been made. In doing so, she seemed to adopt the proposition that "fresh and compelling" was a "compendious" expression.

158 However, ultimately, it was not clear whether she took issue with the proposition that the question of whether the evidence is fresh evidence is dealt with separately in respect of each acquittal, and if "fresh", the question of whether it is "compelling" is dealt with in the context of its availability for use as coincidence evidence and that the only issue on that interpretation is whether the evidence had been adduced in the previous trials.

159 The respondent submitted that it was appropriate to consider each of the applications separately. In his written submissions, he submitted that, in doing so, "evidence of the other trial should be considered contingently and,

alternatively; on the basis that the acquittal of the other trial stands, and alternatively if the acquittal of the other trial is overturned, on the basis that a retrial would be a joint trial".

160 Senior counsel for the respondent stated that the "most likely" application of s 105(7) is where "the respondent has been acquitted of more than one qualifying offence, that is, an offence that has a maximum penalty of life imprisonment, at the one trial, or where there were co-accused who were acquitted of a qualifying offence".

161 Senior counsel for the respondent submitted that it is necessary to consider evidence claimed to be "fresh" in the context of each trial separately. He submitted that considering it in "one bundle" is at odds with the language used throughout Division 2 of Part 8 of CARA, which "exclusively refers to there being a single application for a retrial". In that context, he referred to s 100(1), s 100(2), s 102(1) and s 102(3). He rejected the proposition that this approach preferred "form over substance". He submitted that it was apparent from s 105(7) itself, as well as from what appears elsewhere in Division 2 of Part 8 of CARA, that the evidence must be considered separately in relation to each acquittal. He submitted that the expression "one hearing" in s 105(7) did not offer any guidance.

162 Senior counsel for the respondent submitted that the "manner in which the evidence should be considered is affected by the fact that the meaning of fresh evidence [on the respondent's submission] excludes … the Greenup material from being considered in the Speedy trial and vice versa". In those circumstances, it was necessary to consider whether the Walker evidence was "fresh and compelling" in relation to the murder of Clinton Speedy without reference to the evidence in the Greenup trial. He also submitted that evidence in the Speedy and Greenup trials could not be considered together because they were not "fresh" in relation to each other.

163 Senior counsel for the respondent rejected the proposition that "fresh and compelling" is a "composite phrase" and that whether the evidence was "fresh and compelling" should be considered by putting the evidence on all three

matters together, considering them as a composite whole, and asking "whether that evidence taken as a whole is fresh in each of the two acquittal applications". He submitted that it was essential that the applicant satisfy each of the tests for "fresh" and "compelling" respectively in s 102, and that, if the evidence is not "fresh" on either acquittal, then that "stops the process".

Consideration

164 Section 105 appears under the heading "Application for retrial – procedure". Each of the subsections of s 105, apart from s 105(1) and s 105(1A), which impose limits on the number of applications which can be made under the Part in respect of an acquittal, are plainly concerned with procedural matters relating to the hearing and determination of an application.

165 Although the heading to a section is not included within the list of headings which are said to form "part of the Act" under s 35 of the *Interpretation Act 1987* (NSW), nonetheless, the heading can be used as an aid to interpret the meaning of a provision which is "ambiguous or obscure" under s 34(1)(b) of the *Interpretation Act 1987* (NSW). However, care must be taken in their use. In dealing with the heading "Consumer Protection" to Part 5 of the *Trade Practices Act 1974* (Cth), which did form "part of the Act", the majority in *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at 601; [1990] HCA 17 stated that, while the heading could be taken into account in determining the meaning of substantive provisions "in case of ambiguity", it cannot "control the permissible scope of the substantive provisions" and "cannot properly be used to impose an unnaturally constricted meaning upon the words of those substantive provisions". See also *Silk Bros Pty Ltd v State Electricity Commission (Vic)* (1943) 67 CLR 1 at 16; [1943] HCA 2.

166 The real question is whether and to what extent s 105(7) requires the Court to follow a different approach to the determination of applications under Division 2 of Part 8 of CARA when it is dealing with applications made in respect of more than one acquittal. This question must be considered in the context of the other subsections of s 105 as well as, importantly, the provisions of s 100 and s 102.

167 As we indicated at [159]-[163] above, the respondent submitted that each application to quash an acquittal should be considered separately and that the evidence in the Speedy and Greenup trials could not be considered together because the evidence led in each of those trials was not “fresh” in relation to the other. We do not think that this is the correct approach since it gives s 105(7) no work to do.

168 However, it does not follow that whether the evidence is “fresh” in relation to each acquittal can be considered jointly, as the applicant submitted. On the applicant’s submission, if the evidence demonstrated that the offences should be tried on the same indictment, and this did not happen at the original trials, then the evidence would be “fresh” for the purposes of CARA. Put another way, the applicant submitted that the question of whether the evidence is “fresh and compelling” is to be dealt with “compendiously”, taking into account the use to which it could be put.

169 This submission fails to take into account that the concepts of “fresh” and “compelling” are dealt with separately in s 102 and each comprises separate elements. Section 102(3) looks at the evidence itself and whether it was “fresh” in relation to particular proceedings, rather than whether there could have been a change in the use which could be made of it in those proceedings. Further, while s 105(7) provides for applications to be “heard” together, it does not, either in its text itself or when read in light of its context, go so far as to provide, in circumstances where it can be established that any new trial for the relevant offences “should be tried on the same indictment”, that what is found to be fresh evidence in relation to one acquittal will also equally be fresh evidence on the other.

170 In dealing with fresh evidence, it is important that s 102(2) refers to the fact that the evidence alleged to be “fresh” must not have been “adduced in the proceedings in which the person was acquitted” and “could not have been adduced in those proceedings with the exercise of reasonable diligence”. If there is no evidence that falls within the definition of “fresh” in relation to particular proceedings in which a person was acquitted, then there can be no

room for the operation of Division 2 of Part 8 of CARA as the “gateway” in s 102(2) has not been made out. The fact that there is evidence which may be “fresh” in relation to another set of proceedings does not alter this conclusion.

171 It follows that we do not think that the requirement that the evidence be “fresh and compelling” in s 100(1) can be treated as a “compendious” term. Each element is separately defined in s 102 and, for the evidence to fall within s 100(1), both elements in s 102 and the sub-elements which they comprise must be made out.

172 We do not think that this approach frustrates the purpose of the section. The legislature could have expressly provided that, where any future trial of the relevant offences “should be tried on the same indictment”, then, if there was evidence which was “fresh” in relation to one of the offences, it would also be taken to be “fresh” in relation to the other offences. As we have said at [169] above, s 105(7) does not expressly achieve this result, nor does it do so by necessary implication. In these circumstances, even if the broader construction were available as a matter of “constructional choice”, the principle of legality, in our view, would require the Court to prefer the contrary construction unless, having regard to the language and context, the broader construction were required as a matter of necessary implication. It is not so required in the present case.

173 This does not mean that s 105(7) has no work to do. The qualification that the offences “should be tried on the same indictment” on a retrial demonstrates that, when the Court is satisfied on an application for a retrial under s 100(1) that, in the event of two or more acquittals being set aside, two or more offences should be tried on the same indictment, the Court will look at the fresh evidence in the following manner in determining whether an order for a retrial under s 100(1) should be made.

174 If the Court determines that evidence is “fresh” within the meaning of s 102(2) in relation to one or more acquittals and is satisfied that, at any retrial, the offences “should be tried on the same indictment” for the purpose of s 105(7), then the question of whether the evidence is “compelling” within the meaning of

s 102(3) will be considered in the context of a future joint trial of those offences, while always bearing in mind that it is the evidence which has been found to be “fresh” which must also be “reliable”, “substantial” and “highly probative” for the purpose of s 100(1).

175 In some cases, consideration of this issue may require taking into account other evidence which could be led at any future joint retrial to determine whether the fresh evidence is “highly probative”. One example where fresh evidence might satisfy this standard would be where it provides a missing link in a chain of circumstantial evidence without which other circumstantial evidence would not be “highly probative”. Another example, to take the present case, would be where the fresh evidence demonstrates that weaker coincidence evidence which was previously available becomes “highly probative”.

176 However, it must always be remembered that it is the evidence which has been found to be “fresh” which must also be “compelling”. It is not enough that evidence is discovered or otherwise becomes available after the acquittal which adds to the body of the evidence against the person acquitted. That evidence of itself must be “reliable”, “substantial” and “highly probative”. An isolated piece of fresh evidence which does not meet these requirements does not permit an acquittal to be set aside.

177 The approach can be demonstrated by a simple example. Suppose that, an accused person is acquitted of two offences on two different dates. Thereafter, evidence is discovered or becomes available to show that, subsequently to the acquittals, that person had committed a further number of offences of a similar nature. Since the evidence would be “fresh” in each case on any view, if the Court came to the view, whether having regard to that evidence or otherwise, that the offences “should be tried on the same indictment”, the probative value of that evidence for the purpose of s 102(3)(c) would have to be considered on that assumption. It is at this point that the extent of its potential probative value as coincidence evidence would fall to be considered.

178 The UK Act contains a somewhat similar provision to s 105(7) in s 80(7).

However, there does not appear to be any authority on the construction of that subsection in the United Kingdom. Nevertheless, in *R v A*, which we have summarised at [98]-[100] above, an approach similar to the one that we have suggested was adopted, although in that case there was no dispute that the evidence was "new" within the meaning of the equivalent provisions in the UK Act.

Section 102(2) – the meaning of "fresh", "adduced" and the construction of s 102(4)

179 A critical issue between the parties was what constituted "fresh" evidence and, in particular, the meaning of "adduced" in s 102(2). In broad terms, the applicant submitted that "adduced" meant "admitted", so that fresh evidence would extend to evidence which had not been admitted in the earlier proceedings and could not have been admitted in those proceedings with reasonable diligence. He contended that, on that construction, the Walker evidence was "fresh" in both sets of proceedings, and for that matter, the evidence in the Speedy trial was "fresh" in the Greenup trial and vice versa.

180 The respondent submitted that the word "adduced" meant "tendered" or "brought forward". It would thus exclude evidence which was tendered but rejected and evidence which, irrespective of its admissibility, could have been brought forward with reasonable diligence. In these circumstances, he submitted that the Walker evidence was not "fresh" in relation to either the murder of Clinton Speedy or the murder of Evelyn Greenup.

a The applicant's submissions

181 The applicant submitted that "fresh" was defined exhaustively in s 102(2) of CARA, while noting that neither the expression "adduced in" nor the expression "the exercise of reasonable diligence" is a defined term.

182 The applicant referred to the second reading speech, which we have set out at [81] above, where the Premier stated that CARA was intended to cover situations such as those where "developments in forensic technology will reveal new evidence or new conclusions to be drawn from existing evidence".

He submitted that “inherent in this statement is the recognition that evidence which might have been led in a previous trial but was not admitted into evidence”, might now be admitted as a result of scientific developments enabling new conclusions to be drawn from that evidence. However, that would be because the relevant new evidence being admitted would be the “scientific developments” or the conclusions which could be drawn from those developments.

183 The applicant submitted that evidence which was not admitted in the earlier proceedings is “necessarily evidence which the jury did not consider” in those proceedings. He submitted that, if the evidence is now admissible, “perhaps because of the new conclusions which can now be drawn from that evidence”, then, consistently with the purposes of CARA, that evidence would be treated as “fresh” so as not to “bring the justice system into disrepute by ‘perpetuating a major injustice by allowing a guilty person to walk free even where there is compelling evidence of his or her guilt’”. He submitted that any construction of “adduced in” which meant that it excluded evidence which had been ruled inadmissible from being “fresh” would bring about “outcomes inconsistent with the purpose of the reforms”.

184 The applicant submitted that the construction for which he contended was consistent with the construction adopted by the Court of Appeal of England and Wales, referring in particular to *R v B* and *R v H*. He also submitted that the construction was consistent with the ordinary meaning of “adduced”, referring to the description of its ordinary meaning by Simpson J in *Zhang* at [125] as “admitted” or “given” or “brought out”.

185 The applicant also submitted that the construction of the section for which he contended was supported by s 102(4). He submitted that this subsection recognised that “evidence not led because it was inadmissible is not precluded from being fresh evidence”. He submitted that it was “illogical if evidence which was not led because it was ruled inadmissible were treated differently from evidence which, because of the rules of evidence or for any other reason was never sought to be relied upon”. He submitted that a construction which

produces such an "absurdity" should be avoided.

186 The applicant submitted that the concept of "fresh evidence" used in conviction appeals such as *Mickelberg v The Queen* (1989) 167 CLR 259; [1989] HCA 35 (*Mickelberg*) was of "no assistance", since "fresh" is a defined term in s 102(2) of CARA, with its meaning to be construed in accordance with "settled principles of statutory construction". He also submitted that dictionary definitions of the word "adduced" relied on by the respondent provided little assistance.

187 In that context, senior counsel for the applicant referred to the decision of the High Court in *Van Beelen v The Queen* (2017) 91 ALJR 1244; [2017] HCA 48 (*Van Beelen*). In that case, the Court had to consider the expression "fresh and compelling" for the purpose of s 353A of the *Criminal Law Consolidation Act 1935* (SA), which allowed a "second or subsequent appeal" by a convicted person against a conviction in circumstances where there was evidence which was "fresh and compelling". The grounds upon which evidence could be said to be "fresh" or "compelling" in the Act were the same as those contained in s 102(2) and s 102(3) of CARA. There was no issue that the evidence was "fresh".

188 Senior counsel for the applicant submitted that, in *Van Beelen*, the Court did not resort to the common law to interpret the meaning of "fresh and compelling" and instead applied ordinary principles of construction. However, having regard to the issues before the Court, there was no occasion to resort to the common law, as stated in *Van Beelen* at [28]-[29]. In fact, the Court stated at [23] that it was not in issue that the Full Court of the Supreme Court of South Australia was correct to hold that the question of whether there had been a substantial miscarriage of justice for the purpose of s 353A(3) was to be answered "by applying the *Mickelberg* test".

189 The applicant also submitted that the Wood Report could not be used as an aid to construction. As we have indicted at [82] above, we agree with that submission. The reasoning in the Wood Report is only of assistance to the extent that this Court finds, in considering the construction of the legislation,

that it is persuasive.

190 So far as the persuasive value of the Wood Report was concerned, the applicant emphasised the difference between an appeal against conviction and the position under CARA. He submitted that Part 8 of CARA was a “statutory framework” including its own definition of fresh evidence, and that the word “adduced” formed no part of the common law definition of “fresh”. He submitted that, unlike the common law position, s 105(7) “expressly encompasses more than one application” being made at the same time and that the law relating to appeals against conviction “had no need to address the issue of evidence which was tendered but not admitted in a trial”. He repeated the submission that the construction contended for by the respondent would undermine the “object and purpose” of Part 8 of CARA.

191 The applicant also submitted that the respondent’s submission that the meaning of the word “adduced” in the *Evidence Act 1995* (NSW) should be adopted for the purpose of CARA “ignores that the meaning given to the word in s 101(2) of the *Evidence Act 1995* (NSW) was dependant on an interpretation of that legislation” which was different to the ordinary meaning of the word.

192 The applicant also submitted that the respondent was incorrect in submitting that the construction placed on the UK Act could be distinguished because there was no equivalent to s 102(2)(b) in the UK Act. He submitted that all that section provides is that evidence is not “fresh” if “it could have been admitted into the proceedings with the exercise of reasonable diligence” and that this “says nothing about the utility of the UK cases”.

193 The applicant also submitted that the absence of an equivalent to s 5F(3A) of the *Criminal Appeal Act 1912* (NSW) in the UK Act at the time of *R v B* did not assist the respondent in distinguishing the interpretation adopted by the cases in the United Kingdom, and pointed out that cases subsequent to *R v B* had adopted the same approach, notwithstanding the later introduction of an equivalent section to s 5F(3A), namely, s 62 of the UK Act. He also pointed out that there was no equivalent to s 5F(3A) in other states which had adopted

legislation similar to Part 8 of CARA.

194 The applicant also submitted that s 102(4) did not support the respondent's construction of the word "adduced", and stated that an equivalent provision in the UK Act had not affected the approach of the courts in the United Kingdom to the meaning of "adduced".

195 Senior counsel for the applicant submitted that "adduced" did not mean "available", stating that interpreting "adduced" in this way would be contrary to the words of the section. She submitted that "adduced" meant "admitted", and accepted the proposition that this would leave a person at "risk of retrial" because the legislature decided to "change the evidentiary basis on which material could be admitted". In dealing with the principle of legality, she said that, since the object of CARA was to "overturn the principle of double jeopardy in certain circumstances", this result could not be avoided by simply interpreting the word "adduced" to mean "available".

196 In that context, senior counsel for the applicant contrasted s 102 with the equivalent Western Australian provision in s 46I of the *Criminal Appeal Act 2004* (WA), which she noted specifically used both the words "available" and "adduced". That provision was in the following terms:

> "**46I Meaning of fresh and compelling evidence**
>
> (1) For the purposes of section 46H, evidence is fresh in relation to the new charge if –
>
> > (a) despite the exercise of reasonable diligence by those who investigated offence A, it was not and could not have been made available to the prosecutor in trial A; or
> >
> > (b) it was available to the prosecutor in trial A but was not and could not have been adduced in it.
>
> (2) For the purposes of section 46H, evidence is compelling in relation to the new charge if, in the context of the issues in dispute in trial A, it is highly probative of the new charge.
>
> (3) For the purposes of this section, it is irrelevant whether the evidence being considered by the Court of Appeal would have been admissible in trial A against the acquitted accused."

It should be noted that this section was introduced into the *Criminal Appeal Act 2004* (WA) in 2012, after Part 8 of CARA had been enacted.

197 In relation to “reasonable diligence”, the applicant submitted, referring to the second reading speech and the MCCOC Discussion Paper, that reference to “reasonable diligence” is designed to provide a measure of protection to the accused. He submitted that this was done “by restricting the available evidence in an application under s 100 of CARA by reference to the conduct of the police and prosecution at the original trial”. In that context, he submitted that “reasonable diligence” means “what an ordinary prudent person in the position of the prosecution or the police would do, having regard to all the circumstances then pertaining, including the particular criminal context”.

198 In dealing with “reasonable diligence”, senior counsel for the applicant stated that the test was whether the evidence in question could have been admitted with reasonable diligence. She submitted that it was “an objective test” and thus did not involve “looking into the mind” of the police or the prosecutor.

199 Senior counsel for the appellant accepted that her “central proposition” was that the coincidences involved enabled “new conclusions” to be drawn from that existing evidence. She submitted that, since the respondent accepted that there was “insufficient evidence” to charge him with the Walker murder in 1991 after the initial investigation or in 1994 after the first coronial inquest, this was an admission that there was “no reasonable basis” for finding that the Walker evidence could have been adduced in the Speedy trial with reasonable diligence.

b The respondent’s submissions

200 The respondent referred to the advice to the New South Wales government on the 2003 Draft Bill for the introduction of Part 8 of CARA by Mathews AJ. He noted that her Honour noted that the UK Bill at the time referred to a retrial of an acquitted person on the ground that there was “new and compelling evidence”, whereas the 2003 Draft Bill provided for a retrial if “there appears to be fresh and compelling evidence”. and that her Honour recommended that the

test be tightened to “is” rather than “there appears to be”. However, it must be remembered that this comment was made in respect of the provisions of the2003 Draft Bill which became s 100 of CARA, not the definition section, which was in cl 9D(4) of the 2003 Draft Bill and s 102(2) of CARA.

201 The respondent also referred to the MCCOC Discussion Paper, which he submitted “expressed ‘principles’ for double jeopardy legislation which effectively mirrored those” in the 2003 Draft Bill in New South Wales.

202 The respondent submitted that the concept of “fresh” in s 102(2) of CARA derives from the meaning of “fresh evidence” in relation to appeals against conviction. He referred to the statement by Toohey and Gaudron JJ in *Mickelberg* at 301 that there was “no miscarriage of justice in the failure to call evidence at the trial if that evidence was then available, or, with reasonable diligence, could have been available”.

203 The respondent also relied on a number of dictionary definitions of “adduced” as meaning “tendered” or “brought forward”. He referred to the statement by Basten JA in *R v Zhang* at [38] that, for the purpose of the *Evidence Act 1995* (NSW), “evidence which is ‘adduced’ is not necessarily ‘admitted’”. The respondent adopted the reasoning on the meaning to be attributed to the word “adduced” in the Wood Report, to which we have referred at [84] above. Contrary to the submission by the applicant, the respondent did not contend that the Wood Report could be used as an aid to construction. Rather, he contended that Mr Wood’s reasoning was persuasive.

204 The respondent then referred to two of the United Kingdom cases relied on by the applicant: *R v B* and *R v H*. He submitted that they provided no support for the applicant’s contentions for a number of reasons.

205 First, he submitted that there was no equivalent statutory provision to s 102(2)(b) of CARA in the UK Act.

206 Second, again referring to the Wood Report, he pointed out that there was no equivalent to s 5F(3A) of the *Criminal Appeal Act 1912* (NSW) in the UK Act, and noted the circumstances giving rise to the application in *R v B*, to which we

have referred at [112]-[113] above.

207 Third, he submitted that a further point of distinction between CARA and the UK Act was the fact that, in other provisions in the UK Act, the word "adduced" was given the meaning "admitted". He pointed out that, in *R v H*, the Court of Appeal of England and Wales had stated at [22] that, elsewhere in the UK Act, the word "adduced" was squarely equated with "admitted into evidence", such as in s 62(8) of the UK Act.

208 The respondent submitted that there were other provisions in the UK Act which demonstrated that position even more clearly. In particular, he pointed to s 101(1)(b), which made evidence of a defendant's "bad character" admissible if "adduced by the defendant himself", which he said made it clear that the word "adduced" meant "admitted". By contrast, he noted that the equivalent provision in New South Wales in s 110 of the *Evidence Act 1995* (NSW), and in particular s 110(2), clearly draws a distinction between the word "adduced" and "admitted". He also submitted that, in s 5F(3AA) and s 5F(4) of the *Criminal Appeal Act 1912* (NSW), the word "adduced" is used in the same way as in the *Evidence Act 1995* (NSW).

209 The respondent noted the word "adduced" was not otherwise used in CARA, and that to give it the interpretation for which the applicant contended would be inconsistent with its meaning in the *Evidence Act 1995* (NSW) and the *Criminal Appeal Act 1912* (NSW).

210 Senior counsel for the respondent referred to the distinction between "fresh evidence" and "new evidence" drawn by McClellan CJ at CL in *R v Wood* (2012) 84 NSWLR 581; [2012] NSWCCA 21 at [707], where his Honour stated that "new evidence" was "evidence that was available and not adduced at the trial" and that "fresh evidence" was "evidence which either did not exist at the trial or, if it did, could not then have been discovered by an accused exercising due diligence". He stated that he adopted that distinction for the purpose of s 102(2)(b).

211 Senior counsel for the respondent submitted that the word "adduced" meant

"tendered", but in doing so, he noted that it also included the concept of "available" by reason of the remainder of s 102(2)(b). He submitted that this was consistent with the common law understanding of the meaning of "fresh" and was also consistent with the meaning of "adduced" in the *Evidence Act 1995* (NSW). In that context, senior counsel for the respondent referred to the passages in the MCOCC Discussion Paper to which we have referred at [77]-[80] above, and noted that the Committee's recommendation "replicated" the 2003 Draft Bill and what is now contained in Part 8 of CARA.

212 As a result of his construction of the word "adduced", the respondent submitted that s 102(2)(b) was "related to the availability of evidence for tender". He submitted that, since the Walker evidence was "available and known to police by the time of the Speedy trial", that was the end of the question of whether it could be adduced "with the exercise of reasonable diligence". He stated that it was "flawed" to say that the Walker evidence could not have been adduced with reasonable diligence because "it would not then have been admissible under the common law". He said that this followed for a number of reasons.

213 First, he submitted that such a construction amounted to "permitting a retrial on the basis of a change in the law".

214 Second, he submitted the construction was not consistent with the text of the section. He submitted that, even assuming that the word "adduced" should be read as "admitted" in accordance with the submissions of the applicant, admissibility is not "a fixed, determined state", and that the views of judges might differ, particularly in relation to discretionary matters.

215 He stated that, by contrast, the expression "could not have been adduced" in s 102(2)(b) suggested a "fixed state", namely, that "there are no conditions under which the evidence could have been admitted; that it would not have been possible to present the evidence for tender". He submitted that the applicant's contention that the Walker evidence "could never have been admitted" at the Speedy trial indicated "a fixed certainty" which was at odds with the "qualitative and discretionary judgments" which must be reached by an

individual decision-maker in determining whether or not to admit evidence.

216 Third, he submitted that “there was nothing to suggest it was the intention of the legislature to retrospectively curtail such a fundamental right as the freedom from double jeopardy on the basis that a change of law would enable previously inadmissible evidence to now be admissible”.

217 Fourth, he submitted that such an interpretation had the potential to require an “inquiry into the mind of the ‘reasonable prosecutor’”. He submitted that it would “expose persons to double jeopardy simply because it was reasonably open to a prosecutor at the time to conclude that evidence should not be tendered”. However, this difficulty does not appear to have arisen in the United Kingdom cases.

218 Fifth, he submitted that, if the word “adduced” was held to mean “tendered” or “presented for tender” in accordance with his submission, s 102(2)(b) directs “attention to the availability of the evidence to police and prosecutors”. He submitted that this was “consistent with the purpose and intentions of the legislature that lack of police and prosecutorial due diligence not be grounds for retrial”.

219 The respondent submitted that s 102(4) did not support the applicant’s interpretation. He submitted that the “plain meaning” of s 102(4) was that “evidence which is fresh and compelling is not to be disregarded because it would have been inadmissible had it been led at the time of the trial”.

220 By contrast, the respondent submitted that the construction placed on s 102(4) by the applicant led to anomalous results. He submitted that, on the applicant’s interpretation, the expression “would have been inadmissible” would be confined in its operation to “material which had not been tested before the trial court”, leading to the conclusion that material which had been tendered and rightly or wrongly rejected would have been excluded from consideration, but material which had not been tendered because it was thought to be inadmissible at law could be considered.

221 The respondent submitted that the construction of s 102(4) for which he

contended was supported by what was said by the Lord Chief Justice in *R v A* at [33] concerning the equivalent provision in the UK Act, namely, that its effect was that "the admissibility of evidence in any retrial consequent on a successful application will be decided in accordance with the rules of evidence which apply at the date of the hearing of the application rather than the rules in force at the date of the original trial".

222 Senior counsel for the respondent also emphasised that, in dealing with the question arising under s 102(2)(b), it is important to remember that references to "coincidence reasoning" are references to "a way in which evidence is considered … rather than a body of evidence in itself", and that it is necessary to determine whether that evidence which supports the coincidence reasoning is itself "fresh".

Consideration

223 As we indicated at [179] above, the applicant contended that the word "adduced" in the definition of "fresh" in s 102(2) meant "admitted". The applicant did not resile from the proposition that the result of that construction would be that changes in the rules of evidence, whether by statute or as a result of changes in the common law, could result in evidence previously available but inadmissible being fresh evidence within the meaning of that expression in s 102(2) of CARA, so as to enliven the power to make an order under s 100(1) in relation to an application if the other preconditions were made out.

224 We have set out the applicant's submissions in detail above. In essence, he relied on five principal matters in support of his contention that the word "adduced" in s 102(2) meant "admitted". First, he submitted that this was the "ordinary meaning" of the word and that a limited construction should not be placed on it by reference to common law distinctions between "new" and "fresh" evidence. It was submitted that, since fresh evidence was defined in s 102(2), it should be construed without regard to the common law concept of "fresh evidence". Second, it was submitted that this construction was consistent with the extrinsic material, in particular, the second reading speech.

Third, it was submitted that this construction was consistent with the construction of the equivalent section in the UK Act adopted by the courts in the United Kingdom. Fourth, it was submitted that the construction was supported by s 102(4). Finally, it was submitted that a contrary construction would defeat the purpose of the legislation and "bring the justice system into disrepute by 'perpetuating a major injustice by allowing a guilty person to walk free even where there is compelling evidence of his or her guilt'".

225 Notwithstanding these submissions, we are of the opinion that the word "adduced" in the context in which it appears means "tendered" or "brought forward". Thus, s 102(2)(a) looks to whether the evidence was in fact "tendered" in the "proceedings in which the person was acquitted", irrespective of its admissibility, while s 102(2)(b) looks to whether it could have been "tendered" or "brought forward" in "those proceedings with the exercise of reasonable diligence". The question of the admissibility of the evidence at the previous trial plays no part in this inquiry. Thus, evidence available to the police or prosecutor but not tendered due to a view as to its likely admissibility, whether correct or otherwise, would not be evidence which falls within s 102(2)(b). We have reached this conclusion for the following reasons.

226 First, although, as the applicant pointed out, "fresh" is a defined term, in considering the meaning of the word "adduced" in s 102(2), it is appropriate to have regard to the use of the word "fresh" as distinct from "new", both in s 100(1) of CARA, and in the opening words of the definition in s 102(2).

227 The distinction between "new" and "fresh" evidence is one that was well-established in this country at the time that Part 8 of CARA was enacted. *Ratten v The Queen* (1974) 131 CLR 510; [1974] HCA 35 (*Ratten*) concerned a reference by the Attorney-General of Victoria to the Full Court of the Supreme Court of Victoria to consider whether the appellant's conviction should be quashed on the grounds that evidence was available which had not been available at the trial and which demonstrated that there had been a miscarriage of justice. In that case, Barwick CJ said at 516 that the "rule in relation to civil trials is that evidence, on the production of which a new trial may be ordered,

must be fresh evidence; that is to say, evidence which was not actually available to the appellant at the time of the trial, or which could not then have been available to the appellant by the exercise on his part of reasonable diligence in the preparation of his case".

228 His Honour summarised the position in relation to criminal trials in the following terms at 520:

> "To sum up, if the new material, whether or not it is fresh evidence, convinces the court upon its own view of that material that there has been a miscarriage in the sense that a verdict of guilty could not be allowed to stand, the verdict will be quashed without more. But if the new material does not so convince the court, and the only basis put forward for a new trial is the production of new material, no miscarriage will be found if that new material is not fresh evidence. But if there is fresh evidence which in the court's view is properly capable of acceptance and likely to be accepted by a jury, and which is so cogent in the opinion of the court that, being believed, it is likely to produce a different verdict, a new trial will be ordered as a remedy for the miscarriage which has occurred because of the absence at the trial of the fresh evidence."

229 Although certain aspects of the judgment of the Chief Justice in *Ratten* have later been doubted in *Whitehorn v The Queen* (1983) 152 CLR 657 at 686-687; [1983] HCA 42, *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521 at 532-534; [1984] HCA 7, and *Gallagher v The Queen* (1986) 160 CLR 392 at 409-410; [1986] HCA 26 (*Gallagher*), the distinction between "new" and "fresh" evidence and the application of this concept in criminal cases has been accepted. Thus, in *Gallagher*, Gibbs CJ made the following remarks at 395:

> "The authorities disclose three main considerations which will guide a Court of Criminal Appeal in deciding whether a miscarriage of justice has occurred because evidence now available was not led at the trial. The first of these, that the conviction will not usually be set aside if the evidence relied on could with reasonable diligence have been produced by the accused at the trial, is satisfied in the present case, and need not be discussed, although it should be noted that this is not a universal and inflexible requirement: the strength of the fresh evidence may in some cases be such as to justify interference with the verdict, even though that evidence might have been discovered before the trial."

See also *Mickelberg* at 301, where Toohey and Gaudron JJ, referring to *Gallagher* and *Ratten*, stated that there was "no miscarriage of justice in the failure to call evidence at trial if that evidence was then available, or, with reasonable diligence, could have been available".

230 As we indicated at [186] above, the applicant submitted that it was inappropriate to consider the distinction between “new” and “fresh” evidence drawn at common law in interpreting s 102(2). In *Papakosmos v The Queen* (1999) 196 CLR 297; [1999] HCA 37 at [10], Gleeson CJ and Hayne J, in dealing with the effect of the exceptions to the hearsay rule in the *Evidence Act 1995* (NSW), pointed out that the Act made “express provision different from the common law” and that the language of the statute would determine the manner in which evidence of that kind was to be treated. Similarly, in *R v Ellis* (2003) 58 NSWLR 700; [2003] NSWCCA 319 at [74], Spigelman CJ, with whom the other members of the Court agreed, stated that the provisions in the *Evidence Act 1995* (NSW) dealing with tendency and coincidence evidence showed that Parliament “intended to lay down a set of principles to cover the relevant field to the exclusion of the common law principles previously applicable”. He pointed out at [75] that the use of “different terminology with precise and comprehensive definitions manifests an intention to state the principles comprehensively and afresh”.

231 Notwithstanding these authorities, it does not seem to be inappropriate to take into account the concept of “fresh evidence” at common law in determining the correct construction of s 102(2). The historically accepted meaning of “fresh evidence” forms part of the context in which the definition falls to be construed. As was said in *SZTAL* at [14], notwithstanding the importance of the ordinary and natural meaning of a word, considerations of context and purpose, including historical context, are matters which may suggest a contrary meaning.

232 Thus, in the present case, even if, as suggested by the applicant, the ordinary meaning of the word “adduced” is “admitted”, the context in which it is used, including the use of the concept of “fresh evidence” at common law, may lead to the conclusion that a different meaning is required to give effect to the legislative intention. In that context, it must be remembered that the legislature chose to use the word “fresh” as distinct from the word “new” found in the UK Act.

233 What we have written above proceeds on the assumption that the ordinary meaning of the word “adduced” is “admitted”. However, in the context of the availability or admissibility of evidence, that is by no means clear. As the applicant pointed out in *Zhang* at [125], Simpson J stated the ordinary meaning of the word “adduced” was “admitted”, “given” or “brought out”, and her Honour accepted that, in the context of s 101(2) of the *Evidence Act 1995* (NSW), it should be read as “tendered”. Basten JA reached the same conclusion at [38], referring to s 137 of the *Evidence Act 1995* (NSW) as an instance where the word “adduced” did not merely mean “admitted”.

234 Further, as the respondent pointed out, s 110(2) of the *Evidence Act 1995* (NSW), which deals with character evidence, expressly draws a distinction between “adduced” and “admitted”.

235 The manner in which the word “adduced” is used in these sections of the *Evidence Act 1995* (NSW) is of course not determinative of the meaning of the word in s 102(2) of CARA. However, what those references do demonstrate is that the meaning of the word will depend upon the context in which it is used. In this case, the context includes the use of the word “fresh” to describe the evidence, which supports the construction of the word “adduced” to which we have referred at [225] above. The other contextual matters to which we refer below lend further support to this construction.

236 Second, contrary to the submission of the applicant, the extrinsic material does not support the construction for which he contends, but rather, supports the contrary construction. We have set out the legislative background and history above. The second reading speech for the 2006 Bill by the Premier expressly deals with cases where diligent police and prosecutors failed to find all possible evidence. The examples given in the speech are deliberate concealment of evidence, or where advances in forensic technology reveal new evidence or enable new conclusions to be drawn from existing evidence. An example of the latter would be where there was existing material from which DNA could be extracted at the time of the original trial, but it was only due to subsequent advances in technology which enabled any meaningful

conclusions to be drawn from the presence of that material.

237 There is nothing in the second reading speech to indicate that it was contemplated by the legislature that the section could operate in circumstances where changes in the law, or more particularly, the rules of evidence, would enable evidence which was inadmissible at the time of the trial to be treated as "fresh". Although, as discussed in *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378; [2012] HCA 56 at [24]-[26], care must be taken not to identify the legislative purpose with the subjective intention of the persons responsible for the passage of the legislation as distinct from considering the text and context of the relevant provision aided by such material, the absence of any reference in the second reading speech to an intention that "fresh" evidence includes evidence which was previously inadmissible provides support for a construction of the definition of "fresh" as not extending to evidence which was available but previously inadmissible. It certainly provides no support for the contrary construction.

238 It should also be noted that the second reading speech expressly refers to the Mathews Advice and the MCCOC Discussion Paper. We have summarised the contents of those reports at [74]-[80] above. Neither of them provides any support for the construction contended for by the applicant. So far as the Mathews Advice is concerned, it is true that her Honour noted that "fresh" evidence was defined in the 2003 Draft Bill in a "similar" manner to its definition in the UK Bill. However, in relation cl 9D(4), her Honour was proceeding on the assumption that the clause was "intended to exclude from the purview of 'fresh evidence' any evidence which was not introduced in the earlier proceedings because it was, or was considered to be, inadmissible", as we have noted at [76] above.

239 The MCCOC Discussion Paper provides no support for the construction contended for by the applicant. As we pointed out at [79] above, the Committee expressly dealt with the distinction between "new" evidence and "fresh" evidence, stating that "the difference may be vital". In recommending the adoption of a similar definition to that now contained in s 102(2) of CARA, the

Committee described "fresh" evidence as "new" evidence with "an additional condition", namely, that "it could not have been presented at the original proceedings despite competent police and/or prosecution work". The Committee stated that "allowing retrials for all 'new' evidence is not appropriate given the departure from long-standing legal principle being suggested with these double jeopardy reforms". The Committee stated that the evidence "should not have been available, through the exercise of due diligence, at the time of the original acquittal".

240 It is true that the second reading speech for the 2006 Bill stated that the reforms in the United Kingdom had been "considered", but in that context, it must be remembered that, rather than adopting the word "new" used in the UK Act, the New South Wales legislature expressly chose the word "fresh". It follows that the extrinsic material provides no support for the construction of the word "adduced" contended for by the applicant, but rather, supports the more limited construction contended for by the respondent, which we also prefer.

241 Third, while it is true, as submitted by the applicant, that the construction for which he contends is consistent with the construction placed on the equivalent provisions in the UK Act, that submission fails to grapple with the use of the word "new" in that Act in contradistinction to "fresh", and to the legislative history leading to the passage of the UK Act. We have dealt with the difference between "fresh" and "new" evidence at [227]-[229] above. We have also dealt with the legislative history surrounding the introduction of the relevant provisions into the UK Act at [92]-[95] above. The history shows that the original form of the UK Bill, which provided that evidence was "new" if it was "not available or known to an officer or prosecutor", was expressly amended to expand the meaning of the word "new". See also *R v B* at [11].

242 Although the body of s 102(2)(a) of CARA and s 78(2) of the UK Act are the same, the selection of the word "fresh" in the definition, as distinct from the word "new", and the different legislative history leads, in our opinion, to the conclusion that the meaning of s 102(2)(b) contended for by the respondent should be preferred to the construction contended for by the applicant relying

on the equivalent section in the UK Act.

243 Fourth, contrary to the submission of the applicant, s 102(4) supports the construction contended for by the respondent. This section does not expand the definition of "fresh and compelling" evidence, but states that evidence is not precluded from falling within the definition "merely because it would have been inadmissible in the earlier proceedings". Thus, in the present case, if the Walker evidence was otherwise "fresh", the fact that it was or may have been inadmissible at the earlier trial does not preclude it from being fresh evidence. However, the section does not state that evidence is "fresh" *because* it was inadmissible in the earlier proceedings and that now, because of some change in the rules of evidence, it had become admissible. Indeed, the use of the expression "merely because" is directly contrary to such a construction.

244 Fifth, the applicant contends that a construction which precludes evidence which was available but inadmissible at the time of the original trial not being treated as "fresh" would be productive of a miscarriage of justice in potentially allowing a guilty party to go free. There is a difficulty with that submission. As has been pointed out by the High Court on a number of occasions, an accused person is entitled to a trial "according to law": *X7* at [89]; *Lee v The Queen* (2014) 253 CLR 455; [2014] HCA 20 at [45]-[48], citing *Wilde v The Queen* (1988) 164 CLR 365; [1988] HCA 6; *Jago v District Court of New South Wales* (1989) 168 CLR 23; [1989] HCA 46; *Katsuno v The Queen* (1999) 199 CLR 40; [1999] HCA 50. Such a trial is a trial based on evidence admissible according to law. There is no miscarriage of justice by reason of the fact that, had inadmissible evidence been admitted, the result might have been different. To the contrary, a conviction based on inadmissible evidence would involve a miscarriage of justice.

245 Once this is understood, it follows that there can be no miscarriage of justice in limiting the circumstances in which an acquittal is to be set aside to a situation where evidence was not available at the trial and could not have been made available with the exercise of reasonable diligence. Such a limitation, in our opinion, does not "bring the justice system into disrepute".

246 In expressing the views we have set out above, we are conscious of the unusual nature of this case, where it is submitted that, in considering whether the evidence is "fresh", regard should be had to its availability to be used as coincidence evidence and that this fact changed the evidentiary matrix such that it should be considered as fresh evidence. We are also conscious of the submission that the words "fresh" and "compelling" should be treated as a "composite phrase". However, the difficulties with these submissions are, first, that "fresh" and "compelling" are treated as separate concepts in s 102, and second, s 100(1) and s 102 focus on the evidence itself rather than the use to which it could be put. We have dealt with this in more detail at [168]-[171] above.

247 We have reached the conclusion that the word "adduced" in s 102(2) means "tendered" or "brought forward" as distinct from "admitted" without regard to the principle of legality. However, as we have indicated at [148] above, although it may only have a limited application in the circumstances of the present case, it does provide further support for the conclusion which we have reached. The potential curtailment of the principle against double jeopardy as a result of inadmissible evidence becoming admissible is not stated in "unmistakable and unambiguous language". As was stated in *Coco v The Queen* at 437, there must be "some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment" of the right, but also determined upon such abrogation or curtailment. In the present case, there is no indication that the legislature intended the curtailment of the right to be protected against double jeopardy to extend to circumstances where evidence which was previously inadmissible becomes admissible.

248 We should add that the conclusion which we have reached on this issue is consistent with the conclusion of Mr Wood QC in his Report, whose reasoning we gratefully adopt.

The applicant's fallback position

249 As a fallback position, the applicant contended that, if the word "adduced" in s 102(2)(b) meant "tendered" or "brought forward", then the evidence upon

which the applicant relied could not have been tendered “with the exercise of reasonable diligence” because it was inadmissible. In practical terms, such a construction would lead to the same result as if the word “adduced” in the section meant “admissible”. It should not be accepted for the following reasons.

250 First, it ignores the fact that s 102(2)(b) refers to evidence which “could not have been adduced” with “the exercise of reasonable diligence”. Coupled with the meaning of the word “adduced” to which we have referred at [249] above, s 102(2)(b) refers to evidence that “could not have been brought forward with reasonable diligence”. The construction sought to be placed on s 102(2)(b) by the applicant in this submission effectively means reading s 102(2)(b) as stating that the evidence “could not have been admitted” with reasonable diligence. That is not what the section says and there is no reason to construe it in that fashion.

251 Second, if our opinion as to the meaning of the word “adduced” is correct, then the construction contended for by the applicant would lead to incongruity and lack of coherence in the construction of s 102(2)(a) and s 102(2)(b) because the same word would bear different meanings in each subsection. To the extent possible, a construction which preserves the unity of the statutory scheme should be preferred: *Project Blue Sky* at [69].

252 Third, the construction contended for by the applicant produces anomalous results. Evidence which was tendered, but rejected, would fall outside s 102(2)(b), but evidence not tendered because the prosecutor held a rational belief that the tender would be rejected would fall within s 102(2)(b). There is no reason to suggest the legislature intended such a result.

253 Fourth, the construction contended for by the applicant sits uneasily with s 102(4). The use of the words “merely because it would have been inadmissible” in that subsection indicates that inadmissibility is not of itself a sufficient criterion to render the evidence “fresh”.

254 Fifth, without repeating what we have stated above, the use of the word “fresh”, the extrinsic material and the principle of legality all demonstrate that

the legislative intention was that the section was intended to refer to evidence which was not available to be "brought forward" with "the exercise of reasonable diligence" in the sense we have described.

255 It follows that s 102(2)(b) cannot be construed in the manner contended for by the applicant.

Is the Walker evidence "fresh" in relation to the murder of Evelyn Greenup?

256 As we have indicated at [54] above, the Walker evidence was available prior to the Greenup trial. Indeed, part of it was sought to be tendered in that trial, as we have noted at [31]-[32] above. It follows that all the Walker evidence was available to be tendered at the Greenup trial and, subject to the one exception, was not tendered. In those circumstances, the evidence was not "fresh" within the meaning of s 102(2) of CARA.

257 As we indicated at [69] above, the applicant conceded that the "informer" evidence, the "other admissions" evidence and the "lies evidencing consciousness of guilt" evidence, even if "fresh", would not be sufficient to justify setting aside either acquittal if the Walker evidence was not also "fresh".

258 Notwithstanding that concession, it should be noted that all of the "informer" evidence and the "other admissions" evidence was also available prior to the Greenup trial and so is not "fresh". However, a statement made by the respondent in an interview with Dan Box in 2016, which was relied on by the applicant as a "lie evidencing consciousness of guilt", was made after the Greenup trial, and thus, was "fresh" for the purposes of s 102(2). The portion relied upon by the applicant was in the following terms:

> "Box: And again, I'm not trying to be rude. Did you go into that room where Rebecca was sleeping with Evelyn after ---
>
> [The respondent]: No.
>
> Box: they went to sleep?
>
> [The respondent]: No.
>
> Box: You're saying you had nothing to do with Evelyn's disappearance?

> [The respondent]: That's right."

259 There are self-evident problems with treating this evidence as "compelling" for the purposes of s 102(3). First, it is not an admission against interest and so is not admissible by reason of s 81 of the *Evidence Act 1995* (NSW). Second, even if it could be admitted as hearsay evidence under s 65(2)(c), it would need to be established that it was made in circumstances that made it "highly probable that the representation is reliable". The relevant representations in the above extract are that the respondent did not go into Evelyn's room and had nothing to do with Evelyn's disappearance. If these representations were found to be "reliable", as required by s 65(2)(c), it would be destructive of any question of the guilt of the respondent.

260 Further, for the statements to amount to an "implied admission of guilt" in the manner described in *Edwards v The Queen* (1993) 178 CLR 193; [1993] HCA 63, it would be necessary to prove that they were false. That would inevitably involve independently proving the respondent's guilt beyond reasonable doubt. In the circumstances, quite apart from the other difficulties to which we have referred, the evidence is not "highly probative" for the purposes of s 102(3)(c).

261 It follows that the application to quash the respondent's acquittal for the murder of Evelyn Greenup must be refused.

The Speedy acquittal

262 The express purpose of the Attorney-General's application was to permit the applicant to be tried for all three murders in the same trial. In the application filed by the Attorney-General, the relief sought was explained in the following terms:

> "4 The Applicant seeks an order of the Court quashing the Respondent's acquittals in relation to the murder and manslaughter of Clinton Speedy and Evelyn Greenup (or, alternatively, an order removing the acquittal as a bar to the Respondent being retried for those murders) to enable a retrial of those counts jointly on an indictment with the murder of Colleen Walker.
>
> 5 The Applicant seeks a declaration that the Respondent's acquittals in relation to the murder and manslaughter of both Clinton Speedy and Evelyn Greenup is not a bar to the Respondent being retried for those offences."

263 The relief sought was framed accordingly; the applicant sought “an order that the respondent be retried for the murders of Clinton Speedy and Evelyn Greenup” (order 5). There was no separate order sought in the application that the respondent be retried for the murder of Clinton Speedy.

264 In his written and oral submissions until shortly before the conclusion of the sixth and final day of the hearing, the applicant presented his case consistently with the way in which it was framed in the application. The argument focussed critically on the unique strength of a case in which all three cases would be considered together, with evidence in relation to each murder being admissible as coincidence evidence in relation to each other murder. The applicant argued that the Walker evidence was fresh evidence in relation to both the murder of Clinton Speedy and the murder of Evelyn Greenup and that the evidence of each of those murders was “fresh” in relation to the other. A central plank of the argument was the potential use of the evidence of each murder as coincidence evidence in relation to each of the other murders. For convenience, we will refer to that as the three-part coincidence case.

265 The argument assumed that, in considering whether to quash each of two verdicts of acquittal entered twelve years apart, it would be permissible for the Court to consider all of the evidence that would be lead on a retrial for those two offences and a third together as a whole even if the evidence was not “fresh” in relation to one of the two acquittals. Contrary to that contention, we have concluded that the Court does not have authority under s 100(1) to order an acquitted person to be retried for an offence unless the evidence relied upon by the applicant is “fresh” in relation to that offence. We have also concluded that evidence cannot be regarded as “fresh” within the meaning of s 102(2) of CARA as a result of a change in the use that may be made of existing evidence owing to a change in the law and, further, that for the purpose of the definition of the term “fresh” in s 102(2) of the Act the term “adduced” does not mean “admitted”.

266 Those conclusions preclude consideration of the three-part coincidence case as it was framed and preclude the making of an order in the terms of order 5

sought in the application.

267 The question is whether it is nonetheless open to order the respondent to be retried for the murder of Clinton Speedy alone (on the understanding that he would be tried for that offence and for the murder of Colleen Walker in the same trial). That possibility was explored to a limited extent during the hearing but it is not the way in which the Attorney-General's application was framed. The problem is complicated by the inconsistent positions adopted by both parties at various points. Accordingly, after reserving our decision, the Court called upon the parties to make further submissions addressing that issue. Our consideration of those further submissions has persuaded us that the course of ordering the respondent to be retried for the murder of Clinton Speedy but not Evelyn Greenup is not the case that was brought or argued by the applicant and cannot be permitted, for the following reasons.

268 It is beyond dispute that the Attorney General's case was framed on the basis of the three-part coincidence case. So much was made plain in the "details of application" and in the terms of the relief sought (set out at [262]-[263] above). It was reiterated in the applicant's opening address to the Court, when senior counsel said (T6.8):

> "So, in a nutshell, this application relates to an attempt to quash the two acquittals in relation to Clinton Speedy and Evelyn Greenup, to enable one trial be run where the respondent is charged with those two murders and, for the first time, the murder of Colleen Walker."

269 It was also the position uniformly adopted in the written submissions. In dealing with the s 105(7) issue in written submissions in reply, the applicant submitted that, if the Walker evidence was considered in relation to each acquittal separately, the application would "likely fail" since the applicant considered that, if the evidence from all three murders was not considered together, it would not have "significant probative value" for the purpose of s 98(1)(b) of the *Evidence Act 1995* (NSW).

270 Further, in oral submissions on the true construction of s 105(7), senior counsel for the applicant expressly conceded that, if the applications in respect of the murders of Clinton Speedy and Evelyn Greenup were not heard

together, there was "insufficient" to sustain the application. This occurred after senior counsel for the applicant made the statement set out at [268] above, when the following exchange took place between the Chief Justice and senior counsel for the applicant (T6.19-36):

> "BATHURST CJ: Will that bring into play one thing that's been troubling me, Ms Crown, and that's the effect of subsection (7) of section 105:
>
> > 'The Court of Criminal Appeal may, at one hearing, consider more than one application for a retrial whether or not related to the same person, but only if the offences concerned should be tried on the same indictment'.
>
> ABRAHAM: Yes.
>
> BATHURST CJ: Does that mean, as a matter of jurisdiction, as a precondition of exercising of jurisdiction in the manner you seek to have it exercised, we have to be satisfied that the offences should be tried on the same indictment?
>
> ABRAHAM: Yes, in my submission. Which is why we say that a preliminary argument needs to be whether or not the matters can be properly joined, because we accept if we are wrong about that argument, then there is insufficient to sustain an application."

271 There were other concessions made by the applicant in both written and oral submissions in effect disavowing any reliance on a two-part coincidence case. Indeed on a number of occasions the applicant appeared to concede that an application for a retrial of only one of the offences could not succeed. In his written submissions in chief at [212], the applicant stated that the "similarities which exist between three murders is a fundamentally different case than links between only two murders", and made similar statements at [11], [183] and [326].

272 As already noted, the respondent's position argued in written submissions served well in advance of the hearing (reiterated orally at T241-248) was that the Court was required to take a sequential approach to the two acquittals. In opposing consideration now of the two-part coincidence case, the respondent noted that the applicant did not make any attempt, in response to the written submissions, to advance a case in support of success on the overall application if a sequential approach were taken, let alone that an application for a single retrial could succeed. On the contrary, the applicant's written

submissions in reply persisted in the argument in support of the three-part coincidence case, indeed relying on the perceived weakness of any two-part coincidence case to support the construction of CARA contended for by the applicant. Thus it was submitted at [17] and [18] of the written submissions in reply:

> "17. Unsurprisingly, therefore, the Applicant accepts that the probative value and compelling nature of the Fresh Evidence (and its use as coincidence evidence) would decrease significantly if the Fresh Evidence of only two of the three murders could be considered. Indeed, as the High Court recently recognised in *Hughes v The Queen*, evidence of a tendency might well be weak by itself, but its probative value is to be assessed together with other evidence.
>
> 18. In these circumstances, if the applications for the retrial of the Respondent for the murders of Mr Speedy and Ms Greenup were held separately, the rule of double jeopardy would prevent any coincidence argument from being run. The gist of the Applicant's case would then fall away. As such, to construe Part 8 of *CARA* as bringing about this outcome would result in absurdity. It would render s 105(7) of *CARA* meaningless."

273 That position was reiterated in several exchanges during the hearing, including in the following exchange (T92.27-45):

> "MCCALLUM J: You're saying its compellability is linked to the fact that there are three.
>
> ABRAHAM: Yes.
>
> MCCALLUM J: And two won't be enough, three is what gets you the picture so--
>
> ABRAHAM: And with respect, particularly the two being Colleen Walker and Evelyn Greenup. In my submission one--
>
> MCCALLUM J: So the Speedy acquittal informs this algorithm?
>
> ABRAHAM: Absolutely.
>
> MCCALLUM J: And that's why you run your argument that it has to be run as a whole?
>
> ABRAHAM: Yes."

274 Immediately following that exchange, the following exchange took place (T93.24-30):

> "MCCALLUM J: So you wouldn't seek an outcome of this application that you

> have only one of two acquittals?
>
> ABRAHAM: Sorry, one of –
>
> MCCALLUM J: Two – only one of the two acquittals quashed or removed as a bar?
>
> ABRAHAM: One would need, I would think, to have all three to give it the compellability that one has."

275 The same position was maintained in the applicant's oral submissions in reply, when senior counsel agreed with the proposition that the reason the evidence was said by the applicant to be "compelling" was "because it can be used as coincidence evidence" (T355.4) and that "what is fresh and compelling is the evidence of the three events".

276 It appears the first suggestion of any reliance on the two-part coincidence case came shortly after that exchange when, in the course of responding to a proposition put by Hoeben CJ at CL in support of the sequential approach contended for by the respondent, senior counsel for the applicant posited a fall-back position, saying (T358.1): "even if you were to look at just Walker and Speedy, with the other evidence that's fresh, that would be enough to be fresh and compelling".

277 The position crystallised in the following exchange towards the very end of the hearing:

> "BATHURST CJ: Second, if we came to a view and I just want to make sure I know the hypotheses. If we came to the view that the evidence was fresh in the Speedy case, but not in the Greenup case such as that we justified order in your favour in Speedy, but not the other case, would you agitate for that or not?
>
> ABRAHAM: Yes.
>
> BATHURST CJ: So you'd take the fall-back position as it were?
>
> ABRAHAM: Yes. Can I just pause there. We do say, as is obvious from the note, that Speedy is fresh on Greenup, just so there's no--
>
> BATHURST CJ: I understand that yes. I'm just going through the various hypothetical scenarios to know where you stand."

278 In the further submissions addressing this issue, the applicant notes that,

although senior counsel for the respondent rose to his feet to address other topics after that, he took no objection to the applicant's reliance on the so-called fall-back position. The applicant also noted that the fall-back position had in fact been addressed without objection by senior counsel for the respondent in an earlier exchange (T248.1-27) as follows:

> "HOEBEN CJ at CL: ...It means you might end up being able to use Walker into relation to Speedy but not in relation to Greenup.
>
> IERACE: That would be the end result.
>
> BATHURST CJ: You would have to show absent Greenup Walker is still compelling in relation to Speedy of course.
>
> IERACE: Yes.
>
> HOEBEN CJ at CL: It could be a much more difficult task for the applicant.
>
> IERACE: But in the circumstance that Walker was excluded as being fresh in relation to Greenup that would be the end of the--
>
> HOEBEN CJ at CL: Involving Greenup.
>
> IERACE: Yes.
>
> HOEBEN CJ at CL: But you could still use the two but it would be a much weaker case than have all three.
>
> IERACE: One would then continue on to the interests of justice and the various matters that have to be considered under that heading."

279 It is correct, as the applicant points out, that the respondent insisted the correct approach was that the applications in respect of the murder of Clinton Speedy and the murder of Evelyn Greenup should be dealt with sequentially. However, apart from contending that this approach was incorrect, the applicant did not submit that, even if that approach was adopted, he would be entitled to succeed. Thus, no submissions were made by either party on the question of whether the evidence said to be "fresh" was sufficient to justify ordering a retrial of the respondent for the murder of Clinton Speedy irrespective of whether there was any fresh evidence to justify ordering a retrial in relation to the murder of Evelyn Greenup. Nor were there any submissions that, even if the fresh evidence could be said to be "compelling" in respect of the murder of

Clinton Speedy, it would be in the "interests of justice" to order a retrial in circumstances where there was not an order for the retrial in relation to the murder of Evelyn Greenup.

280 In the supplementary submissions, the applicant argued that it would be open to the Court to consider the two-part coincidence case. It was noted in that context that separate orders were sought quashing each acquittal. However, as submitted by the respondent, those orders are necessary and ancillary to the primary relief sought. Section 100(1) authorises the Court to order an acquitted person to be retried for an offence. Section 100(2) provides that, if the Court makes such an order, "the Court is to quash the person's acquittal or remove the acquittal as a bar to the person being retried for the offence (as the case requires)". The essential authority conferred by the Act is to make an order that the acquitted person be retried.

281 The difficulty for the applicant is that the fall-back case, while consistent with the respondent's legal analysis, is not the case the applicant sought to make. As noted on behalf of the respondent, even now there has been no application by the applicant to amend his application (so as to seek an order in the alternative to the order that the respondent be retried on both counts) and no application to withdraw the several important concessions made in written submissions and during the course of the hearing.

282 Even if such an application were to be made now (none has been), it would not be appropriate to grant it, for the reasons submitted by the respondent. He relied in that context on the decision of this Court in *R v SH* [2014] NSWCCA 218. That was a case in which, at the conclusion of a trial by judge alone, the judge directed himself to return a verdict of not guilty. The Crown brought an appeal against the acquittal under s 107 of CARA. After the completion of the Crown's submissions and during the respondent's address, the Crown sought leave to amend or supplement its grounds of appeal.

283 The Court listed nine reasons for refusing the application, a number of which the respondent submitted are relevant in the present case. Some are more significant than others. Three would be determinative, in our view. First, the

proposition that the applications must be considered sequentially was squarely raised by the respondent from the outset. As explained above, far from reacting to that submission by reframing the application so as to address that case in the alternative, the applicant consistently and vigorously maintained that the approach contended for by the respondent was not only wrong but “would result in absurdity” and render s 105(7) of CARA “meaningless”. As submitted by the respondent, the position adopted in reply traversed that central aspect of the case as initially framed.

284 Secondly, it is significant, as it was held to be in *R v SH*, that the issue was raised exceedingly late (only minutes before the conclusion of a six-day hearing and still not the subject of any application).

285 Thirdly, contrary to the applicant’s submissions, it is clear that if an application were to be made now, it would be necessary to fix a further hearing date. In *R v SH*, after considering other authorities in the analogous context of appeals from acquittals, the Court said at [27] (per Macfarlan JA, Fullerton and Hamill JJ agreeing at [40] and [41]):

> “In light of these authorities, the Court should be slow to afford any indulgence to the Crown which would have the effect of prolonging or expanding the Crown's appeal where the need for indulgence arises out of the Crown's failure to frame and pursue its appeal in a careful and timely fashion.”

286 Those remarks would have some force in the present context.

287 For those reasons, we have concluded that the issue whether the respondent should be retried for the murder of Clinton Speedy only (without also being retried at the same time for the murder of Evelyn Greenup) has not properly been raised for the determination of this Court.

288 It follows that we are of the view that the application must be dismissed.

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Coincidence Table (260 KB, rtf) | Coincidence Table (88.9 KB, pdf)