# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Director of Public Prosecutions v TAL* [2019] QCA 279 |
| PARTIES: | **DIRECTOR OF PUBLIC PROSECUTIONS (applicant)**<br>**v**<br>**TAL**<br>(respondent) |
| FILE NO/S: | CA No 8688 of 2018 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Miscellaneous Application – Criminal |
| DELIVERED ON: | 3 December 2019 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 6, 7, 8 August 2019 |
| JUDGES: | Sofronoff P and Fraser and Morrison JJA |
| ORDER: | **Application refused.** |
| CATCHWORDS: | CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – DOUBLE JEOPARDY – GENERALLY – where the Director of Public Prosecutions made an application under s 678B of the *Criminal Code* to the Court of Appeal to order a retrial of the respondent for murder – where a woman was found stabbed to death in the bedroom of her flat in 1987 – where the respondent was charged and tried for her murder in 1988 – where the respondent admitted that he had gone with the deceased to her unit and spent time inside the unit on the night she was believed to have been killed – where the respondent said that he could not remember whether he had been in her bedroom on the night – where the respondent provided samples of his blood and hair to authorities – where there were blood stains on a pillow lying with the deceased and on underwear lying in the bedroom – where the pillowcase and underwear were sampled and tested for blood grouping – where the samples were consistent with the blood group of the respondent – where hairs found on the deceased's jacket and blouse were consistent with the respondent's pubic hair – where the jury at the 1988 trial found the respondent not guilty of the murder – where after the acquittal it become possible to generate a DNA profile from a sample of blood and compare it to another DNA profile – where the bloodstained samples were tested to produce DNA profiles in 1990, 1999, 2000 and 2015 – where the results showed DNA profiles consistent with that from a sample of the respondent's blood – where it is common ground that the evidence is "fresh" – where the Court |

may allow the application only if the evidence is also "compelling" and it is, in all the circumstances, in the interests of justice to order a second trial – whether the evidence is compelling – whether it is in the interests of justice to order the respondent be retried for the murder

*Criminal Code* (Qld), s 678, s 678B, s 678D, s 678F
*Criminal Code* (Tas), s 402A
*Criminal Procedure Act* 1921 (SA), s 159
*Criminal Justice Act* 2003 (UK), pt 10

*Craig v The King* (1933) 49 CLR 429; [1933] HCA 41, applied
*Crown Prosecution Service (Newcastle) v D* [2009] EWCA Crim 1423, cited
*Gallagher v The Queen* (1986) 160 CLR 392, [1986] HCA 26, applied
*R v Andrews* [2009] 1 WLR 1947; [2008] EWCA Crim 2908, cited
*R v Dobson* [2011] EWCA Crim 1255, cited
*R v Dunlop* [2007] 1 WLR 1657; [2006] EWCA Crim 1354, cited
*R v K* [2013] EWCA Crim 1820, cited
*R v W* [2010] EWCA Crim 1576, cited
*Van Beelen v The Queen* (2017) 262 CLR 565; [2017] HCA 48, applied

COUNSEL: M R Byrne QC, with M P Le Grand, for the applicant
P J Callaghan SC, with C L Morgan, for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the applicant
Legal Aid Queensland for the respondent

[1] **THE COURT:** This is the first application in Queensland for a retrial of a person who has been acquitted of murder.

[2] On 20 September 1987 a woman was found dead in the bedroom of her flat. She had been stabbed four times in the chest and five times in the back. She lay tangled in a pillow and bedclothes. A pair of her underwear were found torn and bloodstained on the floor nearby. During the autopsy a tampon was found high in her vagina in a transverse position. This suggested that she had recently had sexual intercourse with the tampon in place.

[3] The deceased woman was last seen on the evening of 12 September 1987 at a function that she had attended with work colleagues at a local sporting club. When her body was found it was partly clothed in garments similar to those she had worn at that function. A TV Guide in her home was found open at the page for 12 September 1987. The last entry in a diary she kept was dated 11 September. Washing she had hung outside her home on the afternoon of 12 September was still there when she was found some days later. Friends who had tried to contact her since 12 September had been unable to reach her. These facts, as well as the state of decomposition of the body, implied that the deceased had been killed on the night of 12 September 1987 after returning home from the function.

[4] Police inquiries soon led them to the respondent, a former co-worker of the deceased. Witnesses said that the deceased and the respondent had appeared to be romantically involved with each other for some weeks. An entry in the deceased's diary showed that they had gone together to the Brisbane Show in August of that year. They then had a cooling off in their relationship but they appeared to remain friendly with each other. At the function on the evening of 12 September they were both drinking alcohol and they appeared to be happy and getting along.

[5] The respondent was cooperative when police spoke to him. He told them that he had gone to the deceased's home with her after the function. He said that they had watched TV. The deceased made them both a cup of coffee. He then left. The respondent admitted that he had previously tried to start a sexual relationship with the deceased but she did not want to and so he had never had sex with her. The respondent made a written statement and gave police samples of his blood and his hair. He gave police free access to the car that he was using. He told police that he could not remember if he had entered the deceased's bedroom on the night on which she was killed but he said that he had been in her bedroom once or twice on previous occasions.

[6] The pillow found next to the deceased's body was blood stained. Ten areas of that staining were tested and showed results consistent with the deceased's blood group. Two other areas, designated areas A3 and A4, showed results consistent with the blood of the respondent. In 1987 this was the only way of comparing blood. Only one in 1033 members of the Australian population has a blood group consistent with the blood on areas A3 and A4. The respondent was such a person. The deceased was not.

[7] Testing of the underwear in the area of the waistband, designated A2, returned results that were inconsistent with the blood of the deceased but were consistent with the blood of one in 500 members of the Australian population. The respondent was one such person.

[8] Hairs found on the back of the deceased's blouse and jacket were visually more consistent with the pubic hair of the respondent than with any hair of the deceased.

[9] An inspection of the respondent's car produced no signs of blood, nor anything else relevant to the investigation. The clothing that the respondent had worn on the night of 12 September also revealed nothing relevant. The respondent's sister had washed those clothes in her usual routine of doing laundry. Her evidence was that the clothes showed no signs of blood-staining. She had not washed a denim jacket he had worn but there was no blood on it. The respondent was not said to have any injuries to his body which could have caused the blood stains.

[10] Police never found the murder weapon.

[11] There was some indication from the deceased's diary that she was seeing men other than the respondent around the time of her death and the police were aware of the identity of a former boyfriend and several other men who knew her. The blood of some of these men was obtained and testing excluded their blood from the samples taken from the scene.

[12] The respondent was charged with the deceased's murder. The only issue at the 1988 trial was the identity of the killer. The jury acquitted the respondent.

[13] Dr Henry Roberts is a retired forensic scientist. He participated in the establishment of a DNA profiling laboratory in Victoria in 1989 and was working in that laboratory in 1990 when he received certain blood samples and two samples of fabric (labelled "3A3 Blood Pillowcase" and "3A4 Blood Pillowcase") from authorities in Queensland. DNA testing was undertaken at his laboratory to compare the DNA in the respondent's blood with the DNA extracted from the two pieces of fabric. The DNA profile of the respondent's blood matched the DNA profile extracted from sample "3A4 Blood Pillowcase" and it also matched a "partial profile" from sample "3A3 Blood Pillowcase". The partial profile match was "expected in approximately one person in six hundred". The population to which this refers is described as the "American Caucasian population" but, according to Dr Roberts, no relevant differences were to be expected between that population and the Australian population.

[14] The DNA in the sample marked 3A4 was tested again in 1999 in Queensland. The test showed a partial match with the DNA of the respondent. On this occasion, because of advances in the field, the probability that the DNA in sample 3A4 was contributed by somebody other than the respondent was said to be about one in 4800 based upon Queensland Caucasian data. In July 2000, both fabric samples were retested in Queensland and resulted in a match such that the probability that the DNA on the fabric had been contributed by somebody other than the respondent was one in 82 billion, based upon Queensland Caucasian data. Yet another test in March 2015 of the same materials increased the improbability of another contributor to more than one in 100 billion.

[15] In 2007 the *Criminal Code* (Qld) was amended to permit a person who has been acquitted of murder to be retried if certain conditions were satisfied.

[16] Relevantly, the new provisions were as follows. Some parts of the provisions have been underlined for ease of understanding:

> "**678B Court may order retrial for murder – fresh and compelling evidence**
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> (1) The Court may, on the application of the director of public prosecutions, order an acquitted person to be retried for the offence of murder <u>if satisfied that</u> –
>
> 1. <u>there is fresh and compelling evidence</u> against the acquitted person in relation to the offence; and
>
> 2. in all the circumstances <u>it is in the interests of justice</u> for the order to be made.
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> **678D Fresh and compelling evidence – meaning**
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> (1) ….
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> (2) Evidence is *fresh* if –
>
> (a) it was not adduced in the proceedings in which the person was acquitted; and
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> (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.

**678F Interests of justice – matters for consideration**

(1) ….

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

(3) The Court must 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 relation to –

(i) the investigation of the commission of the offence of which the person was acquitted and the prosecution of the proceedings in which the person was acquitted; and

(ii) the application for the retrial of the acquitted person."

[17] In these provisions the term "court" is the Court of Appeal.[1]

[18] As originally enacted, s 678A only permitted a second trial if the person was acquitted after the new law was passed. In 2014 s 678A was amended to allow for a second trial even if the person was acquitted before the law was changed.

[19] On 13 August 2018 the Director of Public Prosecutions applied to allow the respondent to be tried once more for the murder. In support of his application, the Director led evidence about the conduct of the trial in 1988, about DNA comparisons and about the investigation. The Director must satisfy the court that:

1. There is now "fresh" evidence against the respondent in relation to the offence;

2. This evidence is "compelling";

3. In all the circumstances of the case, it is in the interests of justice for the orders to be made.

[20] In this case, there is no need to consider the requirement under s 678B that the evidence be "fresh". There is no dispute that the DNA comparison evidence is "fresh" in the defined sense because the evidence about DNA testing was not led at the trial and could not have been.

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1 See *Criminal Code* (Qld) s 678.

[21] Although the term "compelling" is defined in s 678D(3), the terms by which it is defined are themselves undefined. These words - "reliable", "substantial" and the expression "highly probative of the case against the acquitted person" - have no statutory definitions. However, they are familiar because they have been used in appeals in which it is argued that there has been a miscarriage of justice because fresh evidence has been discovered after a guilty verdict.

[22] Such a case was *Craig v The King*,[2] an appeal from New South Wales. Rich and Dixon JJ said:

> "Sec. 8 [of the *Criminal Appeal Act* 1912 (NSW)] provides that the Court may order a new trial in such manner as it thinks fit if the Court considers that a miscarriage of justice has occurred and that having regard to all the circumstances such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other which the Court is empowered to make. Sec. 12 authorizes the Court, if it thinks it necessary or expedient in the interests of justice, to have witnesses examined before it. There is no power conferred expressly to grant a new trial on the ground of the discovery of fresh evidence. The authority to do so is contained in the power to set aside a conviction when a miscarriage of justice has occurred and to order a new trial when the miscarriage can best be so remedied. It is evident that the exercise of a power to direct a new trial because fresh evidence is forthcoming must be attended both with danger and with difficulty. It is the function of the jury to determine questions of fact in a criminal trial. When they have found a verdict they have performed that duty. If after a verdict of guilty the mere fact that a prisoner produced further relevant evidence required the Court to vacate the conviction and submit the question of the prisoner's guilt to another jury, then in a jurisdiction where perjury is rife great abuses would ensue. A Court of Criminal Appeal has thrown upon it some responsibility of examining the probative value of the fresh evidence. It cannot be said that a miscarriage has occurred unless the fresh evidence has cogency and plausibility as well as relevancy. *The fresh evidence must, we think, be of such a character that, if considered in combination with the evidence already given upon the trial the result ought in the minds of reasonable men to be affected. Such evidence should be calculated at least to remove the certainty of the prisoner's guilt which the former evidence produced.* But in judging of the weight of the fresh testimony the probative force and the nature of the evidence already adduced at the trial must be a matter of great importance."[3] (emphasis added)

[23] Those dicta were later approved by each of the five judges in *Gallagher v The Queen*.[4]

[24] Because of the significance accorded to a jury verdict as conclusive and inscrutable, and because of the operation of the principle of finality, the power to order a second trial on this ground has been limited. First, there is the requirement for the evidence

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2 (1933) 49 CLR 429.
3 *ibid*, at 438-439.
4 (1986) 160 CLR 392.

to be "fresh" in the technical sense of that term. The reason for that requirement is obvious. In many cases, perhaps in most contested cases, it will be possible, by means of further efforts after a guilty verdict, to add to and strengthen a case as originally conducted. To permit a retrial because more evidence has emerged when it could reasonably have been obtained for the first trial would offend the principle of finality which requires each party to put forward their best case once and for all. Second, there is the requirement that the new evidence could have led (with a defined level of probability) to a different result. This requirement ensures that due deference is given to a jury's verdict as a true verdict even in hindsight. The satisfaction of these two requirements demonstrates that there has been a miscarriage of justice.

[25] The character of evidence that supports a conclusion that there has been a miscarriage of justice has been difficult to articulate accurately and comprehensively. In *Gallagher*, Gibbs CJ observed that various verbal formulae have been proposed: "whether the evidence would probably have affected the verdict", whether "the evidence might reasonably have led the jury to have a reasonable doubt", "whether the fresh evidence, if believed, was likely to produce a different verdict", "there must be a likelihood of a different verdict" and "there is a significant possibility that the jury, acting reasonably, would have acquitted the appellant if the new evidence had been before it".[5] His Honour said:

> "However, I emphasize that no form of words should be regarded as an incantation that will resolve the difficulties of every case. No test can detract from the force of the fundamental principle that the appeal must be allowed if a miscarriage of justice is shown to have occurred."[6]

[26] An application under s 678B is not similar to an appeal by a convicted person. In particular there is no inquiry whether there has been a miscarriage of justice. However, both kinds of proceedings are concerned with the emergence, after a concluded trial, of evidence that was unavailable at the trial. Second, both proceedings envisage upsetting a duly obtained jury verdict because of the availability of that evidence. Third, both proceedings engage the principles relating to the finality of judgments and the conclusiveness of jury verdicts.

[27] In considering the statutory requirement that the evidence is "compelling", it is convenient to begin with a consideration of the third criterion in s 678D(3): high probative value. Probative value is another way to refer to the weight of evidence. Evidence is relevant if it makes a fact in issue either more or less probable. Weight of evidence, or probative value, refers to the degree of probability of existence or non-existence that the evidence generates about the fact. Section 678D(3)(c) requires the evidence to be highly probative of the "case against the accused person". However, as a matter of practice items of evidence are not tendered to prove "a case against the accused person". Evidence is tendered to prove a fact. However, s 678D(3) also requires probative value to be considered "in the context of the issues in dispute". This requires an appreciation of the significance of the disputed issues in the case and, in that context, the significance of the issue towards which the fresh evidence is directed. The evidence must be highly probative of the

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5 see the discussion in *Gallagher*, *supra*, at 397-398.

6 *ibid*, at 399.

case against the respondent because of the relationship of that issue to the case for guilt.

[28] Many cases, perhaps most cases, ultimately turn upon a decision about one or two issues that, if established, prove the guilt of the accused. In rape cases, for example, the real issue for the jury may be consent and the sexual act, a vital element for the prosecution to prove, may not be in issue. In another case it might not be disputed that somebody has raped the victim and the issue may be whether the accused was the offender. Cases involving a single substantial issue nevertheless usually involve other less significant, but important issues, for decision. These may be subsidiary factual issues, such as proof that an accused was in the location of the offence when it was committed as a step towards proving the identity of the offender. Section 678D(3)(c) directs the Court's attention to the significant issues because, in order to qualify as compelling evidence, the fresh evidence must be highly probative of a fact in issue in such a way that it can be said to be highly probative of "the case against the accused person".

[29] Section 678D(3)(b) requires that the evidence be "substantial".

[30] In South Australia and Tasmania legislation has been enacted that permits a convicted offender who has already appealed against a conviction to bring a second appeal.[7] Obviously, a second appeal engages the principle of finality. To deal with the issues created by conferring another right of appeal in criminal cases, the statutes in both States have employed the concept of "compelling evidence" as defined by reference to reliability, substantiality and probative value, and both States have used the UK model employed in cases of appeals after acquittal.[8] In *Van Beelen v The Queen*[9] the High Court had to consider the South Australian statute. An application for leave to bring a second appeal against conviction was conditioned upon showing that there was fresh evidence that was "compelling". The latter term was defined in the same way in which it is defined in s 678D(3). The Court said:

> "The criterion of reliability requires the evidence to be credible and provide a trustworthy basis for fact finding. The criterion of substantiality requires that the evidence is (*sic*) of real significance or importance with respect to the matter it is tendered to prove. Plainly enough, evidence may be reliable but it may not be relevantly "substantial". Evidence that meets the criteria of reliability and substantiality will often meet the third criterion of being highly probative in the context of the issues in dispute at the trial, but this will not always be so. The focus of the third criterion is on the conduct of the trial. What is encompassed by the expression "the issues in dispute at the trial" will depend upon the circumstances of the case."[10]

[31] In connection with the use of the adjective "substantial" as qualifying the noun "evidence", the Oxford English Dictionary defines the word to mean, "Based upon

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7 *Criminal Code* (Tas) s 402A; *Criminal Procedure Act* (SA) s 159.

8 see the discussion of these statutes in *R v Keogh (No 2)* (2014) 248 A Crim R 1; *Neill-Fraser v State of Tasmania* [2019] TASSC 10.

9 (2017) 262 CLR 565.

10 *ibid*, at [28].

a solid substratum; firmly or solidly established; not easily disturbed or damaged; of solid worth or value; weighty, sound".

[32] In 2014 the Full Court of South Australia, in *R v Keogh (No 2)*[11], considered the same statute as that which the High Court considered in *Van Beelen*. The Court said that "substantial" was a qualitative and not a quantitative notion as used in the Act. Evidence is substantial, the Court said, if it merits being accorded weight as part of the consideration of the issues to which it relates.[12]

[33] If evidence is reliable and, in the context of the issues in dispute at the trial, also *highly* probative of the case against the acquitted person, it is difficult to see what it means to say that the evidence must also be "substantial".[13] Fortunately, in this case it is not necessary to arrive at a final answer to that question because in this case, for the reasons which follow, the evidence does not satisfy s 678D(3)(c): "highly probative of the case against the acquitted person".

[34] The Queensland double jeopardy exception legislation was modelled upon legislation in the United Kingdom that was enacted in 2003.[14] There are differences between the two sets of legislation but both statutes employ the concept of "compelling evidence" defined by reference to the evidence being reliable, substantial and highly probative of the case against the acquitted person. Consequently, cases concerning the UK legislation are helpful in understanding the provisions of the Code.

[35] The first application to be made under the UK statute is also the most startling of the British cases. In *R v Dunlop*[15] the respondent was charged with the murder of a woman. The case against him was a very weak circumstantial one and he was acquitted. Later, in 1998, the respondent was sentenced to imprisonment for some other offences. While in prison, and seemingly in aid of his own rehabilitation, he confessed to the murder. He was at once charged with perjury and, during the investigations into that offence, he once again admitted his guilt. He was convicted of the perjury offence and sentenced to a term of imprisonment. All of this happened before the enactment of the new legislation. Upon its enactment, the prosecution applied for a second trial for the murder. The Court of Appeal concluded that the confessions constituted new evidence which was "not merely

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11 (2014) 248 A Crim R 1.

12 *ibid*, at [106].

13 The external materials that preceded the enactment of the UK legislation gives no information about the rationale for the requirement that the evidence be "substantial" although there is much discussion about the other elements, see: *A Review of the Criminal Courts of England and Wales ("The Auld Report")* September 2001, Volume 2, at 627 *et seq; The Law Commission, Consultation Paper No 156, "Double Jeopardy",* at [5.30]-[5.42]; *The Law Commission, Report on two references, Law Com. No 267*, at [4.57]-[4.69]; *House of Commons Home Affairs Committee, Second Report of Session 2001-2003*, at [102]-[105]; *House of Commons, Research Paper 02/74, The Criminal Justice Bills, Double Jeopardy and Prosecution Appeals*, at 19-42. This latter paper reveals that the choice of orders that the Court of Appeal can make under s 678B(3) of the *Criminal Code* (Qld) is there to take into account the possibility that the conviction was in Queensland (in which case the Court quashes the conviction of the Queensland Court) as well as the possibility that the acquittal was in a foreign jurisdiction in respect of which the Queensland Court of Appeal could not quash an acquittal (instead it removes the acquittal as a bar to the person being tried, thus extinguishing the defence that would be available under s 17 of the Code, *cf. Treacy v Director of Public Prosecutions* [1971] AC 537).

14 *Criminal Justice Act* 2003 (UK), pt 10.

15 [2006] EWCA Crim 1354.

compelling but overwhelming" and ordered a new trial.[16] The Court cited the report of the Law Commission that had considered the change to the law before it was passed. It had referred to the need for an exception to the rule against double jeopardy because of cases which "may undermine public confidence in the criminal justice system as much as manifestly wrong convictions".[17]

[36] Three UK cases show the circumstances in which DNA evidence might justify a second trial. In *Crown Prosecution Service (Newcastle) v D*[18] the respondent's elderly grandmother had been raped in her home. There was no dispute that somebody had raped her. The respondent was charged. He denied committing the offence or ever having had sex with the victim. He had an alibi. The victim herself gave contested and not very cogent, evidence identifying him as the offender. The rest of the case was circumstantial. The respondent was acquitted. The victim died but, years later, the respondent's DNA was coincidentally matched to a sample of sperm found in the victim's vagina and which had been preserved. The Court held that the new evidence not only confirmed the victim's identification of the respondent but it demonstrated the falsity of the alibi evidence. That falsity was, of course, itself new evidence of guilt. The DNA evidence was, therefore, compelling evidence.

[37] In *R v W*[19] a woman had been attacked and she suffered severe head injuries from which she later died. The respondent was charged with her murder. The evidence against him was circumstantial and included his having been seen in the location in which the victim lived, as well as the differing and suspicious accounts he gave to police about his movements on the day in question. There was a questionable footprint that might have been his. The respondent's boots were examined but no blood was found on them. The respondent denied murdering the deceased. Although he acknowledged knowing her, he said that he had only rarely seen her and he had not seen her on the day she was killed. He was acquitted. Ten years later another examination of the boots revealed traces of the deceased's DNA which, on the evidence, must have been deposited in her wet blood. The Court of Appeal accepted this evidence as "highly probative and in effect decisive in the case".[20]

[38] The third case is *R v Dobson.*[21] A group of young men attacked two bystanders and stabbed one of them to death. The other victim was able to get away. The respondent denied being present at the scene of the attack and denied involvement in the killing. The survivor's identification of the respondent, upon which the case depended, was held to be inadmissible. There was no physical evidence that placed the respondent at the scene. The case collapsed and the respondent was acquitted. After the new laws were enacted the prosecution applied for a second trial. The prosecution led evidence of the presence of "a tiny blood stain" on the back of the collar of the respondent's jacket which carried "an almost full profile" matching the DNA of the deceased. Forty-three separate "blood flakes" were also found on the same jacket. Together, these flakes gave an additional, although incomplete, DNA

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16 Issues about fairness and the interests of justice were raised also for consideration but are not material to the present application.

17 *R v Dunlop*, *supra*, at [43].

18 [2009] EWCA Crim 1423.

19 [2010] EWCA Crim 1576.

20 *ibid*, at [41].

21 [2011] EWCA Crim 1255.

profile which matched the deceased. The reliability and cogency of the DNA findings themselves were unquestioned. The new evidence was held to be compelling because, among other things, it was probative of the respondent's presence during the attack upon the deceased. This evidence also contradicted the respondent's denials that he was present during the attack and instead it proved that his alibi to police was a lie. The combination of blood and lies was compelling evidence.

[39] In each of these cases the DNA evidence went to the heart of the case by directly implicating the respondent in the commission of the act that constituted the offence.[22] The presence of the victim's own blood on the respondent's clothing, in two cases, and the presence of the respondent's sperm in the victim's body, in the other, signified that the respondent had not merely been present when the offence was committed but, when coupled with his proven lies, showed that he had done the act that constituted the offence.

[40] A different category of cases concerned new evidence in the form of similar fact evidence. In *R v Andrews*[23] the respondent was acquitted of raping a 15 year old girl. He had been conducting a residential camp for school aged children and the complainant had begun to assist him in that work on weekends. The complainant claimed that the respondent had raped her during one of these weekends. The case depended upon the credit of the complainant. There were several bases upon which her credit was attacked by the defence. On the other hand, the respondent put himself forward as a man of positive good character who had an unimpeached record of having worked with "thousands of young people". He was acquitted. After his acquittal, his former wife read about his trial. She informed police that the respondent had previously been arrested for indecently assaulting children at a school. An investigation led to 17 fresh charges against the respondent involving children other than the original complainant. During the course of the new investigation, the respondent was also said to have made admissions. The Court of Appeal accepted that the evidence to prove the 17 new charges was admissible to prove the offence against the original complainant. It was probative because it undermined the respondent's case that he was a man of good character against whom no complaints had ever been made and it was probative also because some of the details given by the new complaints were strikingly similar to the original complainant's account. The evidence also tended to show that the incident as related by the original complainant was not an allegation about a singular act by a man of good character but showed the alleged act to be one of a series of acts of his that formed a pattern of behaviour. The evidence was, therefore, substantial and highly probative of the prosecution case.

[41] Another case in which similar fact evidence was deployed, with the same result, was *R v K*[24] in which, on a charge of rape, the issue was whether the complainant had consented. After an acquittal, a new trial was ordered upon the basis of evidence that tended to prove that the respondent had committed several very similar attacks, involving distinctive behaviours on his part, against several other women. These similarities "lend powerful probative value" to the case against the

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22 another similar DNA case was *R v MH* [2015] EWCA Crim 585.
23 [2008] EWCA Crim 2908.
24 [2013] EWCA Crim 1820.

respondent involving the original complainant.[25] It was held that evidence to justify a second trial could be circumstantial evidence.[26]

[42] The evidence relied upon in the present case can now be considered.

[43] A forensic scientist, who worked on the evidence led at the respondent's trial, gave evidence on this application. Ms Kristine Bentley is now retired, but from about 1980 and until 2005, she was a scientist working in the forensic biology section of the State Health Laboratory, and later the John Tonge Centre, in Brisbane. By reference to statutory declarations sworn by her before that trial, Ms Bentley was able to say that on 21 September 1987 she had received a number of items relating to the investigation including, relevantly, a pink pillowcase, a pair of underwear and a sample of the blood of the deceased. She applied a file number to the items that she received. On 29 September 1987 Ms Bentley also received a sample of the respondent's blood. Ms Bentley conducted tests on pieces of these items. In each case she cut out a part of the fabric. She labelled each piece with an identifying code. Ms Bentley determined that some of the blood on the pillowcase had a grouping consistent with that of the deceased woman but that it was also stained with blood that was consistent with the respondent's blood group. The two fragments of fabric from the pillowcase were labelled "A3" and "A4". Portions of the fabric that she had cut away were retained by her in a freezer that was used for storage. Similarly, Ms Bentley cut pieces from the underwear and numbered each piece. The underwear were stained at the fork with blood that was consistent with the deceased's and the respondent's blood groups. The waistband of the garment was stained with blood. Ms Bentley cut away a piece of the waistband and found that it had a grouping consistent with the blood of the respondent. She labelled that sample "A2".

[44] By reference to documents, Ms Bentley recalled that some years later she sent some samples of bloodstained fabric to a laboratory in Victoria. The Director of Public Prosecutions tendered[27] "a true copy of QHFSS casefile regarding the forensic DNA analysis; reference QP1100562719". By reference to this collection of documents Ms Bentley was able to identify a letter dated 12 December 1989 that she had signed. The letter appears to have accompanied four items Ms Bentley sent to Dr Henry Roberts at the Victorian State Forensic Laboratory. These items, contained in test tubes, were said to include cloth samples from a pillowcase which were designated "F4503 3A3" and "F4503 3A4". Ms Bentley also identified a file note in her handwriting that appears, on its face, to record her receipt from Victoria, on 20 July 1999, of four items by way of return. The note contains references to file numbers and item numbers consistent with the items that had been examined by Ms Bentley and which she recorded as having been sent to Victoria. Ms Bentley has no actual recollection of the things recorded by her in these documents. Her note suggests that two of the tubes, which she had sent containing blood, were empty when they were returned to her. The other two tubes were recorded by her as containing "threads" and a "fragment" respectively when she got them back. Dr Roberts had also created some handwritten records. In one such record dated 6 October 1998 he recorded that the exhibits sent to him and which he examined "were never returned to Queensland". In another handwritten record, signed by him

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25 *ibid*, at [64].
26 *ibid*, at [72].
27 Affidavit of Mr T Walls affirmed 2 August 2019.

and dated 15 June 1999, he referred to "4 tubes, each with a green cap, each empty", he underlined the word "empty", as he explained, for emphasis. These were the tubes that Professor Roberts sent back to Ms Bentley.

[45] Another note dated 23 August 1989 that Ms Bentley identified as her own, also bears file number F4503. This note has a number written in Ms Bentley's handwriting using red ink: "25657". Ms Bentley explained that this signified that an item has been submitted for DNA testing and the number constituted the item's file relating to the testing. That number was written on the same line as the words, "F4503- 3A4 – Pillowcase". Some lines down, Ms Bentley had written, "Fragment ~ 1mm2 bloodstained cloth". On a line further down, Ms Bentley had written, "Remnant of original samples" accompanied by a number and the date "December 13, 1989".

[46] Ms Bentley's attention was directed to page number 317 of the "QHFSS casefile".[28] Ms Bentley was able to identify the code "F4503" in the centre at the top of the page and the code number "25657" in a column on the left hand side. She identified these as referring to the pillowcase fragment and, indeed, the word "Pillowcase" appear in the same row. The code "F19973" also appears in that row; this is the number on the note recording the receipt of items from Victoria. The page bears the signature of Ms Bentley at its foot.

[47] Ms Bentley was asked some questions about a handwritten document exhibited to another affidavit.[29] She identified this as a page from the "DNA Register". It records that Ms Bentley had submitted item "25657", which is also described by reference to "F19973 Pillowcase 1", "to the technical section". Ms Bentley had earlier given evidence that, in order to analyse a sample for its DNA profile, a liquid would be added to the sample to form an "extract" which would then be subjected to testing. Ms Bentley said that one of the dates appearing in the Register, 24 August 1989, probably indicates the date on which the "technical section" obtained its extract. Ms Bentley could not say whether an extract had been taken from item "A3".

[48] Ms Bentley was then referred back a particular page of the "QHFSS casefile". Her attention was directed to two entries as follows:[30]

> "25.07.00 12.30 Discovered that Bloodstain 3-A3 (Pillowcase) had been tested for HLA in 199 [*sic*] as #217.
> Resubmitted for reamp in Pro.Plus KB
>
> 26.07.00 Found Remnant sample for 3-A4 in chest freezer.
> => Profiling as #32368."

[49] She explained that the reference to "resubmitted for reamp" referred "to a re-amplification of the sample in Profiler Plus".

[50] Ms Bentley was then taken back to a document, in the form of a spreadsheet, annexed to an affidavit.[31] She said that she was able to "recognise that style of the

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28 Affidavit of Mr T Walls affirmed 2 August 2019, Exhibit 1.
29 Affidavit of Ms S T Gillies sworn 16 July 2019, Exhibit STG-2, Statement of Mr A Pippia, Appendix 5.2.
30 Affidavit of Mr T Walls affirmed 2 August 2019, Exhibit 1, at 427.
31 Affidavit of Ms S T Gillies sworn 16 July 2019, Exhibit STG 2, Statement of Mr A Pippia, Appendix 2.2.

document". Her attention was directed to a number that appeared upon that page, F4503, and to two persons' names associated with that number. These were the names of the deceased and the respondent. The reference 3A3 also appeared in that connection. It emerged that this handwritten document was not Ms Bentley's document but was "the laboratory's document". Ms Bentley was asked to identify a date that appeared on the page, 12.4.92. As to this date, she said, "I imagine it would be on or around that date in 1992" that the testing of the sample took place. A number, "217" that appeared in relation to the sample in question was said to be "the result". Ms Bentley was then referred back to the handwritten document in which she had made the entries quoted in paragraph [48] above and the following exchange took place:

> "MR BYRNE: I've taken you to an earlier entry there about number 217?---Mmm.
>
> Have a look at the entry. I think it's underneath. I've just lost – here we are. The entry underneath dated 26 July 2000. Is that your handwriting?---Yes. Yes. I've got it. Here we are. Found remnant sample for 3A4 in chest freezer. Profiling as number 32368.
>
> Do you recall locating that item in the chest freezer now?---No.
>
> I've already shown you on the work card the red number relating to 32368 on – that's page 95 of that record, your Honour. And that was against the item A4. That suggests testing was done for 32368?---Yes, it does.
>
> Now, would you go back to this document, the colour table?---Yes.
>
> On page 317?---Yeah.
>
> There's an entry there for 32368, is there not?---Yes.
>
> The second one down?---Yes.
>
> And suggests a result on the 8th of August of 2000?---Yes.
>
> Ms Bentley, just keep that with you. I know there's a lot of documents floating around. Then could you go to your last statement, the one that was done at John Tonge Centre at Coopers Plains?---Yes.
>
> You refer there to two of the blood stains at areas 3 and 4 being sampled from the pillowcase. That's on the bottom of the first page?---Yes.
>
> And you refer at the end of the body of the statement to the fact that the same DNA profiles as that named person?---Yes.
>
> Sufficient in the population to be regarded as essential individualisation?---Yes. That's correct. That's how those profiles were reported at the time.
>
> That statement is dated 20th of September of 2000?---Correct.
>
> Am I correct in saying that that is a reference to the results on the coloured table?---Yes. It is.

From the DNA numbers 217, 32368 and 25657?---Yes. It is."

[51] The relevant part of her statement to which Ms Bentley was referred said:

> "BLOODSTAINS (PILLOWCASE)
>
> These gave the same DNA profiles as [the respondent's]. Multilocus profiles of this type occur sufficiently rarely in the population to be regarded as essential individualisations"

[52] The evidence of Ms Bentley was supported by evidence given by Mr Adriano Pippia. By reference to the records in evidence he was able to trace the provenance of the results of DNA testing to samples that had been received and handled by Ms Bentley – with one exception. That exception was a glass tube that contained "a small amount of remnant (pink fabric ~ 3mm x 16 mm) remains". According to a record that was tendered on the application, this tube bore the notation "F19973". According to Mr Pippia, that particular tube was found in a refrigerator in the laboratory and he could find no record of its existence before its discovery on 16 July 2015. Ms Bentley had a similar experience. Her own notation in the records, quoted earlier, shows that on 26 July 2000 she also had found a "remnant sample for 3A4 in chest freezer" and had sent it away for DNA analysis.

[53] The seeming casualness about storage and identification of samples was not due to any unprofessionalism on the part of those who worked in the State Health Laboratory or John Tonge Centre. It was simply a product of the historical development of the techniques and systems used for DNA analysis for criminal investigation purposes. Mr Pippia described how, over the course of years, the whole technical process, including the system of record keeping, has become much more sophisticated and dependable than it was, or than it could reasonably have been, when DNA analysis first began.

[54] Mr Pippia was careful to explain something else. He pointed out that the identification of the respondent's DNA in the samples of cloth that Ms Bentley had cut from the pillowcase did not mean that the respondent's DNA that had been extracted by the scientists had come from his blood. Although there was indeed blood on these samples, as the blood grouping showed, the DNA that was extracted for testing might have come from the respondent's blood or it might have come from cells of the respondent other than blood cells, such as skin cells. It might have come from both sources. In summary, although there was indeed blood on the fabric, the extracted DNA identified as the respondent's may have been extracted from that blood or it might have come from another invisible source contributed by the respondent. Mr Pippia also explained how a person's DNA could be detected on a surface even if the person had never touched that surface. Biological material, such as skin cells, can be deposited by one person touching the body of another person or by touching the clothing of another person. These deposited cells can then be transferred to a surface upon which it is later found.

[55] The result is that the prosecution case about DNA, at its highest, can only prove that the pillow found next to the deceased's body carried bloodstains of the same group as the blood of the respondent and that DNA extracted from the pillow matched the respondent's DNA and that it might have come from his blood, if the blood was his, but it might equally have come from cells of his other than blood cells. How his DNA got onto the pillow or when it was deposited is unknown.

[56] As Mr Byrne QC submitted, the central issue at the trial was the identity of the person who murdered the deceased. To prove that case the prosecution led evidence at the trial about the respondent's relationship with the deceased, about his affection for her and about his desire to have sexual intercourse with her. There was evidence that she had rejected a sexual advance but that his desire nevertheless continued. He did not dispute that he was drunk when he was with the deceased for the last time. In keeping with the practice of the time, counsel's addresses were not transcribed so the prosecutor's actual argument for conviction is not known. But, having regard to how the evidence came out, it was probably based upon a theory that a combination of reduced inhibitions on the respondent's part because of the effect of alcohol, a sense of intimacy he may have felt by being alone with the deceased late at night in her home or in her bedroom and his sexual desire for her led to frustration, to rage and then to murder.

[57] The jury knew that the respondent was at the deceased's home on the night she likely died. The jury also knew that the respondent had been in the deceased's bedroom once or twice before, and perhaps he might have been in there on that night. His sexual interest in her was not in dispute. The only fact in dispute was whether he had stabbed her.

[58] As to this, at the trial the prosecution undoubtedly relied upon the evidence of blood grouping to sustain a conclusion that the respondent had injured himself when he stabbed the deceased. The problem with that theory was that there was no evidence that the respondent had suffered any injury at all that might have caused him to bleed on the pillow on that night. The police interviewed the respondent on 29 September 1987, a little more than two weeks after the murder. Police asked the respondent whether he had recently suffered any injury and he answered in the negative. Although he was told he was not required to do so, he was willing to give police a sample of his blood, the hair on his head and his pubic hair. He also gave them access to his car. Despite that cooperative attitude, the police officers interviewing the respondent did not examine him for indications of injuries or scarring. At least, there is no evidence about that subject. The respondent told police about the clothes he had worn on the night and police later learned from his sister-in-law that she had washed those clothes and that she had seen no evidence of any blood on them. His car also offered no traces of anyone's blood.

[59] In those circumstances, the evidence of blood grouping showed only that some blood found at the scene was consistent with the composition of the respondent's own blood but did not otherwise implicate him in the act of killing and upon that case, the jury acquitted him.

[60] The prosecution now contends that the fresh evidence is reliable, substantial and highly probative of the case against the respondent having regard to the issues in dispute in the proceedings in which he was acquitted.

[61] Mr Byrne submitted that the substantial issue in dispute at the 1988 trial was the identity of the killer. The central issue about guilt remains the same. Mr Byrne submitted that, as in *Dobson*, the DNA evidence "presents a formidable case against the respondent". He submitted that this evidence was probative of the identity of the killer. He submitted that the DNA of the respondent was found on the pillowcase and the blood grouping on the same pillowcase was consistent with the respondent's blood group. He submitted that the pillowcase was intimately

associated with the act of killing because of the position in which it was found next to the deceased's body. The result, he submitted, was that the respondent must have been present when the deceased was killed and it followed that he was the killer.

[62] Having regard to Mr Pippia's evidence, the fresh evidence does not go nearly far enough to prove that the respondent killed the deceased. If accepted, it only proves that the respondent's DNA was on the pillow. In turn, this only proves that the respondent touched the pillow at some point in time or that he had touched something or somebody that later touched the pillow and transferred his DNA to it. The evidence does not show how or when the respondent's DNA came to be on the pillow. There is simply no evidence from which it could be inferred that the respondent's deposited some of his DNA onto the pillow in a way associated with the act of murder.

[63] Yet proof of the deposit of the DNA onto the pillow in the course of doing the act of murder is an indispensable intermediate step in the jury's reasoning to an inference of guilt. That step must, therefore, be proved beyond a reasonable doubt.[32] The proof now offered cannot rationally exclude the possibility that the DNA was deposited onto the pillow in innocent circumstances.

[64] Moreover, the absence of any evidence of injury to the respondent does not support the theory that the DNA had been deposited by the medium of the respondent's blood because of an injury he sustained during his attack.

[65] For these reasons, the fresh evidence does no more than to reinforce the admitted fact that the respondent had been inside the deceased's home or bedroom in a way that resulted in some of his DNA being on the pillow. It does not prove any issue of significance. The evidence is not probative of the fact that the respondent did the act that constituted the offence. It is not highly probative of the case against him.

[66] The uncertainty surrounding the provenance of samples and the unsatisfactory state of the evidence about the handling of some of those samples also raise serious questions about whether the evidence is reliable.[33] The respondent challenged the reliability of the evidence. He submitted that, upon an application like this one, proof of the chain of custody should be impeccable. He pointed to the lack of evidence about the storage of samples, about how the fabric was kept before samples were extracted and about how the samples had been handled and by whom. The precise nature of the stains on the samples is not known and, having regard to the photographs taken at the scene showing copious blood around the deceased, it is, or it may be, important to know whether the samples were taken from deeply stained fabric or from fabric that contained little blood. It may be, he suggested, that the respondent's DNA was present on the pillow in one place and then, by reason of handling by investigators, the DNA was transferred to another place on the pillow from which it was then taken to be tested. Obviously, if the DNA deposited by the respondent was nowhere near the place that was later stained by blood but had been transferred there, any inference of guilt would be weakened.

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32 *Shepherd v The Queen* (1990) 170 CLR 573.

33 In 2002 the *Evidence Act* 1977 (Qld) was amended by inserting s 95A. That section provides that a person appointed under the Act may sign a certificate that will, subject to certain conditions, prove the provenance and reliability of evidence about DNA comparisons. A defendant can only challenge such a certificate with the leave of a judge. There was no reliance upon such a certificate in this case.

[67] The evidence of DNA comparison in this case cannot be regarded as reliable having regard to inability of any person to testify from direct evidence about the provenance and the handling of the various samples and having regard to the ways in which, having regard to the lapse in time, the prosecution was compelled to fashion its evidence.

[68] The *Criminal Code* establishes a stringent series of conditions that must be met before a person can be tried again for murder after a jury's acquittal because the presumption is that the jury's verdict was a true verdict. The stringency is there because the legislature has recognised that, while circumstances might arise that justify a second trial, and while advances in techniques of proof will give rise to new forms of proof that satisfy the strict statutory requirements, a retrial of an acquitted person is an extraordinary proceeding.

[69] Having regard to all of the foregoing matters it is not necessary to consider whether a new trial would be in the interests of justice under s 678F. It is enough to remark upon two things. The underwear that were tested are gone and so the respondent's advisers will not be able to have them tested. The scientists who gave evidence about DNA results have no relevant recollection that can be tested by cross-examination. These are not mere formalities or technicalities. DNA matching is powerful evidence because, if there has been scientific integrity in the process that leads to obtaining a profile, it is almost incontrovertible. The inability of a defendant to test that integrity means that there cannot be a fair trial.

[70] For these reasons the application should be refused.