



## HIGH COURT OF AUSTRALIA

13 December 2023

BROMLEY v THE KING  
[2023] HCA 42

Today, the High Court dismissed an application for special leave to appeal from a judgment of the Court of Criminal Appeal of the Supreme Court of South Australia. On 16 September 2022, this Court referred the matter to an enlarged bench of the High Court on the limited special leave questions as to whether fresh psychiatric and psychological evidence was "compelling" within the meaning of s 353A(1) of the *Criminal Law Consolidation Act 1935* (SA) ("the CLCA"), and whether it was in the interests of justice that the evidence be considered on appeal. Section 353A(1) relevantly provided that the "Full Court may hear a second or subsequent appeal against conviction by a person convicted on information if the Court is satisfied that there is fresh and compelling evidence that should, in the interests of justice, be considered on appeal".

On 14 March 1985, the applicant and a co-accused, Mr Karpany, were convicted of the murder of Mr Docoza on 4 April 1984, and each sentenced to life imprisonment. Their appeals against conviction were both dismissed by the Court of Criminal Appeal. One ground of the applicant's appeal was that the verdict against the applicant was unsafe on the basis that the conviction depended considerably upon the evidence of a witness, Mr Carter, who had schizophrenia or schizoaffective disorder and was acutely unwell on and around 4 April 1984. The applicant's application for special leave to appeal that decision to the High Court was also dismissed in 1986.

In 2016, the applicant applied to the Court of Criminal Appeal for permission to appeal his conviction a second time, this time pursuant to s 353A of the CLCA. The basis for the application, relevantly, was the fresh psychiatric and psychological evidence concerning the reliability of Mr Carter's evidence. That evidence comprised expert evidence from psychiatrists and psychologists who had considered some, but not all, of the evidence in the trial of the offence in the context of the developments since 1985 in the field of cognitive and memory deficits in people with schizophrenia or schizoaffective disorder. The Court of Criminal Appeal considered that the fresh psychiatric and psychological evidence was reliable and substantial, but that it was not highly probative in the context of the issues in dispute at trial, as required by s 353A(1). The evidence was therefore not "compelling" and permission to appeal was refused.

The High Court departed from its usual practice of providing only a concise summation of its reasons for refusing special leave to appeal. This departure was justified given that the application was made solely on the basis that the interests of the administration of justice in the particular case required this Court's reconsideration of the evaluative conclusions of fact reached by the Court of Criminal Appeal.

The High Court, by majority (Gageler CJ, Gleeson and Jagot JJ), held that the fresh psychiatric and psychological evidence was not compelling as it was not highly probative in the context of the relevant issue in dispute at trial – that is, the reliability of Mr Carter's evidence identifying the applicant as the man who attacked Mr Docoza on 4 April 1984. Accordingly, the majority dismissed the application for special leave to appeal. The minority (Edelman and Steward JJ) considered that the fresh psychiatric and psychological evidence was compelling, that it was plainly in the interests of justice that the evidence be considered on appeal, and that there was a

substantial miscarriage of justice. The minority concluded that there was a significant possibility that an innocent person had been convicted. Accordingly, the minority determined that the application for special leave should have been granted, the appeal allowed, and the applicant acquitted.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*