Second and Subsequent Appeals
Background Paper focusing on the Leave to Appeal Stage

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NEW RIGHT TO APPEAL FOR A SECOND OR SUBSEQUENT TIME

Procedural history

1. In late 2019, new provisions were inserted into the *Criminal Procedure Act 2009* ('CPA'), by the *Justice Legislation Amendment (Criminal Appeals) Bill 2019*, which created a new statutory right to appeal against a conviction for a second or subsequent time.

2. The existing provision for appeal against conviction contained in section 274 of the CPA was interpreted as providing a right to only one appeal (see *R v GAM (No 2)* (2004) 146 A Crim R 57; [2004] VSCA 117; more recently confirmed as correct by *Visser v The King* [2023] VSCA 10 [98]).

3. The creation of this new statutory right mirrored provisions already enacted in South Australia and Tasmania (now contained in section 159 of the *Criminal Procedure Act 1921* (SA) and section 402A of the *Criminal Code Act 1924* (Tas)).

4. Prior to the enactment of the Victorian legislation, the equivalent South Australian provisions were considered by the High Court in *Van Beelen v The Queen* (2017) 262 CLR 565; [2017] HCA 48.

5. More recently, Western Australia has now also introduced a statutory right to appeal a second or subsequent time (see section 35E of the *Criminal Appeals Act 2004* (WA)). We note that the terms of these provisions appear to allow for more flexibility than their counterparts.

6. In Victoria, this new right was created in response to the limitations with the process known as a 'petition of mercy' (a statutory right to petition the Attorney-General to refer the matter for consideration by the Court of Appeal, contained at section 327 of the CPA). This was the only avenue for a convicted person, who had already exhausted their right of appeal, to remedy a miscarriage of justice revealed by further evidence.

7. The petition system is also clearly ill-equipped to address the ramifications of the use of lawyer Nicola Gobbo as a human source, which resulted in the prosecution of accused persons in a 'corrupted in a manner which debased fundamental premises of the criminal justice system' (see *AB (a pseudonym) v CD (a pseudonym) EF (a pseudonym) v CD (a pseudonym)* (2018) 93 ALJR 59; [2018] HCA 58 at [10]).

8. During the second reading speech, then Attorney-General Jill Hennessy said of the creation of this statutory right:

> "By establishing a statutory right to second or subsequent appeal against conviction for an indictable offence the Bill provides an avenue for such evidence to be examined by the Court of Appeal, in accordance with the principles of fairness, impartiality and transparency. In doing so, this reform serves as an important safeguard against miscarriages of justice and promotes the right to a fair hearing under section 24(1) of the Charter."

Legislative regime

9. The new provisions are contained in Part 6.4, Division 1 of the CPA. Relevantly:

Section 326A - Right of second or subsequent appeal against conviction

(1) A person convicted of an indictable offence by an originating court who—

(a) has exhausted the person's right to appeal against conviction under Division 1 of Part 6.3; or

(b) has previously appealed under this Part but leave to appeal was not granted or the appeal was dismissed, in whole or in part—

may appeal to the Court of Appeal against the conviction if the Court of Appeal gives the person leave to appeal.

Note

See the definition of *originating court* in section 3.

(2) An appeal under subsection (1) may also include an appeal against a conviction for a related summary offence.

…

Section 326C- Determination of application for leave to appeal under section 326A

(1) The Court of Appeal may grant leave to appeal under section 326A if it is satisfied that there is fresh and compelling evidence that should, in the interests of justice, be considered on an appeal.

(2) The Court of Appeal may grant leave to appeal under section 326A against a conviction for a related summary offence only if it grants leave to appeal under subsection (1) in relation to the indictable offence.

(3) In this section, evidence relating to an offence of which a person is convicted is—

(a) ***fresh*** if—

(i) it was not adduced at the trial of the offence; and

(ii) it could not, even with the exercise of reasonable diligence, have been adduced at the trial; and

(b) ***compelling*** if—

(i) it is reliable; and

(ii) it is substantial; and

(iii) either—

(A) it is highly probative in the context of the issues in dispute at the trial of the offence; or

(B) it would have eliminated or substantially weakened the prosecution case if it had been presented at trial.

(4) Evidence that would be admissible on a second or subsequent appeal is not precluded from being fresh or compelling only because it would not have been admissible in the earlier trial of the offence that resulted in the conviction.

Section 326D- Determination of second or subsequent appeal against conviction

(1) On an appeal under section 326A, the Court of Appeal must allow the appeal against conviction if it is satisfied that there has been a substantial miscarriage of justice.

(2) In any other case, the Court of Appeal must dismiss an appeal under section 326A.

VICTORIA'S ONLY SUCCESSFUL SECOND OR SUBSEQUENT APPEAL

10. Pursuant to section 326C, to date, the Court of Appeal has only granted leave to appeal against conviction for second (or subsequent) time in one case: *Roberts v The Queen* (2020) 60 VR 431; [2020] VSCA 58.

11. Subsequently, the Court allowed the second appeal being satisfied that there had been a substantial miscarriage of justice: *Roberts v The Queen* [2020] VSCA 277.

Eleven Propositions

12. In applying the new leave provisions for the first time, the Court in *Roberts v The Queen* [2020] VSCA 58 summarised 11 'basic principles' that they identified as emerging from the 'language of the statute and the authority of *Van Beelen*' [39]. These have been followed in the subsequent section 326C cases.

13. The principles are contained at [40] to [51] of the *Roberts* leave judgment (citations omitted):

> [40] First, the section manifests an intention that the finality of the criminal process yield in the face of fresh and compelling evidence which, taken with the evidence at trial, satisfies an appellate court that there has been a substantial miscarriage of justice.

[41] Second, the right to seek leave to appeal is additional to, and is to be contrasted with, the mechanism of executive referral in the case of a petition for mercy. The leave requirement is intended to prevent successive meritless applications. Third, the statutory preconditions to the grant of leave may be compared and contrasted with the terms of s 274 of the *Criminal Procedure Act 2009* governing the grant of leave to appeal in the ordinary case.

[42] Third, the statutory preconditions to the grant of leave may be compared and contrasted with the terms of s 274 of the *Criminal Procedure Act 2009* governing the grant of leave to appeal in the ordinary case.

[43] Fourth, the notion of fresh evidence as against new evidence reflects an underlying concept commonly applied by intermediate appellate courts in this country. In *Mickelberg v The Queen*, Toohey and Gaudron JJ said:

> The underlying rationale for a court of criminal appeal setting aside a conviction on the ground of fresh evidence is that the absence of that evidence from the trial was, in effect, a miscarriage of justice: see, eg, *Gallagher v The Queen*. There is 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: see *Ratten v The Queen*, per Barwick CJ, noting however, that there may be somewhat greater latitude in the case of criminal trials than in the case of civil trials. See also *Lawless v The Queen*.

[44] Fifth, the Court must be satisfied that the fresh evidence has the qualities prescribed by s 326C(3). This follows from the plain terms of the section. It will not be sufficient for the purpose of leave under the Victorian statute to establish that it is reasonably arguable that the evidence has these qualities.

[45] Sixth, the onus is upon the applicant to satisfy the Court that the preconditions to the grant of leave are met. The Court must be positively persuaded that the preconditions to the exercise of its power to grant leave have been satisfied.

[46] Seventh, the words ‘reliable’, ‘substantial’, and ‘highly probative’ are to be given their ordinary meanings. In *Van Beelen*, the High Court observed (of the equivalent South Australian provision):

> Nothing in the scheme of the CLCA or the extrinsic material provides support for a construction of the words ‘reliable’, ‘substantial’ and ‘highly probative’ in other than their ordinary meaning. Understood in this way, each of the three limbs of sub-s (6)(b) has work to do, although commonly there will be overlap in the satisfaction of each. 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 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. Fresh

> evidence relating to identity is unlikely to meet the third criterion in a case in which the sole issue at the trial was whether the prosecution had excluded that the accused's act was done in self-defence. On the other hand, fresh evidence disclosing a line of defence that was not apparent at the time of trial may meet the third criterion because it bears on the ultimate issue in dispute, which is proof of guilt.

[47] Eighth, when compared with the South Australian statute, the Victorian statute raises as a further alternative to the final component of 'compelling' evidence, that which would have eliminated or substantially weakened the prosecution case if it had been presented at trial.

[48] Ninth, jurisdiction under s 326C(1) is further conditioned upon the appellate court's satisfaction that it is in the interests of justice that the fresh evidence be considered on appeal. In *Van Beelen*, the High Court observed (of the equivalent South Australian provision):

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

[49] We note that the observations of the High Court recognise that evidence other than the fresh evidence relied on by the applicant and coming to light independently of the trial may bear on the question of the interests of justice.

[50] Tenth, whilst the judgment required as to the interests of justice is an intermediate one, it may be informed by the potentially broad scope of the notion of substantial miscarriage of justice. The issue if leave is granted is not limited to consideration of evidentiary questions going to the ultimate issue of the applicant's guilt but may embrace questions of irregularity in an applicant's trial.

[51] Eleventh, the question whether a proposed ground of appeal is reasonably arguable may demonstrate that it is in the interests of justice that leave be granted. Nonetheless, the concept of the interests of justice is not to be conflated with the ultimate issue of a substantial miscarriage of justice. The High Court's decision in *Van Beelen* demonstrates the application of this principle. In that case, fresh evidence undermined the basis of opinion evidence given at trial as to the probable time of death of a murder victim. Such evidence met the criteria for the grant of permission to appeal, as it is known in South Australia, because the time of death was in dispute at the trial. Nonetheless, the fresh evidence did not ultimately demonstrate a miscarriage of justice because it did not establish that, having regard to the evidence at trial, there was a significant possibility that a jury, acting reasonably, would have acquitted the accused if apprised of it.

Leave application in *Roberts*

14. In *Roberts*, two categories of evidence were relied upon as being fresh and compelling. First, evidence that the dying declaration by a victim captured in one police officer's (Pullin) statement was not recorded contemporaneously, but 10 months later. Second, evidence of other police conduct and practices about the dying declaration evidence.

15. The evidence was clearly fresh, arising out of statements made by police during private and public Independent Broad-based Anti-corruption Commission ('IBAC') examinations that occurred years the original trial and appeal: [8] and [12].

16. Both categories of evidence were accepted by the Court to be reliable: [84]; [137].

17. The Court considered the Pullin evidence was substantial because it was of real significance or importance in proving the applicant did not get a fair trial and undermining the reliability of Pullin's account of the dying declaration: [85].

18. The Pullin evidence was highly probative of an issue 'central to the trial,' whether there was one offender or two. A finding that the evidence was highly probative did not require a finding that Pullin's evidence was 'indispensable': [86]-[89].

19. As to the second broader category of evidence, the Court concluded that this evidence when 'taken as a whole' was substantial. It had the power to 'contextualise' and 'amplify' the unfairness point and the potential attack on the reliability of the Pullin evidence. It was also highly probative of a central issue in the trial – whether there were one or two offenders: [134]-[137].

20. In respect of both categories of evidence, applying *Van Beelen*, there was nothing to mitigate against the ordinary conclusion that as the fresh evidence was compelling, the interests of justice would favour it being considered on appeal: [93]-[94] and [137].

VSCA DOES NOT FIND EVIDENCE IN OTHER CASES COMPELLING

21. In Victoria, leave has been refused in all cases other than *Roberts*.

22. Below is a summary of the reasons for refusal referrable to the statutory criteria contained in section 326C of the CPA.

23. The common thread in all but one case (*Saricayir)*, and in our view the gravamen of the refusal, is the Court's view that the evidence does not meet the statutory test of 'compelling'.

STATUTORY CRITERIA	**CASES & FACTS**
NOT FRESH	*Glascott v The King* [2022] VSCA 158 • DNA evidence (commentary/criticism of methodology) was not fresh because it could have been adduced at trial with reasonable diligence: [84]. Evidence purporting to give the applicant an alibi would have known at the time of trial and records have ever been produced corroborating: [85]. There was 'no reason why' that evidence that others had borne grudges against the deceased could not have been adduced at trial: [87]. *Saricayir v The Queen* [2022] VSCA 133 • Evidence was not fresh because: (a) The provenance of a document was an issue in the trial: [26]-[30]; (b) Statements by a co-offender were available at the committal and at least by the first day of trial: [31]-[37]; (c) The existence of the evidence would have been apparent at the time of trial as it was referred to in other disclosed material: [48]-[50]; (d) The applicant was on notice of a potential line enquiry well before the trial, arising out of his record of interview: [56].
NOT COMPELLING	*Gavanas v The King* [2022] VSCA 271 at [93]-[97] • Evidence of non-disclosure of police payments to a witness prior to him giving evidence in the applicant's trial was not highly probative of the issues at trial nor capable of substantially weakening prosecution case. • Even without this information, cross-examination at trial exposed this witness' incentive to give false evidence and his history of doing so. His evidence going to relating to the charge was 'extremely limited.' In these circumstances, evidence that could have 'more comprehensively discredited' the witness would not have a made a difference to whether the accused was convicted, as there was other significant evidence of his involvement in the manufacture of drugs.

STATUTORY CRITERIA	CASES & FACTS
	Baker v The King (No 2) [2022] VSCA 196 • Evidence of statements by the co-accused about his physical interaction with the deceased shortly before the deceased fell out of the window did not rise to the level of being 'highly' probative: [107]. That was because, largely, the evidence of the co-accused was that he had not seen how the deceased went out the window, and the evidence that suggested the co-accused had actually seen the deceased go out the window (immediately after pushing him) was worth 'little weight' because of the 'potential for error' imbedded in it (given that it was hearsay, reported well after the events): [108]. • The Court did not consider the evidence of the co-accused was reliable as to whether the applicant was in the vicinity of the deceased shortly before his fall from the window because there were inconsistencies between his accounts ([111]-[112]), because of an apparently irreconcilable difference between the co-accused's evidence and the other witness accounts [113], and the co-accused's level of intoxication on the night of the events [114]. *Glascott v The King* [2022] VSCA 158 • DNA evidence (consisting of comments and criticisms about the methodology underpinning expert evidence given at trial of DNA results, which linked the accused to the scene) was not substantial because while it provided comments and criticisms of the methodology used, it did not state the DNA evidence at trial was wrong: [68] and [84]. Nor was the DNA evidence highly probative of the issues in the trial, nor could it have eliminated/substantially weakened the prosecution case: [84]. • Purported alibi evidence from a neighbour that the accused was taken to the hospital at the time of the murder/arson was not credible. There was no explanation for why the witness' could have such a 'detailed recollection' many years later of events occurring on one specific date, as opposed to another day: [85]-[86]. • Evidence of witnesses that others may have borne grudges against the deceased was not substantial because there was nothing to take it out of the realm of being 'speculative' – there was no evidence that the other people had the 'opportunity' to commit the crime or that they had 'antecedents' suggesting they were realistic suspects: [88].

STATUTORY CRITERIA	CASES & FACTS
	Lewers (a pseudonym) v The Queen (No 2) [2021] VSCA 351 • Evidence of the emails/letters sent by the child complainants, asking for the case against their father of sexual offending to be dropped was not considered to be of 'high probative value' of the context of the issues in the case, noting that they did not amount to an assertion that the sexual offending did not occur: [91]. It did not establish the offending did not or could not have occurred and 'falls a long way short of compelling.' [100]. It should be treated with 'caution' given its context- young and impressible child complainants: [93]-[94]. • Evidence of a 'false denial' the child complainants of authoring the letter did not 'constitute compelling evidence that would undermine verdict.': [97]. • Evidence of a witness who purported to have overheard the complainant's recanting the allegations to each other was not reliable. First, it was 'implausible': there would be no reason the complainants would need to discuss amongst themselves why they had fabricated allegations against their father (after the fact). Second, that the evidence was withheld this witness, without any good reason, until after the first appeal, despite the conversation apparently occurring prior to the applicant being charged by police [82]-[83]. Third, it was 'extremely improbable' that witness would come forward 'coincidently and independently' at the same time that the applicant had been heard on Arunta calls trying to procure a witness to say much the same thing: [86]. *Meade v the Queen* [2021] VSCA 74 • Evidence of a purported alibi given by one prisoner (now deceased) for the applicant was 'unreliable in that it is neither a credible nor trustworthy basis for fact-finding' [82]. • The Court's conclusion arose from combination of matters: (a) the account of now deceased prisoner ('the witness') was 'inherently improbable' (being a specific recall of inconsequential and short interaction years after the event) [84]; (b) the witness had a long criminal history including dishonesty [85]; (c) there was evidence before the court that discredited an important detail of the witness' account (being that he did not own a dog called Trixie at the time of the purported alibi) [86]; (d) there were inconsistencies between the witness' account and the other evidence [87];

STATUTORY CRITERIA	CASES & FACTS
	(e) the witness' account fell into the category of evidence understood to be inherently unreliable - evidence of serving prisoners [88]; (f) there was evidence that the applicant 'confabulates' and 'organises facts to suit himself' [89]; • There were 'real grounds for concern' that the deceased prisoner's evidence 'has been fabricated': [90].
NOT IN INTERESTS OF JUSTICE	*Glascott v The King* [2022] VSCA 158 • Even if wrong about the evidence being fresh and compelling, the Court was not persuaded, given the 'strong' prosecution case at trial, that there had been a substantial miscarriage of justice: [89].

FUTURE DEVELOPMENTS IN THE HIGH COURT

24. The Victorian second and subsequent appeal provisions have yet to be considered by the High Court.

25. However, an application for special leave to appeal has been filed by the applicant in *Baker v The King*. Issues raised in that application include whether the state and standard of satisfaction of the statutory preconditions to granting leave has been correctly decided in Victoria.

26. The High Court has already referred special leave to the Full Court in the matter of *Bromley v The King,* which concerns the equivalent South Australian provisions (see [2022] HCATrans 158). Issues raised in this application include when evidence may be highly probative in the context of the issues in dispute at trial.