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## *R v KEOGH [NO 2] (2014) 121 SASR 307*

### I INTRODUCTION

In *R v Keogh [No 2]*,<sup>1</sup> the South Australian Court of Criminal Appeal (‘the Court’) considered an application to grant leave for permission to pursue a ‘second or subsequent appeal’ pursuant to s 353A of the *Criminal Law Consolidation Act 1935* (SA) (‘*CLCA*’). In reviewing the decision reached in *Keogh*, this case note analyses the Court’s approach to the interpretation of the scope and limitations of its power under s 353A of the *CLCA*. In particular, it examines the soundness of the Court’s substantive distinction between its jurisdiction to hear secondary criminal appeals on the grounds of ‘fresh and compelling evidence’<sup>2</sup> under s 353A in contrast to its jurisdiction under s 352 of the *CLCA*.

### II SECOND OR SUBSEQUENT APPEALS

Prior to the enactment of s 353A of the *CLCA*,<sup>3</sup> the right to appeal against a criminal conviction in South Australia followed the ‘finality principle’<sup>4</sup> — that is, that once convicted, the conviction should stand. Thus, in South Australia there existed, as in other jurisdictions,<sup>5</sup> a single statutory appeal against conviction.<sup>6</sup> The right to only one appeal against conviction was enshrined in s 352 of the *CLCA*, and this principle was reflected at common law in *Burrell v The Queen*.<sup>7</sup> Under s 352 of the *CLCA*, an appeal against criminal conviction was available as of right where the appeal concerned a ‘question of law’<sup>8</sup> or with the leave of the Court on ‘any other

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<sup>1</sup> (2014) 121 SASR 307 (‘*Keogh*’).

<sup>2</sup> *CLCA* s 353A(1).

<sup>3</sup> *Statutes Amendment (Appeals) Act 2013* (SA).

<sup>4</sup> David Harmer, ‘Wrongful Convictions, Appeals, the Finality Principle: The Need for a Criminal Cases Review Commission’ (2014) 37 *University of New South Wales Law Journal* 270, 280.

<sup>5</sup> Generally referred to as ‘common form provisions’, each jurisdiction in Australia has enacted appeal rights which reflect to an extent the wording of the *Criminal Appeal Act 1907* (UK). See also *R v Keogh* [2014] SASFC 20 (11 March 2014) [6].

<sup>6</sup> Bibi Sangha and Robert Moles, ‘Post-Appeal Review Rights: Australia, Britain and Canada’ (2012) 36 *Criminal Law Journal* 300, 305 (‘Post-Appeal Review Rights’).

<sup>7</sup> (2008) 238 CLR 218 (‘*Burrell*’).

<sup>8</sup> *CLCA* s 352(1)(a)(i).

ground.<sup>9</sup> In South Australia, where a criminal appeal has already been exhausted, an applicant's method for recourse lay through the 'petition referral procedure'<sup>10</sup> under s 369 of the *CLCA*, which vests the prerogative power of mercy in the Attorney-General.<sup>11</sup> Subject to this power, the Attorney-General possesses the discretion to refer the matter to the Full Court for determination<sup>12</sup> or to grant a full pardon<sup>13</sup> to the convicted and to direct the Full Court to quash the applicant's conviction.<sup>14</sup>

Traditionally, Australian courts have been reluctant to infer any authority to entertain appeals against criminal convictions beyond their statutorily conferred jurisdiction.<sup>15</sup> The courts have been at pains to emphasise, as was stated in *R v Edwards*, that an appeal court 'should not attempt to enlarge its jurisdiction beyond what Parliament has chosen to give it.'<sup>16</sup> Thus, the notion that criminal appeal courts have the jurisdiction to hear subsequent appeals on the basis of fresh and compelling evidence has been firmly rejected by the High Court.<sup>17</sup> This issue was further considered in *Mickelberg v The Queen*,<sup>18</sup> where the High Court held that it does not have jurisdiction on appeal to consider fresh evidence which has not been put before a criminal appeal court.<sup>19</sup> Therefore, subject to a single right of appeal against conviction, there was no further avenue for appealing on the basis of fresh and compelling evidence other than by way of the petition referral procedure.

<sup>9</sup> Ibid s 352(1)(a)(ii).

<sup>10</sup> Bibi Sangha, Robert Moles and Kim Economides, 'The New Statutory Right of Appeal In South Australian Criminal Law: Problems Facing an Applicant — Unanticipated Interpretive Difficulties' (2014) 16 *Flinders Law Journal* 145, 148 ('The New Statutory Right of Appeal').

<sup>11</sup> In practice, however, petitions are made to and received by the Governor, who seeks the advice of the Government by referring the matter to the Premier and, subsequently, the Attorney-General and Solicitor-General.

<sup>12</sup> *CLCA* s 369(1)(a).

<sup>13</sup> Ibid s 369(1), (2).

<sup>14</sup> It is relevant to note that at the time of Keogh's subsequent appeal under s 353A of the *CLCA* before the Full Court, Keogh had petitioned under the referral procedure in s 369 of the *CLCA* five times, of which the first three failed, the fourth was withdrawn and the fifth was reserved for decision pending the result of the current matter. See also *Keogh* (2014) 121 SASR 307, 312 [12].

<sup>15</sup> Sangha and Moles, 'Post-Appeal Review Rights', above n 6, 305. See also *Burrell* (2008) 238 CLR 218.

<sup>16</sup> *R v Edwards [No 2]* [1931] SASR 376, 380 ('*Edwards*').

<sup>17</sup> *Burrell* (2008) 238 CLR 218; *Grierson v The King* (1938) 60 CLR 431; *R v Parenzee* (2008) 101 SASR 469.

<sup>18</sup> (1989) 167 CLR 218 ('*Mickelberg*').

<sup>19</sup> Ibid 264. This is also due to the limited power of the High Court's appellate jurisdiction under s 73 of the *Australian Constitution*. In receiving 'fresh' evidence, the High Court would be exercising its original, rather than appellate, jurisdiction. Thus, this would result in the High Court exercising original jurisdiction in respect of state judicial power. See also Sangha and Moles, 'Post-Appeal Review Rights', above n 6, 308.

The current position in relation to subsequent appeals against criminal convictions has not been met without criticism.<sup>20</sup> In its submission to the Legislative Review Committee of South Australia,<sup>21</sup> the Australian Human Rights Commission ('AHRC') noted that the petition procedure may breach art 14(5) of the *International Covenant on Civil and Political Rights* ('ICCPR')<sup>22</sup> as it requires Australia to ensure that there is a 'right to a review of conviction and sentence on law and facts' and 'the right to introduce fresh evidence.'<sup>23</sup> The AHRC also criticised the petition procedure in relation to the Governor's unfettered discretion to refer a matter to the Full Court. As *Von Einem v Griffin*<sup>24</sup> establishes, the Governor's prerogative power is not subject to judicial review.<sup>25</sup> These concerns were acknowledged by the South Australia Legislative Committee, which ultimately recommended the enactment of a new provision within the *CLCA*. Under the proposed recommendation, a person would be able to mount a subsequent appeal against a conviction where 'the court [was] satisfied' that 'the conviction [was] tainted' and 'where there [was] fresh and compelling evidence in relation to an offence which may cast reasonable doubt on the guilt of the convicted person.'<sup>26</sup> On 5 May 2013, the South Australian Government enacted s 353A of the *CLCA*<sup>27</sup> and established a statutory right for a subsequent appeal against a conviction on the basis of 'fresh and compelling evidence that should, in the interests of justice, be considered on appeal.'<sup>28</sup>

### III BACKGROUND

#### *A Facts*

On the evening of Friday 18 March 1994, Anna Jane Cheney was found dead at her home by her fiancé Henry Vincent Keogh after having allegedly drowned in her bathtub. An autopsy was later performed by Dr Collin Manock. During his examination of Ms Cheney's body, Dr Manock formed the opinion that Ms Cheney was conscious at the time her head was submerged in the bath, as 'he found no mark

<sup>20</sup> Sangha, Moles and Economides, 'The New Statutory Right of Appeal', above n 10, 148.

<sup>21</sup> Australian Human Rights Commission, Submission No 16 to Legislative Review Committee of South Australia, *Inquiry into the Criminal Cases Review Commission Bill 2010*, 25 November 2011.

<sup>22</sup> *International Covenant on Civil and Political Rights*, signed 18 December 1972, [1980] ATS 23, entered into force 23 March 1976, art 14(5).

<sup>23</sup> Australian Human Rights Commission, above n 21, [4.12].

<sup>24</sup> (1998) 72 SASR 110 ('*Von Einem*').

<sup>25</sup> Australian Human Rights Commission, above n 21, [5.3(e)].

<sup>26</sup> Legislative Review Committee, Parliament of South Australia, *Report of the Legislative Review Committee on its Inquiry into the Criminal Cases Review Commission Bill 2010* (2010) 3.10, 7.

<sup>27</sup> *Statutes Amendment (Appeals) Act 2013* (SA).

<sup>28</sup> *CLCA* s 353A(1).

on the surface of the brain at the autopsy.<sup>29</sup> After conducting further examinations, Dr Manock also discovered ‘bruising to the lateral and medial aspects of Ms Cheney’s lower left leg’,<sup>30</sup> the graphical imprints of which he considered to be consistent with that of a ‘hand grip’<sup>31</sup> and which he estimated to have occurred within four hours of Ms Cheney’s death.<sup>32</sup> These suspicions ultimately led Dr Manock to suspect that ‘Ms Cheney’s drowning was assisted’.<sup>33</sup>

The principal suspect of the prosecution case was Ms Cheney’s fiancé Henry Keogh, who stood trial for her murder in 1995. It was the prosecution’s case that Keogh had murdered Ms Cheney in order to benefit from approximately \$1 150 000 in life insurance payments that he had taken out in her name by forging her signature just weeks before her death.<sup>34</sup> It was generally accepted during the trial that, notwithstanding evidence supporting a motive, the expert forensic evidence given by Dr Manock was ‘circumstantial evidence’<sup>35</sup> which was insufficient of itself to prove Keogh’s guilt beyond reasonable doubt.<sup>36</sup> Notwithstanding the circumstantial nature of the case, on 23 August 1995, Keogh was convicted by jury for the murder of Anna Cheney.

A subsequent appeal by Keogh against his conviction in December 1995 to the Court of Criminal Appeal was dismissed.<sup>37</sup> Keogh made two further attempts to mount an appeal, both of which were unsuccessful. In 1997, the Court of Criminal Appeal also refused an application to reopen the first appeal or to hear a second appeal, on the basis that the Court lacked the jurisdiction to do so.<sup>38</sup> Permission was denied to appeal for a second time in 2007 on the basis that the Court lacked jurisdiction<sup>39</sup> and special leave to appeal from this decision was also refused by the High Court of Australia.<sup>40</sup>

<sup>29</sup> *Keogh* (2014) 121 SASR 307, 311 [4].

<sup>30</sup> *Ibid* 312 [6].

<sup>31</sup> *Ibid* 314 [20].

<sup>32</sup> *Ibid* 312 [6].

<sup>33</sup> *Ibid* 311 [4].

<sup>34</sup> *Ibid* 320 [49]–[50].

<sup>35</sup> *Ibid* 312 [7].

<sup>36</sup> *Ibid*.

<sup>37</sup> *R v Keogh* (Unreported, Court of Criminal Appeal, South Australia, Matheson, Millhouse and Mullighan JJ, 22 December 1995).

<sup>38</sup> *R v Keogh* (Unreported, Court of Criminal Appeal, South Australia, Matheson, Millhouse and Mullighan JJ, 13 May 1997).

<sup>39</sup> *R v Keogh* (2007) 175 A Crim R 153.

<sup>40</sup> Transcript of Proceedings, *Keogh v The Queen* [2007] HCATrans 693 (16 November 2007). See also *James v Keogh* [2008] SASC 156 (13 June 2008) where an appeal was launched by Keogh against a decision of the Medical Board of South Australia against Dr Ross James, one of the four expert forensic pathologists involved in Ms Cheney’s autopsy. It was alleged by Keogh that Dr James had engaged in unprofessional conduct

In 2013, Keogh became aware of recantations made by Dr Manock in relation to the forensic evidence he had submitted at trial; namely, the timing in which the bruising on Ms Cheney's left leg was said to have been sustained, the proposed gripping mechanism used to submerge Ms Cheney and that she was conscious at the time she was submerged. On the basis of these discoveries, Keogh instigated an application for leave to pursue a second appeal pursuant to s 353A of the *CLCA*.

### B Decision

Both the application for leave to appeal and the substantive second appeal against conviction were heard *instanter* by Gray, Sulan and Nicholson JJ. The Court delivered a unanimous judgment in respect of both matters. Keogh was granted leave to appeal under s 353A of the *CLCA*, as the Court held that Dr Manock's recantations about the accuracy of his expert evidence submitted at trial<sup>41</sup> constituted 'fresh and compelling evidence' which could not with due diligence have been available before the first appeal and that should subsequently, in the interests of justice, be considered on appeal.<sup>42</sup>

Having granted leave to appeal, the Court also found that, in light of Dr Manock's recantations, the 'trial process was fundamentally flawed' whereby a significant number of Dr Manock's forensic opinions 'materially misled the prosecution, the defence, the trial Judge and the jury.'<sup>43</sup> The Court therefore allowed the second substantive appeal, set aside Keogh's conviction for murder and directed the matter for retrial.<sup>44</sup>

## IV THE EVIDENTIARY FILTER UNDER S 353A

At the current time, South Australia remains the only Australian jurisdiction to have enacted a statutory scheme for second or subsequent appeals against criminal

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by providing inaccurate evidence that haemolytic staining was a symptom consistent with freshwater drowning and that he also failed to disclose his belief that a tissue sample taken from a bruise on Ms Cheney's left leg did not confirm that the mark was in fact a bruise. However, this appeal was also unsuccessful, with the Court holding Dr James not guilty of unprofessional conduct.

<sup>41</sup> The Court also considered other relevant evidentiary material to constitute 'fresh and compelling evidence' which it found should, in the interests of justice, be considered on a second appeal. However, it was primarily Dr Manock's recantations and other expert evidence scrutinising the accuracy of his evidence which was said to have had a substantial bearing in proving a miscarriage of justice had occurred.

<sup>42</sup> *Keogh* (2014) 121 SASR 307, 409 [353].

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid* 409 [356].

convictions.<sup>45</sup> Subsequently, the principal issue for the Court in *Keogh* concerned the proper statutory construction of s 353A, in relation to the Court's jurisdiction and power to grant leave for secondary appeals against conviction and how this power differs from its jurisdiction under s 352 to grant primary appeals<sup>46</sup> and the equivalent common form provisions.

The overarching structure, operation and interrelationship between the need for jurisdiction and permission to appeal under s 353A was considered by the Court at length. *Keogh* held that s 353A requires a prospective applicant to establish three essential conditions (or one essential pre-condition known as the 'jurisdictional fact'),<sup>47</sup> before the Court can be satisfied that it has jurisdiction to hear a secondary appeal against conviction.<sup>48</sup> Thus, for the Court to possess jurisdiction to entertain an appeal, the appellant must principally demonstrate that there is 'fresh' evidence within the meaning of s 353A(6)(a), 'compelling' evidence within the meaning of s 353A(6)(b) and, 'in the interests of justice', the evidence should be considered on an appeal under s 353A(1).<sup>49</sup>

<sup>45</sup> Ibid 328 [72]. See also the case of *Eastman v DPP (ACT)* [2014] ACTSCFC 1 (23 June 2014). On November 3 1995, David Eastman was convicted for the murder of Assistant Federal Police Commissioner Colin Winchester. A primary appeal was lodged and refused by the High Court in *Eastman v The Queen* (2000) 203 CLR 1. In 2011, a court-ordered inquiry was lodged into Eastman's conviction under Pt 20 of the *Crimes Act 1900* (ACT). The final report of the inquiry recommended that Eastman's conviction should be quashed and that a retrial should not be ordered. *Eastman v DPP (ACT)* [2014] ACTSCFC 1 (23 June 2014) considered whether Eastman could enforce, by way of appeal, the recommendation of the inquiry that his conviction be quashed, in spite of s 424 of the *Crimes Act 1900* (ACT) which stated that the proceedings of the inquiry were administrative, rather than judicial in nature. The Court considered whether or not ss 430 and 431 of the *Crimes Act 1900* (ACT) required the Supreme Court of the Australian Capital Territory to exercise judicial or administrative power, and whether or not it had the jurisdiction to quash or confirm Eastman's criminal conviction. In considering the scope of the Court's jurisdiction, the Court determined that the making of a s 430(2) order did involve the exercise of judicial power, as the Court's function under s 430(2) affects the legal status of a conviction and thus forms an inherent part of the Court's judicial power to determine. The Court subsequently quashed Eastman's murder conviction and ordered a retrial in *Eastman v DPP (ACT) [No 2]* [2014] ACTSCFC 2 (22 August 2014). Whilst the practical result of Eastman is comparable with the decision reached in *Keogh*, the appeal process in the Australian Capital Territory is not a secondary 'appeal' process in the traditional sense, but is rather a two-tiered statutory scheme. It firstly involves submitting an application to institute an administrative inquiry under either s 423 or s 424, which then secondly as a result of recommendations of the inquiry, enlivens the Court's judicial power under s 430(2) to either confirm or quash the conviction on the basis of the general principles of procedural fairness.

<sup>46</sup> 'Primary' in this context is used to mean 'first' or 'original appeal,' in contrast to 'second or subsequent appeal.'

<sup>47</sup> *Keogh* (2014) 121 SASR 307, 330 [80].

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

In doing so, their Honours emphasised that the jurisdictional fact requirement ‘operates as a filter’ which protects the Court from hearing appeals that are ‘plainly unmeritorious.’<sup>50</sup> This construction of the limitations of the Court’s power to grant permission is largely uncontroversial. It consistently applies the reasoning in *R v Parenzee*, which asserted that permission to appeal should be refused where the ground is ‘not reasonably arguable’ or ‘found to lack any substance’ or has ‘no reasonable prospect of success.’<sup>51</sup> Therefore, at least in its overall structure and purpose, s 353A does not differ dramatically from s 352.

#### *A Fresh Evidence*

In *Keogh*<sup>52</sup> their Honours distinguished between the meaning of ‘fresh evidence’ as it is understood under s 353A(6)(a) and its common form interpretation under *Ratten v The Queen*.<sup>53</sup> Under the principles held in *Ratten*, evidence will constitute ‘fresh’ or ‘new’ evidence, and enliven the jurisdiction of the Court under s 352, where it is evidence which ‘was not actually available ... at the time of trial’ *or* could not have been adduced by ‘reasonable diligence’.<sup>54</sup> Whilst not dissimilar, their Honours found that ‘fresh evidence’ within the meaning of s 353A has a narrower definition than its common form counterpart. For evidence to be ‘fresh’ as opposed to ‘new’ evidence, *Keogh* requires that the evidence ‘was not adduced at trial’ *and* that it ‘could not have been adduced at trial ‘even with the exercise of due diligence.’<sup>55</sup>

*Keogh* therefore asserts that the onus for establishing ‘fresh evidence’ requires satisfaction of a higher burden of proof to invoke the jurisdiction of the Court to consider a second appeal than that which is required for a primary appeal. This reasoning appears correct in light of Parliament’s ‘evidentiary filter’ approach to the construction of s 353A, which supposes that the purpose of the ability to seek a second appeal is not to adduce *any* fresh evidence which was not previously available, but rather fresh evidence that has only come to light after an appeal has already proven unsuccessful and where the evidence has a ‘reasonable’ potential to prove a substantial miscarriage of justice has occurred.<sup>56</sup>

#### *B Compelling Evidence*

The legislation applied in *Keogh* establishes that not only must evidence be fresh, but it must also be ‘compelling’ within the meaning of s 353A(6)(b), in that the evidence

<sup>50</sup> Ibid 331 [83].

<sup>51</sup> *R v Parenzee* (2007) 101 SASR 456, 461 [22].

<sup>52</sup> (2014) 121 SASR 307, 335–7 [97]–[103].

<sup>53</sup> (1974) 131 CLR 510.

<sup>54</sup> Ibid 516–17 [17].

<sup>55</sup> *Keogh* (2014) 121 SASR 307, 335 [97]–[98].

<sup>56</sup> Attorney-General of South Australia, *Report on Statutes Amendment (Appeals) Bill 2012 (SA)* (27 November 2012) <<http://www.agd.sa.gov.au/about-agd/what-we-do/initiatives/statutes-amendment-appeals-bill-2012>>.

is ‘reliable,’ ‘substantive’ and ‘highly probative’ to the issues in dispute at trial.<sup>57</sup> ‘Reliability’ was a significant point of consideration for the Court on the facts. Interestingly, in determining whether the evidence was compelling, their Honours placed significant weight not just upon the reliability of fresh expert forensic evidence which denounced Dr Manock’s observations and his autopsy examination as ‘wholly inadequate’<sup>58</sup> but also gave consideration to the corresponding unreliability of Dr Manock’s expert evidence and other evidence tendered at trial.<sup>59</sup>

The evidence submitted by the appellant in *Keogh* arguably resulted in a curious application of what constitutes ‘compelling’ evidence, when contrasted against the reasons for accepting the original evidence at trial. It is somewhat ironic that in holding the reports of three expert forensic witnesses (which discredited Dr Manock’s original evidence) to be reliable, that the Court determined these reports to be ‘reliable’ on the basis of *further* expert evidence. This is not to suggest that their Honours were incorrect in their determination that the evidence was compelling, but it may suggest, at least in the context of conflicting forensic evidence, that ‘reliable’ forensic evidence can only ever be determined according to what is considered to be ‘unreliable,’ as opposed to positively accurate or unequivocally accepted evidence.

#### *C In the Interests of Justice*

In assessing the scope and interrelationship between the subsections within s 353A, the legislation applied in *Keogh* establishes that, notwithstanding that there is fresh and compelling evidence, a secondary appeal should only be allowed where it is ‘in the interests of justice.’<sup>60</sup> This reasoning accords with Parliament’s intention to strike ‘a proper balance and [allow] genuine and meritorious applications but [deter] or [restrict] vexatious or unsupportable applications.’<sup>61</sup> Relevantly, their Honours did not state precisely in what circumstances an appellant’s application for appeal will be in the interests of justice.<sup>62</sup> However, it can safely be assumed that this will at least be where fresh evidence establishes ‘a substantial miscarriage of justice’.<sup>63</sup> Indeed, this approach remains consistent with the decision in *R v Drummond*, which asserts

<sup>57</sup> *Keogh* (2014) 121 SASR 307, 337 [104].

<sup>58</sup> *Ibid* 358 [183].

<sup>59</sup> *Ibid* 382 [271].

<sup>60</sup> *Ibid* 339 [115]; *CLCA* s 353A(1).

<sup>61</sup> Attorney-General of South Australia, *Report on Statutes Amendment (Appeals) Bill 2012 (SA)* (27 November 2012) <<http://www.agd.sa.gov.au/about-agd/what-we-do/initiatives/statutes-amendment-appeals-bill-2012>>.

<sup>62</sup> *Keogh* (2014) 121 SASR 307, 339 [116].

<sup>63</sup> *CLCA* s 353A(3).



that where the evidence fails to meet the jurisdictional fact threshold, it cannot be in the interests of justice to allow the appeal.<sup>64</sup>

#### D Miscarriage of Justice

On the facts in *Keogh*, the Court was satisfied that Dr Manock's recantations of the accuracy of his evidence at trial constituted fresh and compelling evidence, which should, in the interests of justice, be considered on second appeal.<sup>65</sup> However, it remains unclear in *Keogh* whether 'miscarriage of justice' as a ground of appeal in the context of s 353A has the same application as it does under s 352 of the *CLCA*.

The court considered the scope of the ground by comparing its formulation in s 352, but found this largely unhelpful,<sup>66</sup> and instead preferred to adopt the reasoning in *Baini v The Queen*<sup>67</sup> as the guiding authority. *Baini* recognised that the categories of miscarriage of justice are not limited<sup>68</sup> and whilst their Honours did not restrictively define the limits of what constitutes a miscarriage of justice, they held that if despite procedural or substantive irregularity, conviction was not inevitable, then a substantial miscarriage of justice will not be established.<sup>69</sup> Indeed, as stated in *Whitehorn v The Queen*, although unreasonable findings of evidence by juries and wrong decisions on questions of law are recognised as separate grounds of appeal, they implicitly involve miscarriages of justice.<sup>70</sup> Therefore, *Keogh* ultimately suggests that, notwithstanding the stricter jurisdictional threshold required under s 353A to obtain leave, once leave has been granted, fresh and compelling evidence may be led which falls within any of the previously recognised grounds of appeal under the common form provisions and s 352.

<sup>64</sup> *R v Drummond* [2013] SASFC 135 (12 December 2013) [42]. However, see also *R v Drummond [No 2]* [2015] SASFC 82 (5 June 2015) in which the Full Court of the South Australian Court of Criminal Appeal (Gray, Peek and Blue JJ) granted Drummond a second appeal against conviction, after deciding to set aside his conviction on the basis of fresh and compelling evidence under s 353A of the *CLCA*. Subsequent evidence given by a forensic expert asserted that the absence of the accused's DNA on the victim was highly probative and that the original trial forensic evidence was misleading to suggest, in the absence of DNA linking Drummond to the victim, that contact could still have occurred. The Court (Gray J dissenting) found that there had been a miscarriage of justice on the basis of the trial evidence and that it was in the interests of justice to set aside Drummond's conviction. The matter is currently awaiting retrial.

<sup>65</sup> *Keogh* (2014) 121 SASR 307, 404 [341].

<sup>66</sup> *Ibid* 340 [122].

<sup>67</sup> (2012) 246 CLR 469, 479, 480–1 [25]–[26], [28]–[33] ('*Baini*').

<sup>68</sup> *Ibid* 480–1 [28]–[33].

<sup>69</sup> *Keogh* (2014) 121 SASR 307, 344 [128].

<sup>70</sup> *Whitehorn v The Queen* (1983) 152 CLR 657, 685 ('*Whitehorn*').

## V CONCLUSION

In its broader social and legal application, *Keogh* has been instrumental in emphasising the potential dangers and injustices which may occur not only as the result of an unfairly conducted trial, but also from a lack of statutory protection to rectify substantial miscarriages of justice where they occur after appeal rights have already been exhausted. However, the effect of s 353A in allowing secondary and subsequent appeals against criminal convictions still largely remains to be seen. Whilst in *Keogh* a successful second appeal can in some respects be viewed as an ending, it is in many ways also just another beginning. Ultimately, as a result of the decision reached in *Keogh* at least, it is important to be reminded that in pursuing the truth in law, as in science, we must not be too eager to shut the door before we have even looked at what might lay beyond.