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Update Summary

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UPDATE 179 **FEBRUARY 2025**

SUMMARY JUSTICE SOUTH AUSTRALIA

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Material Code 41907260
Print Post Approved PP255003/00409

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William Scobie and Edward Stratton-Smith have made the following updates to Summary Justice SA:

Chapter 1: Jurisdiction

Where the charges of contempt involve the knowing and deliberate contravention of successive injunctions or orders, matters to which the Court may have regard in deciding upon the appropriate punishment include: the seriousness of the contempt; whether the contempt was the result of deliberate action or inaction; the reason given for the contempt; whether the contemnor has shown contrition or has corrected his or her contempt; the character and antecedents of the contemnor; general and personal deterrence; the need for the Court to denounce the contempt (*Express Cargo Services Pty Ltd v Mysko* [2024] SASC 112, [15]).

Chapter 2: Investigation Interrogation Arrest and Bail

Investigation: Updated Commentary-Similarly, the use of sensory perception in investigation does not constitute a "search" or require statutory authority – this includes the use of a "sniffer dog" or an infrared camera – see *Young v The King* [2024] SASCA 47 at [37]-[39].

Not every detention or interference with a person's liberty by a police officer involves a de facto arrest, even where a person reluctantly accedes to a police officer's requests or where the police officer would have exercised the power of arrest in any event (*Police v Hunt* [2024] SASC 107, [102]-[106]).

Bail Pending Appeal: new commentary

In *Nankivell v The King* [2024] SASCA 71, Livesey P outlined that on an application for bail pending appeal it is not the function of the court to engage in the same exercise as the appeal court itself, and noted that there is a public interest in not making it appear that any conviction is contingent until affirmed on appeal as well as having any sentence served as soon as possible.

[2.340] The administering of a caution at common law-updated commentary:

Issues relating to cautions have also arisen in circumstances where police request a person to provide them both with their mobile phone and the "PIN" code to access the phone. In *Thomas v The King* [2024] SASCA 51 at [29]-[34], [44]-[48], the Court of Appeal explained that cases involving these questions will require careful consideration of the particular circumstances of the case, and an identification of whether a person has been afforded a genuine choice to provide the "PIN".

Chapter 5: Appearance Representation and Disclosure

Disclosure: 5.170 Source of the obligation to make disclosure to the defendant-updated commentary

[5.200] Content of the obligation – updated commentary

Edwards v The Queen (2021) 273 CLR 585 at [48] the duty requires disclosure of all material that, on a sensible appraisal by the prosecution:

i) is relevant or possibly relevant to an issue in the case;

ii) raises or possibly raises a new issue that was not apparent from the prosecution case;

and holds out a real (as opposed to fanciful) prospect of providing a lead in relation to evidence concerning i) or ii) above. Further, giving the ongoing nature of the obligation, what an "issue in the case" or understanding what "all relevant evidence of help to the accused" must be understood broadly.

These principles were considered and applied by the Court of Appeal in *Brawn v The King* (2022) 141 SASR 465.

Chapter 7: Pleas

The further progressed a matter is, the more reluctant a Court should be to interfere with a plea. The public interest in the finality of litigation is less of a concern when the Court has not yet acted upon the plea in any significant way (*R v HJS* (2020) 137 SASR 280 at [78]). It is one thing to apply to vacate a plea the day after it was made, perhaps in haste or in the heat of the moment. It is another to attempt to vacate a plea at a point in time after which the defendant has been sentenced and has filed an appeal. The Court nevertheless has power to permit a defendant to withdraw his or her plea of guilty, both prior to a conviction being entered and upon an appeal against conviction. The test on an appeal against conviction is whether the circumstances in which the plea was entered involved a miscarriage of justice. The appellant bears the onus of establishing such a miscarriage. (*L T v Police* [2024] SASC 195, [24]-[25]).

Courts approach the question less strictly in cases involving children who might otherwise enjoy the presumption of doli incapax (*L T v Police* [2024] SASC 195, [28]).

Chapter 8: Trial

The test for cross-admissibility of evidence is summarised by the Court of Appeal in *McRoberts v The King* [2024] SASCA 92.

Insertion of new section to replace "propensity evidence"

[8.110] Discreditable Conduct Evidence

Updated commentary: "Discreditable conduct evidence" is not defined but in *Sadler v The King* [2023] SASCA 63, Doyle JA (at [27]) said discreditable conduct connotes conduct which is wrongful or morally repugnant in some way, such that it reflects poorly upon the defendant. It is not confined to conduct which constitutes a criminal offence but the conduct must be such that it might cause a jury (in the absence of instruction from the trial judge) to engage in some form of impermissible "bad person" reasoning.

New section: Section 34P – Impermissible and Permissible Uses – updated commentary relating to propensity evidence, notice requirements, absence of notice, examples of permissible non-propensity uses.

Propensity Evidence

An overview of both propensity and non-propensity uses of evidence and the requirements of s 34P can be found in *Eddy (a pseudonym) v The King* [2024] SASCA

115 – see [65]-[85] for a discussion about propensity uses and [86]-[99] for non-propensity uses.

Directions

Similarly, where a particular use of discreditable conduct evidence was only a peripheral part of the contest at trial, and did not feature prominently in either party's submissions, the fact a Judge did not specifically aver to it in his reasons for verdict did not constitute an error or lead to a miscarriage of justice in the circumstances: *Donald (a pseudonym) v The King* [2024] SASCA 121 at [118]-[124]. For a recent discussion of the section and its requirements, see *Adamson v R* [2024] SASCA 91 at [53]-[57].

Note that in certain circumstances, even if there is no objection, some types of evidence require a direction and the absence of one may require the setting aside of a conviction: *Carr (a pseudonym) v The King* [2024] SASCA 69.

(Insert new section)

[8.165] Section 53 of the *Evidence Act 1929* (SA) and weight

Where a document is admitted as a business record pursuant to s 53 of the *Evidence Act 1929* (SA), there is no obligation to give it weight. In *PA v Abronite* [2024] SASC 130, Kimber J observed that a submission to that effect overlooked the words "if any" in s 53(3): [44].

Chapter 9: Sentencing

Availability of power to suspend

Note that a person must establish "exceptional circumstances" for both whole or partial suspension, but those circumstances that might justify wholly suspending may be different to those justifying a partial suspension: *R v Robinson* [2024] SASCA 118 at [43]-[49].

A further relevant consideration is the maximum penalty prescribed for the offence (*Markarian* (2005) 228 CLR 357; 79 ALJR 1048; [2005] HCA 25, [30]-[31]). A misapprehension by a sentencing court concerning the applicable maximum penalty represents a material error, because it will usually affect the starting point which is adopted and, in that way, the sentence which is imposed for the offending (*Burgoyne v The King* [2024] SASCA 61, [19]). This applies even where a single sentence is imposed for a number of offences under s 26 of the Sentencing Act. An overstatement of one or more of the maximum penalties risks creating the perception that the offending is more serious than it was (*Burgoyne v The King* [2024] SASCA 61, [19]-[20]).

In *Hughes v The King* [2024] SASCA 110, the sentencing Judge both overstated and understated the maximum penalties applicable to different counts. The appeal against sentence was allowed because it could not be determined confidently whether the understatement ultimately worked to the appellant's advantage.

In *Owens v The King* [2024] SASCA 65, the Court of Appeal said that is the preferable approach (at [6]). The approach allows for an explicit reduction from both the head sentence and non-parole period for time served which better reflects the time an accused has actually spent in custody. It is also transparent such that a defendant can see that time served has properly been accounted for in the non-parole period.

[9.500] Imposing a single sentence for more than one offence: updated commentary

Reduction of the minimum mandatory non-parole period if "exceptional circumstances" – updated commentary

Chapter 10: Costs

For an example of a finding that the prosecution acted unreasonably, see *RS v Police* [2024] SASC 111. The appellant was charged with serious domestic violence offending and spent over three years in custody on remand before being acquitted at trial by a unanimous jury verdict. While on remand, the application against him for an intervention order was adjourned 17 times awaiting the outcome of the charges. After his acquittal, the appellant applied, without legal advice and representation, to have the interim intervention order against him revoked. At the first hearing after the appellant had filed the application, the matter was adjourned to allow the prosecutor to ascertain the views of the protected person and to assess "the exact reasons for the acquittal". The matter was listed for pre-trial conference at which the appellant was represented by counsel. In the meantime, there had been lengthy discussions between counsel and prosecution. The prosecution was ordered to make disclosure and set a timetable for the filing of written submissions in preparation for the appellant's abuse of process argument.

Two days before the matter was next before the court, and after there had been several pieces of correspondence from the appellant's solicitor to the prosecution, and after counsel for the appellant had completed and settled the abuse of process outline of argument, the prosecution advised the appellant's legal representatives that the application for an intervention order was to be withdrawn. The appellant's application for costs was unsuccessful.

On appeal, the Supreme Court found there was no basis upon to conclude the prosecution acted in bad faith. The real question was whether the prosecution acted unreasonably in continuing (where "bringing" under s 189C of the *Criminal Procedure Act* means "bringing and continuation of proceedings") the proceedings after the appellant's acquittal. The Court found the prosecution acted unreasonably because:

It would have been a relatively straightforward enquiry to ascertain the status quo of the District Court charges before the first hearing. The matter had a protracted history, over the course of which the appellant had made it clear that he was resisting the order.

At the hearing, the prosecution was made aware the appellant had been incarcerated for an extended period of time, had been acquitted of all charges, had made an application to revoke the intervention order over six months earlier, and had travelled at considerable expense to attend the hearing listed on that date. It was incumbent on the prosecution to make all efforts to deal with the matter on that occasion. In fact, the prosecution had done nothing to prepare for the hearing, despite numerous previous adjournments.

The prosecution's response to correspondence from the appellant's legal representatives was "less than ideal".

Chapter 12: Suppression

Open justice

A convenient summary of the open justice principle, and its application to the provisions in the *Evidence Act 1929* (SA) and *Supreme Court Act 1935* (SA) can be found in *Legal Profession Conduct Commissioner v Belperio (No 2)* [2024] SASCA 133 in which the Court considered an application for a suppression order and the concept of "undue hardship" in the context of pending disciplinary proceedings. See [24]-[55] for a discussion of the common law and statutory framework of open justice.

Does not include the avoidance of publicity or private interests

Legal Profession Conduct Commissioner v Belperio (No 2) [2024] SASCA 133 - consideration of criteria for issue of suppression order pursuant to s 69A *Evidence Act*. Discussion of criteria of "undue hardship" in s 69A(1)(b) and the right of access to Court File material pursuant to s 131 of the *Supreme Court Act*. See [24]-[55] for a discussion of the common law and statutory framework of open justice. It was held that a person's personal or professional reputation is a consideration exogenous to the determination of whether it is appropriate to grant a suppression order: [81].

[12.600] To prevent "undue hardship" to an alleged victim of crime or a witness

Undue hardship

Legal Profession Conduct Commissioner v Belperio (No 2) [2024] SASCA 133: the evaluation of "undue hardship" requires an evaluative judgment that the hardship that will be endured by a person is greater than that suffered in the generality of cases: [110]. In making a judgment as to whether there is good reason to depart from the open justice principle, the extent to which relevant information is in the public domain is a pertinent consideration: [168].

Chapter 13: Intervention and Restraining Orders

An appeal against the making of an intervention order was allowed in *JP v Police* [2024] SASC 114 on the basis that at the time the order was confirmed, the appellant had not seen the protected person for over four years at the date of the appeal, the protected person had long since left the State while the appellant had remained in the same South Australian town, the appellant had no idea where the protected person was and there was no evidence he had attempted to find out. In those circumstances, the Court found it was not open to find the first limb of s 6 of the Act was satisfied. Further, the Court also considered it was not appropriate to issue the order based on the real and not insignificant consequences for a person the subject of an intervention order. Such an order should only be made where it is genuinely necessary to assist in preventing domestic or non-domestic abuse (*JP v Police* [2024] SASC 114, at [45]).

[13.190] Variation and revocation: updated commentary

The court must consider the ultimate issue for revocation; that is, whether it is, as at the date of the revocation application, reasonable to suspect the defendant will, without intervention, commit an act of abuse against the protected person. The reasons for making the original order and any challenge at the time inform that question. It is only if the court is persuaded that the application for revocation has no reasonable prospects

of success, having regard to the applicant's challenge to the underlying basis or the order and having regard to there being no substantial change in circumstances, that it would be open to the court to dismiss the application summarily: see *Cunningham v Cunningham* [2023] SASCA 54.

[13.210] Offence of breaching an order

For an example of an appeal against a refusal to make an order, and application of the principles applicable to appeals pursuant to s 42 and the constraints on an appellate court having not seen and heard the witnesses, in *PA v Abronite* [2024] SASC 130, where Kimber J held, on a review of all of the material, and having regard to the Magistrate's advantage, the Magistrate was wrong not to conclude on a review of all of the evidence that the respondent had sent messages that relevantly justified confirming a final intervention order: [95]-[97].