Wade v The Queen - [2014] VSCA 13

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2013 0087

EDWARD WADE (A PSEUDONYM)[1] Applicant

v

THE QUEEN Respondent

[1] To ensure that there is no possibility of identification of the applicant, this judgment has been anonymised by the adoption of a pseudonym in place of the name of the applicant.

JUDGES NETTLE, REDLICH and COGHLAN JJA

WHERE HELD MELBOURNE

DATE OF HEARING	14 February 2014
DATE OF JUDGMENT	14 February 2014
MEDIUM NEUTRAL CITATION	[2014] VSCA 13
JUDGMENT APPEALED FROM	*DPP v [Wade]* (Unreported, County Court of Victoria, Judge Maidment, 23 April 2013)

CRIMINAL LAW – Conviction – Armed robbery and attempted armed robbery – Applicant sentenced to a 25 years Supervision Order pursuant to *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* – Indictment – Severance – Prejudice – Whether charges should have been severed – Verdict – Whether verdict unreasonable – Evidence – Whether secondary evidence of contents of lost CCTV recordings should have been excluded under s 137 of *Evidence Act 2008* – *Pit kin v R* (1995) 130 ALR 35; *Libke v The Queen* (2007) 230 CLR 559; *Festa v The Queen* (2001) 208 CLR 593, referred to – *Evidence Act 2008* s 137 .

WORDS AND PHRASES – 'Document' – Whether judge erred in treating CCTV footage as document within the meaning of s 48 of *Evidence Act 2008* – *Taylor v Chief Constable* [1986] 1 WLR 1480; *R v Sitek* [1988] 2 Qd R 284; *Smith v The Queen* (2006) 206 CLR 650 referred to.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr J E McLoughlin	Victoria Legal Aid

For the Crown	Ms F L Dalziel	Mr C Hyland, Solicitor for Public Prosecutions

NETTLE JA:

1. We shall grant leave to the applicant to amend his grounds of appeal and written case to accord with those which have been most recently filed.

2. On 27 February 2012, the applicant was found guilty at a special hearing of one offence of armed robbery and one offence of attempted armed robbery and, on 23 April 2013, he was sentenced therefor to a custodial supervision order with a nominal term of 25 years commencing on 31 July 2012 to be reviewed after 15 months. He now seeks leave to appeal against conviction on five grounds amounting in substance to that: (1) the judge erred in failing to sever the first charge from the indictment; (2) the findings that the applicant committed the offences are unreasonable and cannot be supported by the evidence; and (3) the judge erred in admitting evidence of Detective Senior Constable White as to his observations of images shown on CCTV security camera footage.

The Crown case

3. The Crown case on Charge 1 was that on 28 July 2012 the applicant entered the Liberty Petrol Station at 148 Mason Street, Newport at about 8.39pm and approached the store attendant, Manesh Gangi, asking for money. He then entered the counter area and threatened Mr Gangi with a capped syringe. Mr Gangi described the offender as a male, black African, about five feet and six inches or five feet seven inches in height, wearing jeans, dark shoes, carrying a bag, having short hair, or almost bald. The bag was a silver and black backpack. The offence was recorded on CCTV.

4. The Crown case on Charge 2 was that, at about 4.20am on 31 July 2012, the applicant entered the 7-Eleven Store at 35 Bourke Street, Melbourne, approached the store attendant, Vinod Thakur, and asked for money. The offender was wearing a red mask or handkerchief over his face and carrying a broken umbrella handle and a piece of steel piping. Mr Thakur pushed the offender away, moved towards the counter area, and called 000. The offender said: 'Do not call the police, you will die'. Mr Thakur described the offender as between five and six feet, dark in colour, with short hair, wearing a black jacket and blue jeans and holding a blue, possibly Coles branded, shopping bag.

5. A short time after the Charge 2 offence was committed, Constable Jolly saw a male matching the offender's description on the corner of Flinders and Russell Streets. He also noticed a blue cooler bag and a black backpack sitting next to the bin on the corner. The backpack had white zippers and white piping

6. A few minutes later, the applicant was apprehended in McGrath Street nearby and found to have a red bandana in his possession. He was wearing a black jacket, red hood under the

jacket, blue jeans and black shoes, and a pair of pink gloves was located close by. Detective Senior Constable Triantafillou also located a broken umbrella and metal rod at the corner of Little Collins and McGrath Street.

7. The Charge 2 offence was captured on CCTV but the footage was later deleted by mistake. Detective Senior Constable White, however, had viewed the footage before it was deleted and, over objection, he gave evidence at trial of seeing on the footage a male entering the store wearing a red scarf or bandana over the lower part of his face and wearing pink gloves. He was holding a broken umbrella handle and steel pipe. He was also wearing a backpack and carrying a blue Coles bag. He had very dark skin, black hair with shaved sides and slight growth on the top of his head. He took the bandana off as he left the store.

8. As well as that footage, police obtained some CCTV footage from the Grand Hyatt Hotel en route from the crime scene to the point where the applicant was arrested. It showed a man matching the description of the offender, wearing a backpack like the one found in possession of the applicant at the time of his arrest, and striding purposively away from the direction of the crime scene only a few minutes after the commission of the offence.

Ground 1 Severance

9. Originally, the Crown proposed to include in its proofs of Charge 1 evidence of Leading Senior Constable Warren of identifying the applicant from the Charge 1 offence CCTV footage. On the first day of the special hearing, the prosecutor informed the judge that he would not call that evidence because he had discovered that LSC Warren did not meet the applicant before she saw the CCTV footage. Apparently, she had based her identification on the applicant's reputation.

10. Under the heading of Ground 1, counsel for the applicant contended that, once LSC Warren's identification evidence was so excluded, there was virtually no evidence to connect the applicant to the Charge 1 offence and, therefore, that Charge 1 and Charge 2 should have been severed. Alternatively, in counsel's submission, Charge 1 and Charge 2 were each based on inherently weak identification and circumstantial evidence and, in those circumstances, there was such a distinct possibility that the jury would regard the evidence of one as having undue weight relative to the other as to be productive of a substantial miscarriage of justice. Either way, counsel argued, the judge should have severed Charge 2

11. Counsel for the Crown submitted to the contrary that the judge was correct in refusing to sever the indictment. She argued that, although the Crown did not contend at trial that there were sufficient similarities between the two offences to make evidence of one admissible as coincidence evidence in proof of the other, the Crown did rely in proof of Charge 1 on the evidence that, when the applicant was arrested after the commission of the Charge 2 offence, he was found to be in possession of a silver and black backpack with white piping and zippers, like the backpack in the Charge 1 offence CCTV footage and in the Grand Hyatt Hotel CCTV footage. Hence, it was open to the jury, it was submitted, as the judge directed them, to compare the backpack with the silver and black backpack shown in the Charge 1 offence CCTV footage and in the Grand Hyatt Hotel CCTV footage. To that extent, the evidence of each offence was cross-admissible and there was good reason for the two charges to be heard together.

12. Additionally, counsel for the Crown submitted, cross-admissibility was but one consideration in the determination of whether the charges should have been heard separately. [2] Ultimately, the question was to be decided according to the risks of any prejudice which might result from the two charges being heard at once. The judge was correct to rule, it was submitted, as his Honour did, that the risks of prejudice were capable of being eradicated by appropriate directions. And any risk of prejudice was in fact so eradicated by the judge's directions, twice given in the course of his Honour's charge, that the jury were not to take evidence which related to only one charge into account in support of the other. They were bound to decide each charge separately according only to the evidence adduced in support of that charge.

---

[2] *Tognolini v R* [2011] VSCA 394.

---

13. In my view, there is insufficient reason to conclude that the jury failed to heed the judge's very clear directions that they had to decide each charge separately according only to the evidence adduced in support of that charge and thus not to take into account evidence adduced in support of only one charge in deciding whether the applicant was guilty of the other. In particular, the judge made very plain that they were not to take into account in proof of Charge 1, evidence that the applicant had committed Charge 2 or vice versa. It follows that Ground 1 fails.

Ground 2 Whether findings unreasonable as unsupported by the evidence

14. Under the heading of Ground 2, counsel for the applicant submitted that virtually the only evidence against the applicant on Charge 1 was that the applicant was of the same general description as the offender shown in the CCTV footage of the Charge 1 offence and, therefore, that the jury could not properly have been satisfied beyond reasonable doubt that the applicant was the Charge 1 offender. Counsel relied in particular on the decision of this Court in *R v Clune (No 2)* [3] in which Callaway JA (following the High Court in *Pitkin v R* [4]) observed that the fact that an accused person looks like a person who committed a crime is of itself insufficient to sustain a conviction of that accused of that crime.

---

[3] [1996] 1 VR 1.

[4] (1995) 135 ALR 35.

---

15. Similarly, in relation to the Charge 2 offence, counsel submitted, the only evidence against the applicant on Charge 2 was that he was a young African male dressed similarly to the offender, who was in the general vicinity of the scene of the crime at the time of the crime; and, therefore, by parity of reasoning, that it was not open to the jury to be satisfied beyond reasonable doubt that the applicant was the Charge 2 offender.

16. Dealing first with Charge 1, I do not think it correct to say that the only evidence linking the applicant to the offending was that he was of the same general description as the alleged offender. In addition to Mr Gangi's testimony that the offender was a black African male of between five feet six inches and five feet and seven inches in height, wearing jeans, dark shoes, with short hair almost bald and carrying a silver and black backpack there was also the CCTV footage of the Charge 1 offence in which the jury could see for themselves the commission of the offence and those features of the offender which Mr Gangi described, as well as the evidence of the items found in the applicant's possession at the time of his arrest following the Charge 2 offence.

17. The applicant's striking physical features, most of which can be seen in the Charge 1 offence CCTV footage, and the extreme improbability of another person having the same physical features, wearing the same clothes and also carrying a silver and black backpack apparently identical to the one seen in the Grand Hyatt Hotel CCTV footage, and found in the applicant's possession at the time of his arrest following the Charge 2 offence, represented strong circumstantial evidence of the applicant's involvement in the Charge 1 offence. That sets this case well apart from the fact situation in *Clune (No 2)* in which the accused was of relatively unremarkable appearance and was not found in possession of any incriminating items.

18. As Hayne J said in *Libke v The Queen* ,[5] the test for these purposes is whether it was reasonably open to the jury to be satisfied beyond reasonable doubt of the applicant's guilt and thus whether the court considers that upon the whole of the evidence the jury was bound to have had a reasonable doubt.

> ... the question for an appellate court is whether it was *open* to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *must*, as distinct from *might*, have entertained a doubt about the appellant's guilt. It is not sufficient to show that there was material which might have been taken by the jury to be sufficient to preclude satisfaction of guilt to the requisite standard. [6]

---

[5] (2007) 230 CLR 559, 597.

[6] Ibid [113] (citations omitted).

---

19. In view of the evidence to which I have referred, I think it clear that it is the applicant who appears in the CCTV footage of the Charge 1 offence and so I do not see any solid obstacle in the way of the jury reaching the same conclusion.

20. Turning to Charge 2, the position is perhaps even plainer. Assuming that Detective White's evidence as to the contents of the Charge 2 offence CCTV footage were admissible (to which question I shall return under the heading of Ground 3) there was strong circumstantial evidence of guilt comprised of Detective White's description of the offender shown in the Charge 2 offence CCTV; the tendered CCTV footage from the Grand Hyatt Hotel of a man of very similar description walking in the aftermath of the crime en route from the crime scene to the point of arrest; and the evidence of the applicant's arrest very shortly after that close by in

possession of the same kind of hoodie and backpack as were shown in the Charge 1 offence CCTV footage and the Grand Hyatt Hotel CCTV footage and a bag of the kind described by Detective White as carried by the offender shown in the Charge 2 offence CCTV footage. Taken together that comprised a compelling circumstantial case of guilt of Charge 2.

21. In my view, Ground 2 should be rejected.

Ground 3 Error under s 48(4) of the Evidence Act 2008

22. Proposed Ground 3 of appeal is that the judge erred in treating the CCTV footage of the Charge 2 offence as a document within the meaning of s 48 of the *Evidence Act 2008* ('the *Evidence Act* ') and so in admitting testimony of Detective White as secondary evidence of the CCTV footage.

23. I think that argument to be untenable. 'Document' is defined in Part 1 of the Dictionary in the *Evidence Act* as follows:

> ***document*** means any record of information, and includes—
>
> (a) anything on which there is writing; or
>
> (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or
>
> (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
>
> (d) a map, plan, drawing or photograph;
>
> **Note**
>
> See also clause 8 of Part 2 of this Dictionary on the meaning of ***document*** .

24. **Following paragraph cited by:**

> Uniform Evidence Manual (06 May 2025)
>
> > CCTV footage of the commission of an offence has been held to be a document for the purposes of s 48 'because it is a medium from which images of the offence can be reproduced with the aid of an appropriate play-back machine'. Further, security camera footage capturing the commission of an offence is a photograph or series of photographs which comprise a visual and permanent record of what could have been observed by a person in the position of where the camera was (Wade v R (2014) 41 VR 434, [24] , [26]).

According to the plain and ordinary meaning of the words of that definition, CCTV footage of the commission of an offence is a 'document' because it is a medium from which images of the offence can be reproduced with the aid of an appropriate play-back machine.

25. Counsel for the applicant submitted to the contrary that, in order to amount to a 'document', an electronic record must be a 'record of information' and that 'information' in that context denotes 'the use of words, symbols or created images to express a record of information conceived of by a person … the key aspect being that a document records language of some kind'. In counsel's submission, that was supported by the common law's conception of a document which he submitted was of an object upon which is visibly inscribed intelligible writing or figures or more precisely something on which thoughts are represented by means of a species of conventional mark or symbol.

26. I reject that submission. Security camera footage of the commission of a crime is a photograph or perhaps more accurately a series of photographs comprising a 'visual and permanent record of what could have been seen by a person positioned where the camera was'. [7] As such, it falls squarely within the conception of 'photograph' in para.(d) of the definition of document. Whether or not that accords with common law conceptions of documentary evidence is largely immaterial. But, if it matters, I note that, even at common law, a video cassette was and is recognised as a document for some purposes. [8]

---

[7] *R v Goodall* [1982] VR 33, 37.

[8] *Radio Ten Pty Ltd v Brisbane TV Limited* [1984] 1 Qd R 113.

---

27. **Following paragraph cited by:**

Ford v The King (16 November 2023) (The Honourable President Livesey, the Honourable Justice Doyle and the Honourable Justice David)

60. In both *Athans v The Queen (No 2)* and *R v SDI* reference was made to the Queensland case of *R v Sitek* . [25] In *R v Sitek* de Jersey J likened the evidence of what a witness saw of offending on a video to eyewitness evidence. [26] *R v Sitek* was later followed in *Wade v The Queen* , where the Victorian Court of Appeal accepted the oral evidence given by a detective about what he had seen of the clothing worn by an offender during an armed robbery in a CCTV recording, later deleted by mistake. [27] Nettle JA regarded the CCTV recording as real evidence which could be described in evidence: [28]

> At common law, security camera footage of the commission of an offence is real evidence of what occurred (albeit having some of the features of testimonial

> evidence). Subject to considerations of reliability, prejudice and the exercise of discretion it is permissible therefore for a witness who has seen the footage to give evidence of its contents as if the witness had been a witness to the crime.

via
[28] *Wade v The Queen* (2014) 41 VR 434, [27] (Nettle JA, with whom Redlich and Coghlan JJA agreed), [51]-[52] (Redlich JA).

Athans v The Queen (No 2) (11 August 2022)

> 142. The rulings in *Taylor v Chief Constable* and *R v Sitek* were followed in *Wade v The Queen* , where the Victorian Court of Appeal accepted the admissibility of oral evidence given by a detective about what he had seen of the clothing worn by an offender during an armed robbery in a CCTV recording, which was later deleted by mistake. [152] Nettle JA also regarded the CCTV recording as real evidence which could later be described in evidence: [153]
>
> > At common law, security camera footage of the commission of an offence is real evidence of what occurred (albeit having some of the features of testimonial evidence). Subject to considerations of reliability, prejudice and the exercise of discretion it is permissible therefore for a witness who has seen the footage to give evidence of its contents as if the witness had been a witness to the crime.
>
> *via*
> [153] *Wade v The Queen* (2014) 41 VR 434, [27] (Nettle JA, with whom Redlich and Coghlan JJA agreed), [51]-[52] (Redlich JA).

R v Athans (24 March 2020) (S David J)

> 102. Finally, even if the electronic data constituting each of the Snapchat photographs and messages was a 'document' which attracts the exclusionary secondary evidence rule, and there was not a due search, I would still consider the complainants' oral testimony admissible as real evidence or 'eyewitness-like' evidence of the actus reus of the offence, and indeed what occurred, and admissible. [64] The complainants are purporting to describe the event itself rather than describe a record of the event in a second-hand way.
>
> *via*
> [64] *Wade v The Queen* at [27] .

Additionally, even if there were any substance in the point, it would make no difference to the outcome of the case; as indeed counsel for the applicant ultimately conceded. At common law, security camera footage of the commission of an offence is real evidence of what occurred (albeit having some of the features of testimonial evidence). [9] Subject to considerations of reliability, prejudice and the exercise of discretion, it is permissible

therefore for a witness who has seen the footage to give evidence of its contents as if the witness had been a witness to the crime. The point was explained by Ralph Gibson LJ, who gave the leading judgment in *Taylor v Chief Constable* ,[10] as follows:

> For my part I can see no effective distinction so far as concerns admissibility between a direct view of the action of an alleged shoplifter by a security officer and a view of those activities by the officer on the video display unit of a camera, or a view of those activities on a recording of what that camera recorded. He who saw may describe what he saw because, as Ackner LJ said in *Kajala v Noble* ,[11] to which I have referred, it is relevant evidence provided that that which is seen on the camera or recording is connected by sufficient evidence to the alleged actions of the accused at the time and place in question. As with the witness who saw directly, so with him who viewed a display or recording, the weight and reliability of his evidence will depend upon assessment of all relevant considerations, including the clarity of the recording, its length, and, where identification is in issue, the witness's prior
>
> knowledge of the person said to be identified, in accordance with well established principles. [12]

---

[9] *R v Ames* [1964–5] NSWR 1489, 1491 ; *R v Sitek* [1988] 2 Qd R 284; *Police v Dorizzi* (2000) 84 SASR 403, 411–4 ; *Buttera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180, 184–5 .

[10] [1986] 1 WLR 1480 .

[11] [1982] 75 Cr App R 149 .

[12] [1986] 1 WLR 1479, 1486.

---

28. In *R v Sitek* ,[13] the Queensland Court of Criminal Appeal took the same approach in relation to evidence of a witness, Ms Eistrich, of what she had seen of an offence on a television monitor as the offence took place. Both Carter J and de Jersey J dealt with the matter at some length. After referring to Ralph Gibson LJ's observations in *Taylor* and to other English decisions, Carter J said:

> In my view the evidence of the video tape itself and the evidence of Ms Estreich as to what she saw on the day in question on the monitor as well as her evidence given by way of explanation in court whilst the video was being played to the jury was admissible. She was in my view in the same position as an eyewitness when giving evidence of what she originally saw on the

monitor; the video tape was admissible as real evidence; the evidence given by her in court when explaining the contents of the video was admissible on the same basis as that stated by Douglas J. in *Schmidt v. Schmidt*. In addition, as de Jersey J. has observed, it was permissible for the video to be played in the course of her evidence so as to permit her to refresh her memory of what she had seen at the time of the commission of the alleged offence. [14]

---

[13] [1988] 2 Qd R 284 .

[14] Ibid 288 (citation omitted).

---

29. To like effect, de Jersey J held that:

> The evidence of Ms Estreich as to what she saw of the transaction by means of the monitor was admissible as eyewitness type evidence. Her evidence of what she saw of the transaction by means of the monitor was admissible, just as, for example, evidence of things seen through a telescope, which would not otherwise be noted, would be admissible (cf. *R. v. Maqsud Ali* [1966] 1 Q.B. 688, 701). Also analogous is the reception of evidence of what is heard over the telephone. It was permissible for Miss Eistreich to refresh her memory of what she witnessed at the time by reference to the contemporaneously produced video tape. Her evidence was led in an acceptable way. She was asked to give her recollection based on what she saw on the monitor on the evening of the offence, and was later asked, in effect, to supplement that evidence by refreshing her memory from the video tape. But all of her evidence appears to have been based on her actual recollection of what she saw on the evening, and was therefore admissible. [15]

---

[15] Ibid 292.

---

30. **Following paragraph cited by:**

Athans v The Queen (No 2) (11 August 2022)

> 141. Similarly, de Jersey J regarded the evidence of the witness as being no different to “eyewitness type evidence” or evidence of what is “seen through a telescope” or “heard over the telephone”: [151]

> The evidence of Ms Estreich as to what she saw of the transaction by means of the monitor was admissible as eyewitness type evidence. Her evidence of what she saw of the transaction by means of the monitor was admissible, just as, for example, evidence of things seen through a telescope, which would not otherwise be noted, would be admissible (cf. *R. v. Maqsud Ali* [1966] 1 Q.B. 688, 701). Also analogous is the reception of evidence of what is heard over the telephone. It was permissible for Miss Eistreich to refresh her memory of what she witnessed at the time by reference to the contemporaneously produced video tape. Her evidence was led in an acceptable way. She was asked to give her recollection based on what she saw on the monitor on the evening of the offence, and was later asked, in effect, to supplement that evidence by refreshing her memory from the video tape. But all of her evidence appears to have been based on her actual recollection of what she saw on the evening, and was therefore admissible.
>
> The video tape itself was admitted into evidence. It was admissible, as real evidence, to prove what it recorded, just as photographs are admissible. A recent case confirming the admissibility of video recordings is *Kajala v. Noble* (1982) 75 Cr.App. R. 149. The admissibility of tape recordings was confirmed by the Court of Criminal Appeal in *R. v. Beames* (1980) 1 A.Crim.R. 239, 240–241. There is of course no reason why video recordings, if properly authenticated, should not also be admissible. The jury viewed this video tape, and may well have reached a view from it of the amount of money paid over. The events are clearly shown on the recording …

via
[151] *R v Sitek* [1988] 2 Qd R 284, 292 (de Jersey J). In *Wade v The Queen* (2014) 41 VR 434 (***Wade***), [30] after referring to the ruling of the High Court in *Smit h v The Queen* (2001) 206 CLR 650, Nettle JA warned that, “Arguably, the decision in *Smith* affects the validity of the conclusion reached in *Sitek* that Ms Eistrich’s (sic) evidence was admissible (because, in *Sitek* , the monitor was also available to the jury). But, subject to that limitation, there is little reason to doubt *Sitek* . To the contrary, with respect, it is both logical and in accordance with precedent”. To this one may add the observations made by the majority in *B utera* about cases where “the tape is available …, there can be no reason to admit the evidence of an out of court listener to the tape recording to prove what the tape recorded: it should be proved by the playing over of the tape. Prudence and convenience combine to support the application of the best evidence rule in such a case”, at 186.

After *Sitek* was decided, the High Court held in *Smith* [16] that evidence of police officers as to what they had seen on security camera footage was irrelevant and, therefore, inadmissible, because the footage was tendered in evidence before the jury and hence the jury were in as good a position as the police officers to determine its effect. Arguably, the decision in *Smith* a ffects the validity of the conclusion reached in *Sitek* that Ms Eistrich's evidence was admissible (because, in *Sitek* , the monitor was also available to the jury). But, subject to that limitation, there is little reason to doubt *Sitek* . To the contrary, with respect, it is both logical and in accordance with precedent.

[16] *Smith v The Queen* (2001) 206 CLR 650, [10]–[11] .

---

31. Accordingly, I reject Ground 3.

Ground 4 Detective White's evidence as to the Charge 2 offence CCTV video

32. The principal argument advanced under proposed Ground 4 was that, assuming Detective Senior Constable White's evidence of what he viewed on the Charge 2 CCTV footage were otherwise admissible, it should have been excluded because Detective White did not set down in writing what he had viewed until some weeks after the viewing and after interviewing and charging the applicant. Counsel for the applicant submitted that, in those circumstances, there was such a high risk of displacement effect and consequent inherent unreliability that the evidence should have been excluded pursuant to s 137 of the *Evidence Act* .

33. I do not accept that submission. The test for the judge under s 137 was whether the probative value of Detective White's evidence was outweighed by the danger of unfair prejudice. As the judge appears to have understood, in turn that depended upon whether Detective White's evidence was so inherently unreliable or alternatively there was such a risk that the jury would overestimate its reliability that the prejudicial effect of it outweighed its probative value. I do not consider that it did.

34. As the decision of this Court in *Dupas* [17] shows, while reliability is a relevant consideration in the determination of whether evidence is of sufficient probative value to warrant its admission, evidence which is otherwise of significant probative value is not to be excluded on the basis of a possibility of unreliability where there is no reason to doubt the ability and propensity of the jury to comprehend the risk of unreliability and deal with it accordingly.

---

[17] *Dupas v R* (2012) 218 A Crim R 507.

---

35. In this case, although it is true that Detective White might have been influenced in his recollection of what he saw on the video by what he later saw of the applicant, it is apparent that the jury were made aware of that possibility and were capable of taking it into account. Detective White did not give evidence of positive identification as such. His evidence was of what he had observed of the offender or, in other words, of a kind which McHugh J described in *Festa v The Queen* [18] as 'circumstantial evidence of identification'. Accordingly, it was not the kind of evidence for which a *Domican* [19] warnin g would have been required at common law and, perhaps for that reason, defence counsel did not seek that a warning be given under s 165 of the *Evidence Act* . Defence counsel, however, made detailed submissions to the jury as to the supposed shortcomings in Detective White's evidence, and the judge summarised them at some length in his Honour's charge. Thus, the jury were made aware of the risks and the considerations to be taken into account in the assessment of that evidence so brought specifically to their attention. [20]

[18] (2001) 208 CR 593, [54]– [56].

[19] *Domican v R* (1992) 173 CLR 555.

[20] Cf *R v Miletic* [1997] 1 VR 593.

36. Counsel contended that in view of the High Court's decision in *Domican* , neither *Taylor* nor *Sitek* can any longer be regarded as applicable. I do not accept that submission. *Domican* established or rather confirmed the necessity for a judge to give a jury adequate directions as to the dangers of convicting on the basis of identification evidence which represents a significant part of the proof of guilt when the reliability of the evidence is disputed. As such, *Domican* was largely based upon and accords with similar requirements earlier laid down in England in *R v Turnbull*. [21] Both judges in *Taylor*, on which *Sitek* was based, expressly referred to *Turnbull*.

[21] [1977] QB 224, 228.

37. Counsel further contended that the authority of *Taylor* was eroded by what he described as the failure of the court in that case to consider the quality of the video recording in question, and he sought to contrast that with the approach adopted in *R v Dastagir*. [22] That submission is, in my view, misplaced. As has been noticed, Ralph Gibson LJ gave the leading judgment in *Taylor* , and it can be seen that his Lordship expressly took into account the quality of the video evidence. Although it lasted only a few seconds, and showed only the back of the offender, Ralph Gibson LJ concluded that the Magistrates had not failed to appreciate how much those limitations went to the weight of the evidence. McNeil LJ was of the same view.

[22] [2013] SASC 26 .

Ground 5 Discretion to exclude

38. Finally, under proposed Ground 5, counsel argued that the judge erred in his Honour's approach to s 48(4) of the *Evidence Act* by failing to appreciate that it called for an exercise of discretion. As counsel would have it, the judge proceeded on the basis that, once it was established that the original CCTV footage had been destroyed, secondary evidence of its contents was admissible unless excluded under s 137 . In counsel's submission, the judge should have proceeded on the basis that, once it was established that the tape had been

destroyed, it was for the judge to decide in the exercise of discretion whether the secondary evidence of it should be admitted. Further or alternatively, counsel said, the judge erred in the exercise of discretion in failing to exclude the recording.

39. I reject the first part of that submission. Section 48(4) is manifestly not discretionary in any sense other than enabling a litigant who satisfied its conditions to choose to prove the contents of a document by secondary evidence. As to the second part of the submission, for the reasons already given I consider the judge was correct to approach the matter on the basis of whether the probative value of Detective White's evidence was outweighed by the danger of unfair prejudice arising from its admission and I am not persuaded that the judge was in error in concluding

that the probative value of it was not outweighed by the risk of unfair prejudice. I do not consider that it was. In the result, I reject Ground 5.

Conclusion

40. It follows, from what I have said, that I would refuse the application for leave to appeal.

REDLICH JA:

41. I am also of the view, for the reasons given by my brother Nettle, that leave to appeal should be refused.

42. As to Ground 2, the test by which a Court of Criminal Appeal must determine whether a jury verdict is unsafe and unsatisfactory or, as that ground is expressed in the appeal statute 'is unreasonable or cannot be supported having regard to the evidence', has been stated and restated many times since the High Court's decision in *M v The Queen*. [23]

---

[23] (1994) 181 CLR 487 .

---

43. For example, in *Libke v The Queen* ,[24] Hayne J (with whom Gleeson CJ and Heydon J agreed) described the test as follows:

> But the question for an appellate court is whether it was open to the jury to be satisfied of guilt beyond reasonable doubt which is to say whether the jury must, as distinct from might, have entertained a doubt about the appellant's guilt.
>
> It is not sufficient to show that there was material which might have been taken by the jury to be sufficient to preclude satisfaction of guilt to the requisite standard. [25]

---

[24] (2007) 230 CLR 559 .

[25] Ibid 596–7 .

---

44. Provided the jury has been given appropriate and adequate directions of law by the trial judge to enable them to consider their verdict properly, that verdict is solely a matter for them. The verdict will only be interfered with on appeal if the

applicant can demonstrate that allowing for the special advantages that the jury had, no reasonable jury could properly have reached it upon the evidence before them.

45. Here, as the parties accept, with the exception of the evidence of Detective White, this Court is in as good a position as the jury to evaluate the strength of the evidence.

46. Applying the ordinary rule relating to circumstantial evidence, namely the rule that you cannot be satisfied beyond reasonable doubt on such evidence unless no other explanation than guilt is reasonably compatible with the circumstances, it was contended that the jury could not have excluded the innocent hypothesis that the offender on each charge was someone other than the applicant. In particular it was said that the evidence on Charge 1 could not support a conviction.

47. If the identity of an offender is to be proved by circumstantial evidence, facts must be established which are so connected to proof of his identity that the conclusion as to his identity follows as a rational inference. The evidentiary circumstances must bear no other reasonable explanation.

48. Nettle JA has identified the circumstantial evidence available in support of each charge. The relationship of those circumstantial facts to the issue of the applicant's identity consisted in such increased probability that those facts could not exist unless the applicant was the offender on each charge as to satisfy the criminal standard of proof.

49. There was, in my view, ample evidence to support the jury's verdicts that the applicant was guilty on both charges. None of the matters raised on his behalf suggest that there is anything unreasonable or unsafe about the jury's verdict.

50. As to Grounds 3, 4 and 5, I agree with Nettle JA that the CCTV footage was a document containing information within the meaning of s 48 of the *Evidence Act 2008* and that upon its destruction, oral evidence as to its content was admissible.

51. The CCTV footage was, in any event, real evidence, the content of which could be adduced by *viva voce* evidence if it were destroyed. [26]

---

[26] *Taylor v Chief Constable* [1986] 1 WLR 1480.

52. In either event, the question for the trial judge was whether such evidence should have been excluded if the reliability of the oral description of that real evidence was attended by sufficient doubt.

53. The trial judge approached this matter in a way which properly reflected the issues that needed to be addressed. In his direction to the jury, he raised the issue of the reliability of the oral evidence. I see no error in the manner in which his Honour approached this question or in the directions which he gave the jury.

COGHLAN JA:

54. I agree that leave to appeal should be refused for the reasons stated by the learned presiding judge and the additional reasons of Redlich JA.

NETTLE JA:

55. The order of the Court is:

1 Leave is granted to the applicant to amend his grounds of appeal and written case to accord with those most recently filed.

2 The application for leave to appeal against conviction is refused.

- - -

Cited by:

Uniform Evidence Manual [2023] JCV Uniform_Evidence_Manual (06 May 2025)

> CCTV footage of the commission of an offence has been held to be a document for the purposes of s 48 'because it is a medium from which images of the offence can be reproduced with the aid of an appropriate play-back machine'. Further, security camera footage capturing the commission of an offence is a photograph or series of photographs which comprise a visual and permanent record of what could have been observed by a person in the position of where the camera was (Wade v R (2014) 41 VR 434, [24] , [26]).

Director of Public Prosecutions v Zheng (Ruling No 2) [2024] VSC 142 (26 March 2024) (Tinney J)

> 73. Dr Rogers distinguished the facts of this case from those in *Smith v The Queen*. [11] Each witness was an active participant in the actual scenes captured by the CCTV footage. She

relied on a statement made by Nettle JA in *Wade v R,* [12] in support of the contention that it would be permissible for these witnesses to relate and describe what they could see in the footage.

Director of Public Prosecutions v Zheng (Ruling No 2) [2024] VSC 142 (26 March 2024) (Tinney J)

73. Dr Rogers distinguished the facts of this case from those in *Smith v The Queen*. [11] Each witness was an active participant in the actual scenes captured by the CCTV footage. She relied on a statement made by Nettle JA in *Wade v R,* [12] in support of the contention that it would be permissible for these witnesses to relate and describe what they could see in the footage.

via

[12] (2014) 41 VR 434 (' *Wade*').

Ford v The King [2023] SASCA 117 (16 November 2023) (The Honourable President Livesey, the Honourable Justice Doyle and the Honourable Justice David)

Application for Reservation of Questions of Law (No 1 of 2017) [2017] SASCFC 90 ; *Athans v The Queen (No 2)* [2022] SASCA 70; *Bevan v Western Australia* (2012) 43 WAR 233; *Bevan v Western Australia* (2010) 202 A Crim R 27; *Commonwealth Shipping Representative v P&O Branch Service* [1923] AC 191; *Crofts v The Queen* (1996) 186 CLR 427; *Day v The Queen* (2021) 289 A Crim R 346; *HCF v The Queen* [2023] HCA 35; *Hillier v The Queen* (2007) 228 CLR 618; *Inspector Stephen Campbell v James Gordon Hitchcock* [2003] NSWIRComm 148; *Kingston (a pseudonym) v The Queen; Maxwell (a pseudonym) v The Queen* [2022] SASCA 90; *McNamara v The Queen* [2021] SASCFC 2; *Maric v The Queen* (1978) 52 ALJR 631; *Mehesz v Redman (No 2)* (1980) 26 SASR 244; *Nasaris v The Queen* [2021] SASCA 143; *North Sydney Leagues' Club Ltd v Synergy Protection Agency Pty Ltd* (2012) 83 NSWLR 710; *Palmer v The Queen* (1998) 193 CLR 1; *R v Ciantar* (2006) 16 VR 26; *R v Dent* [2022] SASC 65; *R v Goodall* (2007) 15 VR 673; *R v Jarrett* (1994) 62 SASR 443; *R v Nieterink* (1999) 76 SASR 56; *R v SDI* [2023] QCA 67; *R v Sitek* [1988] 2 Qd R 284; *R v Trewin* [2018] ACTSC 109; *R v Weatherall* (1981) 27 SASR 238; *Re Van Beelen* (1974) 9 SASR 163; *Shearer v Hills* (1989) 51 SASR 243; *Shepherd v The Queen* (1990) 170 CLR 573; *Smith v The Queen* (2001) 206 CLR 650; *Smith v Western Australia* (2014) 250 CLR 473; *Stevenson v The Queen* (2020) 61 VR 624; *Stokes v Samuels* (1973) 5 SASR 18; *Tilley v The King* [2023] SASCA 80; *Tipping v The King (No 2)* [2023] SASCA 17; *VIM v Western Australia* (2005) 31 WAR 1; *Wade v The Queen* (2014) 41 VR 434 ; *Webb & Hay v The Queen* (1994) 181 CLR 41; *Weiss v The Queen* (2005) 224 CLR 300; *Quist v The Queen* (2021) 140 SASR 16, considered.

Ford v The King [2023] SASCA 117 (16 November 2023) (The Honourable President Livesey, the Honourable Justice Doyle and the Honourable Justice David)

60. In both *Athans v The Queen (No 2)* and *R v SDI* reference was made to the Queensland case of *R v Sitek* . [25] In *R v Sitek* de Jersey J likened the evidence of what a witness saw of offending on a video to eyewitness evidence. [26] *R v Sitek* was later followed in *Wade v The Queen* , where the Victorian Court of Appeal accepted the oral evidence given by a detective about what he had seen of the clothing worn by an offender during an armed robbery in a CCTV recording, later deleted by mistake. [27] Nettle JA regarded the CCTV recording as real evidence which could be described in evidence: [28]

> At common law, security camera footage of the commission of an offence is real evidence of what occurred (albeit having some of the features of testimonial evidence). Subject to considerations of reliability, prejudice and the exercise of discretion it is permissible therefore for a witness who has seen the footage to give evidence of its contents as if the witness had been a witness to the crime.

Ford v The King [2023] SASCA 117 (16 November 2023) (The Honourable President Livesey, the Honourable Justice Doyle and the Honourable Justice David)

60. In both *Athans v The Queen (No 2)* and *R v SDI* reference was made to the Queensland case of *R v Sitek* . [25] In *R v Sitek* de Jersey J likened the evidence of what a witness saw of offending on a video to eyewitness evidence. [26] *R v Sitek* was later followed in *Wade v The Queen* , where the Victorian Court of Appeal accepted the oral evidence given by a detective about what he had seen of the clothing worn by an offender during an armed robbery in a CCTV recording, later deleted by mistake. [27] Nettle JA regarded the CCTV recording as real evidence which could be described in evidence: [28]

> At common law, security camera footage of the commission of an offence is real evidence of what occurred (albeit having some of the features of testimonial evidence). Subject to considerations of reliability, prejudice and the exercise of discretion it is permissible therefore for a witness who has seen the footage to give evidence of its contents as if the witness had been a witness to the crime.

via

[27] *Wade v The Queen* (2014) 41 VR 434, [27]-[30] (Nettle JA, with whom Redlich and Coghlan JJA agreed), addressing the common law as an alternative to admissibility of the oral evidence as secondary evidence of the CCTV footage as a "document" under s 48 of the *Evidence Act 2008* (Vic) .

Ford v The King [2023] SASCA 117 (16 November 2023) (The Honourable President Livesey, the Honourable Justice Doyle and the Honourable Justice David)

60. In both *Athans v The Queen (No 2)* and *R v SDI* reference was made to the Queensland case of *R v Sitek* . [25] In *R v Sitek* de Jersey J likened the evidence of what a witness saw of offending on a video to eyewitness evidence. [26] *R v Sitek* was later followed in *Wade v The Queen* , where the Victorian Court of Appeal accepted the oral evidence given by a detective about what he had seen of the clothing worn by an offender during an armed robbery in a CCTV recording, later deleted by mistake. [27] Nettle JA regarded the CCTV recording as real evidence which could be described in evidence: [28]

> At common law, security camera footage of the commission of an offence is real evidence of what occurred (albeit having some of the features of testimonial evidence). Subject to considerations of reliability, prejudice and the exercise of discretion it is permissible therefore for a witness who has seen the footage to give evidence of its contents as if the witness had been a witness to the crime.

via

[28] *Wade v The Queen* (2014) 41 VR 434, [27] (Nettle JA, with whom Redlich and Coghlan JJA agreed), [51]-[52] (Redlich JA).

Monash University v EBT [2022] VSC 651 (03 November 2022) (Cavanough J)

99. Contrary to Monash's submissions, the definition of 'document' in s 5 of the FOI Act is not exhaustive but inclusive. It certainly looks inclusive on its face. Unlike some other definitions in s 5, the definition of 'document' does not contain the word 'means'. Instead, it contains the word 'includes'. As to the use of the expressions 'means' and 'includes' in statutory definitions, I agree with what Professor Pearce says:[77]

> It is usual to find one or other of these expressions where a word or phrase is being defined in legislation. The orthodox and, it is submitted, the correct approach to the understanding of the effect of these expressions is that 'means' is used if the definition is intended to be exhaustive while 'includes' is used if it is intended to enlarge the ordinary meaning of the word.

There are situations where this orthodox view does not apply,[78] but, in my opinion, the present is not one of them. This is not a situation where the list of things expressly included seems to be designed to restrict the coverage that the word would otherwise have. [79] Every sub-paragraph of the definition, from (a) right through to (h), commences with the broad word 'any'. In addition, the word 'whatsoever' occurs twice (in sub-paragraph (c) and in sub-paragraph (f)). There are things listed which, at least in 1982 when the provision was enacted, the Victorian Parliament might not have been confident would be treated by the courts as being within the, or any relevant, 'ordinary' meaning of the word 'document'. For example, Parliament might not have been confident about the treatment of a thing such as a photograph [80] (see now sub-paragraph (b) of the definition) or such a thing as a 'device' of one of the various kinds now referred to in sub-paragraphs (b) and (f) of the definition. Thus in 1971, in *R v Matthews & Ford, [81]* which was a criminal appeal that raised the question whether a tape recording was admissible in evidence in light of the secondary evidence rule, the Full Court observed that a tape recording was 'not a document as generally understood'. The Full Court approved statements to that effect previously made by McInerney J in *Beneficial Finance Corp Co Ltd v Conway* ,[82] with the Full Court noting that there was 'no writing on the tape, only impressions'. In 1978, in *R v Gaudion* ,[83] Br ooking J followed those cases, saying that 'the original recording is not a document but a physical object'. As Brooking J acknowledged, other judges, including Mason J in an *obiter dictum* expressed in the High Court of Australia, [84] had doubted the correctness of *Beneficial Finance* in this regard. One of those other judges was Walton J, a judge of the High Court of England and Wales, who, in 1975, in *Grant v Southwestern Properties* ,[85] in the context of a dispute about discovery of documents in a civil proceeding, had described the judgment of McInerney J in *Beneficial Finance* as a 'very persuasive judgment', [86] but had gone on to make two major criticisms of it, and had eventually concluded that a tape recording (of relevant sounds of some description) *was* a 'document'. With respect, I, like Mason J, see much in the judgment of Walton J to recommend it, at least in relation to the usual or ordinary meaning of the word 'document' as understood in England and Australia in the 1970s and 1980s. In particular, I am impressed by the following observations made by Walton J, which also apparently appealed to Mason J: [87]

> There are a number of cases in which the meaning of the word 'document' has been discussed in varying circumstances. Before briefly referring to such cases, it will, I think, be convenient to bear in mind that the derivation of the word is from the Latin 'documentum': it is something which instructs or provides information. Indeed, according to *Bullokar's English Expositor (1621),* it meant a lesson. The *Shorter Oxford English Dictionary* has as the fourth meaning for the word the following: 'something written, inscribed, etc., which furnishes evidence or information upon any subject, as a manuscript, title-deed, coin, etc.' and it produces as the relevant quotation:– 'These frescoes... have become invaluable as documents', the writer being Mrs Anna Brownell Jameson who lived from 1794 to 1860.
>
> I think that all the authorities to which I am about to refer have consistently stressed the furnishing of information – impliedly otherwise than as to the document itself – as being one of the main functions of a document.
>
> ...
>
> I think it is fair to say that all these cases, in different ways, stress that the essential feature of a document is the information thereby conveyed: they all hark back to the Latin origin and meaning of the word. Although there are, of course, expressions in them which, if taken literally, might be considered to exclude tapes from the ambit of documents, I conclude that the tenor of such cases is strongly in favour of the admission of tapes to the category of documents.

> On the other hand, there was plainly a basis for the Victorian Parliament to be uncertain about what might amount to a 'document' when, in 1982, the Parliament was considering the terms of the then proposed FOI legislation. There was then nothing in the *Acts Interpretation Act 1958* (Vic) (as amended) [88] corresponding to the detailed definition of 'document' that was subsequently enacted (in 1984) in the *Interpretation of Legislation Act 1984* (Vic) . The latter definition is very similar to, though not quite as wide as, the definition of 'document' in the FOI Act . Parliament's evident intention was to cast a very wide net. So, in my view, the definition of 'document' in s 5 of the FOI Act should be given a broad and inclusive reading, not a restrictive one. Others have reached the same conclusion. [89]

via

[80] Cf *Wade (a Pseudonym) v R* (2014) 41 VR 434, 440 [26] (Nettle JA) .

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

ASIC v Rich [2005] NSWSC 417; *Attorney-General's Reference (No 1 of 1990)* (1992) 95 Crim App R 296; *Beauregard-Smith v The Queen* (1995) 180 LSJS 188; *Blatch v Archer* (1774) 1 COWP 63; *Bristow v The Queen* (2020) 137 SASR 449; *Bromley v The Queen* (1986) 161 CLR 315; *Butera v DPP (Vic)* (1987) 164 CLR 180; *Commissioner for Railways (NSW) v Young* (1962) 106 CLR 535; *Conwell v Tapfield* (1981) 1 NSWLR 595; *Daw v Toyworld (NSW) Pty Ltd* [2001] NSWCA 25; *De Sa v The Queen* [2021] SASCFC 22; *Derby & Co Ltd v Weldon (No 9)* [1991] 1 WLR 652; *DPP (SA) v Jaunay* [2020] SASCFC 25; *DPP v Garcia* [2015] VSCA 275; *DPP v Nguyen* (1990) 156 LSJS 475; *Garton v Hunter* [1969] 2 QB 37; *Godfrey v Woolworths (WA) Pty Ltd* (1998) 103 A Crim R 336; *Gregg v The Queen* [2020] NSWCCA 245; *Hill v Zuda Pty Ltd* (2022) 96 ALJR 540; *Holmden v Bitar* (1987) 47 SASR 509; *Jago v District Court (NSW)* (1989) 168 CLR 23; *JGS v The Queen* [2020] SASCFC 48; *Kajala v Noble* (1982) 75 Cr App R 149; *Lloyd v Powell Duffryn Steam Coal Co Ltd* [1914] AC 733; *Longman v The Queen* (1989) 168 CLR 79; *Mack v Lenton* (1993) 32 NSWLR 259; *Maks v Maks* (1986) 6 NSWLR 34; *Masquerade Music v Springsteen* (2001) 51 IPR 650; *Myers v DPP* [1965] AC 1001; *National Australia Bank Ltd v Rusu* [1999] NSWSC 539; *Omychund v Barker* (1744) 1 Atk 21; *People v Rose* (Mich Ct App, No 351282, 18 February 2021); *Police v Dorizzi* (2000) 84 SASR 403; *Police v Dunstall* (2014) 120 SASR 88; *Police v Dunstall* (2015) 256 CLR 403; *Police v Hall* (2006) 95 SASR 482; *Police (SA) v Pakrou* (2008) 103 SASR 124; *Police v Sherlock* (2009) 103 SASR 147; *Pollitt v The Queen* (1992) 174 CLR 558; *Port Jackson Steamship Co v Mayers* (1888) 9 LR (NSW) 470; *Question of Law Reserved (No 3 of 1997)* (1998) 70 SASR 555 ; *R v Ames* [1964-5] NSWR 1489; *R v Athans* [2021] SADC 1; *R v Athans* [2021] SADC 3; *R v B, P* [2016] SASCFC 30; *R v Becirovic* [2017] SASCFC 156; *R v Calabria* (1982) 31 SASR 423; *R v Cheng* [2015] SASCFC 25; *R v Christie* [1914] AC 545; *R v Collie* (1991) 56 SASR 302; *R v Edwards* (2009) 83 ALJR 717; *R v Finn* [2014] SASCFC 46; *R v Gaudion* [1979] VR 57; *R v Governor of Pentonville Prison, ex parte Osman* [1990] 1 WLR 277; *R v Howe* [1958] SASR 95; *R v Lobban* (2000) 77 SASR 24 ; *R v Matthews* [1972] VR 3; *R v N, RC* [2012] SASCFC 37; *R v Narula* (1986) 22 A Crim R 409; *R v Nikolovski* [1996] 3 SCR 497; *R v Nguyen* [2015] SASCFC 7; *R v Nicholson* (1984) 113 LSJS 125; *R v O'Leary* [1946] SASR 175l; *R v O'Sullivan and Mackie* (1975) 13 SASR 68; *R v Perry (No 3)* (1981) 28 SASR 112 ; *R v Perry (No 4)* (1981) 28 SASR 119; *R v Romeo* (1982) 30 SASR 243; *R v Sitek* [1988] 2 Qd R 284; *R v Symons* (2018) 130 SASR 503; *R v Szach* (1980) 23 SASR 504; *R v T, WA* (2014) 118 SASR 382; *R v Wakefield* [1975] 2 All ER 40; *R v Whitehorn* (1983) 152 CLR 657; *Ratten v The Queen* [1972] AC 378; *Ridgeway v The Queen* (1995) 184 CLR 19; *Saleh v Romanous* [2010] NSWCA 373; *Seiler v Lucasfilm Ltd* (1987) 808 F2d 1316; *Semple v Noble* (1988) 49 SASR 356; *Smith v The Queen* (2001) 206 CLR 650; *Southern Equities Corporation (in liq) v Bond (No 2)* (2001) 78 SASR 554; *Strickland v DPP (Cth)* (2018) 266 CLR 325; *Subramaniam v Public Prosecutor* [1956] 1 WLR 965; *Sudgen v Lord St Leonards* (1876) 1 PD 154; *Taylor v Chief Constable of Cheshire* [1986] 1 WLR 1479; *Wade v The Queen* (2014) 41 VR 434 ; *Walton v The Queen* (1989) 166 CLR 283; *Williams v Spautz* (1992) 174 CLR 509, considered.

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

3. After the hearing of the appeal the Court asked for and was provided with written submissions addressing the following questions:

    1. Does the best evidence rule apply to images which do not include any writing?

    2. Is the best evidence rule limited to precluding oral evidence to prove the meaning or significance of the writing in a document from a legal or evidentiary point of view?

    3. If yes to either or both of the above questions, does the failure to put into evidence the image, whether the original or a reproduction, affect only the weight to be given to the testimony purporting to describe the image?

    4. Does the approach to the best evidence rule in *Butera* [2] apply by analogy to [images] sent and received using Snapchat?

    5. Must *Wade v The Queen* (*Wade*) [3] and *R v Sitek* [4] be read as subject to *Butera*?

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

3. After the hearing of the appeal the Court asked for and was provided with written submissions addressing the following questions:

    1. Does the best evidence rule apply to images which do not include any writing?

    2. Is the best evidence rule limited to precluding oral evidence to prove the meaning or significance of the writing in a document from a legal or evidentiary point of view?

    3. If yes to either or both of the above questions, does the failure to put into evidence the image, whether the original or a reproduction, affect only the weight to be given to the testimony purporting to describe the image?

    4. Does the approach to the best evidence rule in *Butera* [2] apply by analogy to [images] sent and received using Snapchat?

    5. Must *Wade v The Queen* (*Wade*) [3] and *R v Sitek* [4] be read as subject to *Butera*?

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

30. The use of the evidence in this case is similar to the evidence considered in *Kajala v Noble* (*Kajala*) [28], *Taylor v Chief Constable of Cheshire* (*Taylor*) [29] and *Wade*. [30]

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

36. The circumstances of this case also bear some analogy to those considered in the Victorian Court of Appeal in *Wade*. [40] In *Wade* it was held that a police officer could give oral evidence of the description and actions of the offender he observed on replaying CCTV footage of the offence which was mistakenly destroyed after he had viewed it. The rationale for its admission was that the images generated by the CCTV footage are real evidence of the acts visually captured by it. No question of due search or satisfactory explanation for the loss of the recording arose. [41]

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

36. The circumstances of this case also bear some analogy to those considered in the Victorian Court of Appeal in *Wade*. [40] In *Wade* it was held that a police officer could give oral evidence of the description and actions of the offender he observed on replaying CCTV footage of the offence which was mistakenly destroyed after he had viewed it. The rationale for its admission was that the images generated by the CCTV footage are real evidence of the acts visually captured by it. No question of due search or satisfactory explanation for the loss of the recording arose. [41]

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

142. The rulings in *Taylor v Chief Constable* and *R v Sitek* were followed in *Wade v The Queen*, where the Victorian Court of Appeal accepted the admissibility of oral evidence given by a detective about what he had seen of the clothing worn by an offender during an armed robbery in a CCTV recording, which was later deleted by mistake. [152] Nettle JA also regarded the CCTV recording as real evidence which could later be described in evidence: [153]

> At common law, security camera footage of the commission of an offence is real evidence of what occurred (albeit having some of the features of testimonial evidence). Subject to considerations of reliability, prejudice and the exercise of discretion it is permissible therefore for a witness who has seen the footage to give evidence of its contents as if the witness had been a witness to the crime.

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

143. The approach taken in *Wade* did not turn on any exception to the best evidence rule. That point does not appear to have been taken. That is perhaps unsurprising as in Victoria the best evidence rule is abrogated by s 51 of the *Evidence Act 2008* (Vic). Nonetheless, when addressing the common law, the Court cited cases such as *Taylor v Chief Constable* and *Butera* which had referred to the best evidence rule. The ruling regarding the common law, even if *obiter*, demonstrated that the objection based on s 48(4) of the *Evidence Act 2008* (Vic) was misconceived. Relying on *Taylor v Chief Constable* and *R v Sitek*, the approach taken to the common law in *Wade* was to treat the CCTV footage as real evidence. On this approach there was not thought to be any impediment to giving oral evidence about what was seen on the missing CCTV footage. Whilst this approach to the common law of evidence by another intermediate appellate court should be followed unless this Court is convinced that the approach is plainly wrong, [154] or there is a compelling reason not to follow it, [155] the approach taken in *Wade* can only be followed to the extent that it accords with the approach taken by a majority of the High Court in *Butera*.

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

143. The approach taken in *Wade* did not turn on any exception to the best evidence rule. That point does not appear to have been taken. That is perhaps unsurprising as in Victoria the best evidence rule is abrogated by s 51 of the *Evidence Act 2008* (Vic). Nonetheless, when addressing the common law, the Court cited cases such as *Taylor v Chief Constable* and *Butera* which had referred to the best evidence rule. The ruling regarding the common law, even if *obiter*, demonstrated that the objection based on s 48(4) of the *Evidence Act 2008* (Vic) was misconceived. Relying on *Taylor v Chief Constable* and *R v Sitek*, the approach taken to the common law in *Wade* was to treat the CCTV footage as real evidence. On this approach there was not thought to be any impediment to giving oral evidence about what was seen on the missing CCTV footage. Whilst this approach to the common law of evidence by another intermediate appellate court should be followed unless this Court is convinced that the

approach is plainly wrong, [154] or there is a compelling reason not to follow it, [155] the approach taken in *Wade* can only be followed to the extent that it accords with the approach taken by a majority of the High Court in *Butera* .

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

143. The approach taken in *Wade* did not turn on any exception to the best evidence rule. That point does not appear to have been taken. That is perhaps unsurprising as in Victoria the best evidence rule is abrogated by s 51 of the *Evidence Act 2008* (Vic) . Nonetheless, when addressing the common law, the Court cited cases such as *Taylor v Chief Constable* and *Butera* which had referred to the best evidence rule. The ruling regarding the common law, even if *o biter*, demonstrated that the objection based on s 48(4) of the *Evidence Act 2008* (Vic) was misconceived. Relying on *Taylor v Chief Constable* and *R v Sitek* , the approach taken to the common law in *Wade* was to treat the CCTV footage as real evidence. On this approach there was not thought to be any impediment to giving oral evidence about what was seen on the missing CCTV footage. Whilst this approach to the common law of evidence by another intermediate appellate court should be followed unless this Court is convinced that the approach is plainly wrong, [154] or there is a compelling reason not to follow it, [155] the approach taken in *Wade* can only be followed to the extent that it accords with the approach taken by a majority of the High Court in *Butera* .

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

146. It is appropriate to summarise the key features of relevance in the cases just discussed:

1. In *Butera* the audio tape remained available and what was said about a missing tape was probably *obiter*. In *R v Sitek* the video remained available. In *Kajala v Noble* the original film was not available but a copy was available. In *Taylor v Chief Constable* and *Wade* neither the video nor the CCTV footage were available.

2. In *Butera* the best evidence rule was considered and applied to real evidence which could not be described as a written "document".[159] Although the distinction between documents and "real evidence" was not addressed by the majority, it was addressed by Dawson J and Gaudron J. In *Kajala v Noble* and in *Taylor v Chief Constable* the best evidence rule was discussed but not applied, and in *Wade* the best evidence rule was not discussed, though cases discussing it were cited in support of the approach taken to the common law concerning the viewing of the real evidence. In *Taylor v Chief Constable* and *Wade* what was viewed was regarded as real evidence.

3. In none of the cases mentioned was the viewing out of court of real evidence itself an essential element of the offending as charged, as it is in this case.

4. In each of *Kajala v Noble* , *Taylor v Chief Constable*, *R v Sitek* and *Wade* the film, video and CCTV footage depicted the offending as it happened. The same may be said about viewing the snaps in this case. A potential point of distinction between this case and *Butera* is that the audio tape did not record the offending as it occurred. [160] The audio tape in *Butera* recorded conversations containing statements that represented what were at least implied admissions.

5. In this case the absence of the original has been satisfactorily explained, and on the approach taken in *Butera* no more is required. That requirement would have been satisfied in *Kajala v Noble* and *Taylor v Chief Constable*, although all that seems to have been required was that the party tendering the secondary evidence was not holding the original. According to the report of *Wade*

, it appears that the requirement to satisfactorily explain the absence of the original would have been satisfied in that case as well.

6. Whether oral evidence could be given about real evidence which remains available does not arise for decision in this case. *Butera* suggests that it cannot be given. Whilst *R v Sitek* suggests that it can be given, in each case that depends on what the oral evidence is intended to prove, as is shown by *Smith v The Queen* .

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

146. It is appropriate to summarise the key features of relevance in the cases just discussed:

1. In *Butera* the audio tape remained available and what was said about a missing tape was probably *obiter*. In *R v Sitek* the video remained available. In *Kajala v Noble* the original film was not available but a copy was available. In *Taylor v Chief Constable* and *Wade* neither the video nor the CCTV footage were available.

2. In *Butera* the best evidence rule was considered and applied to real evidence which could not be described as a written "document".[159] Although the distinction between documents and "real evidence" was not addressed by the majority, it was addressed by Dawson J and Gaudron J. In *Kajala v Noble* and in *Taylor v Chief Constable* the best evidence rule was discussed but not applied, and in *Wade* the best evidence rule was not discussed, though cases discussing it were cited in support of the approach taken to the common law concerning the viewing of the real evidence. In *Taylor v Chief Constable* and *Wade* what was viewed was regarded as real evidence.

3. In none of the cases mentioned was the viewing out of court of real evidence itself an essential element of the offending as charged, as it is in this case.

4. In each of *Kajala v Noble* , *Taylor v Chief Constable*, *R v Sitek* and *Wade* the film, video and CCTV footage depicted the offending as it happened. The same may be said about viewing the snaps in this case. A potential point of distinction between this case and *Butera* is that the audio tape did not record the offending as it occurred. [160] The audio tape in *Butera* recorded conversations containing statements that represented what were at least implied admissions.

5. In this case the absence of the original has been satisfactorily explained, and on the approach taken in *Butera* no more is required. That requirement would have been satisfied in *Kajala v Noble* and *Taylor v Chief Constable*, although all that seems to have been required was that the party tendering the secondary evidence was not holding the original. According to the report of *Wade* , it appears that the requirement to satisfactorily explain the absence of the original would have been satisfied in that case as well.

6. Whether oral evidence could be given about real evidence which remains available does not arise for decision in this case. *Butera* suggests that it cannot be given. Whilst *R v Sitek* suggests that it can be given, in each case that depends on what the oral evidence is intended to prove, as is shown by *Smith v The Queen* .

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

146. It is appropriate to summarise the key features of relevance in the cases just discussed:

1. In *Butera* the audio tape remained available and what was said about a missing tape was probably *obiter*. In *R v Sitek* the video remained available. In *Kajala v Noble* the original film was not available but a copy was available. In *Taylor v Chief Constable* and *Wade* neither the video nor the CCTV footage were available.

2. In *Butera* the best evidence rule was considered and applied to real evidence which could not be described as a written "document".[159] Although the distinction between documents and "real evidence" was not addressed by the majority, it was addressed by Dawson J and Gaudron J. In *Kajala v Noble* and in *Taylor v Chief Constable* the best evidence rule was discussed but not applied, and in *Wade* the best evidence rule was not discussed, though cases discussing it were cited in support of the approach taken to the common law concerning the viewing of the real evidence. In *Taylor v Chief Constable* and *Wade* what was viewed was regarded as real evidence.

3. In none of the cases mentioned was the viewing out of court of real evidence itself an essential element of the offending as charged, as it is in this case.

4. In each of *Kajala v Noble* , *Taylor v Chief Constable*, *R v Sitek* and *Wade* the film, video and CCTV footage depicted the offending as it happened. The same may be said about viewing the snaps in this case. A potential point of distinction between this case and *Butera* is that the audio tape did not record the offending as it occurred. [160] The audio tape in *Butera* recorded conversations containing statements that represented what were at least implied admissions.

5. In this case the absence of the original has been satisfactorily explained, and on the approach taken in *Butera* no more is required. That requirement would have been satisfied in *Kajala v Noble* and *Taylor v Chief Constable*, although all that seems to have been required was that the party tendering the secondary evidence was not holding the original. According to the report of *Wade* , it appears that the requirement to satisfactorily explain the absence of the original would have been satisfied in that case as well.

6. Whether oral evidence could be given about real evidence which remains available does not arise for decision in this case. *Butera* suggests that it cannot be given. Whilst *R v Sitek* suggests that it can be given, in each case that depends on what the oral evidence is intended to prove, as is shown by *Smith v The Queen* .

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

146. It is appropriate to summarise the key features of relevance in the cases just discussed:

1. In *Butera* the audio tape remained available and what was said about a missing tape was probably *obiter*. In *R v Sitek* the video remained available. In *Kajala v Noble* the original film was not available but a copy was available. In *Taylor v Chief Constable* and *Wade* neither the video nor the CCTV footage were available.

2. In *Butera* the best evidence rule was considered and applied to real evidence which could not be described as a written "document".[159] Although the distinction between documents and "real evidence" was not addressed by the majority, it was addressed by Dawson J and Gaudron J. In *Kajala v Noble* and in *Taylor v Chief Constable* the best evidence rule was discussed but not applied,

and in *Wade* the best evidence rule was not discussed, though cases discussing it were cited in support of the approach taken to the common law concerning the viewing of the real evidence. In *Taylor v Chief Constable* and *Wade* what was viewed was regarded as real evidence.

3. In none of the cases mentioned was the viewing out of court of real evidence itself an essential element of the offending as charged, as it is in this case.

4. In each of *Kajala v Noble* , *Taylor v Chief Constable*, *R v Sitek* and *Wade* the film, video and CCTV footage depicted the offending as it happened. The same may be said about viewing the snaps in this case. A potential point of distinction between this case and *Butera* is that the audio tape did not record the offending as it occurred. [160] The audio tape in *Butera* recorded conversations containing statements that represented what were at least implied admissions.

5. In this case the absence of the original has been satisfactorily explained, and on the approach taken in *Butera* no more is required. That requirement would have been satisfied in *Kajala v Noble* and *Taylor v Chief Constable*, although all that seems to have been required was that the party tendering the secondary evidence was not holding the original. According to the report of *Wade* , it appears that the requirement to satisfactorily explain the absence of the original would have been satisfied in that case as well.

6. Whether oral evidence could be given about real evidence which remains available does not arise for decision in this case. *Butera* suggests that it cannot be given. Whilst *R v Sitek* suggests that it can be given, in each case that depends on what the oral evidence is intended to prove, as is shown by *Smith v The Queen* .

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

146. It is appropriate to summarise the key features of relevance in the cases just discussed:

1. In *Butera* the audio tape remained available and what was said about a missing tape was probably *obiter*. In *R v Sitek* the video remained available. In *Kajala v Noble* the original film was not available but a copy was available. In *Taylor v Chief Constable* and *Wade* neither the video nor the CCTV footage were available.

2. In *Butera* the best evidence rule was considered and applied to real evidence which could not be described as a written "document".[159] Although the distinction between documents and "real evidence" was not addressed by the majority, it was addressed by Dawson J and Gaudron J. In *Kajala v Noble* and in *Taylor v Chief Constable* the best evidence rule was discussed but not applied, and in *Wade* the best evidence rule was not discussed, though cases discussing it were cited in support of the approach taken to the common law concerning the viewing of the real evidence. In *Taylor v Chief Constable* and *Wade* what was viewed was regarded as real evidence.

3. In none of the cases mentioned was the viewing out of court of real evidence itself an essential element of the offending as charged, as it is in this case.

4. In each of *Kajala v Noble* , *Taylor v Chief Constable*, *R v Sitek* and *Wade* the film, video and CCTV footage depicted the offending as it happened. The same may be said about viewing the snaps in this case. A potential point of distinction

between this case and *Butera* is that the audio tape did not record the offending as it occurred. [160] The audio tape in *Butera* recorded conversations containing statements that represented what were at least implied admissions.

5. In this case the absence of the original has been satisfactorily explained, and on the approach taken in *Butera* no more is required. That requirement would have been satisfied in *Kajala v Noble* and *Taylor v Chief Constable*, although all that seems to have been required was that the party tendering the secondary evidence was not holding the original. According to the report of *Wade*, it appears that the requirement to satisfactorily explain the absence of the original would have been satisfied in that case as well.

6. Whether oral evidence could be given about real evidence which remains available does not arise for decision in this case. *Butera* suggests that it cannot be given. Whilst *R v Sitek* suggests that it can be given, in each case that depends on what the oral evidence is intended to prove, as is shown by *Smith v The Queen*.

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

150. On the approach taken in cases such as *Taylor v Chief Constable* and *Wade*, the best evidence rule does not apply and there is no impediment to giving oral evidence about what was seen of real evidence of the offending as it occurred where the "original" evidence is not available to the prosecution. The preferable view may be that the best evidence rule does not apply because the issue for the trial court in this case was to determine the reliability and weight to be given to relevant oral evidence led in proof of an element of the offence, where the missing snaps depicted the offending as it occurred. Whilst it was necessary to connect the appellant with what was alleged to have been sent and with what was alleged to have been seen, that was addressed by the oral evidence and a combination of circumstantial evidence and expert evidence about Snapchat. The admission of the oral evidence was however subject to the exercise of discretion by the court to exclude it, for example, for prejudice or requisite unfairness.

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

172. In any event, whether on the approaches taken in *Butera*, or in *Taylor v Chief Constable* and *Wade*, described earlier in these reasons and applied by analogy to a snap sent and received using Snapchat, each complainant was permitted to describe what she saw in each snap and that evidence was not inadmissible hearsay.

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

3. After the hearing of the appeal the Court asked for and was provided with written submissions addressing the following questions:

1. Does the best evidence rule apply to images which do not include any writing?

2. Is the best evidence rule limited to precluding oral evidence to prove the meaning or significance of the writing in a document from a legal or evidentiary point of view?

3. If yes to either or both of the above questions, does the failure to put into evidence the image, whether the original or a reproduction, affect only the weight to be given to the testimony purporting to describe the image?

4. Does the approach to the best evidence rule in *Butera* [2] apply by analogy to [images] sent and received using Snapchat?

5. Must *Wade v The Queen* (*Wade*) [3] and *R v Sitek* [4] be read as subject to *Butera* ?

via

[3] (2014) 41 VR 434 [27].

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

30. The use of the evidence in this case is similar to the evidence considered in *Kajala v Noble* (*Kajala*) [28] , *Taylor v Chief Constable of Cheshire* (*Taylor*) [29] and *Wade*. [30]

via

[30] (2014) 41 VR 434 .

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

36. The circumstances of this case also bear some analogy to those considered in the Victorian Court of Appeal in *Wade*. [40] In *Wade* it was held that a police officer could give oral evidence of the description and actions of the offender he observed on replaying CCTV footage of the offence which was mistakenly destroyed after he had viewed it. The rationale for its admission was that the images generated by the CCTV footage are real evidence of the acts visually captured by it. No question of due search or satisfactory explanation for the loss of the recording arose. [41]

via

[40] (2014) 41 VR 434 .

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

36. The circumstances of this case also bear some analogy to those considered in the Victorian Court of Appeal in *Wade*. [40] In *Wade* it was held that a police officer could give oral evidence of the description and actions of the offender he observed on replaying CCTV footage of the offence which was mistakenly destroyed after he had viewed it. The rationale for its admission was that the images generated by the CCTV footage are real evidence of the acts visually captured by it. No question of due search or satisfactory explanation for the loss of the recording arose. [41]

via

[41] Ibid , 440-441 at [28]-[30] .

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

127. This case is different to many concerning the application of the rules of evidence and procedure to “new” technologies. Many of those cases addressed technology such as photographs, [126] audio tapes [127] and video tapes [128] which were intended to create a

permanent, accurate and accessible record of what each machine captured, whether as images or sounds or both. In order to address the issues raised, the courts drew on longstanding authority and took rules developed by reference to handwritten documents, real evidence or oral evidence and developed them by analogy.

via

[128] *Taylor v Chief Constable of Cheshire* [1986] 1 WLR 1479, 1486-1487 (Ralph Gibson LJ); *R v Sitek* [1988] 2 Qd R 284, 288 (Carter J), 292 (de Jersey J); *Police v Dorizzi* (2002) 84 SASR 403; *Wade v The Queen* (2014) 41 VR 434, [27]-[30] (Nettle JA, with whom Redlich and Coghlan JJA agreed).

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

141. Similarly, de Jersey J regarded the evidence of the witness as being no different to "eyewitness type evidence" or evidence of what is "seen through a telescope" or "heard over the telephone": [151]

> The evidence of Ms Estreich as to what she saw of the transaction by means of the monitor was admissible as eyewitness type evidence. Her evidence of what she saw of the transaction by means of the monitor was admissible, just as, for example, evidence of things seen through a telescope, which would not otherwise be noted, would be admissible (cf. *R. v. Maqsud Ali* [1966] 1 Q.B. 688, 701). Also analogous is the reception of evidence of what is heard over the telephone. It was permissible for Miss Eistreich to refresh her memory of what she witnessed at the time by reference to the contemporaneously produced video tape. Her evidence was led in an acceptable way. She was asked to give her recollection based on what she saw on the monitor on the evening of the offence, and was later asked, in effect, to supplement that evidence by refreshing her memory from the video tape. But all of her evidence appears to have been based on her actual recollection of what she saw on the evening, and was therefore admissible.
>
> The video tape itself was admitted into evidence. It was admissible, as real evidence, to prove what it recorded, just as photographs are admissible. A recent case confirming the admissibility of video recordings is *Kajala v. Noble* (1982) 75 Cr.App.R. 149. The admissibility of tape recordings was confirmed by the Court of Criminal Appeal in *R. v. Beames* (1980) 1 A.Crim.R. 239, 240–241. There is of course no reason why video recordings, if properly authenticated, should not also be admissible. The jury viewed this video tape, and may well have reached a view from it of the amount of money paid over. The events are clearly shown on the recording ...

via

[151] *R v Sitek* [1988] 2 Qd R 284, 292 (de Jersey J). In *Wade v The Queen* (2014) 41 VR 434 (***Wade***), [30] after referring to the ruling of the High Court in *Smith v The Queen* (2001) 206 CLR 650, Nettle JA warned that, "Arguably, the decision in *Smith* affects the validity of the conclusion reached in *Sitek* that Ms Eistrich's (sic) evidence was admissible (because, in *Sitek* , the monitor was also available to the jury). But, subject to that limitation, there is little reason to doubt *Sitek* . To the contrary, with respect, it is both logical and in accordance with precedent". To this one may add the observations made by the majority in *Butera* about cases where "the tape is available ..., there can be no reason to admit the evidence of an out of court listener to the tape recording to prove what the tape recorded: it should be proved by the playing over of the tape. Prudence and convenience combine to support the application of the best evidence rule in such a case", at 186.

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

142. The rulings in *Taylor v Chief Constable* and *R v Sitek* were followed in *Wade v The Queen* , where the Victorian Court of Appeal accepted the admissibility of oral evidence given by a detective about what he had seen of the clothing worn by an offender during an armed robbery in a CCTV recording, which was later deleted by mistake. [152] Nettle JA also regarded the CCTV recording as real evidence which could later be described in evidence: [153]

> At common law, security camera footage of the commission of an offence is real evidence of what occurred (albeit having some of the features of testimonial evidence). Subject to considerations of reliability, prejudice and the exercise of discretion it is permissible therefore for a witness who has seen the footage to give evidence of its contents as if the witness had been a witness to the crime.

via

[152] *Wade v The Queen* (2014) 41 VR 434, [27]-[30] (Nettle JA, with whom Redlich and Coghlan JJA agreed), addressing the common law as an alternative to admissibility of the oral evidence as secondary evidence of the CCTV footage as a "document" under s 48 of the *Evidence Act 2008* (Vic) .

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

142. The rulings in *Taylor v Chief Constable* and *R v Sitek* were followed in *Wade v The Queen* , where the Victorian Court of Appeal accepted the admissibility of oral evidence given by a detective about what he had seen of the clothing worn by an offender during an armed robbery in a CCTV recording, which was later deleted by mistake. [152] Nettle JA also regarded the CCTV recording as real evidence which could later be described in evidence: [153]

> At common law, security camera footage of the commission of an offence is real evidence of what occurred (albeit having some of the features of testimonial evidence). Subject to considerations of reliability, prejudice and the exercise of discretion it is permissible therefore for a witness who has seen the footage to give evidence of its contents as if the witness had been a witness to the crime.

via

[153] *Wade v The Queen* (2014) 41 VR 434, [27] (Nettle JA, with whom Redlich and Coghlan JJA agreed), [51]-[52] (Redlich JA).

Athans v The Queen (No 2) [2022] SASCA 70 (11 August 2022)

198. On this part of the case the appellant emphasised that the use of screenshots was only explained by police not wishing to inconvenience the complainants. The investigating officer explained that if police seized their phones and had them analysed that may have deprived the complainants of their phones for some months. However it was not suggested that the screenshots were not documents within the meaning of s 57 , nor that they were not accurate. Critically, it is not suggested that, in terms, s 57 did not facilitate tender. [202]

via

[202] See *Wade v The Queen* (2014) 41 VR 434 (Nettle JA, with whom Redlich and Coghlan JJA agreed) regarding the reliance placed on the uniform *Evidence Act* to prove security camera photographs.

R v Athans [2021] SADC 3 (24 March 2020) (S David J)
Wade v The Queen (2014) 239 A Crim R 29 ; *R v Sitek* (1987) 26 A Crim R 421; *Taylor v Chief Constable of Cheshire* [1986] 1 W.L.R. 1479; *Semple v Noble* (1988) 49 SASR 356; *Godfrey v Woolworths (WA) Pty Ltd* (1998) 103 A Crim R 336; *Maks and Maks* (1986) 6 NSWLR 34 ; *Mack v Lenton* (1993) 32 NSWLR 259; *Buter a v DPP (Vic)* [1987] HCA 58; (1987) 164 CLR 180; *Police v Sherlock* [2009] SASC 64; *Jago v District Court of New South Wales* [1989] HCA 46; (1989) 168 CLR 23; *R v Edwards* (2009) 83 ALJR 717; *R v Lobban* (200

0) 77 SASR 24; *Police v Dunstall* [2015] HCA 26; *Police v Hall* (2006) 95 SASR 482; *Wigmore on Evidence* 3rd Ed; *Cross on Evidence* 9th Ed 2013; *Documentary Evidence in Australia* 1st Ed 1988 R A Brown, considered.

R v Athans [2021] SADC 3 (24 March 2020) (S David J)

66. The prosecution relied on two authorities in support of their contention: *Wade v The Queen* [31] and *R v Sitek* [32].

R v Athans [2021] SADC 3 (24 March 2020) (S David J)

69. Both the cases of *Wade* and *Sitek* draw upon the English authority of *Taylor v Chief Constable of Cheshire.* [36] In that case, an accused had been charged with theft in a shop. The prosecution adduced evidence from witnesses who had seen a video recording of the events alleged to constitute the offence. The recording had been made by a security officer but was not available at the trial because it had been inadvertently erased. The case of *Taylor* deals directly with the contention that oral testimony describing CCTV footage, where the footage has been lost, is hearsay. The Court held that it is not.

R v Athans [2021] SADC 3 (24 March 2020) (S David J)

66. The prosecution relied on two authorities in support of their contention: *Wade v The Queen* [31] and *R v Sitek* [32].

via

[31] (2014) 239 A Crim R 29.

R v Athans [2021] SADC 3 (24 March 2020) (S David J)

102. Finally, even if the electronic data constituting each of the Snapchat photographs and messages was a 'document' which attracts the exclusionary secondary evidence rule, and there was not a due search, I would still consider the complainants' oral testimony admissible as real evidence or 'eyewitness-like' evidence of the actus reus of the offence, and indeed what occurred, and admissible. [64] The complainants are purporting to describe the event itself rather than describe a record of the event in a second-hand way.

via

[64] *Wade v The Queen* at [27].

Xavier v ROPS Engineering Australia Pty Ltd [2019] WADC 146 (29 October 2019) (Troy DCJ)

Wade v The Queen (2014) 41 VR 434

Xavier v ROPS Engineering Australia Pty Ltd [2019] WADC 146 (29 October 2019) (Troy DCJ)

122. Obviously, the weight to be given to this evidence suffers from the fact that it cannot be empirically evaluated. Rather than viewing the footage for myself, I am confined to Mr Dickinson's recollection of what he viewed on the footage some four years earlier. I am quite satisfied that a person who watches an event, not directly but on closed circuit television, can give admissible evidence of it. [119]

via

[119] By way of analogy see *Wade v The Queen* (2014) 41 VR 434 [27] - [31] (Nettle JA).

R v Jenkin (No 14) [2018] NSWSC 837 (23 May 2018) (Hamill J)

17. The Crown Prosecutor submitted that the "document" with which we are concerned is the recovered file (*not* the file on the 'phone) which is, on the Crown's argument, "a document in its own right". He observed that the provision in s 48 was facilitative rather than being concerned with admissibility. He also relied on s 48(4) and the decision of the Victorian Court of Appeal in *Wade v The Queen* [2014] VSCA 13; (2014) 29 A Crim R 29 and referred to the abolition of the original evidence rule (s 51 *Evidence Act*) and the presumption that a device or process produces the expected result (s 146 *Evidence Act*).

R v Jenkin (No 14) [2018] NSWSC 837 (23 May 2018) (Hamill J)

23. Section 48(4) would allow evidence to be given of the contents of the document (that is, the data, images and audio on the corrupted video file) because it "is not available to the party". In *Wade v The Queen* , the Victorian Court of Appeal held that the section allowed a police officer to recount details of CCTV footage that had been lost. I accept the Crown's submission in this case that the file recovered or repaired by means of the *Untrunc* programme falls within the provision in s 48(4) .

Glyn Dickman v The Queen [2015] VSCA 311 (23 November 2015) (Whelan and Priest JJA and Croucher AJA)

7. In this case, the determinative issue was not the assessment of the factors which reduced the probative value of the evidence. The judge accepted the existence of those factors and he knew the jury would be fully aware of them. The relevant issue here was whether, notwithstanding the jury's knowledge of those factors and the directions and warnings they would be given, there remained a risk or danger that the jury would give the evidence disproportionate weight in a way which was unfair to the applicant. The trial judge found that that risk or danger was minimal. In that connection he cited the New South Wales decision *R v Darwiche* [4] and this Court's decision in *Wade (a Pseudonym) v The Queen* ('*Wade*'). [5] In *Wade* this Court referred to the relevance of a jury's ability and propensity to comprehend the risk of unreliability and to deal with it accordingly. [6]

via

[5] (2014) 41 VR 434 .

Glyn Dickman v The Queen [2015] VSCA 311 (23 November 2015) (Whelan and Priest JJA and Croucher AJA)

7. In this case, the determinative issue was not the assessment of the factors which reduced the probative value of the evidence. The judge accepted the existence of those factors and he knew the jury would be fully aware of them. The relevant issue here was whether, notwithstanding the jury's knowledge of those factors and the directions and warnings they would be given, there remained a risk or danger that the jury would give the evidence disproportionate weight in a way which was unfair to the applicant. The trial judge found that that risk or danger was minimal. In that connection he cited the New South Wales decision *R v Darwiche* [4] and this Court's decision in *Wade (a Pseudonym) v The Queen* ('*Wade*'). [5] In *Wade* this Court referred to the relevance of a jury's ability and propensity to comprehend the risk of unreliability and to deal with it accordingly. [6]

via

[6] Ibid 442 [34] (Nettle JA, Redlich and Coghlan JJA agreeing).

Glyn Dickman v The Queen [2015] VSCA 311 (23 November 2015) (Whelan and Priest JJA and Croucher AJA)

10. In *McCartney* , this Court said:

> On the appeal against conviction, the appeal court is able to review the record of the relevant evidence as actually presented to the jury and can assess, in the context of the trial as a whole, whether there was a danger of unfair prejudice to the accused and, if so, whether it outweighed the probative value of the evidence. The question is whether the decision of the trial judge not to exclude the evidence under s 137 was 'an error ... in, or in relation to the trial' and, if so, whether it was productive of a substantial miscarriage of justice. That question can only be answered by considering the trial in its entirety. [7]

via

[7] (2014) 41 VR 434 , 11–12 [50] .