IN THE HIGH COURT OF AUSTRALIA

BRISBANE OFFICE OF THE REGISTRY No. B24 of 2011

BETWEEN

DANIEL ARAN STOTEN

Appellant

and

THE QUEEN

Respondent

10 **RESPONDENT'S SUBMISSIONS**

Part I – Certification

1. These submissions are suitable for publication on the internet.

Part II – Statement of Issues

2. In summary the Respondent contends in relation to the Appellant's issues that the Appeal should be dismissed as:

   (1) In relation to the proviso (AS [2]) – an infringement of the principles in *Robinson v The Queen*[1] does not necessarily render the proviso inapplicable, rather its application depends on the circumstances of the particular case;

20 (2) In relation to s 80 (AS [3]) – the so-called right to a verdict of a jury has always been qualified by the possibility of appellate intervention, and s 80 does not limit the application of the proviso in this case. Section 80 does not

[1] (1991) 180 CLR 531

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Commonwealth Director of Public Prosecutions
15 Adelaide Street Brisbane, 4000
Tel: 07 3224 9450
Fax: 07 3229 4124
Ref: Frank Walsh

guarantee a trial free from legal error. An appellate court is not "retrying" an accused but rather it is determining whether a substantial miscarriage of justice has actually occurred.

3. The issues raised by the notice of contention are whether the direction given, in the circumstances of this case, infringed the principles in *Robinson v The Queen* and if so whether a miscarriage of justice has been established. If there was no breach, as contended by the Respondent, or a breach did not give rise to a miscarriage of justice, the proviso does not fall for consideration.

Part III – Section 78B of the *Judiciary Act* 1903

4. The Appellant has filed appropriate notices as required by s 78B of the *Judiciary Act.*

Part IV – Statement of Facts

5. The Appellant's summary of the facts omits reference to significant evidence.

6. The facts are accurately summarised in the judgment of Muir JA (with whom Fraser JA and Atkinson J agreed) (at [1] – [49], [55], [57], [78] – [90]).

7. The Appellant and Adam Hargraves were convicted of conspiracy to defraud the Commonwealth. Each has been granted special leave to appeal to this Court on the same grounds of appeal. The factual references below to the "Appellants" refer to both Stoten and Hargraves.

8. The fact that the Appellants and others agreed to implement the scheme, the subject of the count, was not disputed in the trial. The only issue was the state of mind of the Appellants, that is, whether they intended to make false representations to the Commonwealth as to the allowable deductions of PDC. The Appellants argued that it was a legitimate means of tax minimisation and therefore their conduct was not dishonest. This belief included, as a crucial component, that they did not have control over the overseas structure and, in particular, the funds.

9. It is to be noted that the Appellants were never told the scheme was legitimate (at [95]), they did not ask for that advice (at [95]), they did not inform their accountant (Tony Coote) who was involved in the preparation of their and PDC's tax returns of

their participation in the scheme and they did not discuss with him any matters relating to it (at [48] and see [90]).[2]

10. The Appellants and others entered into an agreement to set up a scheme which operated as follows: QH Data would render invoices to Amber Rock Pty Ltd (a company incorporated in the British Virgin Islands) ("AR") instead of PDC, PDC having also been informed of the amount of the invoice would instruct AR to inflate the invoice by an amount specified by them and AR would send the inflated invoice to PDC, PDC would pay the total amount to AR and AR would pay the original invoice amount to QH data. The balance of the money was paid, on the Appellants' instructions, into trusts related to each of them established for that purpose. The Appellants would then access those funds through ATM machines in Australia. The amount by which the invoices were inflated was totally arbitrary. The average mark-up was 3000%.[3]

11. As at the time the scheme was implemented PDC was already using the Chinese company QH data to compile data for their products. After the scheme was operational, the Appellants continued to deal directly with QH data: they placed its orders directly with them and they received a copy of the true invoice from them or were informed of the amount of the invoice. PDC placed no orders with AR, there were no contracts between AR and PDC in respect of the invoices sent to PDC, AR simply inflated invoices on the instructions of PDC and forwarded the invoices to them.[4]

12. PDC claimed tax deductions for the inflated amounts.

13. The first transaction illustrated the operation of the scheme. By 1 November 1999, the Appellant Adam Hargraves e-mailed Strachans (an accounting firm based in Geneva) advising them that QH data would fax them an invoice. He instructed Strachans to add US$100,000.00 to the invoice and to then fax it to PDC. When they paid the full amount, the US$100,000.00 would be the security needed for a gold Visa card for Glen Hargraves to enable the cash proceeds of the scheme to be accessed by him. QH data did forward an invoice to AR for US$6,019.81, and in accordance with

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[2] T23-8, T 24-36
[3] Exhibit CJSS –X5
[4] Exhibit DD-6I – DD-6X, CJSS – X6, Z118, Z163, Z194, Z205, Z207, Z208, Z211, Z217, Z237, Z251, Z2516, Z2518, Z293, Z390, Z441, Z462, Z531

Hargraves' instructions to Strachans, AR forwarded an invoice to PDC for US$106,019.81. PDC paid that full amount to AR and then AR paid the US$6,019.81 to QH data. In accordance with the instructions the $100,000.00 difference was used as the security for the credit card.[5]

14. AR did not carry out any work for PDC. The sum of US$100,000.00 was claimed, falsely, as a business expense deduction in relation to directory listing expenses in the 2000 tax return of PDC.[6] This return was not filed until 6 June 2001,[7] during the time period covered by count 2 on the indictment.

15. After the first transaction the Appellant Stoten provided Strachans with instructions as to the amount by which each invoice was to be inflated and how the difference was to be dispersed between the Appellants (and Glen Hargraves). The nature and content of these instructions, amongst other things, demonstrated the Appellants' control over the scheme and the funds generated by it.[8]

16. The communications between the Appellants and Strachans (which were recorded primarily in emails and notes of meetings with Strachans) revealed the state of mind of the Appellants as to how the scheme was understood and intended to (and did in fact) operate. Some of these communications are summarised by the Court below (at [17] – [23]).

17. For example on 12 August 1999, after Adam Hargraves began to deal directly with Strachans, he sent an email to them which postulated that, with regard to listings data, the mark-up figure per annum would be of the order of $300,000.00. Significantly, the email closed with the note:[9]

> *"PS – can you give me an idea on the rules and procedure associated with withdrawal of funds and the mechanics of how and where it all happens."*

18. On 30 September 1999, the Appellant emailed further queries to Strachans[10] and a reply by them on 1 October 1999 relevantly contained the following:

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[5] Z529, Z2903
[6] CJST- table 3(a)
[7] J3
[8] For example, the Appellant Stoten even gave instructions to Strachans to pay invoices which had not by then been raised in order to take advantage of currency fluctuations: Z163
[9] Z541
[10] Z536

"... Philip Egglishaw will have available at your meeting a signed, undated letter of resignation for that Protector and appointment in blank of a successor Protector. This will allow the client to replace the Trustees and ultimately control the overall structure ...

Amber Rock Limited has been given a London address for cosmetic purposes and is effectively controlled from our office by the provision of directors and company secretary. Again, you will have no relationship with the company in any way and must not be seen to have any control.

All invoices produced by the company should be seen to be coming from the company and not from anywhere else. I think we could easily operate a system whereby you email us details for the invoice which we could then superimpose on a template final invoice and fax out from the London number. It may well be that we could use the details from the purchase invoice with an agreed mark-up to produce the sales invoice..."[11] (emphasis added)

19. A few hours after receiving that reply, the Appellant Hargraves emailed further queries to Strachans about the scheme as follows:

"Q2 in Australia, the ultimate control of a trust rests with an appointor, is this the same as a protector? If so, the client becomes the protector/appointor. Is that correct? ..."

The primary transactions will be the purchase of listings from a company in China by the name of Q-data. They are up to speed with our requirements and are awaiting further instructions ... I guess you could call the services rendered to Q-data by Amber Rock brokerage fees ...

Q3. I am most interested in information on how the charge card works. Once the security funds are deposited, what are the withdrawal rules? (could you confirm that amount required in US$ for the security bond) ..."[12]

20. Strachans replied the same day as follows:

"Q2. My understanding is that an Appointor is similar to a Protector. However, I would not recommend the client in Australia being appointed as

[11] Z1269
[12] Z531

the Protector. The position could be argued to be that of a quasi trustee which may cause adverse tax consequences. The blank letter that Philip will have with him should only be used as a last resort situation in replacing the trustees

...

Q3. By the charge card I assume you mean a Standard Chartered Debit card.

... I would stress that the card should not be used for retail transactions in the holders country of residence as these transactions normally require a signature. We advise that only withdrawals from automatic cash machines should be used in these cases ..."[13] (emphasis added)

10 21. On 4 October 1999 the Appellants (and Glen Hargraves) met with Egglishaw[14] (at [23]) at which time the blank protector letter referred to above was given to Hargraves. When his residence was searched on 9 June 2005, that letter was located.[15] Although no such letter was found when Stoten's residence was searched on 9 June 2005, he had enquired of Strachans as to obtaining a letter and in fact acknowledged receiving one in December 2000.[16] Resort to these letters was never necessary because Strachans faithfully carried out the directions and instructions of the Appellants in respect of the funds.

22. In accordance with the instruction referred to in the meeting note of 4 October 1999,[17] (at [21] above) Stoten formulated an agreement purporting to reflect the arrangements
20 between AR and PDC. The agreement went through various forms but in the end, referred in its terms to AR providing "*brokerage services*" to PDC. This was clearly false. The Respondent's case was that the agreement was deliberately false and specifically designed to mislead anyone who might enquire into the legitimacy of the arrangements between PDC and AR. This is exactly the way the agreement was used when the Police searched the Appellant's residence on 9 June 2005. The evidence of Stoten's lies to the police concerning the agreement and the true role of AR constituted evidence of a consciousness of guilt on his part.

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[13] Z531
[14] For notes of the meeting see Z656
[15] K14
[16] Z480, Z478, and Z2274
[17] Z656

23. As the Court below correctly concluded that it was always apparent to the Appellants that they had control of this scheme (at [88]). AR was designed to do and did do whatever PDC directed it to.

24. In addition, during the period the subject of count 2, two particular events occurred which were relevant to the Appellants' state of mind and the issue of dishonesty.

25. The first relates to the actions of Smibert, who was a director of PDC from 1995 until his resignation in 2002. In about mid 2001, when Smibert was in the process of negotiating to purchase a holding in the company, Stoten informed him that it would be necessary for him to receive his dividends on the shares through ATM's in cash. Smibert told Stoten he was uncomfortable with this proposal. In April 2002, Stoten again told him that it would be necessary for him to receive at least part of his dividend in cash through ATM's. As a consequence, on 12 April 2002, he wrote to the Appellants (and Glen Hargraves), expressing his concerns. The letter contains the following:

> "*You will recall, that upon learning of company monies being sent to Jersey, I expressed my concern. Admittedly, financial management is not among my talents. Despite the assurances given about the propriety of such an arrangement, I elected not to utilise the "Jersey" facility personally. This was not a criticism of any of you. When described as 'ignorant' on the subject, I accepted that, but nevertheless I question the ethics and legitimacy of such an arrangement.*
>
> *At the time that the share agreement was established, it was verbally agreed that I would not use the "Jersey facility" as I elected to pay tax on all my dividend. This week however, I learned that my declaring the full amount of my dividend to the A.T.O would jeopardise my fellow share holders standing with the Taxation dept. It is surely your business how and when you pay your tax but I am now left in a regrettable position.*
>
> *One must ask, if indeed these are legitimate shares, why can't I legitimately declare them without implicating others? And what if I chose one day to sell or bequeath my shares? Would the buyer or beneficiary have to look over his shoulder each time he used an A.T.M and not be able to bank the money he*

withdrew? Ignorant as I may be, I cannot feel comfortable about going down that path."[18] (emphasis added).

26. On the same day, Smibert resigned as a director of PDC and related entities.[19]

27. Having been thus alerted to concerns about the legitimacy of the scheme, the Appellants simply continued to implement it. They did not seek any advice from anyone as a result of the concerns expressed to him. Significantly, they did not raise it with Coote, their accountant.[20]

28. The second event which occurred was that, on 14 February 2004, Egglishaw was detained by the authorities in Australia and his laptop was seized. From that time the procedures which had been adopted in relation to implementing the scheme changed in two respects: the instructions which had previously been given by e-mail were to be given orally to a nominated mobile telephone[21] and the cards used to access ATM's were put in the names of foreign nationals.

29. There was also a significant body of evidence located by the police searches on 9 June 2005 as well as evidence of the conduct of the Appellants that day and in the period thereafter.

30. The summary in the Appellant's submission of his evidence at trial (AS [39] ff) does not address the objective evidence (referred to above) as to the set up and operation of the scheme or the Smibert incident. It also omits reference to the following evidence.

31. An intercepted telephone call on 9 June 2005, between both Appellants where Stoten asked Hargraves whether the police had found the card, to which Hargraves replied that they had not. Stoten then remarked "... *they haven't really got nothin' there then is there?*"[22] The Respondent's case was that this conversation, in its conspiratorial tone and content, revealed an awareness of the dishonesty in the operation of the scheme.

32. It was significant that in that and other conversations[23] there was no complaint by the Appellants as to having been misled as to the legitimacy of the scheme by Feddema or

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[18] DD1
[19] DD2
[20] T13-4(1), T13-7(50) to 13-8(5), T13-15(20), T26-35(30), T22-70(15-30)
[21] Z64 (the note included: "*all communication needs to be done by phone and only to DS mobile phone*"; Z61, Z54, Z50, Z39 and Z32 and CJSS spreadsheet X6
[22] A29
[23] A28, A13, A29 and A14

Egglishaw or indeed in the calls with Feddema and Egglishaw was there any attempt to have either explain the legitimacy of the structure.

33. For example, when Egglishaw telephoned Stoten on 9 June 2005, there was a conspiratorial tone to the conversation concerning the search then going on. Significantly, there was no complaint by Stoten to Egglishaw concerning their predicament and no complaint about the advice which Egglishaw had given them or the structure he had established for them.[24] Rather, there was discussion about what documents might be found. In relation to Stoten, his concern expressed to Feddema and Glen Hargraves as to the authorities finding his card in the name of Ward[25] and his concern as to whether the cards of his co-conspirators had been found,[26] was all evidence, together with other evidence, capable of satisfying the jury of the Appellant's knowledge that the scheme was dishonest.

34. For example, Stoten attempted to arrange for his brother to get him a physical disguise to enable him without being identified to access (and ultimately conceal) the contents of a safety deposit box at the Commonwealth Bank which contained $40,000.00 in cash (the proceeds of the scheme).[27]

35. Stoten instructed Catherine McGarry, an employee of the firm, to destroy documents and wipe the computer.[28] He also instructed another employee David Lawson, to wipe the contents of the PDC computer hard drive in case the police came back to obtain further copies.[29] The conversations, together with other evidence were clearly capable of demonstrating a consciousness of guilt.

36. Stoten's evidence explaining these conversations with Catherine McGarry, which occurred on the day of the search and thereafter, as him being in a state of shock[30] was inherently incredible. For example, he is heard in the relevant conversation laughing and joking with McGarry when she informs him that she had thrown away a book containing evidence against him and then by re-enactment was able to recover the document. When asked by her what he would like her to do with it, he replied "*Destroy it right now.*" He praised her for her efforts, calling her a "*champion*" and

[24] A17
[25] A28 and A13
[26] A28 and A29
[27] A30 and A31
[28] A14, A16, A18 and A20
[29] A20
[30] T26-21(22); T26-22(21)

telling her "*if I have to do less time because of you, I'll be thinking of you baby – laughter – chuckles – (when) I come out ... instead of 20 years get 10 – chuckles.* In effect he tells her as a result of what she has done he may only get 10 years in prison instead of 20.[31]

37. Stoten also told deliberate lies to the police when spoken to during the course of the search of his residence on 9 June 2005. He told the police there that AR was a brokerage company, that it sourced everything for PDC, that it was owned by a bunch of guys in London; he also denied any knowledge of each of the Gabriel, Galaxy and Dunedin Trusts, despite the fact that he had been giving instructions to Strachans from 1999 as to the proportion of the distribution of funds to those very trusts.[32]

38. In so far as the Appellants relied on their contact with Feddema to found an argument as to their state of mind it should be noted that it was never suggested in evidence by them that they had been told by Feddema that the scheme was legitimate or that they had directly asked him whether it was. Feddema's evidence was that he only had limited involvement which was supported by documentary evidence which confirmed his introduction of the Appellants to Strachans, but thereafter he had no further involvement.[33] After 7 August 1999 Feddema was never copied in on any of the great many emails in relation to the scheme and its operation that passed between Strachans and the Appellants. He was not paid any professional fees at all for whatever role he had in the scheme, whereas he was appropriately rewarded for all the professional work he carried out for the Appellants before they changed accountants in 1999.[34] He did not attend with the Appellants at their first (or in fact any) meeting with Egglishaw.[35] The intercepted telephone call between Stoten and Feddema on the morning of the police searches on 9 June 2005 is entirely inconsistent with the notion that Stoten had believed what was being done was legitimate and that Feddema had advised him at every step of the way.[36]

39. The evidence of Stoten was inherently implausible. It did not (and could not) explain his actions (as recorded in documents). He was unresponsive and evasive on a number

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[31] A18
[32] H2
[33] M24, Z549, Z546, Z545 and Z542
[34] The total fees paid in 1996 – 1999 for corporate advice, tax planning and compliance work was $152,085 – K71
[35] Z656
[36] A13

of topics including in relation to AR being a brokerage company and London owned;[37] the terms of the agreement between AR and PDC and the circumstances of its drafting;[38] the importance of the transactions overseas being at arm's length;[39] the issue of "*control*";[40] the AR invoices being false and the mark-up figure in respect of each;[41] the protector letter;[42] the change to the procedures after 14 February 2004;[43] and his email discussing the cash economy and the cash proceeds of the scheme.[44]

40. The verdict in relation to Glen Hargraves does not have the significance contended for by the Appellant (AS [13]). The case against Glen Hargraves was very different to the cases against the Appellants.[45] For example, unlike the Appellants he was not involved in communications with Strachans setting up the scheme (he only had one contact with them which was an inquiry about a credit card), nor did he ever give them any instructions implementing the scheme. There was no evidence that he was aware of the concerns expressed by Smibert in relation to the legitimacy of the scheme.[46]

Part V – Relevant Provisions

41. The Appellant's statement of applicable constitutional provisions and statutes is accepted.

Part VI – Summary of Argument

42. The Appellant contends that the direction which infringes the principles in *Robinson v The Queen*:[47]

(1) is a significant denial of procedural fairness and as such the proviso has no application (AS [2]); if not

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[37] T25-56 (1-35); T25-57 (45-55); T25-58 (15-55); T25-63 (10-20); T25-56 (45); T25-57 (10)
[38] T25-59 (25-40); T26-3 (25-40)
[39] T26-9 (15-55)
[40] T26-10 (30-40); T26-29 (35); T26-30 (20)
[41] T26-11 (20-55); T26-13 (25-45)
[42] T26-41 (35); T26-43 (20)
[43] T26-45 (30); T26-46 (45)
[44] T26-50 (25); T26-51 (45) DE6F
[45] See MFI"N" – Respondent's power point slides.
[46] T12-51(1) – the Crown accepted that Glen Hargraves did not have any conversations with Smibert about the structure. See also T12-26(40) and T12-30(40) – Smibert did not speak to Glen Hargraves after he wrote DD1; he spoke only to Adam Hargraves and Daniel Stoten to resolve the matter.
[47] (1991) 180 CLR 531

(2) the application of the proviso in s 668E(1A) of the *Criminal Code* (Qld) in relation to Commonwealth offences is inconsistent with s 80 of the *Constitution* (AS [3]).

It is submitted neither proposition is correct.

A significant denial of procedural fairness

43. The Appellant's argument is based on the premise that a direction to a jury which infringes the principles in *Robinson* except in an *"exceptional case"* is a *"significant denial of procedural fairness"* which thereby precludes the operation of the proviso (AS [64]).

10 44. The argument does not address either the terms or the context of the direction given in this case. It is based on a characterisation of the nature of the error considered in a vacuum. It seeks to impose a mechanical or rigid formula to the application of the proviso, to the effect that a direction which infringes *Robinson* necessarily amounts to a denial of procedural fairness and therefore renders the proviso inapplicable.

45. This Court has repeatedly emphasised that it is the statutory language which is to be applied; the question is whether the Court considers *"no substantial miscarriage of justice has actually occurred"*.[48] That involves a consideration of the nature of the error in the context of the trial and the possible effect it may have had on the outcome, and necessarily includes the terms of the direction, the evidence and the issues at
20 trial.[49]

46. The Court below concluded *"not without some hesitation"* that the direction[50] infringed *Robinson* (at [129]), but given the nature and context of the direction *"it may be doubted"* that it gave rise to a miscarriage of justice (at [130] and see [159]). The Court considered the proviso on the basis that even if the direction was capable of establishing a miscarriage, there was nonetheless no substantial miscarriage of justice (at [130]). (The correctness of the underlying conclusion that there was a misdirection is addressed below (at [74] – [79])).

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[48] *Weiss v The Queen* (2005) 224 CLR 300 at [31] – [35][42]; *Cesan v The Queen* (2009) 236 CLR 358 at [123]; *Gassy v The Queen* (2008) 236 CLR 293 at [34]

[49] *Gassy v The Queen* (supra) at [34]; *AK v Western Australia* (2008) 232 CLR 438 at [52] – [55]; *Glennon v The Queen* (1994) 179 CLR 1 at 8

[50] T31-75

47. As the Court below correctly concluded, a number of factors in this case suggested that the principles in *Robinson* had not been infringed (at 128]). The direction (at [98]):

(1) was general in nature and applicable to all witnesses; it did not single out the Appellants (at [128]);

(2) was seventh out of nine matters which emphasised the generality of it (at [128]);

(3) was consistent with the observations in *Robinson* that an accused person "*is subject to the tests which are generally applicable to witnesses in a criminal trial*"[51] (at [128]);

(4) did not invite an assessment of credit by means of comparison of interest in the outcome of the trial (at [102]);

(5) ".. *would not have been understood by the jury as meaning 'that the evidence of [each] appellant had to be scrutinized more carefully than any other witness'*"[52] (at [128]).

48. Further, the learned trial judge gave the direction in the context of the issues at trial; Mr Feddema, who the Appellants argued was a critical witness in the Crown case, was challenged by them and the trial judge considered that in those circumstances a failure to give the impugned direction "*may run a grave risk of injustice to the accused*"[53] (at [101]).

49. It is submitted that the direction given, in the context of this case, is far removed from that considered in *Robinson.*[54]

50. Accepting the Court's conclusion that there was a breach of *Robinson,* in light of the direction actually given and the Court's conclusions as to its effect (at [47] above), there is no basis for the Appellant's contention that the direction *"was a significant*

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[51] *Robinson v The Queen* (supra) at 536
[52] *Robinson v The Queen* (supra) at 536
[53] Ruling: T 32-11
[54] *Robinson v The Queen* (supra) at 533 – 534 (referred to in judgment by Court below at [103] – [105] The direction included "*Still on the subject of witnesses, you might think that some of them have an interest in the outcome of this case. Indeed you might think that one witness has above all others has a greater interest than all the others in the outcome of the case. You might say, 'Well, this witness has a particular interest in the outcome of his case. We should look at his or her evidence closely, more closely perhaps we would at others'. That is a matter you have to bear in mind when scrutinising a particular witness's evidence*" at 533 and later "*You might think – it is a matter solely for you – the accused had the greatest interest of all the witnesses you saw and heard and that, therefore, you should scrutinize his evidence closely*" at 534

denial of procedural fairness" (AS [64]). The statements (AS [61][62] and see [59]) from *Robinson* relied upon by the Appellants are not supported by the judgment of the Court below. In particular as noted above (at [47]) the Court found that the jury would not have understood the direction as meaning that the evidence of the Appellants was to be scrutinized more carefully than other witnesses (see AS [61][62]) or that it is to be assessed by means of the comparison of interest in the outcome of the trial. The Appellant has not challenged (or addressed) the correctness of those findings.

51. It is submitted that the Court below correctly concluded that a direction that breaches *Robinson* does not necessarily preclude the application of the proviso (at [154]). That conclusion is consistent with authority.[55]

52. Every case must depend on its particular circumstances. The impact of the direction will depend on many circumstances including its terms, the evidence, the context and the issues at trial.[56]

53. If it was necessary to turn to the proviso, there is nothing about the nature of the error in the circumstances of this case which precluded its application.

54. Contrary to the Appellant's contention (AS [65] – [66]) that the outcome of a trial depended on an assessment of credibility does not necessarily preclude the application of the proviso. That submission taken to its logical conclusion would mean that, regardless of the nature of the error or irregularity, the application of the proviso would be excluded whenever there was a substantial factual dispute.[57] Clearly, such circumstances do not necessarily prevent a court concluding that in a particular case no substantial miscarriage of justice has occurred.[58] Further, in this case the Appellant argued below that the Court could assess the strength of the case to uphold a ground of an unsafe verdict. The submission that the proviso can never be applied where the misdirection goes to the accused's credibility was rejected by this Court in *Glennon v The Queen.*[59]

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[55] *Stafford v The Queen* (1993) 67 ALJR 510; *R v Rezk* (1994) 2 Qd R 321 at 331 and see *Glennon v The Queen* (1994) 179 CLR 1 at 8 (the error related to the right to silence – the Court concluded that although the right to silence is a fundamental right it cannot be said that any misdirection precludes the application of the proviso).

[56] *Glennon v The Queen* (supra) at 8; *The Queen v McMahon* (2004) 8 VR 101; *R v Haggag* (1998) 101 A Crim R 593 at 602; *The Queen v Asquith* (1994) 72 A Crim R 250; *R v Rezk* (supra) at 330

[57] *Weiss v The Queen* (supra) at [38]

[58] *Driscoll v The Queen* (1977) 137 CLR 517 at 527 – 528;

[59] (1994) 179 CLR 1 at 9 – 10 and see at 8

55. The Court below analysed the direction and made findings as to its effect; it was conscious of the issues in the trial and that the Appellants each gave evidence about their respective states of mind (at [158]). However, as the Court correctly observed, there was a "*wealth of evidence from which their states of minds could be objectively assessed*" (at [158] and see [85]).

56. The Court below correctly applied the principles in *Weiss* as to the application of the proviso (at [151] – [159]).

57. It is submitted that the Court correctly concluded that "*no miscarriage of justice; substantial or otherwise, has actually occurred*" (at [159]).

10 Section 80 of the Constitution

58. The Appellant's reasoning on this aspect appears to be as follows:

(1) That the proviso involves an appellate court determining the guilt of the accused (AS [68]);

(2) That s 80 is to be read as a guarantee that a verdict of guilty can only be reached by a jury (AS [69]);

(3) That guarantee will be infringed if a miscarriage is found by an appellate court which then, pursuant to the proviso, "*decides guilt*" (AS [69]);

(4) That history of the appeal procedure "*tends to suggest that what was intended by the use of the words of s 80 is a trial free from legal error*" (AS [80] and see
20 [85]); and/or

(5) The proviso should be seen either in accordance with observations of Deane J in *Dietrich v The Queen*[60] or s 75 of the *Judiciary Act* (AS [85]).

59. The Appellant does not submit that the nature of the error found in this case is such that it has breached an essential characteristic of trial by jury in s 80.

60. The Appellant's contention (AS [69][85]) is premised on the proposition that applying the proviso involves an appellate court finding the Appellant guilty (AS [69]). That submission erroneously characterises the task the Court is undertaking.

61. The Appellants had a trial by jury. If the Appellant satisfies the first stage of s 668E of the *Criminal Code* 1899 (Qld) the Court may dismiss the appeal if it considers that no
30 substantial miscarriage of justice has actually occurred. The Court, (after it finds an

[60] (1992) 177 CLR 292 at 338

error), is not then "*proceeding pursuant to the proviso to find guilt*" (AS [69]); it is determining whether a substantial miscarriage of justice has actually occurred.[61] It is necessary, although not necessarily a sufficient step, for the Court to consider on the evidence properly admitted whether *"the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty"*.[62] That is an objective task.[63]

62. As noted above (at [44][45]) in answering the statutory question it is necessary, amongst other things, for the appellate court to consider the nature of the error and the possible effect it had on the outcome of the trial.[64]

10 63. This Court in *Weiss* did no more than identify one circumstance where the proviso cannot be engaged; when an appellate court is not persuaded that the evidence properly admitted proved beyond reasonable doubt the Appellant's guilt of the offence.[65]

64. There may be some errors which, by their very nature, may be such that would render the proviso inapplicable regardless of the strength of the evidence or whether an appellate court concluded that the Appellant had been proved guilty beyond reasonable doubt.[66]

65. In *Cheatle v The Queen*[67], the High Court held that s 80 of the *Constitution* entrenched certain immutable and essential features of a jury for the purposes of a trial of a
20 Commonwealth offence. Discerning those features may be difficult.

66. This Court has held that s 80:

(1) means that there is to be *"a trial before a judge and jury;"*[68]

(2) precludes majority verdicts;[69]

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[61] *Weiss v The Queen* (supra) at [35][40]
[62] *Weiss v The Queen* (supra) at [41] – [44]
[63] *Weiss v The Queen* (supra) at [41][42][43] and see: *M v The Queen* (1994) 181 CLR 487 at 494 - 495
[64] *Gassy v The Queen* (supra) at [34]; *Cesan v The Queen* (supra) at [126][127]
[65] *Weiss v The Queen* (supra) at [44][46]; *AK v Western Australia* (supra) at [53] – [55]; *Cesan v The Queen* (supra) at [124]
[66] *Weiss v The Queen* (supra) at [45]; *Darkan v The Queen* (2006) 227 CLR 373 at [94]); *Nudd v The Queen* (2006) 80 ALJR 614 at [6][7] (for example if there is a failure of process or departures from the requirements of a fair trial or as a result of failure to observe the conditions of a fair trial); *Gassy v The Queen* (supra) at [33] For example; *AK v Western Australia* (supra) (this Court concluded that the failure to comply with s 120 (2) of the Criminal Procedure Act which required a reasoned decision, but no reasons were given in relation to a central issue , it could not be said that there was no substantial miscarriage of justice: at [59])
[67] (1993) 177 CLR 541
[68] *Brownlee v The Queen* (2001) 207 CLR 278

(3) precludes an accused person giving up his or her rights under s 80;[70]

(4) requires the jury to be randomly and impartially selected, not chosen by the prosecution or the State;[71]

(5) requires the jury to be comprised of lay decision-makers who are impartial as to the issues;[72]

(6) permits the use of reserve or additional jurors;[73]

(7) does not preclude a State law which permits the jury to separate, or to be reduced from 12 to 10 in number, before the verdict is given;[74]

(8) does not make unalterable all aspects of trials by jury as they existed in England or in the Australian colonies as at 1900 – thus property and gender qualifications for jurors need not and have not been retained.

67. As has been recognised in the authorities, the procedures with respect to the jury system are not immutable.[75] Not all traditional incidents of trial by jury are essential.[76] Classification, as an essential feature of the institution of trial by jury, involves an appreciation of the objectives that institution advances or achieves.[77]

68. While an historical understanding of the institution of trial by jury must be borne in mind when interpreting the scope of s 80,[78] it is nevertheless the case that the ambit of the right established by s 80 cannot be determined solely by reference to the scope of the institution as it existed at the time of the provision's enactment.[79]

69. Rather, the content of trial by jury in a criminal context has adapted in accordance with contemporary custom and this has been reflected in concomitant legislative change. It is against this evolutionary background that the interpretation of s 80 must properly take place, recognising the objectives that the institution seeks to achieve and

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[69] *Cheatle v The Queen* (supra)
[70] *Brown v The Queen* (1986) 160 CLR 171
[71] *Cheatle v The Queen* (supra); *Katsuno v The Queen* (1999) 199 CLR 40 at 64-65
[72] *Cheatle v The Queen* (supra) at 549 and 560; *Brownlee v The Queen* (supra) at 289 and 299
[73] *Ng v The Queen* (2003) 217 CLR 521
[74] *Brownlee v The Queen* (supra)
[75] *Brownlee v The Queen* (supra) at 286 [12]; *Ng v The Queen* (supra) at 533 [36] per Kirby J; Spigelman CJ in *R v JS* (2007) 175 A Crim R 108 at 127 [85]
[76] As shown by Kirby J in *Ng v The Queen* at 533 [36]
[77] *Brownlee v The Queen* (supra) at 298 [54]
[78] *Cheatle v The Queen* (supra) at 560
[79] *Brownlee v The Queen* (supra) at [6]-[7], [12], [17] [33] [115], [125]

adopting a *"readiness to accept any changes which do not impair the fundamentals of trial by jury".*[80]

70. It is not correct to say that an essential and immutable feature of jury trial is a trial free from legal error (AS [80]), nor that this was always the case as a matter of history in the 19th century. Thus, this Court in *Conway v The Queen*[81] noted four quite limited avenues for challenging convictions or sentences, and later said:

> *"In criminal appeals and applications for leave to appeal against criminal convictions, the Judicial Committee has always refused to allow the appeal or grant the application unless it is satisfied that the legal error — whatever it was — has brought about a miscarriage of justice."*[82]

The Court referred to *Ibrahim v The King* (amongst others) in support of that proposition which case made it clear that the principle went back until at least 1885.[83]

71. Indeed, the following statement from *Weiss v The Queen*[84] tells decisively against the Appellant's premise:

> *"As Wigmore pointed out the conduct of jury trials has always been subject to the direction, control and correction both of the trial judge and the appellate courts. Once it is acknowledged that an appellate court may set aside a jury's verdict "on the ground that it is unreasonable or cannot be supported having regard to the evidence", it follows inevitably that the so-called "right" to the verdict of a jury rather than an appellate court is qualified by the possibility of appellate intervention. The question becomes, when is that intervention justified? And that, in turn, requires examination of when a court should conclude that "no substantial miscarriage of justice has actually occurred".*
> (emphasis added)

72. It is to be noted also that s 423 of *Criminal Law Amendment Act* 1898 (NSW), the precursor to the current common form appeal provision in NSW contained a proviso.[85]

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[80] *Brownlee v The Queen* (supra) at [55], [21]-[22], [146]-[147]
[81] (2002) 209 CLR 203 at [31] and see comments in *Cesan v The Queen* (supra) at [124] – [127]
[82] Equally, the NSW precursor to the proviso, s 423 of the *Criminal Law (Amendment) Act* 1883 (NSW) at least applied *'where it was impossible for the appellate court to suppose that the evidence improperly admitted had any effect upon the jury'*: *Makin v Attorney-General* (NSW) [1894] AC 57.
[83] [1914] AC 599 at 615
[84] (2005) 224 CLR 300 at [30]

73. The Appellant has put no submission in support of adopting the other approaches contended for (AS [85]), nor is there a basis to do so. Indeed to do so (for example to apply the description of Deane J in *Dietrich*) would be to apply judicially crafted concepts into the terms of the statute; it is those terms which are to be applied.[86]

Part VII – Notice of Contention

74. It is submitted that the impugned direction, in the circumstances of this trial, did not infringe the principle in *Robinson*. If that is correct the proviso does not arise for consideration.

75. In light of the findings of the Court below as to the effect of this particular direction (at [47] above), particularly that the jury would not have understood it to mean that the evidence of the Appellants had to be scrutinized more carefully than other witnesses, or that it is to be assessed by means of a comparison of interest in the outcome of the trial, the vice with which this Court in *Robinson* was concerned did not exist.[87] The direction did not invite the jury to discount the evidence of the Appellant.

76. As noted above (at [48]) the learned trial judge considered the direction necessary in the context of this trial and that in his view a failure to give such a direction "*may run a grave risk of injustice to the accused.*"[88] As his Honour noted in refusing an application to discharge the jury, the direction was not specific to the accused, it was completely general, it did not refer to taking into account an interest in the outcome of the trial rather it referred to an interest in the subject matter and the context in which it was given pointed away from outcome, and that it was preceded and followed by a direction on the onus of proof.[89] The direction was general in nature both as to witnesses and topics (at [98]).

77. If contrary to the above, the direction is considered to infringe the principles in *Robinson*, the learned trial judge correctly concluded that the circumstances required such a direction and as such could properly be considered exceptional. It is submitted on either scenario no miscarriage of justice occurred. Again, the proviso would not arise for consideration.

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[85] It was in the following terms "*provided that no conviction or judgment thereon shall be reversed arrested or avoided on any case so stated unless for some substantial wrong or other miscarriage of justice.*"
[86] See for example: *Cesan v The Queen* (supra) at [126]
[87] *Robinson v The Queen* (supra); *Stafford v The Queen* (supra) at 510
[88] Ruling: T 32-11
[89] Ruling: T 32-9 – T32-10

78. Section 668E contains a two stage process;[90] an Appellant must establish one or more of the grounds specified before the proviso falls to be considered. Where, as here, the error is said to fall within the miscarriage of justice ground, an Appellant must establish a miscarriage of justice. That involves a consideration of the irregularity in the context and circumstances of this trial.[91] In many cases, depending on the nature of the irregularity, that will require an assessment of the strength of the Crown case and the impact of the error or irregularity in the context of the trial as a whole. It is submitted that when relying on this ground it is not sufficient to merely establish that an irregularity has occurred, it must constitute a miscarriage of justice.[92]

10 79. Even if there was an infringement of the principle in *Robinson*, in the circumstances of this case the Appellants had not established a miscarriage of justice. The Court below doubted that there was a miscarriage; they ought to have found there was not one. The Court's ultimate conclusion was that there was *"no miscarriage of justice; substantial or otherwise"* (at [159]). It was correct to do so.

80. The appeal ought to be dismissed.

Counsel for the Respondent

20 **Wendy Abraham QC**

12 Wentworth Chambers
Tel: (02) 8029 6319
Fax: (02) 8023 9539
wendy.abraham@12thfloor.com.au

Alan MacSporran SC

More Chambers
Tel: (07) 3236 2719
Fax: (07) 3236 2720
alanmacsporran@morechambers.com

[90] *AK v State of Western Australia* (supra) at [42], [53] – [55]; *Gassy v The Queen* (supra) at [19] [31], [55] – [57]; *Evans v The Queen* (2007) 235 CLR 521at [40]; *Gately v The Queen* (2007) 232 CLR 208 at [110] – [117], [22] – [23]; *TKWJ v The Queen* (2002) 212 CLR 124 at [23] – [25]; *Libke v The Queen* (2007) 230 CLR 559 at 573 - 580 [44]; *Nudd v The Queen* (2006) 80 ALJR 614 [24], [25]

[91] *Gassy v The Queen* (supra) at [29] – [31]; *Cesan v The Queen* (supra) at [112] – [122]; *Nudd v The Queen* (supra) at [24] [25]; *TKWJ v The Queen* (supra) at [31] [33], [79], [101] – [103], [104]; *Libke v The Queen* (supra) at [81]

[92] *Nudd v The Queen* (supra) at [24] [25], cf; [68], [83], [100]; *Libke v The Queen* (supra) at [46] – [53], [81], [134][135]; *Cesan v The Queen* (supra) at [83] – [89][118] This is not to imply that miscarriage of justice is exclusively a matter of outcome, it may also be a matter of process: *Cesan v The Queen* (supra) at [81] – [89]; *Nudd v The Queen* (supra) at [3], [85] – [87]