HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

DAVID HAROLD EASTMAN APPLICANT

AND

THE QUEEN RESPONDENT

Eastman v The Queen [2000] HCA 29
25 May 2000
C5/1997

ORDER

1. *Special leave to appeal granted.*

2. *Appeal dismissed.*

On appeal from the Federal Court of Australia

Representation:

D F Jackson QC with R D Cavanagh and G R Kennett for the applicant (instructed by John Forrest Boersig) at the hearing on 25 March 1999

D F Jackson QC with G R Kennett for the applicant (instructed by John Forrest Boersig) at the hearing on 1 February 2000

T A Game SC with S J Gageler for the respondent (instructed by Director of Public Prosecutions for the Australian Capital Territory) at the hearing on 25 March 1999

T A Game SC with R C Refshauge for the respondent (instructed by Director of Public Prosecutions for the Australian Capital Territory) at the hearing on 1 February 2000

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with M A Perry and C J Horan intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor) at the hearing on 25 March 1999

D Graham QC, Solicitor-General for the State of Victoria with N D Hopkins intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with C F Jenkins intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia) at the hearing on 25 March 1999

CATCHWORDS

Eastman v The Queen

Constitutional Law (Cth) – Appellate jurisdiction of High Court – Appeal from a federal court – Whether High Court has power to receive new evidence in an appeal from a federal court – Whether power to receive new evidence is different in appeals from federal and state courts.

Constitutional Law (Cth) – Interpretation – Relevance of historical background to Constitution.

Appeals – New evidence – Whether admissible on appeal to High Court.

Criminal Law and Practice – Fitness to plead – Issue not raised at trial – Whether material before appeal court suggested issue of fitness to plead at trial – Whether appeal court under a duty to investigate whether an accused was fit to plead at trial – Whether fundamental failure of trial process.

Words and phrases – "appellate jurisdiction" – "appeal" – "fresh evidence" – "fitness to plead".

Constitution, s 73.
Mental Health (Treatment and Care) Act 1994 (ACT), s 68.
Crimes Act 1900 (ACT), s 428E.
Federal Court of Australia Act 1976 (Cth), s 24.

1 GLEESON CJ. The applicant, following a trial in the Supreme Court of the Australian Capital Territory, was convicted of the murder of Colin Stanley Winchester. He was sentenced to imprisonment for life. An appeal to the Full Court of the Federal Court of Australia was unsuccessful[1]. The applicant seeks special leave to appeal to this Court.

2 A challenge to the legality of the trial, based upon a claim that the trial judge was not validly appointed, was dealt with separately, and rejected, by this Court[2].

3 The grounds of the present application, as amended, are as follows:

(1) At his trial, the applicant was unfit to plead. He was unfit to instruct counsel or to defend himself, because of mental illness.

(2) The Director of Public Prosecutions and Crown Prosecutor knew it was likely that the applicant suffered from mental illness which would render him unfit to plead, to instruct counsel or to defend himself, and should have informed the learned trial judge of the fact.

(3) Because of the applicant's mental illness and his unfitness to plead, the trial miscarried.

4 None of the above grounds had been argued in the Full Court, and no question as to the applicant's fitness to plead was raised before the trial judge. It will be necessary to make further reference, in due course, to the conduct of the trial and the appeal. For the present, it suffices to say that the grounds of appeal argued in the Full Court were not pursued in this Court, and the grounds sought to be argued in this Court represent a substantial departure from the way in which the trial and the appeal were conducted on behalf of the applicant.

The new evidence

5 At the commencement of the hearing of the application, senior counsel for the applicant sought to read 10 affidavits. Two of the affidavits were sworn by a psychiatrist, Dr White, who expressed opinions concerning the applicant's mental condition, and his fitness to plead. The remaining affidavits were sworn by a number of legal practitioners, and contained evidence as to the conduct of the

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1 *Eastman v The Queen* (1997) 76 FCR 9.

2 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 73 ALJR 1324; 165 ALR 171.

applicant in relation to the preparation and conduct of his trial, said to bear upon his fitness to plead.

6 None of this evidence had been before the Full Court. It was objected to by the respondent. The primary ground of objection was that, upon the authority of the decision of this Court in *Mickelberg v The Queen*[3], the Court had no power to receive the further evidence on an appeal, and that it would be futile to grant special leave to appeal on the basis of evidence which would not be admissible on an appeal. The arguments involved in this tender of further evidence, and the respondent's objection, raised a constitutional issue, and a number of Attorneys-General intervened. Senior counsel for the applicant contended that *Mickelberg* did not stand in the way of his attempt to lead the evidence and that, even if it did, it should be reconsidered, and not followed.

7 There were other objections to the evidence. It was observed that the opinions of Dr White were largely based upon assumptions of fact concerning the applicant which were not shown to be true, and that his evidence included a substantial amount of inadmissible hearsay. It was also foreshadowed that, if the new evidence were admitted, counsel would wish to cross-examine some of the deponents, including Dr White, and would challenge Dr White's opinions.

8 It was decided that the appropriate course was to hear full argument from the parties and interveners upon what might be described as the *Mickelberg* point. If the evidence were to be rejected on that basis, then it would be unnecessary to deal with other grounds of objection, and no occasion to cross-examine Dr White or any other witness would arise. In that event, the grounds of appeal sought to be raised by the applicant would be considered in the light of the material that was before the Full Court.

9 It is the opinion of a majority of the Court, consisting of Gaudron J, McHugh J, Gummow J, Hayne J and myself, that the respondent's primary objection should be upheld, and that the further evidence upon which the applicant seeks to rely must be rejected. That being so, the evidence will not be received, and it is unnecessary to consider further questions as to the admissibility or cogency of the evidence, or to permit cross-examination.

10 My reasons for joining in the majority opinion on this point are as follows. They are based upon the nature of the jurisdiction which is invoked by an application for special leave to appeal to this Court, and upon a long line of authority, of which *Mickelberg* is a relatively recent example.

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3 (1989) 167 CLR 259.

11 The jurisdiction invoked by an application for special leave to appeal is that conferred by s 73 of the Constitution. It is a jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State.

12 In *Davies and Cody v The King*[4], Latham CJ said:

> "This is an application for special leave to appeal by two persons who have been sentenced to death. This court is sitting in this matter as a court of appeal and only as a court of appeal, and is not in this instance exercising original jurisdiction. The only power of the court as a court of appeal is to consider and determine whether the judgment of the court appealed from was right upon the materials before that court."

13 This proposition, and the corollary, that in the exercise of its jurisdiction under s 73 the Court does not act upon new evidence, was established at an early stage in the Court's history. In 1910, in *Ronald v Harper*[5], an appeal from the Supreme Court of Victoria, there was an attempt to lead evidence for the purpose of showing that evidence given at first instance was perjured. The Court held that it had no power to receive the new evidence. To like effect were the decisions in *Scott Fell v Lloyd*[6], in 1911, and *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan*[7], in 1931. In *Grosglik v Grant (No 2)*[8], in 1947, Latham CJ, Rich, Dixon, McTiernan and Williams JJ said: "Fresh evidence cannot be admitted upon appeals to this Court".

14 Appeals are creatures of statute. It is not uncommon for intermediate appellate courts in Australia, including Courts of Criminal Appeal, to have conferred upon them, by statute, power to receive and act upon evidence which was not before the court of first instance. When such a power is exercised, what is involved is an exercise of original rather than strictly appellate jurisdiction. The relevant statute ordinarily defines the conditions and limits of the exercise of the power. There is no statute which confers such power upon this Court, or which regulates the circumstances in which further evidence might be received. The authorities referred to above do not deny the capacity of Parliament to enact

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4 (1937) 57 CLR 170 at 172.

5 (1910) 11 CLR 63.

6 (1911) 13 CLR 230.

7 (1931) 46 CLR 73 at 85, 87, 109-111, 113.

8 (1947) 74 CLR 355 at 357.

such legislation, at least in relation to appeals from courts exercising federal jurisdiction, but it has never done so.

15 In Courts of Criminal Appeal which, by statute, are given such power, an opportunity exists for an appellant, who has been convicted of a crime, to seek to demonstrate, by evidence not adduced (and, usually, not available) at the trial, that there has been a miscarriage of justice. Such an opportunity, by its nature, only applies in relation to new evidence which is available at the time of the hearing of the appeal. It is not unusual for there to be claims of miscarriage of justice based upon material which first became available only after the conclusion of an unsuccessful appeal; sometimes many years later. In this country, that situation is addressed in various jurisdictions by statutory provisions empowering executive or curial inquiries into alleged miscarriages of justice. An example is to be seen in the provisions of Pt 13A of the *Crimes Act* 1900 (NSW). Although those provisions may give rise to a judicial inquiry, and empower the Court of Criminal Appeal, following such an inquiry, to quash a conviction, the process could be described as an "appeal" only in the loosest and most colloquial sense. Nevertheless, the availability of such procedures is part of the background against which the issue presently under consideration arises. Another part of the background is to be found in the principles governing the circumstances in which a Court of Criminal Appeal may re-open its own decisions[9]. Once again, what is involved in such a procedure is in no legal sense an appeal, and the time limits and procedures which govern the appellate process do not apply.

16 The line of authority going back to 1910, concerning the power of this Court, in the absence of any statutory provision, to receive further evidence when exercising its jurisdiction under s 73 of the Constitution, was opened for reconsideration by this Court in 1989 in *Mickelberg*[10], an application for special leave to appeal in a criminal case. By a majority of four to one[11], the Court decided that on an appeal under s 73 of the Constitution from a decision of a State court exercising State jurisdiction this Court has no power to receive new evidence. The reasoning upon which that conclusion was based is equally applicable to an appeal from another federal court, or a court exercising federal jurisdiction.

17 For almost a century, appeals, including criminal appeals, in this Court have been conducted and decided upon the basis of the principles reconsidered and

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9 See, for example, *Grierson v The King* (1938) 60 CLR 431; *Postiglione v The Queen* (1997) 189 CLR 295.

10 (1989) 167 CLR 259.

11 Mason CJ, Brennan, Toohey and Gaudron JJ; Deane J dissenting.

re-affirmed in *Mickelberg.* The reasons underlying those principles were fully explained in *Mickelberg*. That a different view is open is shown by the dissenting opinion in that case; but the issue should now be regarded as settled. The point, which is fundamental to the exercise by the Court of its appellate jurisdiction, should not be treated as open for further consideration every time a change in the composition of the Court encourages counsel to attempt to re-argue what is, by now, a very old question.

18 In *Mickelberg*[12], Mason CJ noted that one of the propositions underlying this uninterrupted stream of authority is that a court exercising strictly appellate jurisdiction is called upon to decide whether there was an error on the part of the court below, considering the material which was before the court below.

19 In the present case, against the possibility that the new evidence tendered in this Court would be rejected, the Court invited full argument from counsel (as if on appeal) on the question whether, on the material that was before the Full Court of the Federal Court of Australia, that Court could, and should, itself have made inquiries about, and considered, the applicant's fitness to plead or stand his trial.

Was the Full Court in error?

20 The nature of the suggested error on the part of the Full Court, and the context in which the suggestion is to be examined, may be seen from the preceding two paragraphs.

21 In the present case, nothing is said to turn upon any difference between the concepts of fitness to plead to an indictment and fitness to be tried[13]. It is convenient to refer simply to fitness to plead.

22 Early statements on the subject reflect what, in modern times, would be regarded as an unsophisticated approach to psychiatric questions, but they also emphasise that what is in question is a matter of comprehension, not skill. Sir Matthew Hale[14] referred to the case where a man who commits a capital offence, later, but before arraignment, "becomes absolutely mad". In such a case "he ought not by law to be arraigned during such his frenzy, but be remitted to prison until that incapacity be removed". The reason is "because he cannot

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12 (1989) 167 CLR 259 at 267.

13 cf *Kesavarajah v The Queen* (1994) 181 CLR 230 at 234.

14 Hale, *The History of the Pleas of the Crown* (1736), vol 1 at 34-35.

advisedly plead to the indictment". In *R v Pritchard*[15], in 1836, Baron Alderson instructed the jury that the question was "whether the prisoner has sufficient understanding to comprehend the nature of this trial, so as to make a proper defence to the charge." That was a case where the accused was deaf and dumb, but the wider issue of fitness to plead was considered. Alterations in the rules concerning the right of legal representation of accused persons affected the context in which the question may arise, and developments in the understanding of mental illness have elucidated the considerations that may be relevant to the inquiry. Even so, the test is substantially the same.

23 For the purposes of the present case, the test was the subject of statute. Paraphrasing s 68(3) of the *Mental Health (Treatment and Care) Act* 1994 (ACT), and applying it to the present case, the test was whether the applicant was capable of –

(a) understanding what it is that he had been charged with;

(b) pleading to the charge and exercising his right of challenge;

(c) understanding that the proceeding before the Supreme Court would be an inquiry as to whether or not he did what he was charged with;

(d) following, in general terms, the course of the proceeding before the Court;

(e) understanding the substantial effect of any evidence given against him;

(f) making a defence to, or answering, the charge;

(g) deciding what defence he would rely on;

(h) giving instructions to his legal representative (if any); and

(i) making his version of the facts known to the Court and to his legal representative (if any).

24 Unfortunately, it is not unusual for the criminal justice system to have to deal with people with mental disorders; sometimes severe disorders. The existence of the disorder does not, of itself, prevent them from being brought to trial. It certainly does not mean that they must be allowed to be at liberty. It is not to be overlooked, as Deane and Dawson JJ pointed out in *Kesavarajah v The Queen*[16], that the usual consequence of a finding that a person is unfit to plead is

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15 (1836) 7 Car & P 303 at 304 [173 ER 135 at 135].

16 (1994) 181 CLR 230 at 249.

indefinite incarceration without trial. It is ordinarily in the interests of an accused person to be brought to trial, rather than to suffer such incarceration.

25 In the case of *Berry*[17] Geoffrey Lane LJ, criticising a direction to a jury empanelled to determine an issue of fitness to plead, said:

> "It may very well be that the jury may come to the conclusion that a defendant is highly abnormal, but a high degree of abnormality does not mean that the man is incapable of following a trial or giving evidence or instructing counsel and so on."

26 The Ontario Court of Appeal, in *R v Taylor*[18], recorded the following propositions, agreed by counsel, as representing the state of authority in that province:

> "(a) The fact that an accused person suffers from a delusion does not, of itself, render him or her unfit to stand trial, even if that delusion relates to the subject-matter of the trial.
>
> (b) The fact that a person suffers from a mental disorder which may cause him or her to conduct a defence in a manner which the court considers to be contrary to his or her best interests does not, of itself, lead to the conclusion that the person is unfit to stand trial.
>
> (c) The fact that an accused person's mental disorder may produce behaviour which will disrupt the orderly flow of a trial does not render that person unfit to stand trial.
>
> (d) The fact that a person's mental disorder prevents him or her from having an amicable, trusting relationship with counsel does not mean that the person is unfit to stand trial."

27 In the present case, the ultimate test to be applied is the statutory test set out earlier. However, each of the above propositions is sound, and they are consistent with the statutory test.

28 Section 428E of the *Crimes Act* 1900 (ACT) provided that, where the issue of fitness to plead to the charge was raised by a party or by the court, and the court was satisfied that there was a question as to such fitness, then there should

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17 (1977) 66 Cr App R 156 at 158.

18 (1992) 77 CCC (3d) 551 at 564-565.

be an inquiry into the question by the Mental Health Tribunal. The reference to a "question" is to a real and substantial question[19].

29 No such issue was raised either by the prosecuting authorities, or by the applicant or his legal representatives or by the trial judge. No such inquiry was held.

30 The behaviour of the applicant during the trial was in a number of respects violent, abusive and disruptive. He dismissed his legal representatives on a number of occasions, and conducted his own defence for lengthy periods. At the time when he was conducting his own defence he appeared to have a clear understanding of the issues in the case, the nature of the charge against him, and the nature of his answers to the charge.

31 In his remarks on sentence, Carruthers AJ said of the applicant:

> "He suffers from no apparent physical disability and no evidence has been put before me either by the Crown or the prisoner that he suffers from any psychiatric condition. As I have earlier said, the evidence in that regard before me, rests with the final report of Dr Hocking, who detected no mental abnormality."

32 His Honour also said:

> "As the trial progressed, the cogency of the Crown case became clear. Regrettably, however, from the outset of the trial the prisoner attempted to avoid the consequences of the damning nature of the Crown evidence by adopting a process of manipulating the trial process and attempting to frustrate its progression in any conventional manner. Despite the persistence of this approach, the trial process nevertheless managed to overcome the obstacles presented and reached finality."

33 That was the background against which the case went on appeal to the Full Court of the Federal Court. No ground of appeal to that Court raised an issue as to fitness to plead, or made any complaint of a failure on the part of the trial judge to discern the existence of a question about that matter. The applicant was represented on the appeal by experienced counsel, although, as at the trial, he changed his representation from time to time and also, on occasion, represented himself.

34 For the purpose of considering certain grounds of appeal it became necessary for the Full Court to look at a number of reports of a psychiatrist,

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19 *R v Presser* [1958] VR 45 at 46 per Smith J.

Dr Milton, which had not been in evidence at the trial. There had been reference to the existence of such reports during cross-examination of police witnesses, but they were not seen by Carruthers AJ or, of course, by the jury. It is unnecessary to go into the full history of the reports. It suffices to say that some years before the trial, and whilst the applicant was under police surveillance, Dr Milton had been engaged to advise the police as to the likelihood that the applicant, who was suspected of killing Mr Winchester, an Assistant Commissioner of the Australian Federal Police, was also a danger to other people in authority.

35 The main point made by the reports, which is understandable having regard to the context in which they were written, is that Mr Eastman was a dangerous person who was quite capable of murdering Mr Winchester, and who could well harm others. Dr Milton said: "Eastman is a typical, dangerous, paranoid personality."

36 In a report of 15 January 1990 Dr Milton wrote: "I think he should now be regarded as psychotic (ie insane)".

37 On 28 February 1990 Dr Milton wrote:

> "We [ie Dr Milton and the police] discussed the issue of sanity. I noted that in my last report I said that on balance he would have to be regarded as psychotic, ie out of touch with reality. This is not so much because there are specific indications of him suffering a recognisable psychosis such as schizophrenia, but rather that taking him as a whole, one would have to say he is far from normal."

38 In a report of 3 August 1990 Dr Milton recorded that there "was no suggestion of any schizophrenic thought disorder."

39 On 26 January 1992 Dr Milton wrote:

> "Mr Eastman suffers from a serious emotional disorder and it is this which underlies his aggression and hostility. His disorder is sufficiently severe as to be likely to qualify for a defence of diminished responsibility were he to face trial for Mr Winchester's murder."

40 Significantly, Dr Milton did not say or suggest that the applicant would be unfit to be tried. By hypothesis, people who, successfully or unsuccessfully, raise an issue of diminished responsibility are regarded as fit to be tried, as are people who suffer from many forms of emotional disorder or psychiatric illness, which may explain why they have committed crimes, and which may be a material matter to be considered on sentencing.

41 The argument presently under consideration does not seek to attribute error to the trial judge. It proceeds upon the assumption that, on the material available

to him, on the evidence at the trial, and on his observations of the conduct of the applicant, he was not in error in failing to raise an issue as to the applicant's fitness to plead and in failing to refer the question to the Mental Health Tribunal.

42 The Full Court of the Federal Court was exercising a jurisdiction conferred by s 24(1)(b) of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act"). This was said, in *Chamberlain v The Queen [No 2]*[20], to comprehend a power to "entertain any matter, however arising, which shows that the decision of the Court appealed from is erroneous", and a power to set aside a verdict whenever the Federal Court is of the opinion that there has been a miscarriage of justice.

43 No ground of appeal before the Full Court, and no submission made to that Court, asserted that there was a question about the applicant's fitness to plead, or that there was a miscarriage of justice because such a question had not been referred to the Tribunal. Nevertheless, it is contended, the Full Court had both the power and the duty to inquire into that matter itself and that its failure to do so involved error requiring correction by this Court.

44 It is far from clear what, in practical terms, is suggested to be the course the Full Court was obliged to take in the circumstances. Let it be supposed that the material in Dr Milton's reports, coupled with the evidence at the trial, and the information before the Full Court as to the applicant's conduct, were such as would be expected to lead an appellate court to wonder whether this was a case in which, if an issue as to fitness to plead had been raised at the trial, it might possibly have been resolved adversely to the prosecution. It cannot be, and was not, argued that, in the present case, on the material available to the Full Court, there was only one possible outcome of an inquiry by the Mental Health Tribunal. What, then, would have been the issue for the Full Court to decide? And how would it have gone about deciding it?

45 It is one thing to say that s 24(1)(b) of the Federal Court Act empowers the Court to set aside a verdict which involves a miscarriage of justice. It is another thing to say that it obliges the Court, of its own motion, to embark upon an investigation of the fitness to plead of an appellant who denies unfitness, who is prosecuting his appeal upon the basis that he is competent to appeal and to instruct counsel, and who shows no interest in co-operating in any inquiry into his mental condition. (It may be added that the proceedings in this Court were fully adversarial in nature and were conducted upon the assumption that the applicant was competent to instruct counsel, and to make decisions as to how his case should be argued. This Court did not regard itself as entitled or obliged to investigate the validity of that assumption.)

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20 (1984) 153 CLR 521 at 529 per Gibbs CJ and Mason J.

46 The argument for the applicant must involve two premises. The major premise is that, if the material before the Full Court raised a real and substantial question as to the applicant's fitness to plead then, even though neither party sought to pursue the question, the Full Court had both the power and the duty to pursue it. The minor premise is that the material in Dr Milton's reports, considered either alone or in conjunction with the evidence at the trial and the information available to the Full Court as to the applicant's behaviour, raised such a question.

47 If the major premise is valid, it is not easy to understand why it should be limited to the issue of fitness to plead. The circumstance that such an issue can more readily be seen to be, in some degree, apart from the adversarial trial process, does not make it so different from any other issue giving rise to a potential miscarriage of justice that it stands alone. If it is the duty of a Court of Criminal Appeal, regardless of the issues raised by an appellant, to discover and investigate one possible form of miscarriage of justice, then the duty ought to extend to investigating, of its own motion, any form of miscarriage of justice. That is not a function which is conferred by s 24(1)(b) of the Federal Court Act.

48 As to the minor premise, no issue of fitness to plead having arisen at the trial, and Dr Milton's reports not having addressed any such issue (but, rather, having been written on the assumption that a trial could occur), the most that can be said is that the Full Court had before it material which indicated that the applicant suffered from a form of mental disorder. That did not mean that he was not fit to plead. Appellate courts frequently have before them material of that nature, without it being suggested that they are, on that account, obliged to raise the issue themselves and then pursue it, without the assistance of the parties. Much of the information available to the Full Court indicated that the applicant was fit to plead. The fact that some other information may have suggested the possibility that he was unfit to plead, a possibility which neither party to the appeal was advancing for consideration, did not mean that, in the appellate context, a question of fitness to plead arose for examination.

49 The applicant's argument fails at both levels.

Conclusion

50 I would refuse special leave to appeal. However, there is a majority of the Court in favour of granting special leave. In those circumstances, I consider that the appeal should be dismissed.

51 GAUDRON J. David Harold Eastman ("the applicant") seeks special leave to appeal from a decision and order of the Full Court of the Federal Court of Australia dismissing an appeal against his conviction for murder[21]. The applicant was convicted in the Supreme Court of the Australian Capital Territory of the murder, on 10 January 1989, of Assistant Commissioner Winchester of the Australian Federal Police.

History of the proceedings

52 The applicant's trial, which was presided over by Carruthers AJ, commenced on 16 May 1995 and lasted for five and a half months, concluding with his conviction on 3 November 1995. The trial was marked by various outbursts from the applicant and the frequent withdrawal of instructions from his legal representatives. From time to time, he represented himself either until he re-instructed those whose services he had dispensed with or until he engaged new legal representation[22]. He was unrepresented from 10 October until the conclusion of his trial on 3 November 1995.

53 It will later be necessary to give a more detailed account of the behaviour of the applicant at his trial. For the moment, however, it is sufficient to note that neither the applicant, his various legal representatives, nor prosecuting counsel raised any question during the trial as to his fitness to plead. Nor did the trial judge who, in his remarks on sentence, indicated that he regarded the applicant's conduct as an attempt "to avoid the consequences of the damning nature of the Crown evidence by adopting a process of manipulating the trial process and attempting to frustrate its progression in any conventional manner."

54 On appeal to the Federal Court, an argument was put that there had been a miscarriage of justice because of "[t]he inability of the [applicant] to adequately prepare his defence and instruct Counsel at trial by reason of actions by the Prosecution". In essence, the argument related to police surveillance, including electronic surveillance, to which the applicant had been subjected for some years and which, according to the argument, resulted in conduct from which an adverse inference might be drawn but which could not properly be explained to the jury. It will be necessary to refer again to this aspect of the appeal to the Federal Court. For present purposes, however, it is sufficient to note that, although there was an issue as to the ability of the applicant to prepare his defence and to instruct counsel, no specific issue was raised as to his fitness to plead. In fact,

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21 *Eastman v The Queen* (1997) 76 FCR 9.

22 *Eastman v The Queen* (1997) 76 FCR 9 at 32-34 per von Doussa, O'Loughlin and Cooper JJ.

counsel expressly rejected any suggestion of mental illness which might bear on that question[23].

55 By his application for special leave to appeal to this Court, the applicant raises, for the first time, the question of his fitness to plead at the time of his trial. As originally cast, his application seeks leave to appeal in order to present evidence to this Court on that issue. The application was referred to the Full Court to determine whether, if special leave were granted, this Court could or could not receive that evidence. If it could not, the grant of special leave on the basis upon which it was originally sought would be futile.

56 At the conclusion of the argument as to this Court's ability to receive evidence on the issue of the applicant's fitness to plead, the Court invited argument on the question whether there was material before the Federal Court such that it should have raised that issue of its own initiative. The application for special leave to appeal was subsequently argued on the basis that, if the Federal Court should, itself, have raised the issue of the applicant's fitness to plead, this Court should proceed as if an appeal had been instituted and allow the appeal.

Fitness to plead

57 In order to understand the questions that arise in this matter, it is necessary to say something as to the content of the expression "fitness to plead" and, also, as to its significance in the trial process. In general terms, a person is fit to plead if he or she "has sufficient understanding to comprehend the nature of [the] trial, so as to make a proper defence to the charge."[24] The accused "need not have the mental capacity to make an able defence"[25] but, nonetheless, there are certain matters which he or she must comprehend.

58 In *R v Presser*, Smith J, in a passage referred to with approval by this Court in *R v Ngatayi*[26], explained that, to be fit to plead, a person must be able:

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23 *Eastman v The Queen* (1997) 76 FCR 9 at 48-49.

24 *R v Pritchard* (1836) 7 Car & P 303 at 304 per Baron Alderson [173 ER 135 at 135].

25 *R v Presser* [1958] VR 45 at 48. See also *R v Robertson* [1968] 1 WLR 1767; [1968] 3 All ER 557; *Berry* (1977) 66 Cr App R 156 at 158; *Ngatayi v The Queen* (1980) 147 CLR 1 at 8.

26 (1980) 147 CLR 1 at 8. See also *Kesavarajah v The Queen* (1994) 181 CLR 230 at 244 per Mason CJ, Toohey and Gaudron JJ.

> "to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand ... the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is ... [H]e must ... have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any."[27]

59 A number of matters should be noted with respect to what was said in *Presser*. The first is that the question whether a person is fit to plead may arise for reasons other than mental illness. It may arise, for example, because a person is deaf and dumb[28] or, more generally, because language difficulties make it impossible for him or her to make a defence[29]. The second matter to be noted is that fitness to plead is a concept that derives from the common law. Usually, however, there are statutory provisions which bear on the determination of that issue. In this case, the relevant statutory provisions are to be found in Pt XIA of the *Crimes Act* 1900 (ACT) ("the Act").

60 The third matter to be noted is that a question may arise as to an accused person's fitness to plead at any stage during the trial[30]. Particularly is that so in a case involving mental illness. This is reflected in the provisions of Pt XIA of the Act, particularly s 428E. At the time of the applicant's trial, s 428E(1) provided:

> " Where, on the trial of a person charged with an indictable offence-
> (a) the issue of fitness to plead to the charge is raised by a party to the proceedings or by the Court; and
> (b) the Court is satisfied that there is a question as to the person's fitness to plead to the charge;

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27 [1958] VR 45 at 48.

28 See *Ebatarinja v Deland* (1998) 194 CLR 444.

29 See *R v Grant* [1975] WAR 163; *Ngatayi v The Queen* (1980) 147 CLR 1 at 9 per Gibbs, Mason and Wilson JJ; *Begum* (1985) 93 Cr App R 96.

30 See *Kesavarajah v The Queen* (1994) 181 CLR 230.

the Court shall order the person to submit to the jurisdiction of the [Mental Health] Tribunal to enable the Tribunal to determine whether or not the person is fit to plead to the charge."

61 Section 428E of the Act acknowledges in plain terms that the issue is whether "there is a question as to the person's fitness to plead", not whether he or she is, in fact, fit to plead or, even, unfit to plead. It also acknowledges difficulties that can sometimes arise when a person is not fit to plead by allowing that the issue can be raised by a party or by the court and, thus, need not be raised by the accused or by his or her legal representatives.

62 The significance of the question of a person's fitness to plead is often expressed in terms indicating that, unless a person is fit to plead, there can be no trial[31]. Certainly, that is the position where the issue of fitness to plead is raised before or during a trial. If a person stands trial notwithstanding that there is an unresolved issue as to his or her fitness to plead, or, if that issue is not determined in the manner which the law requires, "no proper trial has taken place [and the] trial is a nullity."[32] To put the matter another way, there is a fundamental failure in the trial process.

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31 See *R v Dashwood* [1943] KB 1; *R v Beynon* [1957] 2 QB 111. See also Hale, *The History of the Pleas of the Crown*, (1736), vol 1 at 34-35 where it was said:

> " If a man in his found memory commits a capital offence, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his [f]renzy, but be remitted to prison until that incapacity be removed; the reason is, because he cannot advisedly plead to the indictment ... And if such person after his plea, and before his trial, become of non sane memory, he shall not be tried; or, if after his trial he become of non sane memory, he shall not receive judgment; or, if after judgment he become of non sane memory, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution.
>
> But because there may be great fraud in this matter, yet if the crime be notorious, as treason or murder, the judge before such respite of trial or judgment may do well to impanel a jury to inquire ex officio touching such insanity, and whether it be real or counterfeit.
>
> If a person of non sane memory commit homicide during such his insanity, and continue so till the time of his arraignment, such person shall neither be arraigned nor tried, but remitted to gaol, there to remain in expectation of the king's grace to pardon him." (footnotes omitted)

32 *Begum* (1985) 93 Cr App R 96 at 100 per Watkins LJ.

63 The question whether there was a fundamental failure in the trial process is different from the question whether there was a miscarriage of justice in the sense that the accused lost a chance of acquittal that was fairly open[33]. If a proceeding is fundamentally flawed because the accused was not fit to plead or if, to use the words in *Begum*, "the trial [is] a nullity", the only course open to an appellate court is to set aside the verdict. And that is so regardless of the strength of the case against the accused or of the likely outcome of a further trial according to law[34]. That is the basis upon which this Court proceeded in *Kesavarajah v The Queen*[35] where the question of fitness to plead should have been but was not submitted to the jury for determination.

64 Traditionally, an accused person has not been put on trial unless fit to plead because of "the humanity of the law of England falling into that which common humanity, without any written law would suggest, has prescribed, that no man shall be called upon to make his defence at a time when his mind is in that situation as not to appear capable of so doing"[36]. That statement may indicate a positive and independent right on the part of an accused not to be tried unless fit to plead. It is unnecessary to decide whether that is so. It is sufficient to approach the present matter on the basis that the common law guarantees an accused person a fair trial according to law and that one aspect of that guarantee is that a criminal trial cannot proceed unless the accused is fit to plead.

65 It is in the context of the common law's guarantee of a fair trial according to law that s 428E of the Act is to be construed. It is well settled that a statute is not to be construed as abrogating fundamental common law principles unless that is manifestly clear from its terms or as a matter of necessary implication[37]. There is

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33 *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J.

34 *Wilde v The Queen* (1988) 164 CLR 365; *Glennon v The Queen* (1994) 179 CLR 1; *Katsuno v The Queen* (1999) 73 ALJR 1458 at 1469-1471 per McHugh J; 166 ALR 159 at 172-175.

35 (1994) 181 CLR 230 at 248. See also *R v Gibbons* [1947] 1 DLR 45 at 49-50; *R v Khallouf* [1981] VR 360.

36 *Proceedings in the Case of John Frith for High Treason* (1790) 22 Howell's State Trials 307 at 318.

37 See, for example, *Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 93 per Isaacs J; *Sorby v The Commonwealth* (1983) 152 CLR 281 at 289-290 per Gibbs CJ, 309 per Mason, Wilson and Dawson JJ, 311 per Murphy J; *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 635-636; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 338 per Gaudron J.

nothing in s 428E to suggest any departure from the common law's guarantee of a fair trial according to law or, if there be a difference, the common law's requirement that an accused person not be tried unless he or she is fit to plead. On that basis, s 428E is to be construed as doing no more than directing the trial judge as to the steps to be taken if "on the trial of a person ... the issue of fitness to plead ... is raised". It says nothing as to the situation if, for whatever reason, there is a question as to the accused's fitness to plead but the issue is not raised at the trial.

66 The meaning and operation of s 428E(1)(b), which is concerned with the trial judge's satisfaction "that there is a question as to the person's fitness to plead", should also be noted. The statutory scheme considered in *Kesavarajah* required the question of fitness to plead to be referred to a jury. It was held in that case that the issue had to be left to the jury "unless no reasonable jury, properly instructed, could find that the accused was not fit to be tried."[38] Because the issue to which s 428E directs attention is neither fitness to plead nor unfitness to plead, but the existence of a question as to fitness to plead, a court will necessarily be satisfied for the purposes of that section that there is such a question unless the Mental Health Tribunal could not reasonably find the accused not fit to plead.

This Court's power to receive evidence on the question of fitness to plead

67 The question whether this Court can receive evidence going to the applicant's fitness to plead does not arise simply because that issue was not raised at his trial or in the Federal Court. It arises because of the nature of an appeal postulated by s 73 of the Constitution. Relevantly, s 73 confers jurisdiction on this Court to hear appeals from "judgments, decrees, orders, and sentences:

(i) of any Justice or Justices exercising the original jurisdiction of the High Court;
(ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council".

68 In *Mickelberg v The Queen*[39], this Court affirmed its earlier decisions that s 73 of the Constitution does not authorise the reception of fresh evidence on appeal. The decision in *Mickelberg* was not based on any conception as to the nature of an appeal as at 1900, although that was a matter referred to by

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38 (1994) 181 CLR 230 at 245.

39 (1989) 167 CLR 259.

Mason CJ[40]. The basis of the decision was the distinction between this Court's original and appellate jurisdiction[41], original jurisdiction being conferred by s 75 and pursuant to s 76 of the Constitution, whilst appellate jurisdiction is conferred by s 73.

69 In *Mickelberg*, Toohey J and I pointed out that when an appellate court reaches a decision by reference to evidence called for the first time in that court, it is exercising original jurisdiction notwithstanding that the proceeding is called an appeal[42]. Because ss 75 and 76 constitute a complete and exhaustive statement of this Court's original jurisdiction[43], s 73 does not authorise the receipt of evidence on appeal from a State court exercising non-federal jurisdiction. And because s 73 does not relevantly distinguish between appeals from State courts exercising non-federal jurisdiction and appeals from courts exercising federal jurisdiction, that provision must be construed as not authorising the receipt of further evidence no matter the court from which the appeal is brought.

70 To say that s 73 does not authorise the receipt of further evidence in the exercise of this Court's appellate jurisdiction is not to say that Parliament may not confer original jurisdiction with respect to the matters specified in ss 75 and 76 of the Constitution in such a way that, in conjunction with an appeal from a court exercising federal jurisdiction, this Court may receive further evidence and, having regard to that evidence, set aside the decision of the court from which the appeal is brought or, if it be appropriate, substitute its own decision in the matter[44]. In my view, there is no constitutional inhibition on the Parliament legislating to that effect.

71 Further, the Parliament can, in my view, legislate to enable this Court to receive further evidence in respect of matters which originate in the courts of a

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40 (1989) 167 CLR 259 at 269. See also *Scott Fell v Lloyd* (1911) 13 CLR 230 at 234 per Griffith CJ.

41 (1989) 167 CLR 259 at 269-271 per Mason CJ, 297-299 per Toohey and Gaudron JJ.

42 (1989) 167 CLR 259 at 298, see also at 267-271 per Mason CJ (agreeing). See also *Werribee Council v Kerr* (1928) 42 CLR 1 at 20 per Isaacs J; *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 109-110 per Dixon J; *Davies and Cody v The King* (1937) 57 CLR 170 at 172 per Latham CJ.

43 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.

44 See *Mickelberg v The Queen* (1989) 167 CLR 259 at 271 per Mason CJ. See also at 297-299 per Toohey and Gaudron JJ.

Territory. That is because, as I explained in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*[45], the existence of a Territory court is ultimately sustained by a law under s 122 of the Constitution and the rights, duties and obligations in question in a matter before a Territory court must ultimately depend for their enforcement on the law by which the existence of that court is sustained. They, thus, arise under that law. And for the reasons I explained in *Northern Territory v GPAO*[46], a law under s 122 is a law of the Commonwealth for the purposes of s 76(ii) of the Constitution.

72 Moreover, it may be as Toohey J and I pointed out in *Mickelberg*[47], that so far as concerns appeals with respect to matters falling within s 75 of the Constitution, s 75 is itself a source of power for this Court to receive further evidence on the hearing of an appeal in a matter falling within that provision. However, the present matter is not one falling within s 75.

73 It follows from what has been written that, if special leave were granted to the applicant, this Court could only receive further evidence on the hearing of an appeal if it were to depart from its decision in *Mickelberg* or if the Parliament has authorised that course.

74 There are two arguments favouring reconsideration of the decision in *Mickelberg*. The first is that s 73 should be construed in the light of the modern meaning of an appeal which, it is said, encompasses an appeal in which an appellate court can receive further evidence and, having regard to that evidence, set aside the decision under appeal. However, that argument overlooks the distinction which Ch III clearly draws between original and appellate jurisdiction.

75 The second argument favouring reconsideration of *Mickelberg* is that, in the words of Deane J in that case, this Court may be fettered in its "ability ... to do justice in the exercise of its general appellate jurisdiction under the Constitution."[48] Indeed, it might be thought that this case establishes that very proposition. This notwithstanding, it is this Court's duty to do justice according to law and under the Constitution. It is only if s 73 is capable of being construed so as to permit of the receipt of further evidence that this Court should reconsider *Mickelberg*.

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45 (1999) 73 ALJR 1324; 165 ALR 171.

46 (1999) 196 CLR 553.

47 (1989) 167 CLR 259 at 298-299.

48 (1989) 167 CLR 259 at 280.

76 Section 73 must be construed, in my view, in the context of the provision made by ss 75 and 76 of the Constitution with respect to the original jurisdiction of this Court. When so construed, s 73 does not permit of any conclusion other than that reached in *Mickelberg*. Accordingly, the evidence which the applicant wishes to place before this Court can be received on appeal only if the Parliament has legislated to that effect.

77 The only presently relevant provision with respect to appeals from the Federal Court to this Court is s 33 of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act"). That section provides, in sub-s (1), as follows:

> " The jurisdiction of the High Court to hear and determine appeals from judgments of the [Federal] Court, whether in civil or criminal matters, is subject to the exceptions and regulations prescribed by this section."

Succeeding sub-sections deal with various exceptions and regulations, but not with the question of this Court's power to receive further evidence on appeal.

78 Section 33(1) of the Federal Court Act does not purport to confer jurisdiction on this Court. Rather, it specifies exceptions and regulations with respect to the jurisdiction which this Court otherwise has with respect to appeals from the Federal Court. That jurisdiction is the jurisdiction conferred by s 73 of the Constitution and, as *Mickelberg* holds, this Court cannot receive further evidence in exercise of that jurisdiction. It follows that the grant of special leave to enable this Court to receive evidence going to the applicant's fitness to plead at the time of his trial would be futile. To the extent that the applicant seeks special leave for that purpose, the application should be refused.

The appellate function of the Federal Court in relation to fitness to plead

79 The Federal Court has jurisdiction pursuant to s 24(1)(b) of the Federal Court Act to hear and determine "appeals from judgments of the Supreme Court of a Territory". By s 27 of that Act, the Federal Court is to "have regard to the evidence given in the proceedings out of which the appeal arose, and has power to draw inferences of fact and, in its discretion, to receive further evidence". And pursuant to s 28(1) it may, in the exercise of its appellate jurisdiction:

> "(e) set aside the verdict and judgment in a trial on indictment and order a verdict of not guilty or other appropriate verdict to be entered;
> (f) grant a new trial in any case in which there has been a trial, either with or without a jury, on any ground upon which it is appropriate to grant a new trial".

80 By s 28(3) of the Federal Court Act, the Federal Court may exercise the powers conferred by s 28(1) "notwithstanding that the notice of appeal asks that part only of the decision may be reversed or varied, and may be exercised in

favour of all or any of the respondents or parties, including respondents or parties who have not appealed from or complained of the decision."

81 It was held by the Federal Court in *Minister for Immigration, Local Government and Ethnic Affairs v Hamsher* that an appeal under s 24 of the Federal Court Act is "neither a trial de novo nor a trial of the case afresh on the record"[49]. So much may be accepted for the purposes of this matter. However, it is a fundamental rule of construction that statutory provisions conferring powers on a court are not to be read as subject to limitations which are not required by their terms[50].

82 When ss 24(1), 27 and 28(1) and (3) of the Federal Court Act are construed on the basis that they are not subject to limitations which their terms do not require, it is clear that the Federal Court has power to set aside a verdict on the ground that there was a fundamental failure in the trial process and, subject to hearing the parties on that issue, to do so whether or not the Notice of Appeal is directed to that issue. Moreover, it has power to receive evidence on the issue.

83 Earlier, I drew attention to the fact that, if there is a fundamental failure in the trial process, an appellate court proceeds on a different basis from that on which it proceeds when there is an error on the part of the trial judge or a blemish in the trial. In the former situation, there is no occasion to apply the proviso to the common criminal appeal provisions by asking whether the appellant lost a chance of acquittal that was fairly open. There is another difference. There can be a fundamental failure in the trial process without any error on the part of the trial judge. For example, there may be a failure of that kind because, without the knowledge of the trial judge, the jury is not properly constituted[51].

84 In the present case, the trial judge would have been in error if, after an issue was raised as to the applicant's fitness to plead, he failed to take the steps required by s 428E(1) of the Act[52]. So, too, he would have been in error if, although neither the prosecution nor defence raised that issue, there was material which suggested that there was such an issue and the trial judge failed to raise it. However, no suggestion is made that there was any material of that kind. Thus,

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49 (1992) 35 FCR 359 at 369. See also *Duralla Pty Ltd v Plant* (1984) 2 FCR 342.

50 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404; *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 301; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 81.

51 See *Katsuno v The Queen* (1999) 73 ALJR 1458 at 1466-1467 per Gaudron, Gummow and Callinan JJ; 166 ALR 159 at 168-170.

52 See *Kesavarajah v The Queen* (1994) 181 CLR 230; *R v Khallouf* [1981] VR 360.

the only question that arises is as to the role of the Federal Court if there was material before that court suggesting that there was an issue as to the applicant's fitness to plead at the time of his trial.

85 Two matters which were earlier referred to bear directly on the role of the Federal Court. The first is the basic tenet of the common law that, unless a person is fit to plead, there can be no trial and its corollary that, if he or she was not fit to plead, there was no trial or, as it is generally put, there was a fundamental failure in the trial process. The second is that a person who is not fit to plead may lack the capacity to raise that issue whether at trial or on appeal. In that context, it is convenient to note the manner in which the law protects a person's right not to be put on trial unless fit to plead.

86 Unless there is material to suggest otherwise, a person is presumed fit to plead. And that is so both at trial and on appeal[53]. At trial however, that presumption is displaced if there is material which raises a question as to that person's fitness to plead. Moreover, if there is a question as to the accused person's fitness to plead, the trial must stop unless and until the appropriate body determines that he or she is fit to plead.

87 Once it is accepted that the law acknowledges that a person who is not fit to plead may also lack the capacity to raise that issue, it must follow that the role of an appellate court differs from that of a trial judge in one respect only, namely, that it looks to the past whereas the trial judge is concerned with events as they are happening. More precisely, if there is material suggesting that the appellant was not fit to plead, an appellate court must inquire whether, at the time of the trial, the appropriate tribunal could not reasonably have found the appellant not fit to plead.

88 Where, on appeal to the Federal Court, there is material suggesting that an appellant was not fit to plead at his or her trial, that court may, if necessary, appoint an expert under O 34 r 2 of the Federal Court Rules[54] to inquire into and

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53 As to the position on appeal, see *R v Dashwood* [1943] KB 1.

54 Order 34 r 2(1) provides:

> " Where a question for an expert witness arises in any proceedings the Court may, at any stage of the proceedings, on its own motion or on application by a party or the Registrar:
>
> (a) appoint an expert as court expert to inquire into and report upon the question;
>
> (b) authorize the court expert to inquire into and report upon any facts relevant to his inquiry and report on the question;

(Footnote continues on next page)

report on the question. If after inquiry, it is determined that it cannot be said that the appropriate tribunal could not reasonably have found the appellant not fit to plead, the verdict must be set aside and an order made for a new trial at which, if there is still an issue as to his or her fitness to plead, it can be properly determined.

The material before the Federal Court

89 The Federal Court had before it details of the applicant's behaviour at trial. In this regard, it is sufficient to note the Federal Court recorded that, on the first day of his trial, the applicant terminated the instructions of counsel and informed the trial judge that he had done so because "police intimidation had been 'condoned' by the Court ... and ... [counsel] had refused to conduct the defence in accordance with his instructions."[55] The trial proceeded with counsel later being reinstated. Thereafter, however, instructions were withdrawn and, later, reinstated with some frequency, sometimes with the applicant instructing new lawyers. In this regard, the Federal Court observed:

> "It cannot be said that the [applicant] acted with justification in so frequently dismissing his lawyers. If he were justified in terminating their instructions, why then would he have re-engaged them on so many occasions? Any suggestion that the answer to that question rests in an acknowledgment of fault by counsel would be ridiculed by the number of times their supposed incompetence or refusal to accept instructions allegedly justified their dismissal."[56]

90 The Federal Court described the circumstances in which the applicant terminated counsel's instructions on 10 October and thereafter proceeded to represent himself as "astonishing" and recorded this account of that event:

> "[The applicant] claimed ... that he had heard [counsel] say [to a person in the courtroom] 'Don't you stare at me like that you flea' ... The [applicant] told the Court that when he inquired of him, [counsel] said that the other person was a police officer but that he refused to disclose his identity ... The [applicant] ... said that '... if my counsel is distracted by a police officer in

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(c) direct the court expert to make a further or supplemental report or inquiry and report; and

(d) give such instructions as the Court thinks fit relating to any inquiry or report of the court expert."

55 *Eastman v The Queen* (1997) 76 FCR 9 at 32-33.

56 (1997) 76 FCR 9 at 33.

> this court moments before addressing the jury it becomes of interest to me against the background of numerous such incident [sic] going on over the last six years'."[57]

91 The Federal Court noted that the frequent changes in legal representation were "indicative of the [applicant's] inability to work in harmony with his lawyers."[58] It also noted that, during his trial, the applicant "made vile, foul-mouthed, vituperative comments"[59] and that "there were occasions when [he] was invited by the trial judge to cross-examine a witness, only to be met with a tirade of abuse."[60]

92 Standing alone, the events recorded by the Federal Court are capable of being viewed as a manipulative attempt to subvert the trial. Particularly is that so, if, as was put in argument in this Court, the applicant displayed a high order of intelligence in the way he put various arguments during the period when he was unrepresented. However, there was material before the Federal Court which was capable of suggesting another explanation for the applicant's behaviour.

93 As already mentioned, the applicant was under surveillance, including electronic surveillance, for some time prior to his trial. It emerged during the trial when the applicant cross-examined a prosecution witness that that surveillance had been undertaken, at least in part, because of concerns that had been raised with investigating police by Dr Milton, a psychiatrist who, apparently, had been retained to advise them[61]. Dr Milton's reports were produced by the prosecution and marked for identification, but not tendered in evidence[62]. Thus, it may be taken, the contents of those reports did not come to the attention of the trial judge.

94 In the Federal Court, Dr Milton's reports were received for the purpose of enabling an argument to be put on ground 13 of the grounds of appeal which raised, albeit not directly, the question of the applicant's surveillance. That is the ground which complained of "[t]he inability of the [applicant] to adequately

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57 (1997) 76 FCR 9 at 34.

58 (1997) 76 FCR 9 at 34.

59 (1997) 76 FCR 9 at 34.

60 (1997) 76 FCR 9 at 35.

61 (1997) 76 FCR 9 at 46.

62 (1997) 76 FCR 9 at 49.

prepare his defence and instruct Counsel at trial by reason of actions by the Prosecution".

95 The reports of Dr Milton span a period from 20 February 1989 until 4 September 1992, less than three years before the applicant's trial commenced. In his first report, Dr Milton noted that a Dr McDonald, who, at one stage, had been the applicant's treating doctor, concluded that he was "suffering from paranoia, a rare psychotic condition characterised by well systematised paranoid delusions."

96 In his second report, Dr Milton noted that some of the recorded material suggested that "some of [the applicant's] utterances while alone [might be] a response to hallucinatory voices" and expressed the opinion that the applicant manifested "at the very least a severe form of the condition known as paranoid personality". Later in that report, he expressed the view that the applicant "should ... be regarded as psychotic (ie insane) ... the paranoid features of his disorder and his high intelligence allowing the more serious aspects of his condition to be concealed." He added that he inclined to the view earlier expressed by Dr McDonald that the applicant "suffer[ed] a paranoid psychosis and [would] eventually need to be institutionalised".

97 In a report of 6 September 1990, Dr Milton noted the possibility that the applicant was taking "Largactil or Melleril, both major tranquillisers used in severe mental disorders." Later, in January 1992, he recorded that the applicant's emotional disorder was "sufficiently severe as to be likely to qualify for a defence of diminished responsibility were he to face trial for Mr Winchester's murder." In his final report of 4 September 1992, he noted certain claims made by the applicant and described them as "the typical comments of a paranoid person". He again repeated his view that the applicant was "for practical purposes, psychotic, ie out of touch with reality", adding, however, that it would be difficult "to substantiate [that opinion] in terms of the ... Mental Health Act".

98 Dr Milton's reports suggest the possibility of a different explanation for the applicant's behaviour at trial from that adopted by the trial judge. They suggest a mental illness that might have worsened with the passage of time. And given that possibility, they suggest that the applicant might not have been capable of performing some or all of the functions identified in *Presser*. They, thus, raise the possibility that he might not have been fit to plead at the time of his trial.

Conclusion and orders

99 Because the material before the Federal Court raised the possibility that the applicant might not have been fit to plead at the time of his trial, that court, of its own initiative, should have raised the issue of the applicant's fitness to plead and thereafter proceeded to take evidence and to determine whether, at the time of his trial, there was a question as to his fitness to plead.

100 Special leave should be granted so far as concerns the question whether there was material before the Federal Court raising an issue as to the applicant's fitness to plead and the appeal treated as instituted instanter. The appeal should be allowed, the order of the Federal Court dismissing the applicant's appeal should be set aside and the matter remitted to that court for further hearing and determination as to whether there was a question as to the applicant's fitness to plead at the time of his trial.

101 McHUGH J. The applicant seeks special leave to appeal against an order of the Full Court of the Federal Court of Australia which dismissed his appeal against a conviction for murder after a trial before a jury in the Supreme Court of the Australian Capital Territory. The ground of the application is that the Full Court erred in failing to determine whether the trial judge had erred in not investigating whether the applicant was unfit to plead to the charge. If special leave to appeal were granted, the applicant would seek to lead evidence in this Court tending to prove his alleged unfitness to plead. To make good his claim that the case is one for the grant of special leave to appeal, the applicant also wishes to put that evidence before this Court on the leave application.

102 In my opinion, the application must be dismissed on the ground that this Court, when hearing an appeal, has no power to receive evidence that was not before the court whose order is the subject of the appeal. Once that conclusion is reached, the grant of special leave to appeal would be futile because an appeal could not succeed. Nor do I think that special leave to appeal should be granted to determine whether, on the materials before the Full Court, it should have examined whether the trial judge erred in not investigating the issue of the applicant's fitness to plead. Fitness to plead was not an issue before the trial judge or the Full Court. That being so, the Full Court made no error. Because the applicant cannot point to any error by the Full Court, this Court should not grant special leave to appeal to deal with a question raised for the first time in this Court even if our appellate jurisdiction extends to a case where the point has not been raised in any court before the matter reached this Court.

<u>This Court has no jurisdiction to hear further evidence in an appeal</u>

103 The appellate jurisdiction of this Court arises from s 73 of the Constitution which provides:

> "The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences:
>
> (i) of any Justice or Justices exercising the original jurisdiction of the High Court;
>
> (ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;
>
> (iii) of the Inter-State Commission, but as to questions of law only;
>
> and the judgment of the High Court in all such cases shall be final and conclusive.

> But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.
>
> Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court."

104 When the Constitution was enacted in 1900, a grant of appellate jurisdiction was not seen as carrying with it a power to receive further evidence[63]. An appeal meant[64] and, in my view, still means "the right of entering a superior Court, and invoking its aid and interposition to redress *the error of the Court below*." (emphasis added) When the appeal is an appeal in the true sense, therefore, no appealable error exists if the trial court has correctly found the facts on the material before it and correctly applied the law to those facts in the course of deciding the issues raised before it for determination. Because that is so, the grant of appellate jurisdiction to a court does not authorise it to decide the case on the basis of a change in the law since the original decision was made[65]. Nor does a grant of appellate jurisdiction authorise it to hear evidence that was not before the court whose order is the subject of appeal[66]. As Isaacs J pointed out in *Werribee Council v Kerr*[67], "[t]he appellate Court judges for itself whether there has been an error from the materials which were before the Court below, so far as it can".

105 Authority for an appellate court to receive further evidence must come from a grant of legislative power in addition to a mere grant of appellate jurisdiction. It does not come from the simple grant of appellate jurisdiction because an appeal is the right of entering a superior court to redress the error of the court

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63 *Donegani v Donegani* (1835) 3 Knapp 63 at 88 [12 ER 571 at 581]; *Ponnamma v Arumogam* [1905] AC 383 at 388; *Mickelberg v The Queen* (1989) 167 CLR 259 at 270.

64 *Attorney-General v Sillem* (1864) 10 HLC 704 at 724 [11 ER 1200 at 1209].

65 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73.

66 *Ronald v Harper* (1910) 11 CLR 63; *Scott Fell v Lloyd* (1911) 13 CLR 230; *Werribee Council v Kerr* (1928) 42 CLR 1 at 20; *Davies and Cody v The King* (1937) 57 CLR 170; *Crouch v Hudson* (1970) 44 ALJR 312.

67 (1928) 42 CLR 1 at 21.

below[68] and whether that court erred is to be determined on the materials before it[69]. The power to receive further evidence is usually expressly granted but it may be implied where the appeal is stated to be one by way of re-hearing[70]. There does not appear to be any case where a court has held that the simple grant of appellate jurisdiction carries with it the right to admit further evidence in hearing the appeal. Furthermore, where a court is given jurisdiction to hear "appeals" but with power to re-hear the matter or to take new evidence, it is not exercising appellate jurisdiction in its true sense. In such cases, as Jessel MR pointed out in *Quilter v Mapleson*[71], the jurisdiction exercised by the appellate court is an amalgam of appellate and original jurisdiction.

106 Most appellate courts today are given a statutory power to receive further evidence on appeal. In some cases, if the appeal is by way of re-hearing, it may be possible to infer an implied power to receive further evidence. When such a power is conferred, expressly or inferentially, the "appellate" court decides the case on all the facts as it finds them to exist as at the date of hearing. But the court is not exercising appellate jurisdiction in its true sense.

107 When no statutory power to receive evidence has been conferred, the court must decide the case on the basis of the evidence before the trial court. In such cases, a further question frequently arises as to whether the appeal is an appeal in the true sense, that is, an appeal decided on the facts and law as they existed at the date of the lower court's order or an appeal by way of re-hearing. If the appeal is by way of re-hearing, the appellate court decides the case on the law as it applied at the date of its order disposing of the appeal.

108 The jurisdiction which s 73 of the Constitution confers on this Court is jurisdiction "to hear and determine appeals". The section confers no express power to receive further evidence in hearing an appeal. That being so, this Court has consistently taken the view[72] that s 73 gives the Court no jurisdiction to decide an appeal on the basis of evidence that was not before the court whose

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68 *Attorney-General v Sillem* (1864) 10 HLC 704 at 724 [11 ER 1200 at 1209].

69 *Quilter v Mapleson* (1882) 9 QBD 672 at 676; *Ponnamma v Arumogam* [1905] AC 383 at 390.

70 *Ex parte Currie; Re Dempsey* (1968) 70 SR (NSW) 1.

71 (1882) 9 QBD 672 at 675-676.

72 *Ronald v Harper* (1910) 11 CLR 63; *Scott Fell v Lloyd* (1911) 13 CLR 230; *Werribee Council v Kerr* (1928) 42 CLR 1; *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73; *Davies and Cody v The King* (1937) 57 CLR 170; *Crouch v Hudson* (1970) 44 ALJR 312.

order is the subject of appeal. That view of s 73 was recently confirmed in *Mickelberg v The Queen*[73].

109 The decisions in *Mickelberg* and the earlier cases accord with the division made by Ch III of the Constitution between original and appellate jurisdiction. By exercising the powers referred to in ss 75, 76 and 77 of the Constitution, the Parliament can authorise a federal court other than the High Court to review a decision and call the review "an appeal" even though Parliament authorises the court to hear new evidence or re-hear the matter. The jurisdiction so conferred will be authorised by s 77(i) of the Constitution, but it will not be appellate jurisdiction in the true sense even if Parliament calls the matter in respect of it an appeal. It will be original jurisdiction or, depending upon the powers of the reviewing court, a combination of original and appellate jurisdiction, the power conferred on the Parliament by s 77(i) in respect of federal courts other than the High Court being wide enough to confer any form of appellate jurisdiction on those courts[74].

110 Subject to the Constitution, the Parliament may also be able to give this Court a similar power of review and call it "an appeal". But, assuming that the grant of jurisdiction is not invalid by reason of a negative implication in s 73 that the Court cannot "review" a decision other than by way of appeal, the plain words of ss 75 and 76 show that the grant of such a jurisdiction to this Court could only be *original* jurisdiction. It could not be appellate jurisdiction because s 77(i) does not apply to this Court and ss 75 and 76 would be the only source of power for such a jurisdiction. The jurisdiction conferred by s 73 is true appellate jurisdiction and any other jurisdiction conferred on the High Court can only be original jurisdiction, whatever label Parliament places upon it.

111 In my opinion, the earlier cases and *Mickelberg* correctly establish that in s 73 of the Constitution "appeal" means an appeal in its true sense. Not only is the ordinary meaning of "appeal" in a legal context "the right of entering a superior Court, and invoking its aid and interposition to redress the error of the Court below"[75], but the Constitution draws a distinction between the original and appellate jurisdiction of this Court. Add to those matters the omission in the Constitution of any power to admit further evidence and the knowledge that in 1900 a simple grant of appellate jurisdiction required the appellate court to determine whether the decision appealed against was rightly decided upon the

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73 (1989) 167 CLR 259.

74 *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529; *CDJ v VAJ* (1998) 72 ALJR 1548; 157 ALR 686.

75 *Attorney-General v Sillem* (1864) 10 HLC 704 at 724 [11 ER 1200 at 1209].

facts and the law existing at the time of the decision[76], and the case for concluding that "appeal" in s 73 is an appeal in the true sense becomes irresistible.

112 Moreover, there is a good reason why the framers of the Constitution may have preferred that the right of appeal to this Court should be an appeal in the true sense rather than an "appeal", which would be an amalgam of original and appellate jurisdiction, with the right to adduce fresh evidence. If s 73 had contemplated such an appeal, the laws governing the admissibility of evidence on the appeal might depend on federal law, not State law, unless the federal Parliament made State law applicable. The result might be that the rights of the citizens of the States in areas of State law would eventually be determined on evidence that, for one reason or another, could not be admitted in the courts of the States. It was one thing for the people of the States to have their cases finally determined by this Court on evidence adduced in accordance with the laws and policies of the States governing those cases at the time that they were heard in the States; it was another matter altogether to have their cases determined in accordance with evidence adduced pursuant to a combination of State and federal law, and in accordance with what happened to be the substantive State law when this Court heard those cases.

113 In *Mickelberg*, Deane J dissented. His Honour thought that the appellate jurisdiction referred to in s 73 of the Constitution carried with it the right to admit further evidence because:

(1) "Section 73 was clearly intended to confer upon the Court an equivalent jurisdiction to that exercised by the Privy Council on appeals from the Supreme Courts of the Australian Colonies prior to Federation."[77]

(2) In 1900 the Judicial Committee of the Privy Council had the power to receive further evidence on such appeals[78].

(3) It is highly unlikely that it would have been intended that the grant of jurisdiction contained in s 73 should be confined in a way which would make the powers of this Court on appeals from State Supreme

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76 *Donegani v Donegani* (1835) 3 Knapp 63 at 88 [12 ER 571 at 581]; *Ponnamma v Arumogam* [1905] AC 383 at 388; *Mickelberg v The Queen* (1989) 167 CLR 259 at 270.

77 *Mickelberg v The Queen* (1989) 167 CLR 259 at 283.

78 *Mickelberg v The Queen* (1989) 167 CLR 259 at 283.

Courts significantly more restricted than were the powers of the Privy Council on such appeals at the time of the establishment of the Constitution."[79]

(4) A grant of jurisdiction contained in s 73 being so confined would lead to the "bizarre situation" that this Court could not receive further evidence but on appeal from this Court to the Privy Council (during the period in which such appeals did lie), the Privy Council could receive the evidence[80].

114 But with great respect to his Honour, the statement that s 73 was "clearly intended" to give this Court an appellate jurisdiction in State matters equivalent to that which the Privy Council had in 1900 is merely an assertion. Moreover, in the light of the first and last paragraphs of s 73, it seems a contestable proposition. The last paragraph gave the Parliament the power to impose different "conditions of and restrictions on appeals" to the High Court from those which governed appeals to the Privy Council. Although the subject matters of those appeals could not be abolished by reason of the second paragraph of s 73, the conditions and restrictions in respect of such appeals could be altered. By the imposition of different monetary limits and other restrictions and conditions, the Parliament could prevent appeals from the States to the High Court which could nevertheless be taken to the Privy Council. Moreover, subject to the prohibition in the second paragraph, the Parliament could regulate and restrict appeals to this Court from the State Supreme Courts by reason of the first paragraph of s 73. Ironically, if s 73 did permit the adduction of fresh evidence, the Parliament could almost certainly have provided that such evidence could not be adduced in a s 73 appeal[81]. Furthermore, the Imperial Parliament and the State legislatures[82] could act so as to make the nature of appeals to the Privy Council substantially different from that of an appeal to the High Court.

115 The most that can be said is that the framers of the Constitution intended in 1900 that, if the High Court had then existed, it should have the same appellate jurisdiction as the Privy Council. But to say that is not to say very much. The framers of the Constitution must have known that, by the time this Court was created, the actions of the Parliament, the United Kingdom Parliament or the

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79 *Mickelberg v The Queen* (1989) 167 CLR 259 at 284.

80 *Mickelberg v The Queen* (1989) 167 CLR 259 at 284.

81 *Parkin and Cowper v James* (1905) 2 CLR 315; *Smith Kline & French Laboratories (Aust) Ltd v The Commonwealth* (1991) 173 CLR 194.

82 *British Coal Corporation v The King* [1935] AC 500 at 511.

State legislatures could have resulted in substantial differences between the appellate jurisdiction of the High Court and the Privy Council.

116 There is a more fundamental objection to using the jurisdiction of the Privy Council as an indicator of this Court's appellate jurisdiction. The jurisdiction of the Privy Council was so different from that conferred on this Court by s 73 of the Constitution that the power of the Privy Council to receive further evidence is hardly persuasive of the nature of this Court's appellate jurisdiction.

117 Section 3 of the *Judicial Committee Act* 1833 (Imp)[83] provided that all "appeals or complaints in the nature of appeals whatever" which might "be brought before His Majesty or His Majesty in Council from or in respect of the determination, sentence, rule, or order of any Court, judge, or judicial officer" were to be "referred by His Majesty to the said Judicial Committee of His Privy Council". Section 4 provided that it "shall be lawful for His Majesty to refer to the said Judicial Committee for hearing or consideration any *such other matters whatsoever* as His Majesty shall think fit". (emphasis added)

118 It was against this background that s 7 of the *Judicial Committee Act* provided that it should be "lawful for the said Judicial Committee, in any matter which shall be referred to such Committee, to examine witnesses by word of mouth ... or to direct that the depositions of any witness shall be taken in writing". Section 8 empowered the Judicial Committee of the Privy Council "to direct that such witnesses shall be examined or re-examined, and as to such facts as the said Committee shall seem fit, notwithstanding any such witness may not have been examined, or no evidence may have been given on any such facts in a previous stage of the matter". Section 8 also empowered the Judicial Committee to remit the matter the subject of appeal to the court which had decided the matter for re-hearing "either generally or upon certain points only". This power was in addition to the power to order new trials[84].

119 Thus, the Judicial Committee had both original and appellate jurisdiction. The Committee had no power to place any limits on the matters which could be referred to it[85]. In addition to appeals from the colonies, the Committee heard such diverse matters as ecclesiastical, admiralty, prize and patent cases, appeals against orders of the Lord Chancellor in the exercise of the powers conferred upon him under the Royal Sign Manual for the custody of lunatics and their estates, and references and petitions concerning the Universities of Oxford and

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83 3 & 4 Will IV c 41.

84 Section 13 of the *Judicial Committee Act*.

85 *In re Schlumberger* (1853) 9 Moo 1 [14 ER 197].

Cambridge, the Scottish Universities and bodies operating under the *Endowed Schools Act* 1869 (UK). There was no limit to the matters which could be referred to the Committee and which might require the taking of evidence under ss 7 or 8 of the *Judicial Committee Act.*

120 Moreover, notwithstanding its powers to take evidence on an appeal from the courts of a colony, by 1900 the settled practice of the Judicial Committee was not to receive such evidence. It determined appeals on the materials before the courts of the colonies. In 1905 in *Ponnamma v Arumogam*[86], Lord Davey speaking for the Committee said:

> "Without limiting the extent of His Majesty's prerogative, their Lordships can safely say that it is not the practice of this Board to entertain any other appeal than one strictly so called, in which the question is whether the order of the Court from which the appeal is brought was right on the materials which that Court had before it. The Board may, however, think that the Court below had not sufficient materials for its judgment, or improperly omitted to receive or to require further evidence, or to try some issue, in which case it may remit the case for further hearing."

121 In *Stevenson v Florant*[87], the Committee gave short shrift to an attempt to lead further evidence, saying:

> "A petition was presented to this Board asking leave to adduce further evidence, the object of such evidence being to attack the moral conduct of the respondent in the period immediately succeeding the death of her husband, now twelve years ago. Their Lordships are of opinion that this petition cannot be entertained and should be dismissed with costs, but without prejudice to any fresh application which may be made to the Courts in Canada founded on further evidence, and they will on this matter also humbly advise His Majesty accordingly."

122 Given that by 1900 the long-standing practice of the Judicial Committee was to exercise its appellate jurisdiction as true appellate jurisdiction, the "bizarre situation" to which Deane J referred was a theoretical construct rather than a real possibility. It had no existence in the appellate practice of the Privy Council.

123 It is true that in *Indrajit Pratap Sahi v Amar Singh*[88], an Indian Appeal, a Committee consisting of Viscount Finlay, Lord Atkinson and Mr Ameer Ali

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86 [1905] AC 383 at 390.

87 [1927] AC 211 at 217.

88 (1923) LR 50 IA 183.

admitted two documents which they considered were wrongly rejected by the High Court of Patna on appeal from the Subordinate Judge. After admitting the documents, the Committee allowed the appeal. The issue in the proceedings was whether a grant referred to three villages or to one. The documents in question placed "beyond dispute the fact that the grant was in respect of all three villages"[89], the originals having been duly executed and registered and the documents in question being copies obtained from the registry office. Giving the Advice of the Committee, Mr Ameer Ali said there was "no restriction on the powers of the Board to admit such evidence for the non-production of which at the initial stage sufficient ground has been made out."[90]

124 However, the circumstances in the case were plainly exceptional. Their Lordships and Mr Ameer Ali had to examine the documents to see whether they should have been admitted in the High Court. Holding that they were admissible and that they conclusively decided the case in favour of the appellant, the Committee admitted the documents and restored the verdict of the Subordinate Judge rather than sending the matter back to the High Court.

125 Having regard to what their Lordships said in 1905 in *Ponnamma*[91] and subsequently in 1926 in *Stevenson*[92], the prospect of the "bizarre situation" arising on an appeal from the High Court of Australia was such a tenuous possibility that that situation can be disregarded as an interpretative aid in determining the meaning of s 73 of the Constitution. Moreover, I am unaware of any case in the long period of Privy Council appeals after federation where the Judicial Committee allowed fresh or further evidence in an appeal from this Court or the State Supreme Courts.

126 Furthermore, with great respect to the opinions of Deane J in *Mickelberg* and Kirby and Callinan JJ in this application, I do not think that the concluding paragraph of s 73 indicates that *Mickelberg* and the earlier cases in this Court were wrongly decided. When that paragraph states that the "conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court", it is referring to the conditions and restrictions which the individual Australian colonies had imposed on appeals from their Supreme Courts to the Privy Council. The practice of colonial governments imposing conditions and restrictions on appeals to the Privy Council, as distinct from applications for

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89 (1923) LR 50 IA 183 at 189.

90 (1923) LR 50 IA 183 at 191.

91 [1905] AC 383.

92 [1927] AC 211.

special leave to appeal, was referred to by Viscount Sankey LC in *British Coal Corporation v The King*[93] when giving the Advice of the Judicial Committee in that case. Viscount Sankey said[94]:

> "The practice had grown up that the colonies under the authority either of Orders in Council or of Acts of Parliament should provide for appeals as of right from their Courts to the King in Council and should fix the conditions on which such appeals should be permitted. But outside these limits there had always been reserved a discretion to the King in Council to grant special leave to appeal from a colonial Court irrespective of the limitations fixed by the colonial law".

127 The purpose of the last paragraph of s 73 was to ensure that, until the Parliament otherwise provided, an appeal from a State Supreme Court to the High Court would be subject to the same conditions and restrictions as that State had imposed on appeals from its Supreme Court to the Privy Council. The paragraph was not concerned with the power of the Judicial Committee under s 8 of the *Judicial Committee Act* to hear further evidence on an appeal.

128 Nor in my view is it a proper approach to the interpretation of the Constitution to reason that, because further evidence is now admitted in most "appeals" in this and other countries, the term "appeal" in s 73 now has a different meaning from that which it had in 1900.

129 In 1900, an appeal in the true sense did not permit the adduction of fresh evidence. If the judgment of Deane J in *Mickelberg*[95] is intended to suggest the contrary, I can only say that, before 1900, in the absence of a statutory power to admit evidence or the statutory grant of an appeal by way of re-hearing, there appears to be no decided case holding that the right of appeal permitted such evidence to be adduced. Before the entry of judgment, a verdict could be set aside at common law and a new trial ordered on the basis of fresh evidence. But that was an exercise of original, not appellate, jurisdiction. The order for a new trial was an interlocutory order in the original action[96].

130 In a variety of legal contexts, courts still recognise that "appeal" has at least four different meanings. It may mean an appeal in the true sense, an appeal by re-hearing on the evidence before the trial court, an appeal by way of re-hearing

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93 [1935] AC 500.

94 *British Coal Corporation v The King* [1935] AC 500 at 511.

95 (1989) 167 CLR 259 at 277-288.

96 *CDJ v VAJ* (1998) 72 ALJR 1548 at 1563; 157 ALR 686 at 706.

on the evidence before the trial court and such further evidence as the appellate court admits pursuant to a statutory power to do so, and an appeal by way of a hearing *de novo*[97]. Which of these meanings the term "appeal" has depends on the context of the term, the history of the legislation, the surrounding circumstances, and sometimes an express direction as to what the nature of the appeal is to be. The continued use of these different meanings of the term "appeal" is itself a complete answer to the proposition that, because further evidence is now admitted in most "appeals" in this and other countries, the term "appeal" in s 73 now has a different meaning from that which it had in 1900.

131 Moreover, to adopt the reasoning that the meaning of "appeal" in s 73 changes so as to accord with what constitutes an appeal in contemporary circumstances is a course fraught with difficulties. A number of common law jurisdictions, for example, have legislated to permit the Crown to appeal against an acquittal in a criminal trial. Does this mean that this Court should now reject its earlier precedents[98] and hold that the Crown may appeal against a verdict of acquittal by a criminal jury? If the Court were now to hold that the term "appeal" in s 73 permitted the adduction of further evidence and yet still maintained that that term did not include the right of the Crown to appeal against an acquittal, it would be open to the charge that its decisions depended on the individual predilections of its justices, and not on rational principles of constitutional interpretation.

132 It is true that, in some cases, the meaning of a constitutional provision may be different from that accepted at the time of federation. With experience, we may see that the meaning of particular expressions in the Constitution is different from or more expansive than that which people understood in 1900. At least some members at the Constitutional Conventions almost certainly perceived that this would be the case. At the Melbourne Convention in 1898, Sir John Downer, speaking of the justices of the future High Court, said[99]:

> "With them rest the interpretation of intentions which we may have in our minds, but which have not occurred to us at the present time. With them rests the obligation of finding out principles which are in the minds of this

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97 *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 619-622 per Mason J, with whose judgment Barwick CJ and Stephen J agreed.

98 *R v Snow* (1915) 20 CLR 315; *Menges v The King* (1919) 26 CLR 369.

99 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 28 January 1898 at 275, cited in part by Donaghue, "The Clamour of Silent Constitutional Principles", (1996) 24 *Federal Law Review* 133 at 139.

> Convention in framing this Bill and applying them to cases which have never occurred before, and which are very little thought of by any of us."

133 But no accepted principle of constitutional interpretation permits us to depart from what was the intended meaning of "appeal" in s 73 of the Constitution.

The traditional view of constitutional interpretation

134 The traditional view of the Court has been that the Constitution is to be construed as a statute enacted by the Parliament of the United Kingdom, and that the appropriate way to amend it is not by judicial activism but by the machinery laid down in s 128 of the Constitution. In the first volume of the Commonwealth Law Reports, in *State of Tasmania v The Commonwealth of Australia and State of Victoria*[100], O'Connor J made it clear that the Constitution was to be interpreted in accordance with the principles of statutory construction. His Honour said[101]:

> "I do not think it can be too strongly stated that our duty in interpreting a Statute is to declare and administer the law according to the intention expressed in the Statute itself. In this respect the Constitution differs in no way from any Statute of the Commonwealth or of a State. ... The intention of the enactment is to be gathered from its words. If the words are plain, effect must be given to them; if they are doubtful, the intention of the legislature is to be gathered from the other provisions of the Statute aided by a consideration of surrounding circumstances. In all cases in order to discover the intention you may have recourse to contemporaneous circumstances – to the history of the law ... In considering the history of the law ... you must have regard to the historical facts surrounding the bringing [of] the law into existence. ... You may deduce the intention of the legislature from a consideration of the instrument itself in the light of these facts and circumstances, but you cannot go beyond it. If that limitation is to be applied in the interpretation of an ordinary Act of Parliament, it should at least be as stringently applied in the interpretation of an instrument of this kind, which not only is a statutory enactment, but also embodies the compact by which the people of the several colonies of Australia agreed to enter into an indissoluble union."

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100 (1904) 1 CLR 329.

101 *State of Tasmania v The Commonwealth of Australia and State of Victoria* (1904) 1 CLR 329 at 358-360.

135 However, the Court has always recognised that the Constitution, although a statute and to be interpreted in accordance with the principles of statutory construction, is a statute of a special kind. Since at least *Jumbunna Coalmine, No Liability v Victorian Coal Miners' Association*[102], the Court has emphasised that a liberal view must be given to the grant of powers to the Commonwealth. The words of O'Connor J in that case have often been cited. His Honour said[103]:

> "[W]here it becomes a question of construing words used in conferring a power of that kind on the Commonwealth Parliament, it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.
>
> For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose."

136 In *Victoria v The Commonwealth* ("the *Payroll Tax Case*")[104], Windeyer J said[105]:

> "[T]he Constitution is not an ordinary Statute: it is a fundamental law. In any country where the spirit of the common law holds sway the enunciation by courts of constitutional principles based on the interpretation of a written constitution may vary and develop in response to changing circumstances. This does not mean that courts have transgressed lawful boundaries: or that they may do so."

137 These views were widely accepted in Australia throughout the 20th century. As late as 1972, in *King v Jones*[106] Barwick CJ said:

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102 (1908) 6 CLR 309.

103 *Jumbunna Coalmine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368. This statement was really an Australian summary of the principle stated by Marshall CJ in *McCulloch v Maryland* 17 US 159 at 200 (1819), where his Honour said that in construing the Constitution of the United States courts should never forget that it was a Constitution that they were expounding.

104 (1971) 122 CLR 353.

105 *Victoria v The Commonwealth* (1971) 122 CLR 353 at 396-397.

106 (1972) 128 CLR 221 at 229.

> "There are some basic propositions of constitutional construction which are beyond controversy. The words of the Constitution are to be read in that natural sense they bore in the circumstances of their enactment by the Imperial Parliament in 1900. That meaning remains ... subject only to alteration by the means provided by s 128 of the Constitution. The connotation of words employed in the Constitution does not change though changing events and attitudes may in some circumstances extend the denotation or reach of those words. These propositions are fully documented in the reported decisions of this Court".

138 Some years earlier, Windeyer J had said in *Ex parte Professional Engineers' Association*[107]:

> "[I]n the interpretation of the Constitution the connotation or connotations of its words should remain constant. We are not to give words a meaning different from any meaning which they could have borne in 1900. Law is to be accommodated to changing facts. It is not to be changed as language changes."

139 Similar views have been expressed in more recent cases. In 1981 in *Attorney-General (Vict); Ex rel Black v The Commonwealth*[108], speaking of the meaning of s 116 of the Constitution, Mason J said that "a Constitutional prohibition must be applied in accordance with the meaning which it had in 1900." In 1986 in *Brown v The Queen*[109], Wilson J said of s 80 of the Constitution that "in interpreting a statute it is necessary to determine the meaning of the words used as they were understood at the time when the statute was passed." In 1988 in *Cole v Whitfield*[110], the Court gave great weight to the Convention Debates and the historical circumstances concerning border tariffs in this country, to give the apparently wide words of s 92 a narrow meaning that coincided closely with the framers' *actual* intention in enacting s 92. In 1993 in *Cheatle v The Queen*[111], the whole Court said that "[i]n the context of the history of criminal trial by jury, one would assume that s 80's directive that the trial to which it refers must be by jury was intended to encompass that requirement of unanimity."

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107 (1959) 107 CLR 208 at 267.

108 (1981) 146 CLR 559 at 614-615.

109 (1986) 160 CLR 171 at 189-190.

110 (1988) 165 CLR 360.

111 (1993) 177 CLR 541 at 552.

140 There was nothing novel about any of these statements of the principles of constitutional interpretation or understanding. They have been regarded as settled doctrine and used to construe the Constitution in many cases[112]. Probably, most Australian judges have been in substance what Justice Scalia of the United States Supreme Court once called himself – a faint-hearted originalist. Speaking of the United States situation, Justice Scalia said that he was a member of "a small but hardy group of judges and academics … [who] believe that the Constitution has a fixed meaning, which does not change: it means today what it meant when it was adopted, nothing more and nothing less."[113]

141 It is, however, too simplistic to view even "faint-hearted originalism" as meaning that a word or phrase in the Constitution only applies in circumstances envisaged by the makers of the Constitution. Justice Scalia himself acknowledges that old constitutional principles may be applied to new physical realities. Nevertheless, he emphasises that "acknowledging the need for projection of old constitutional principles upon new physical realities is a far cry from saying what the non-originalists say: that the Constitution changes; that the very act which it once prohibited it now permits, and which it once permitted it now forbids."[114]

142 Similarly, the jurisprudence of this Court has traditionally drawn a distinction between the connotation and denotation of words[115]. Professor Zines has explained the distinction as follows[116]:

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112 See among others: *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 17 per Barwick CJ, 47 per Gibbs J; *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 at 261-262 per Gibbs CJ, Mason and Wilson JJ; *Brown v The Queen* (1986) 160 CLR 171 at 179 and 180-181 per Gibbs CJ, 190 per Wilson J, 216-217 per Dawson J. These are some of the cases cited to this effect by Goldsworthy in "Originalism in Constitutional Interpretation", (1997) 25 *Federal Law Review* 1 at 14-15.

113 Scalia, "The Role of a Constitutional Court in a Democratic Society", (1995) 2 *The Judicial Review* 141 at 142.

114 Scalia, "The Role of a Constitutional Court in a Democratic Society", (1995) 2 *The Judicial Review* 141 at 142.

115 Sir Anthony Mason has said that this has had the consequence that "a constitutional term is read as including within its embrace a new exemplification which falls within its overall meaning": Mason, "The Interpretation of a Constitution in a Modern Liberal Democracy", in Sampford and Preston (eds), *Interpreting Constitutions* (1996) 13 at 14.

116 Zines, *The High Court and the Constitution*, 4th ed (1997) at 17.

> "It is the connotation of a term that is the 'meaning' and the connotation refers to those qualities and only those qualities that a thing must have in order to come within the term. The denotation consists of those objects or classes that have *all* the requisite qualities."

143 Thus, the connotation of the term "internal carriage" in s 92 of the Constitution in 1900 was any method of inland transport. Its denotation in 1900 included transport by horse-drawn carriages and trains. Today, its denotation includes the carriage of goods within Australia by aeroplane even if in 1900 few people expected or intended that it would cover transport by aeroplane. Similarly, in *Sue v Hill*[117] the Court held that the denotation of "foreign power" in s 44 of the Constitution now includes the United Kingdom although that country was not a foreign power in 1900.

144 But this is not a case where there is any question of the denotation of the term "appeal" changing. In 1900, the various types of appeal were well recognised. The present case therefore is not like *Sue v Hill*[118]. The objects or classes of "appeals" have not changed. The question is the same today as it was in 1900: What is the nature of the appeal contemplated by s 73 of the Constitution? That requires us to choose, as it required our predecessors to choose, which of the four usual meanings of "appeal" the makers of the Constitution intended to give to that term in s 73.

145 In one very important respect, judicial practice in Australia has departed from Justice Scalia's view of constitutional interpretation and the notion that the meaning of constitutional provisions is fixed as at 1900. Even taking the most favourable view of the Court's interpretation of some constitutional provisions, it is difficult to reconcile some judicial decisions as to their meaning with the theory that the meaning of each constitutional provision is that which it had in 1900. To take one example: as Sir Harry Gibbs has noted, the interpretation of the conciliation and arbitration power conferred by s 51(xxxv) of the Constitution has assumed a meaning vastly different from that contemplated by the framers of the Constitution[119].

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117 (1999) 73 ALJR 1016; 163 ALR 648.

118 (1999) 73 ALJR 1016; 163 ALR 648.

119 Gibbs, "Courage in Constitutional Interpretation and its Consequences – One Example", (1991) 14 *University of New South Wales Law Journal* 325 at 330.

146 The reason for the Court's interpretation is that the relevant intention of constitutional provisions is that expressed in the Constitution itself[120], not the subjective intentions of its framers or makers. It is an intention that is determined objectively. Indeed until *Cole v Whitfield*[121] the Court would not even look at the Convention Debates. No doubt the notion of constitutional intent, like that of legislative intent, is fictitious. But it serves a useful purpose, as Professor Popkin has recently pointed out[122]:

> "The simple act of thinking about the meaning of statutory language in this broader context – which the judge must do – requires judgment about how the text should interact with its past and future. That is why, despite its being an obvious fiction, the judge when engaged in statutory interpretation is unable to do without the concept of legislative intent. Intent is matched with text as an essential aspect of statutory meaning, not because the judge has any confidence that legislative intent is knowable, but because 'intent' (or 'will') captures the idea that choices *must* be made in order to apply a text to facts. Legislative intent is a useful judicial construct because the judge is required to make the choices that best express the statutory text's meaning."

147 Because the intention of the makers of the Constitution is one to be determined objectively[123], the present generation may see that the provisions of the Constitution have a meaning that escaped the *actual understandings or intentions* of the founders or other persons in 1900. If asked in that year what an industrial dispute extending beyond the limits of any one State meant, most people would probably have said that it meant strikes in more than one State by workers in the same industry. They would have had in mind the maritime and shearers strikes of the 1890s. But we now perceive that "industrial disputes", in their context, easily cover paper disputes arising out of the service of logs of claims on employers in more than one State for wages and conditions for numerous categories of employment in disparate industries. The makers of the Constitution intended the Parliament to have legislative powers in respect of

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120 *State of Tasmania v The Commonwealth of Australia and State of Victoria* (1904) 1 CLR 329 at 358-360.

121 (1988) 165 CLR 360.

122 *Statutes in Court – The History and Theory of Statutory Interpretation* (1999) at 211.

123 See Dawson, "Intention and the Constitution – Whose Intent?", (1990) 6 *Australian Bar Review* 93 at 93. When the Court speaks of legislative intention, what it means is that "a court will construe the language of a statute and arrive at the intention which is revealed by that language."

"industrial disputes" of a certain kind. If those words cover "paper disputes" about wages and conditions, it is irrelevant that those who framed and enacted the Constitution had something else in mind or believed that the words only covered strikes and similar disturbances. It is therefore true to say, as Windeyer J said in the *Payroll Tax Case*[124], that the meaning of the Constitution is not necessarily the same as that which it had for an earlier, or I would add a later, generation.

148 The traditional approach to constitutional interpretation in Australia is probably best described as textualism or semantic intentionalism[125]. It is not literalism, if by literalism is meant no more than a statute is to be interpreted by reference to its words according to their natural sense and in the context of the document[126]. As many cases show, the Court has frequently taken into account the consequences of particular interpretations in determining the meaning of constitutional provisions[127], as well as the history and circumstances of their making.

149 It has often been suggested that *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ("the *Engineers' Case*")[128] committed the High Court to a regime of literalism[129]. Although the majority justices in the *Engineers' Case* emphasised the necessity to construe the words of the Constitution, their approach is probably better regarded as one of legalism with textualism the instrument of that legalism. The majority justices in the *Engineers' Case* emphatically rejected the use of external political principles or policies to interpret the Constitution, and thereby committed the Court to the strict legalism of which Sir Owen Dixon became the leading proponent. However, the *Engineers' Case* did not rule out the history or background of the Constitution as interpretative aids. The majority justices in that case expressly said that the Constitution was to be read in the light of the circumstances in which it was

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124 (1971) 122 CLR 353 at 396-397.

125 Dworkin, Comment in *A Matter Of Interpretation* (1997) at 119-120; Scalia, Response at 144.

126 See, for example, Craven, "The Crisis of Constitutional Literalism in Australia", in Lee and Winterton (eds), *Australian Constitutional Perspectives* (1992) 1 at 2.

127 See, for example, the many cases cited in Kirk, "Constitutional Interpretation and a Theory of Evolutionary Originalism", (1999) 27 *Federal Law Review* 323 at 327.

128 (1920) 28 CLR 129.

129 See, for example, Craven, "The Crisis of Constitutional Literalism in Australia", in Lee and Winterton (eds), *Australian Constitutional Perspectives* (1992) 1 at 2.

made with knowledge of the combined fabric of the common law and the pre-Constitution statute law. This approach was emphatically approved by Barwick CJ in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*[130] when his Honour said:

> "The problem which is thus presented to the Court is a matter of the legal construction of the Constitution of Australia, itself a legal document; an Act of the Imperial Parliament. The problem is not to be solved by resort to slogans or to political catch-cries or to vague and imprecise expressions of political philosophy. The question of the validity of an Act of the Parliament ... is to be decided by the meaning of the relevant text of the Constitution having regard to the historical setting in which the Constitution was created and the terms and operation of the Act in respect of the subject matter which, upon that construction, is committed by the Constitution to the Parliament. The only true guide and the only course which can produce stability in constitutional law is to read the language of the Constitution itself, no doubt generously and not pedantically, but as a whole: and to find its meaning by legal reasoning. I respectfully agree with Sir Owen Dixon's opinion that 'there is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism'. In case of ambiguity or lack of certainty, resort can be had to the history of the colonies, particularly in the period of and immediately preceding the development of the terms of the Constitution. But it is settled doctrine in Australia that the records of the discussions in the Conventions and in the legislatures of the colonies will not be used as an aid to the construction of the Constitution."

150 Furthermore, it seems obvious that the text of the Constitution must contain not only the natural or ordinary meaning of the words, but also by necessary implication such matters as are necessary to the existence and understanding of its provisions. At the Melbourne Convention, Mr Alfred Deakin pointed out[131]:

> "[The draft] requires for its full interpretation a considerable amount of constitutional knowledge. Although the members of the Convention and others will have every opportunity of expounding it, in the light of their constitutional knowledge, to the public, the measure itself will not, except to a student of our form of government, convey a great deal of what it necessarily means."

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130 (1975) 135 CLR 1 at 17.

131 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 17 February 1898 at 1064, cited by Goldsworthy in "Originalism in Constitutional Interpretation", (1997) 25 *Federal Law Review* 1 at 11.

151 Professor Dworkin has pointed out[132]:

> "[C]onstitutional interpretation must begin in what the framers said, and, just as our judgment about what friends and strangers say relies on specific information about them and the context in which they speak, so does our understanding of what the framers said. History is therefore plainly relevant. But only in a particular way. We turn to history to answer the question of what they intended to *say*, not the different question of what *other* intentions they had. We have no need to decide what they expected to happen, or hoped would happen, in consequence of their having said what they did, for example; their purpose, in that sense, is not part of our study. That is a crucial distinction".

152 Elsewhere[133], I have observed that the true meaning of a legal text will depend on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood. Thus, it is only history and the practice of the courts prior to 1900 that enable us to know that "appeal" in s 73 of the Constitution does not include an application for a new trial. There is therefore no right to "appeal" to this Court from the verdict of a jury or from a judgment of the Supreme Court of a State founded upon a general verdict of a jury. The verdict can only be set aside by appeal to this Court from a decision of the Supreme Court of a State given by that court in respect of an application for a new trial[134]. Similarly, only history and practice inform us that it was not the intention of the makers of the Constitution to permit the Crown to appeal from an acquittal by a jury, even when the acquittal is by direction of a judge exercising federal jurisdiction[135].

153 Again, it is only familiarity with United States and Canadian constitutional practice and recourse to the Convention Debates that tell us that the makers of the Constitution intended that this Court and other courts should have the power to declare legislation of the State and federal parliaments unconstitutional. A person looking at the Constitution, without any knowledge of the history of judicial review in the United States and Canada, would be hard-pressed to find a basis for our power to declare unconstitutional the legislation of those

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132 *Freedom's Law* (1996) at 10.

133 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 196.

134 *Dagnino v Bellotti* (1886) 11 App Cas 604; *Musgrove v McDonald* (1905) 3 CLR 132; *Brisbane Shipwrights' Provident Union v Heggie* (1906) 3 CLR 686; *The Commonwealth v Brisbane Milling Co Ltd* (1916) 21 CLR 559; *Menges v The King* (1919) 26 CLR 369.

135 *R v Snow* (1915) 20 CLR 315; *Menges v The King* (1919) 26 CLR 369.

parliaments. Sir Robert Garran[136] has told us that, during a Privy Council appeal in 1907, "no less an authority than Lord Halsbury" had interjected "that he did not know what was meant by an unconstitutional Act of Parliament", and that "he had ... in *Webb v Outtrim*, observed that, except the Colonial Laws Validity Act, it seemed to him no authority existed to declare an Act of the Commonwealth Parliament invalid."

154 Nevertheless, even when we see meaning in a constitutional provision which our predecessors did not see, the search is always for the objective intention of the makers of the Constitution. A commitment to discerning the intention of the makers of the Constitution, in the same way as a court searches for the intention of the legislature in enacting an ordinary statute, does not equate with a Constitution suspended in time. Our Constitution is constructed in such a way that most of its concepts and purposes are stated at a sufficient level of abstraction or generality to enable it to be infused with the *current* understanding of those concepts and purposes[137]. This is consistent with the notion that our Constitution was intended to be an enduring document able to apply to emerging circumstances while retaining its essential integrity. The Constitution was addressed to posterity as well as to those living at the time of its enactment. Those who framed and enacted the Constitution knew that the meaning of the document would have to be deduced by later generations as well as their contemporaries. This Court has not accepted that the makers' *actual* intentions are decisive, and I see no reason why we should regard the understandings of the immediate audience as decisive.

155 The fact that the meaning attributed to a particular provision now may not be the same as the meaning understood by the makers of the Constitution or their 1901 audience does not make constitutional adjudication a web of judicial legislation. They may not have envisaged that freedom of political communication was part of the system of representative government. They may not have understood that the Commonwealth power with respect to industrial disputes could be invoked by the serving of a log of claims. The participants at the Constitutional Conventions may not have understood that juries would include women or those without property or that "the people of the Commonwealth" might include Aboriginal people. But to deny that the events following federation and the experiences of the nation can be used to see more than the Constitutional Convention participants or the 1901 audience saw in particular words and combinations of words is to leave us slaves to the mental images and understandings of the founding fathers and their 1901 audience, a prospect which they almost certainly did not intend.

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136 *Prosper the Commonwealth* (1958) at 171.

137 *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839 at 850; 163 ALR 270 at 286.

156 The application, and sometimes the meaning, of a constitutional provision may therefore be informed by an appreciation of "contemporary circumstances". This approach recognises that those who made and enacted the Constitution intended it to endure, to be responsive and relevant to the community in which it would operate, and to be sufficiently malleable to account for circumstances and conditions that they could not have foreseen. According to this view, the Constitution is not "a rigid blueprint" but rather "an outline or broad framework for national government capable of adjusting to changing conditions and circumstances."[138] Such a view enjoys some heritage in Australian constitutional thinking. Justice Dixon advocated it in *Australian National Airways Pty Ltd v The Commonwealth*[139] when he said that:

> "it is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances."

157 Thus, one of the chief proponents of legalism and textualism in Australia saw no inconsistency between textualism and an evolving approach to the Constitution.

158 But accepting, as I do, that constitutional provisions may mean something to us that they did not mean to our predecessors, I can find no basis for holding that the term "appeal" in s 73 of the Constitution now authorises this Court to admit further evidence when hearing an appeal under that section. Given the nature of appeals that existed in 1900, the distinction between original and appellate jurisdiction in Ch III of the Constitution, and the omission of any power to receive further evidence in an appeal under s 73, the best interpretation of s 73 is that those who drafted and enacted it intended that this Court should have only true appellate jurisdiction. The arguments that led this Court to that conclusion for the first time nearly a century ago are as valid today as they were then. In my opinion, *Mickelberg* was correctly decided.

Further evidence in appeals from federal courts or appeals concerned with the sanity of the accused

159 A further question arises, however, as to whether appeals from federal courts stand in a different position from those from State courts. The order of the Full Court of the Federal Court, which is the subject of the present application, was made in the exercise of federal jurisdiction. The Full Court's jurisdiction

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138 Mason, "The Interpretation of a Constitution in a Modern Liberal Democracy", in Sampford and Preston (eds), *Interpreting Constitutions* (1996) 13 at 17.

139 (1945) 71 CLR 29 at 81.

arose from s 24(1)(b) of the *Federal Court of Australia Act* 1976 (Cth) which authorises it to hear an appeal from a judgment of the Supreme Court of the Australian Capital Territory. The law under which the applicant was charged was a law made by the Parliament of the Commonwealth[140]. In so far as s 24(1)(b) applied to the present proceedings, it was a law made under s 77(i) of the Constitution which defined the jurisdiction of the Federal Court in respect of a matter arising under s 76(ii) of the Constitution[141]. Because that is so, Mr D F Jackson QC, counsel for the applicant, asked us to distinguish *Mickelberg*[142] on the ground that it was an authority only in respect of appeals against orders made in the exercise of State jurisdiction. He contended that *Mickelberg* does not prevent the Court from receiving the evidence sought to be adduced, because:

(i) *Mickelberg* was concerned with further evidence of events relevant to the commission of the offence, whereas this case is concerned with further evidence of matters going to whether there should have been a trial of the charge at all. A different attitude should be taken to further evidence on questions of sanity because the person whose sanity is in question "cannot be charged with any neglect or failure to have the full strength of his case presented"[143] in the courts below.

(ii) *Mickelberg* was concerned with an appeal from a State court exercising State jurisdiction. It expressly left open the possibility that a s 75 or s 76 matter may not be governed by the same constraints.

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140 Section 6 of the *Seat of Government Acceptance Act* 1909 (Cth) and s 4 of the *Seat of Government (Administration) Act* 1910 (Cth) adopted s 18 of the *Crimes Act* 1900 (NSW), which was the provision under which the applicant was charged with murder. Section 34 of the *Australian Capital Territory (Self-Government) Act* 1988 (Cth), as amended by s 7 of the *ACT Supreme Court (Transfer) Act* 1992 (Cth), continues the operation of s 18 of the *Crimes Act* 1900 (NSW) as a law made by the Parliament of the Commonwealth. See generally *Northern Territory v GPAO* (1999) 196 CLR 553.

141 Given the Court's decision in *Northern Territory v GPAO* (1999) 196 CLR 553 that proceedings in the Federal Court in respect of matters enacted under s 122 of the Constitution are exercises of federal jurisdiction, difficult questions arise as to the nature of an appeal from a Territory court under s 24(1)(b) where the subject matter of the appeal arises under the common law. Because the charge in the present case arose under a law of the Parliament, these questions do not arise in this case.

142 (1989) 167 CLR 259.

143 *R v Tucker* (1915) 15 SR (NSW) 504 at 509.

160 In my opinion, *Mickelberg* was correctly decided, as I have already held. Moreover, it is not distinguishable, as Mr Jackson QC contended, on the ground that it involved an appeal from a State court exercising State jurisdiction while the present case involves a federal court exercising federal jurisdiction. In *Mickelberg*, Mason CJ queried whether in some circumstances this Court might have power to receive fresh evidence on an appeal. His Honour said[144]:

> "However, it may be that the existence of a discretion to receive evidence of supervening facts on matters which were the subject of assumption or estimation in the courts below, as discussed in *Barder v Caluori*[145], is properly to be seen as an incident of the exercise of appellate jurisdiction. And it may be that appeals in constitutional cases stand in a different position; the Court possesses an original jurisdiction in constitutional matters. For the purposes of disposing of the present case, it is not necessary to decide these questions. Accordingly, I reserve my opinion on them.
>
> My conclusion on this point therefore is that the Court has no power to receive the further evidence which the applicants seek to adduce. That conclusion should not be understood as denying the capacity of Parliament to confer on the Court power to receive fresh evidence in appeals, at least in those appeals which involve the exercise of federal jurisdiction."

161 When read as a whole, the reasoning of Mason CJ in *Mickelberg* supports the following propositions:

(a) the grant of appellate jurisdiction in s 73 of the Constitution does not, of itself, give the Court power to receive fresh evidence on appeal in the ordinary course; however a discretion to receive evidence of supervening facts which were the subject of assumption or estimation in the courts below may be an incident of the exercise of appellate jurisdiction;

(b) the Constitution may not prevent the Parliament from legislating so as to give the Court power to receive fresh evidence in appeals where those appeals involve the exercise of federal jurisdiction;

(c) whether the Constitution permits the Parliament to legislate so as to give the Court power to receive fresh evidence in appeals from the

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144 (1989) 167 CLR 259 at 271.

145 [1988] AC 20.

State Supreme Courts in matters of State jurisdiction remains an open question.

162 Toohey and Gaudron JJ (with whom Brennan J agreed on this issue) took a more cautious approach than Mason CJ. Their Honours said[146]:

> "It may be that s 75 of the Constitution, in conferring original jurisdiction on this Court, confers power to receive fresh evidence on the hearing of appeals in matters falling within that section. It may also be that Parliament can confer the same power in respect of the hearing of appeals in matters falling within s 76 of the Constitution. However, a power in this Court to receive fresh evidence in an appeal from a State court exercising State judicial power and to determine the issues then raised by reference to that fresh evidence would be 'equivalent to investing this Court with original jurisdiction [over matters falling within] State judicial power': *Werribee Council*[147], per Isaacs J. See also *Meakes v Dignan*[148], per Dixon J; *Davies and Cody v The King*[149], per Latham CJ. Such a power is not conferred by Ch III of the Constitution for ss 75 and 76 constitute a complete and exhaustive statement of the original jurisdiction comprehended within the judicial power of the Commonwealth: *In re Judiciary and Navigation Acts*[150]; *R v Maryborough Licensing Court; Ex parte Webster & Co Ltd*[151].
>
> The present application is for leave to appeal from a State court exercising State judicial power. Accordingly, the power of this Court, should leave be granted, is confined to determining the correctness or otherwise of the decision made by the Court of Criminal Appeal on the material before it."

163 As I have already indicated, under ss 75 and 76 of the Constitution the Parliament may be able to authorise this Court, when hearing an appeal against the decision of a court exercising federal jurisdiction, to receive evidence that was not before that court. But if it can, an "appeal" so authorised would not be

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146 (1989) 167 CLR 259 at 298-299.

147 (1928) 42 CLR 1 at 20.

148 (1931) 46 CLR 73 at 109-110.

149 (1937) 57 CLR 170 at 172.

150 (1921) 29 CLR 257 at 265.

151 (1919) 27 CLR 249 at 253.

an exercise of the appellate jurisdiction conferred by s 73 of the Constitution. It would be an independent exercise of the *original jurisdiction* conferred by ss 75 and 76 in exactly the same way that, at common law, proceedings in error to set aside a jury's verdict were an exercise of original and not appellate jurisdiction[152]. Assuming without deciding that the Parliament may authorise this Court, pursuant to ss 75 and 76 of the Constitution, to receive further evidence, the Court might then be able to hear together an appeal under s 73 and a review in the original jurisdiction. But the further evidence that might be admitted in the original jurisdiction could not be used in the appeal. To permit it would be contrary to s 73 of the Constitution.

164 In my opinion, it cannot be asserted that *Mickelberg* was rightly decided and at the same time logically asserted that this Court can receive further evidence in appeals under s 73 from orders of courts exercising federal jurisdiction or from orders of the justices of this Court. The appeal of which s 73 speaks is a true appeal. *Ex hypothesi*, it denies to the Court the power to receive evidence that was not before the court whose order is the subject of appeal. It makes no difference whether the appeal comes from a State Supreme Court exercising State jurisdiction, a State or federal court exercising federal jurisdiction, or a justice of this Court exercising the original jurisdiction of the Court. Nor does it make any difference that the issue in respect of which further evidence is sought to be adduced concerned the sanity of the appellant.

165 It follows that, if special leave to appeal were granted, this Court could not receive the evidence which the applicant seeks to rely on in support of his claim that he was unfit to plead to the charge of murder. Because that is so, a grant of special leave to appeal would be futile.

No error by the Full Court in not determining the ground of appeal

166 In my opinion, the Court should also reject the claim that special leave should be granted to determine whether the Full Court of the Federal Court should have investigated whether the applicant was fit to plead at his trial. At common law, a trial judge has a duty to inquire whether the accused is fit to plead. In the Australian Capital Territory, the trial judge's functions in respect of fitness to plead are regulated by statute[153] and bear little resemblance to the course of the procedure at common law. But assuming that the trial judge, Carruthers AJ, had an obligation to inquire into the question of fitness to plead if it was fairly raised, it does not follow either that his Honour erred in not

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152 *CDJ v VAJ* (1998) 72 ALJR 1548 at 1563, 1564; 157 ALR 686 at 706, 708.

153 Part XIA of the *Crimes Act* 1900 (ACT), in particular s 428E, and s 68 of the *Mental Health (Treatment and Care) Act* 1994 (ACT).

inquiring into the matter or that the Full Court had an obligation to determine whether his Honour should have so inquired.

167 The duty of the Full Court was to determine the issues raised in the appeal. It was not its duty to act as if it were a tribunal reviewing the propriety of the applicant's conviction. Unless statute law indicates to the contrary, the function of a court of criminal appeal is not to conduct an investigation into whether the appellant was rightly convicted, but to decide the issues raised in the appeal. The issues in the notice of appeal were the measure of the Full Court's duty and authority. Because those issues raised no question of the applicant's fitness to plead at his trial, the Full Court did not err in failing to investigate or determine that question. For the reasons given by Gleeson CJ, there was no failure in the trial process calling for the Full Court's intervention even if, contrary to my view, the Full Court had an overriding duty to investigate whether the conviction of the applicant was a miscarriage of justice. That being so, assuming that this Court would have authority to hear an appeal on a point not raised before the Full Court or the learned trial judge, this Court should not grant special leave to appeal on a ground not raised in the Full Court.

168 The application for special leave should be dismissed. However, a majority of the Court favours the grant of special leave, and the Court heard full argument on the issues as if the application for special leave to appeal was an appeal. That being so, I would dismiss the appeal because the Court has no power to receive the evidence now sought to be tendered in the appeal and the Full Court did not err in not investigating whether the appellant was fit to plead. My reasons for dismissing the appeal are set out in the reasons why I thought that special leave to appeal should be refused.

Order

169 The appeal should be dismissed.

170 GUMMOW J. This is an application for special leave to appeal from the judgment and orders of the Full Court of the Federal Court[154]. The Full Court rejected the applicant's appeal against his murder conviction in the Supreme Court of the Australian Capital Territory ("the Territory"). The application should be dismissed because an appeal to this Court on the grounds which the applicant seeks to advance would have no prospects of success.

Unfitness to plead

171 In the amended draft notice of appeal furnished with the application for special leave, the applicant contends that, at his trial, he was unfit to plead and, for that reason, the trial miscarried. The applicant submits that the issue of his fitness to plead, which previously has not been determined, should now be determined by this Court or, consequent upon the allowance of his appeal, by the Federal Court on remitter by this Court. If the application for special leave were granted, the applicant would seek to lead evidence in this Court on the issue. The nature of this evidence is described by the Chief Justice in his reasons. The respondent to the leave application contends that the decision in *Mickelberg v The Queen*[155], or the reasoning of the majority in that case, bars the reception of such evidence in this Court. The applicant responds by seeking leave, so far as it is necessary, to re-open *Mickelberg*.

172 I approach the issues raised by the application for special leave on the footing that, on an appeal, the Court in certain circumstances may entertain a question of law which the applicant advances for the first time in this Court[156]. Further, I accept that, under the procedures of the common law courts, questions of fitness to plead and to stand trial may be matters for the trial judge to consider, even if they have not been agitated by the prosecution or by the accused. However, the antiquity of the decisions from which this principle derives[157] suggests several matters of some present relevance. First, the common law developed at a time when there was no appellate structure in the criminal jurisdiction such as that later established in England by the *Criminal Appeal Act* 1907 (UK), and when conviction for felony attracted the death penalty. Further, before the *Trials for Felony Act* 1836 (UK)[158], the accused had restricted rights of

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154 *Eastman v The Queen* (1997) 76 FCR 9.

155 (1989) 167 CLR 259.

156 See the authorities referred to in *Bond v The Queen* (2000) 74 ALJR 597 at 602; 169 ALR 607 at 614 and in *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319.

157 Notably *Proceedings in the Case of John Frith for High Treason* (1790) 22 Howell's State Trials 307 and *R v Pritchard* (1836) 7 Car & P 303 [173 ER 135].

158 6 & 7 Will IV c 114, s 1.

legal representation[159]. Against that background, the reference by Lord Kenyon LCJ in *Frith*[160] to "the humanity of the law of England" in not requiring the accused to make his or her defence when unfit to plead had a certain edge.

173 In the Territory, particular provision has been made by s 428E of the *Crimes Act* 1900 (ACT) ("the Crimes Act")[161]. In certain circumstances, if the issue of fitness to plead had been raised, s 428E would have obliged the Supreme Court to order the applicant to submit to the Mental Health Tribunal ("the Tribunal") established under the *Mental Health (Treatment and Care) Act* 1994 (ACT) to determine whether or not he was fit to plead to the charge of murder. The issue might have been raised "by a party to the proceedings or by the [Supreme] Court" (s 428E(1)(a)). The Supreme Court would have been obliged to make an order for submission to the Tribunal if it had been "satisfied that there [was] a question" as to the applicant's fitness to plead to the charge (s 428E(1)(b)). Section 428E has been amended since the applicant's trial by the *Crimes (Amendment) Act* 1999 (ACT), but nothing turns on this.

174 However, I do not accept the submission now made by the applicant in this Court that, in the absence of any ground of appeal raising the question, the Full Court had a separate and distinct obligation of its own to consider whether the trial judge had erred in not of his own motion raising the issue of fitness to plead.

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159 The position before 1836 was explained as follows by Sir Harry Poland QC in his lecture, "Changes in Criminal Law and Procedure Since 1800", delivered in 1900 and published in *A Century of Law Reform*, (1901) 43 at 50:

> "A prisoner charged with high treason was allowed to have two counsel to address the jury for him, and was also allowed to address the jury himself after his counsels' speeches. … In cases of misdemeanour one counsel was allowed to address the jury for the defendant, but in cases of felony a prisoner's counsel was only allowed to cross-examine witnesses and to argue points of law and to examine witnesses for the defence, and he could write a defence for the prisoner. In 1826 Sydney Smith wrote an article on the subject in the *Edinburgh Review*, which is reprinted in his works, and after reading it it is difficult to understand how the law could have remained unchanged until 1836".

160 *Proceedings in the Case of John Frith for High Treason* (1790) 22 Howell's State Trials 307 at 318.

161 In respect of trials of federal offences on indictment, Div 6 (ss 20B-20BH) of Pt 1B of the *Crimes Act* 1914 (Cth) deals with unfitness to be tried.

175 There could have been no such obligation imposed by the common law as it developed in England in advance of the creation by statute of an appellate structure of the kind now familiar in Australia. The Federal Court is, of necessity, a creature of statute, as a court created by the Parliament within the meaning of s 71 of the Constitution. It has been regarded as settled since the judgment of Griffith CJ in *Ah Yick v Lehmert*[162] that the power of the Parliament under s 77(i) of the Constitution to make laws defining the jurisdiction of a court such as the Federal Court includes a power to provide for appellate jurisdiction[163]. In the exercise of their appellate jurisdiction, both the Federal Court[164] and the Family Court[165] are endowed by statute with a power to receive further evidence. There is no reason to doubt the validity of those provisions and none is suggested. But the appellate jurisdiction of this Court is founded not in statute but in the direct terms of s 73 of the Constitution. It will be necessary to return to the significance of this constitutional provision.

176 In the present case, the jurisdiction of the Full Court was conferred by s 24(1)(b) of the Federal Court Act in respect of appeals from judgments of the Supreme Court of a Territory[166]. The term "judgment" is defined in s 4 of the Federal Court Act as meaning "a judgment, decree or order, whether final or interlocutory, or a sentence"[167]. *Chamberlain v The Queen [No 2]*[168] establishes that, in an appeal such as that brought to the Full Court in this case, the Full Court is empowered by the general terms of s 24(1)(b) to allow the appeal if it concludes that there has been a miscarriage of justice.

177 I accept that a trial in the Territory may miscarry because the trial judge has erred in failing to raise the issue of fitness to plead as provided in s 428E(1)(a) of the Crimes Act and that this may found a good ground of appeal to the

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162 (1905) 2 CLR 593 at 603-604.

163 See Cowen and Zines, *Federal Jurisdiction in Australia*, 2nd ed (1978) at 130-132.

164 *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act"), s 27. See *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134.

165 *Family Law Act* 1975 (Cth) ("the Family Law Act"), s 93A(2). See *CDJ v VAJ* (1998) 72 ALJR 1548 at 1563-1564; 157 ALR 686 at 707-708.

166 This expression does not include the Supreme Court of the Northern Territory (s 24(6)).

167 Leave is required to appeal from interlocutory judgments (s 24(1A)).

168 (1984) 153 CLR 521 at 529.

Full Court, even though the failure of the trial judge occurred outside the immediate operation of the adversary system.

178 However, the appellate jurisdiction exercised by the Full Court under the Federal Court Act did not include the imposition upon it of an obligation, outside the adversary appellate process, to raise for consideration whether the trial judge had erred in this way. The jurisdiction exercised by the Supreme Court was enlivened by the institution of the prosecution, whilst that of the Full Court was enlivened by institution of the appeal by the accused after his conviction. It was the grounds of appeal, not some further duty imposed upon the Full Court, which indicated the nature of the subject-matter for determination by the Full Court. The Full Court was not obliged to go beyond that which the appellant before it contended amounted to a miscarriage of justice, by asking for itself whether the material before it raised a question respecting the fitness of the appellant to plead at the trial. This was nonetheless so where the Full Court had before it evidence which was not tendered at the trial and was received by the Full Court on other issues, but which the unsuccessful appellant now contends would have supported the case never sought to be made in the Full Court.

179 Indeed, had the Full Court done as the applicant now says it was obliged to do, a question would have arisen as to its power to act in this way. For present purposes, it may be assumed that the Full Court would have had the power to raise the issue of fitness to plead, but the matter may be left for determination on another occasion. It should be added that to determine that the trial judge had erred in not raising the issue under s 428E(1)(a) would not mean that the appeal to the Full Court should have succeeded. It would have been necessary further to determine whether, within the meaning of s 428E(1)(b), the trial judge should have been satisfied that there was a question as to fitness to plead, so that there was an error in failing to order the accused to submit to the jurisdiction of the Tribunal.

180 It follows from the above that an appeal to this Court would fail for want of any error on the part of the Full Court.

Further evidence

181 Error by the Full Court would not be established by the evidence which the applicant would seek to have this Court receive on such an appeal and which, if admitted and accepted, would bear upon the question of the mental condition of the applicant at the time of the trial. However, as the position concerning the adducing of evidence in, or in respect of, appeals to this Court under s 73 of the Constitution is dealt with in the other judgments, I should indicate my position in the matter.

182 Evidence beyond that in the record of the court below is received in respect of various aspects of the appellate process under s 73. In *Government Insurance*

Office of NSW v Fredrichberg[169], this Court received, with reluctance, an affidavit by the respondent's instructing solicitor setting out the solicitor's account of what had happened at the trial in the Supreme Court of New South Wales but which had not been recorded by the shorthand writer. More familiar examples are the receipt of evidence in resolution of disputes in this Court respecting a stay of the orders appealed from, and the provision of security for costs of the appeal to this Court. Further, s 73 of the Constitution empowers the Parliament to fetter by "exceptions" and "regulations" what otherwise would be appeals as of right. For many years, this involved the Court in resolving, by regard, for example, to valuation evidence, objections to competency when the appeal as of right was conditioned by the involvement of property or any civil right amounting to or of the value of a stipulated money sum[170]. Where an appeal lies only by special leave, the Court receives on the special leave application evidence designed to show such matters as the presence of a question of general public importance or, on the other side, that an issue sought to be agitated on an appeal would now be moot. The requirement of special leave is a statutory "regulation" within the meaning of s 73 of the Constitution and to determine a special leave application is not to exercise appellate jurisdiction[171].

183 The applicant raises quite a different matter from those considered above. The contention is that in the exercise of its power to hear and determine appeals under s 73, the Court may go beyond the record on which the court whence the appeal is brought founded its judgment, decree, order or sentence. In particular, the applicant submits that the nature of the appeal provided for in s 73 is such that the constitutional endowment of jurisdiction carries with it the power to receive evidence not in that record. To make good his submission, the applicant seeks to challenge, or distinguish, the decision in *Mickelberg*.

184 In that case, Mason CJ[172] attached significance to what had been said by Dixon J in *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan*[173]. This was an appeal from a State court exercising federal

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169 (1968) 118 CLR 403 at 410, 416-417, 422.

170 The amount specified in par (a) of s 35(1) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") was £300. By 1976, the amount was $20,000: *Judiciary Amendment Act* 1976 (Cth), s 6. Section 35 was recast by s 3 of the *Judiciary Amendment Act (No 2)* 1984 (Cth) to impose a general requirement of special leave in appeals from State Supreme Courts and from other State courts in the exercise of federal jurisdiction.

171 *Attorney-General (Cth) v Finch [No 2]* (1984) 155 CLR 107 at 115.

172 (1989) 167 CLR 259 at 267-268.

173 (1931) 46 CLR 73 at 108-109.

jurisdiction. Dixon J referred to what had been said in several earlier cases[174] and declared that the High Court "has always refused to hear fresh evidence"[175]. Evatt J emphasised that the jurisdiction conferred by s 73 is to be exercised "for the purpose of determining whether the decision of the inferior tribunal was right or wrong when it was pronounced"[176].

185 Dixon J made his remarks after discussing the provisions respecting the English Court of Appeal made by the Judicature legislation[177]. These included extensive powers conferred for the taking of further evidence. Rule 52 of the Rules of Procedure included in the Schedule to the *Supreme Court of Judicature Act* 1873 (UK), so far as material, had stated:

> "The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the Court of First Instance, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a decree or judgment upon the merits, at the trial or hearing of any action or matter, such further evidence (save as aforesaid) shall be admitted on special grounds only, and not without special leave of the Court."

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174 *New Lambton Land and Coal Co Ltd v London Bank of Australia Ltd* (1904) 1 CLR 524 at 532 *arguendo*; *Ronald v Harper* (1910) 11 CLR 63 at 77-78; *The Commonwealth v Brisbane Milling Co Ltd* (1916) 21 CLR 559. The last of these cases was an application by the Commonwealth to enter judgment for nominal damages for the plaintiff or for a new trial after a verdict for the plaintiff in a jury action against the Commonwealth. The application was brought directly to the High Court. This Court held the appeal incompetent because it was brought from the verdict, not the judgment. It followed that s 73 was not engaged. The case is not presently in point.

175 (1931) 46 CLR 73 at 109.

176 (1931) 46 CLR 73 at 113.

177 (1931) 46 CLR 73 at 108.

Provisions to like effect were adopted forthwith in some of the Australian colonies[178]. They were repeated in English rules over the next century[179]. For example, O 59 r 10(2) of the Rules of the Supreme Court 1875 (UK) provided:

> "The Court of Appeal shall have power to receive further evidence on questions of fact … but … no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds."

In *Doherty v Liverpool District Hospital*, Gleeson CJ observed of what he described as the "long-standing English rule" that it[180]:

> "in its terms draws a distinction between evidence as to matters occurring before the date of the trial and evidence as to matters occurring after the date of the trial, and, further, in terms confers a general discretion in relation to evidence of the latter kind but limits the power to receive evidence of the former kind to cases where there are 'special grounds'".

This then, at the time of the adoption of the Constitution, was the position under the Judicature system as established in England and copied in Australia.

186 In *Mickelberg*, Mason CJ stated that, in 1900 or thereabouts, "a mere grant of appellate jurisdiction without more would not be understood as carrying with it a power to receive further evidence"[181]. The power conferred by the Schedule to the Judicature legislation, to which I have referred, and which Sir George Jessel MR described as a "special power"[182], is consistent with that proposition. So also is the observation of Griffith CJ in *Ronald v Harper*[183]:

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178 In New South Wales by the *Equity Act* 1880 (NSW), s 73; in Victoria by O 58 r 5 of the Rules of Court in the Second Schedule to the *Judicature Act* 1883 (Vic); and in Queensland by O 57 r 6 of the Rules of Court in the Schedule to the *Judicature Act* 1876 (Q).

179 *Mulholland v Mitchell* [1971] AC 666 at 678.

180 (1991) 22 NSWLR 284 at 294.

181 (1989) 167 CLR 259 at 270.

182 *In re Chennell; Jones v Chennell* (1878) 8 Ch D 492 at 505.

183 (1910) 11 CLR 63 at 77-78.

> "The Judicial Committee of the Privy Council has, by Statute, authority to receive fresh evidence whenever it thinks fit. We have no such authority given to us".

187 Griffith CJ appears to have been referring to the powers conferred upon the Judicial Committee by ss 7 and 8 of the *Judicial Committee Act* 1833 (Imp) ("the 1833 Act")[184]. However, the Judicial Committee advises the Sovereign with respect to the exercise of the Prerogative, it does not owe its existence to any entrenched constitutional provision, and any statutory regulation of its powers and procedures (as by the 1833 Act) is, and was in 1900, subject to change by like means. In *Viro v The Queen*, Jacobs J remarked[185]:

> "The express constitutional provision governing Australia in particular prevails over the generality of the 1833 Act and of the Prerogative power."

To construe s 73 of the Constitution by reference to the powers conferred on the Judicial Committee by the 1833 Act is to distort the normative hierarchy to which Jacobs J referred. Moreover, as McHugh J points out in his reasons for judgment, at the time of the adoption of the Constitution, the Judicial Committee exercised both appellate and original jurisdiction.

188 I should add that I agree with McHugh J, and for the reasons given by his Honour, that the reference in the last paragraph of s 73 of the Constitution to "conditions of and restrictions on" appeals from State Supreme Courts to the Privy Council is not to statutory powers such as those in the 1833 Act.

189 The statement by Mason CJ in *Mickelberg* set out above was, with respect, correct. It is true that, under the procedures which had evolved in the Court of Chancery, the grounds upon which a bill of review might be brought after enrolment of the decree or order had included newly discovered matter which "could not possibly have been used when the decree was made"[186]. In *Graziers*

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184 3 & 4 Will IV c 41. See *Mellin v Mellin* (1838) 2 Moore 493 at 495 [12 ER 1094 at 1095]; *Hughes v Porral* (1842) 4 Moore 41 at 50-51 [13 ER 216 at 220]; *Blue & Deschamps v Red Mountain Railway* [1909] AC 361 at 365-366; *Indrajit Pratap Sahi v Amar Singh* (1923) LR 50 IA 183 at 191; *Stevenson v Florant* [1927] AC 211 at 217; Safford and Wheeler, *The Practice of the Privy Council in Judicial Matters*, (1901) at 33-34; Bentwich, *The Practice of the Privy Council in Judicial Matters*, 3rd ed (1937) at 211-212.

185 (1978) 141 CLR 88 at 151. See further the earlier discussion by Jacobs J in *The Commonwealth v Queensland* (1975) 134 CLR 298 at 328-329.

186 Daniell, *The Practice of the High Court of Chancery*, 5th ed (1871), vol 2 at 1422.

Association of New South Wales v Australian Legion of Ex-Servicemen and Women[187], Jordan CJ pointed out that the right of rehearing in the Court of Chancery had involved the exercise of appellate rather than original jurisdiction[188]. However, that system eventually[189] was replaced by the Judicature structure including the modern Court of Appeal where, as discussed above, express provision was made respecting the receipt of further evidence.

190 I would not grant leave to re-open the correctness of *Mickelberg*. That case was an appeal from the Court of Criminal Appeal of Western Australia, exercising State judicial power[190]. It is authority for the proposition that the conferral by s 73 of the Constitution of authority to determine appeals from a State court exercising State jurisdiction does not, by force of s 73 itself, confer power to receive additional evidence. The position is, in my view, no different, and should be no different, where the appeal is brought from a Justice or Justices exercising the original jurisdiction of this Court or from any other federal court or from another court exercising federal jurisdiction. The "appeals" provided in s 73 were plainly intended to have the same character regardless of the identity of the particular court, among those enumerated, from which the appeal was brought.

191 McHugh J explains in his reasons that the answer to the question as to the nature of the appeal provided for by s 73 of the Constitution has not changed by reason of the passage of time since 1900. His Honour contrasts the issue

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187 (1949) 49 SR (NSW) 300 at 303.

188 Jordan CJ referred to *In re St Nazaire Co* (1879) 12 Ch D 88 at 98, 101. See also *Werribee Council v Kerr* (1928) 42 CLR 1 at 20; *Fleming v The Queen* (1998) 73 ALJR 1 at 6; 158 ALR 379 at 385; *DJL v The Central Authority* (2000) 170 ALR 659 at 670.

189 An intermediate step was the creation by the *Court of Chancery Act* 1851 (UK) (14 & 15 Vict c 83) of the Court of Appeal in Chancery; see *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 619-620. The Court of Appeal in Chancery had power conferred by statute (s 39 of the *Chancery Amendment Act* 1852 (UK) (15 & 16 Vict c 86)) to order the oral examination of witnesses although they had not been examined in the court below: *Hope v Threlfall* (1854) 23 LJ Ch (NS) 631.

190 (1989) 167 CLR 259 at 299.

respecting the term "foreign power" in s 44 of the Constitution which was resolved in *Sue v Hill*[191].

192 Even if events since the establishment of the Court in 1903 were relevant to the construction of the constitutional grant in s 73, they would support rather than weaken the construction given to s 73 in *Mickelberg*. In *Ex parte Currie; Re Dempsey*[192], the New South Wales Court of Appeal divided on the issue whether a statutory conferral of jurisdiction to entertain "an appeal by way of re-hearing" carried with it a power to admit fresh evidence or whether a specific conferral of such a power was necessary. Later, Glass JA observed[193] that, whilst judicial opinion differed as to whether a power to receive fresh evidence was implied in respect of an appeal from a judge identified as "by way of rehearing", the power was expressly conferred "[a]lmost invariably".

193 It may be added that the considerations which favour a power to permit further evidence on appeal are stronger at the level of a first rather than an ultimate appeal. Contrary to what once was the case, it is extremely unusual now for an appeal to be brought directly to this Court from a decision at first instance in a State Supreme Court[194]. Appeals from the Federal Court and the Family Court almost invariably reach this Court through their Full Courts[195]. Causes remitted from the original jurisdiction of this Court under the provisions of the Judiciary Act to a federal court or State Supreme Court, which has or which may receive jurisdiction with respect to the subject-matter and the parties, usually follow the same path[196]. In addition, the practical difficulties in a contested fact-finding process by an ultimate court of appeal comprising five or seven members are so apparent as not to require elaboration. The applicant correctly eschewed the submission that those difficulties might be obviated by a remitter

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191 (1999) 73 ALJR 1016; 163 ALR 648. See also the joint judgment in *Grain Pool of Western Australia v The Commonwealth* (2000) 74 ALJR 648 at 652-653; 170 ALR 111 at 116-118.

192 (1968) 70 SR (NSW) 1 at 6, 10.

193 *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281 at 297.

194 An example is *Carlton & United Breweries Ltd v Castlemaine Tooheys Ltd* (1986) 161 CLR 543.

195 Federal Court Act, s 33(2); Family Law Act, s 95.

196 Examples are *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 517 and *Airservices Australia v Canadian Airlines International Ltd* (1999) 74 ALJR 76; 167 ALR 392.

of the fact-finding process to another court. Only this Court has conferred upon it the jurisdiction specified in s 73 of the Constitution[197].

194 There is a question whether the power of the Parliament conferred by s 51(xxxix) of the Constitution to make laws with respect to matters incidental to the execution of any power vested by the Constitution in the Federal Judicature extends to authorise the reception of fresh evidence in this Court. Part II of the Schedule to the *High Court Procedure Act* 1903 (Cth) ("the 1903 Act") set out the first "Appeal Rules" for this Court. Section 1 thereof dealt with appeals from single Justices of the High Court and purported to give the Full Court "full discretionary power to receive further evidence upon questions of fact" (cl 9). No such provision is made in the current Rules.

195 In *Werribee Council v Kerr*[198], Isaacs J expressed the view that to put this Court in the position of treating as a rehearing an appeal from a State court exercising State jurisdiction, in the sense formerly understood in the Court of Chancery, would be to invest the High Court with original jurisdiction as to State judicial power. That is not what s 73 provides. The views of Isaacs J on this point were accepted by Toohey and Gaudron JJ in *Mickelberg*[199].

196 In the present case, as McHugh J explains in his reasons for judgment, the applicant was tried for an offence constituted, for the Territory, by laws made by the Parliament. The Federal Court on appeal was exercising jurisdiction conferred by a law made under s 77(i) of the Constitution (s 24(1)(b) of the Federal Court Act) with respect to a matter arising under s 76(ii) thereof. There is a question as to whether, notwithstanding the position with respect to appeals from State courts exercising State jurisdiction, the Parliament might legislate, by making provision for the receipt of further evidence, to translate appeals from Justices of the Court, other federal courts and State courts exercising federal jurisdiction into appeals by way of rehearing. In my view, notwithstanding what was provided in the Schedule to the 1903 Act, there must be considerable doubt as to whether this could be achieved. The result would be to give s 73 a differential operation. As a matter of textual analysis, that would be an odd result. Section 73 confers jurisdiction "to hear and determine appeals from all

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197 Further, a referral of part of an appeal to a single Justice would face the objection that the appellate jurisdiction of the High Court in relation to appeals from the Full Court of the Federal Court is to be exercised by not less than three Justices: Federal Court Act, s 33(6). Corresponding provision in respect of appeals from the Full Court of a State Supreme Court is made by s 21(2) of the Judiciary Act.

198 (1928) 42 CLR 1 at 20.

199 (1989) 167 CLR 259 at 298-299.

judgments, decrees, orders, and sentences" without differentiating the nature of the appellate process between the three categories it then lists. The only qualification is with respect to the Inter-State Commission, where the appeal is "as to questions of law only".

197 In any event, no such legislation by the Parliament is pointed to as supporting the reception of the evidence which the applicant would seek to put before this Court on an appeal were the application for special leave to be granted.

Conclusion

198 The application for special leave should be refused. However, a majority of the Court favours the grant of special leave. There has been full argument. In the result, I would give effect to the reasons I have expressed above by ordering that the appeal be dismissed.

199 KIRBY J. The principal question in this application could hardly be more important. It concerns the content of the appellate jurisdiction of this Court as the ultimate constitutional and appellate court of the nation[200]. In contest is the power of the Court under the Constitution[201], in exceptional circumstances, to receive evidence which was not before the courts below. May this Court do so, exceptionally, to prevent the confirmation of orders resulting from proceedings alleged to have occasioned a serious miscarriage of justice?

200 In the path of the reception of such evidence is a long line of authority which, with few exceptions[202], has adhered to a narrow view about the ambit of proceedings by way of "appeal", as that word is used in the Constitution[203]. Application is made for the Court:

1. To reconsider the previous holdings and, upon overruling or distinguishing them, to proceed to an evaluation of new evidence tendered in this matter ("the first issue"); and

2. In the alternative, and confined to the record, to permit a fresh ground of appeal concerning the mental fitness of the applicant which the courts below ought to have perceived, raised and decided in his favour, although never hitherto presented as an issue for decision or a matter of argument ("the second issue").

201 In order to resolve these two issues, it is necessary to understand the nature of the evidence which the applicant proffers in support of his argument on the first issue. This provides the foundation for his submissions. It also illustrates, with a vividness which theoretical reflection could not, the significance of the first issue which this Court must decide.

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200 cf Laskin, "The Role and Functions of Final Appellate Courts: The Supreme Court of Canada", (1975) 53 *Canadian Bar Review* 469 at 473 cited in *R v Gardiner* [1982] 2 SCR 368 at 391 per Dickson J.

201 s 73.

202 *Buzacott & Co Ltd v Cyclone Proprietary Ltd* (1920) 27 CLR 286.

203 Constitution, s 73. See *Mickelberg v The Queen* (1989) 167 CLR 259. Earlier authorities include *Ronald v Harper* (1910) 11 CLR 63 at 77, 82, 84; *Scott Fell v Lloyd* (1911) 13 CLR 230 at 234; *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 85, 87, 107, 112; *Davies and Cody v The King* (1937) 57 CLR 170 at 172; *Grosglik v Grant (No 2)* (1947) 74 CLR 355 at 356-357; and *Crouch v Hudson* (1970) 44 ALJR 312.

The course of the proceedings and a procedural ruling

202 The present proceedings represent the second stage of the attempt by Mr David Eastman (the applicant) to overturn his conviction of murder, the sentence of life imprisonment which followed[204] and the dismissal by the Full Court of the Federal Court of Australia ("the Full Court") of his appeal against the same[205].

203 The first challenge to the lawfulness of the applicant's conviction involved complaint by the applicant that the court in which he was tried, the Supreme Court of the Australian Capital Territory ("the Supreme Court"), was invalidly constituted. Although I accepted the applicant's contention, this Court, by majority, rejected it[206].

204 I am now obliged to decide this second application on the footing that the first one has failed. I turn then to the exercise of this Court's appellate jurisdiction. What is the boundary of that jurisdiction? Does the very notion of "appeal", as used in the Constitution, forbid the reception of new evidence, whatever the content of such evidence, however vital it may be and despite the fact that it may demonstrate a serious miscarriage of justice or a fundamental flaw in the process leading to the orders impugned?

205 Essentially, the present application for special leave to appeal seeks to challenge the applicant's fitness to plead and to stand trial ("the applicant's mental fitness") in the proceedings which resulted in his conviction and sentence. This was not a point that was raised by the applicant, nor by those who successively represented him, either in the trial before the Supreme Court or in the appeal to the Full Court. The applicant's present representatives (who did not appear below) contend that his mental fitness to plead, understand the proceedings and advance his interests both at trial and in the Full Court, can be shown to be such that he ought not to have been required to plead or placed in the charge of the jury, nor required to present his case in either court[207]. It is argued that a question is presented that raises the duty of the earlier courts to determine the applicant's mental fitness[208]. It is contended that both of the courts below were,

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204 *Crimes Act* 1900 (ACT), s 12(2).

205 *Eastman v The Queen* (1997) 76 FCR 9.

206 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 73 ALJR 1324; 165 ALR 171.

207 *R v Podola* [1960] 1 QB 325 at 349-350.

208 *Kesavarajah v The Queen* (1994) 181 CLR 230 at 244-245.

in effect, put on inquiry although neither the prosecutor nor the defence expressly raised the issue[209].

206 The constitutional question affecting the admissibility of the evidence was presented when counsel for the applicant sought to read to the Court a number of affidavits. Counsel for the respondent objected. Although the latter acknowledged a differentiation between the tender of evidence (eg concerning the importance or ramifications of an issue[210]) in an application for special leave and evidence in the appeal if special leave were granted, he submitted that it would be futile to receive the evidence in the application if constitutional doctrine forbade any consideration of it in the appeal.

207 In the past, as in this case, the Court has allowed evidence to be adduced during the hearing of a special leave application[211]. This course has been justified by the suggestion that the Court, at such a stage, has not commenced exercising its appellate jurisdiction. The jurisdiction that it is exercising has been described as bearing "some resemblance to the jurisdiction which the Court exercises in its original jurisdiction"[212]. I have always been dubious about this supposed distinction. By the Constitution, this Court's jurisdiction is either appellate or original. If its appellate jurisdiction is invoked, the ancillary proceedings, which are many and varied (stays, expedition, security for costs, interlocutory orders, dismissal for want of jurisdiction etc), are all interlocutory to the exercise of appellate jurisdiction. They are not some hybrid, halfway between "appeals" and the exercise of the original jurisdiction of the Court. Yet in such matters evidence has long been received[213]. In my view the full force of the logic of the opinion about "appeals" favoured by the Court in the past would exclude evidence in such proceedings. Yet this has never been the law and it would be absurd to suggest that it should be. The supposed distinction has been

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209 *Kesavarajah v The Queen* (1994) 181 CLR 230 at 244.

210 cf *Deputy Commissioner of Taxation v Woodhams*, transcript of special leave proceedings, High Court of Australia, 14 May 1999 at 10 per McHugh J for the Court, noted in "Back to Basics in the High Court", (1999) 73 *Australian Law Journal* 724.

211 In *Cheng v The Queen*, transcript of special leave proceedings, High Court of Australia, 4 April 2000 at 44-46, the Court, without objection, received an affidavit concerning the number of offenders who could be affected by a constitutional argument. This was a proper course in light of *Deputy Commissioner of Taxation v Woodhams*.

212 Reasons of Callinan J at [338].

213 See the examples given in the reasons of Gummow J at [182].

drawn. For present purposes, having protested against its illogicality, I will go along with it.

208 The respondent made it plain that the objection to the receipt of the affidavits was not procedural nor merely technical. Thus, it was accepted that, in the application at least, it was open to the Court to look at the evidence for at least two discrete purposes. These were, first, to demonstrate that a foundation existed for the constitutional argument which the applicant wished to advance and, secondly, to meet a possible objection that, even if in law admissible, the evidence in question could be given no credence. This latter situation could arise if the evidence manifestly lacked an exceptional character or was of a kind that was available in earlier proceedings so that it ought properly to have been presented during the trial or, at the latest, made the subject of an application for reception of further evidence by the Full Court[214].

209 It was in these circumstances that this Court took the procedural course, and made the ruling, described by Callinan J[215]. Subsidiary questions (which would arise if the proffered evidence were received) were thus postponed. Those questions include various evidentiary objections to the central evidence of the applicant's chief medical witness (Dr Allan White) upon whose opinions the applicant sought to rely[216]. Furthermore, the respondent indicated that, if the proffered evidence were received, it would wish to cross-examine at least one of the deponents, a facility that should not be exercised until a ruling was made concerning the admissibility of the evidence in an appeal. An additional procedural question would also then arise as to whether it would be constitutionally permissible, and within the statutory powers of remitter available to this Court[217], to provide for the remittal of the whole or any part of the examination of the contested evidence to a single Justice of this Court, to the Federal Court or otherwise or whether this Court, as presently constituted, would be obliged to hear and determine the effect of the new evidence for itself.

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214 In the Full Court of the Federal Court of Australia further evidence may be received. See *Federal Court of Australia Act* 1976 (Cth), s 27; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 526.

215 Reasons of Callinan J at [349].

216 It was observed during argument that Dr White had based his opinion upon factual premises not established by the evidence. This included facts asserted during an interview with the applicant and other documentary materials not in evidence at the trial; cf *Melbourne v The Queen* (1999) 73 ALJR 1097 at 1100, 1136; 164 ALR 465 at 469, 517-518.

217 *Judiciary Act* 1903 (Cth), s 44.

210 Because the procedural ruling just mentioned postponed the determination of these issues, it is premature, and would be inappropriate, to comment upon them save for the first. In the resolution of the first issue it is enough to decide the fundamental constitutional question which it presents. If that question is not foreclosed by authority, or if such authority should be reopened and reversed or distinguished, the issue is whether the proffered evidence, and the legal question it raises, now warrant the grant of special leave. Only if the Court ultimately rejects the evidence (either on the basis of established legal authority or because, were that authority changed, it would not avail the applicant in this case) is it necessary to proceed to the second issue, based solely on the record.

New evidence is proffered for the applicant

211 *Categories of new evidence:* I have described the evidence which the applicant sought to read in support of his application for special leave as "new". I have used that adjective, without pre-judgment, to differentiate such evidence from "additional" evidence, that is, evidence relevant to a substantive matter in the proceedings from which the appeal comes to an appellate court. Various other words have been used in legislation and in judicial descriptions of such evidence, including "fresh evidence"[218] and "further evidence"[219]. Whatever else was in doubt about the evidence tendered for the applicant in this matter, it was not suggested that it referred to any issue which he, or those previously appearing in his interest, had ever raised at the trial before Carruthers AJ, before the jury or in the Full Court. Moreover, the applicant contended that the evidence was "new" in the sense that it did not relate to any factual question touching his commission of the offence charged but only the validity of the trial in which his guilt was determined and whether, retrospectively and in the light of the proffered evidence, it was demonstrated that a serious miscarriage of justice has occurred or that the trial has failed in a fundamental respect.

212 The procedural ruling of this Court identified 10 affidavits which contained the contested evidence. These affidavits fall into three categories, namely:

1. Affidavits by Dr Allan White, consultant psychiatrist retained by the applicant's present solicitor;

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218 eg *Catholic Children's Aid Society of Metropolitan Toronto v M (C)* [1994] 2 SCR 165 at 185.

219 *Federal Court of Australia Act* 1976 (Cth), s 27; cf *Supreme Court Act* RSC 1985, c S-26 (Can), s 62(3); Court of Appeal (Civil) Rules 1997 (NZ), r 24; *Supreme Court Act* 1959 (SAf), s 22(a).

2. Affidavits by seven legal practitioners who were retained by, or on behalf of, the applicant at the trial or on the appeal; and

3. An affidavit annexing reports of Dr Rod Milton, psychiatrist retained by the Australian Federal Police. These reports were not admitted into evidence at the trial[220]. Accordingly they were not there relied upon by the applicant or the Crown[221]. They only emerged as a result of cross-examination of a police witness (Detective Sergeant Jackson) conducted by the applicant himself during a period when he was unrepresented at the trial, having for a time dismissed his legal representatives. The reports were marked for identification. They were later placed before the Full Court. They were extensively quoted in that Court's reasons, although not formally received as "further evidence" in the appeal[222].

213 It is convenient to deal with the proposed evidence in reverse order. In that sequence, the evidence represents, substantially, the chronological consideration of the applicant's mental fitness, before and during the trial and on the appeal, to understand the charge he faced, to comprehend the proceedings and the nature of the evidence brought against him, and to follow the trial, make his defence and, where relevant, represent himself in the hearing[223].

214 *Reports of a police psychiatrist:* The first report of Dr Milton dated 20 February 1989 was prepared at the request of police some six weeks after the death of Mr Winchester. It was based substantially on a reading of the transcript of proceedings before the Administrative Appeals Tribunal in 1980 at which the applicant had sought superannuation benefits following the termination of his employment by the Commonwealth. Also reviewed by Dr Milton were certain witness statements and transcripts of recorded intercepted telephone conversations involving the applicant. Even at that early stage, Dr Milton expressed a view that the applicant "suffered from a paranoid disorder" which resulted in his being "aggressive, suspicious, demanding, argumentative and violent". However, at that point he concluded that there was "no way" that the applicant could be "committed to a mental hospital under the present legislation". He recommended continued police surveillance.

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220 *Eastman v The Queen* (1997) 76 FCR 9 at 46.

221 (1997) 76 FCR 9 at 46.

222 *Federal Court of Australia Act* 1976 (Cth), s 27.

223 *Ngatayi v The Queen* (1980) 147 CLR 1 at 7; *R v The Stipendiary Magistrate at Toowoomba; Ex parte McAllister* [1965] Qd R 195 at 217; cf *Crimes Act* 1900 (ACT), s 428E(1); *Mental Health (Treatment and Care) Act* 1994 (ACT), s 68(3).

215 In a report of 15 January 1990 Dr Milton's opinion was that the applicant "should now be regarded as psychotic (ie insane)", a condition which he suspected had existed "for a long time". The paranoid features of his disorder and the applicant's high intelligence allowed the "more serious aspects of his condition to be concealed". Dr Milton was of the view that the applicant would "eventually need to be institutionalised" and that he probably shared with identified family members "severe schizophrenia" resulting from "a genetic predisposition to severe mental disorder".

216 In subsequent opinions Dr Milton relied on transcripts procured from surveillance devices which police had placed in the applicant's residence. On this and other material, by August 1990, Dr Milton expressed the view that the applicant was:

> "in much better shape emotionally … He does not seem to be having conversations with himself at night now, and I would regard him to [sic] having returned to his stable state of being a dangerous, determined, tenacious paranoid personality. He appears well in touch with reality, at least as he perceives it. He is not delusional."

217 In September 1990, Dr Milton noted reports which were placed before him indicating that the applicant was taking medication which he described as "major tranquillisers used in severe mental disorders". The apparent improvement of his mental condition was attributed to the fact that he was responding to these anti-psychotic drugs. In a review in January 1992, based upon material placed before him at that time, Dr Milton expressed the following conclusion:

> "Mr Eastman suffers from a serious emotional disorder and it is this which underlies his aggression and hostility. His disorder is sufficiently severe as to be likely to qualify for a defence of diminished responsibility were he to face trial for Mr Winchester's murder. The late Dr Macdonald, who treated David Eastman for a long while, considered that Mr Eastman would eventually require to be placed in an institution because of mental illness."

218 In April 1992, as a result of outbursts by the applicant during court proceedings, Dr Milton was again consulted by police. In the final report in the series he described the way in which the applicant had behaved in court as "disinhibited and aggressive". It was such as to suggest "that he was unable to control himself – even though he realised the harm done to himself by acting that way". Dr Milton concluded that it was desirable to get a message to the applicant "that his previous history of psychiatric care might be taken into account in major criminal proceedings" and that this "might reduce the pressure on him and cause him to feel there is an honourable way out". In a major survey of the applicant's behaviour Dr Milton concluded that the applicant had demonstrated virtually all features of a paranoid personality disorder, leading him to conclude that he was "for practical purposes, psychotic, ie out of touch with reality". However, he

expressed the view that it would be "difficult to substantiate this in terms of the present Mental Health Act".

219 It will be observed that none of the foregoing reports of Dr Milton addresses the particular issue of the applicant's mental fitness at the trial in the Supreme Court or in the appeal thereafter. The applicant made his plea of not guilty on 2 May 1995. The trial commenced and the jury took their place on 16 May 1995. They returned their unanimous verdict of guilty on 3 November 1995. The applicant was sentenced on 10 November 1995. Dr Milton gave no testimony at the trial. None of his reports was received in evidence. Some of his opinions between 1990 and 1992 clearly raise matters that would seem to present questions about the applicant's general mental condition. On the other hand, they also reveal a measure of variability in the course of that condition (depending, in part, upon his use of medication). They are totally silent as to the applicant's mental fitness during the trial which did not commence until two years and eight months after the last of the reports.

220 Despite the availability and reference to the reports in the Full Court's reasons, neither the grounds of appeal nor the presentation of those grounds suggested that any reliance was placed by or for the applicant upon Dr Milton's opinions[224]. To the contrary, the Full Court records that the applicant possessed copies of Dr Milton's reports for two months during the course of the trial following the disclosure of their existence when he cross-examined Detective Sergeant Jackson[225]. The applicant had been legally represented for part of this time. For reasons which the Full Court considered obvious, no suggestion had been made at the trial that the reports should have been received in evidence and placed before the jury. Moreover, Carruthers AJ was "at no stage invited to read them"[226].

221 *Affidavits of earlier legal advisers:* The next category of new evidence comprises affidavits of a succession of lawyers who represented the applicant before, during and after his trial. Mr M J Williams QC deposes that, when he assumed the brief from other counsel in early 1995, he attempted on one occasion, with junior counsel, to persuade the applicant in his own best interests to undergo examination by a psychiatrist. According to Mr Williams, the applicant, in response, became "consumed with rage". The applicant ranted and raved and abused him. Mr Williams, along with his junior, was ultimately dismissed from the case on 15 May 1995. Mr Williams stated that at about that

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224 (1997) 76 FCR 9 at 46-49.

225 (1997) 76 FCR 9 at 49.

226 (1997) 76 FCR 9 at 49.

time he informed the Crown Prosecutor "that I believed the applicant was unfit to plead, and asked him to come with me to see the trial judge in chambers so I could inform the trial judge of my fears. The Crown Prosecutor declined." Mr Williams stated that he then sought the advice of senior members of the Council of the New South Wales Bar Association (of which he was a member) as to whether he should raise the issue in court, contrary to the instructions of the applicant. He was advised that he should not.

222 Mr T J O'Donnell, barrister, deposes to a meeting which he had with the applicant, together with Mr Lander, solicitor, on 21 May 1995. He describes the behaviour of the applicant as extremely volatile and irrational. As a result of the meeting, Mr O'Donnell states:

> "It confirmed a view I had been forming of him since 1993, that there were times when he was, despite his intelligence and his considerable gifts, quite severely mentally ill and at times unfit to plead. I believed that I should act on that view."

223 Mr O'Donnell states that he consulted three senior members of the Bar of the Australian Capital Territory. He was aware of the fact that Mr Williams had earlier raised what should be done with the New South Wales Bar Association. He assumed that the New South Wales Bar Association must have ruled against raising the applicant's mental fitness. According to Mr O'Donnell all senior counsel whom he consulted "were of the view that the question of fitness should be raised without instructions from the client, in the alternative a clear miscarriage of justice was imminent".

224 In the result, however, when Mr O'Donnell appeared before Carruthers AJ to announce the withdrawal of his instructions to represent the applicant at the trial, he did not express the conclusion to which he and Mr Lander had come or the view he had reached, endorsed by his senior colleagues. This much appears from his affidavit and from the verbatim transcript of the trial. Mr O'Donnell did indicate enigmatically to Carruthers AJ that there was "something – I am seeking a ruling from the Bar Council as to … a matter of judicial importance". However, the applicant then interrupted to complain of counsel "ventilating their opinions". Mr O'Donnell withdrew. On the same day a letter was sent by Mr Lander to the Director of Public Prosecutions for the Australian Capital Territory ("the DPP"). According to Mr O'Donnell, he later met the Crown Prosecutor. He made it "clear that it was [his] view that [the applicant] was unfit to instruct counsel", a view also expressed in Mr Lander's letter.

225 Mr David Lander deposes that, in company with Mr O'Donnell, he met the applicant on the weekend prior to the date fixed for his trial seeking instructions for the conduct of the defence. According to Mr Lander, the applicant "appeared to be incapable of giving any rational instructions" in respect of his defence. He seemed so "pre-occupied with the injustices as he saw them, that he seemed

unable to sufficiently focus, concentrate or act rationally in respect of the evidence which needed to be addressed". In these circumstances, Mr Lander, with the concurrence of Mr O'Donnell, caused the letter previously mentioned to be written to the DPP. That letter is annexed to his affidavit. It bears the date 22 May 1995. It expresses the conclusion that Mr Lander and Mr O'Donnell were of the view that "Mr Eastman may be unfit to plead". Specifically, it records the opinion that the applicant was incapable of "giving instructions to his or her legal representative" in terms of the *Mental Health (Treatment and Care) Act* 1994 (ACT)[227] at the relevant time. There is no suggestion that this letter was ever brought to the notice of Carruthers AJ.

226 Mr Andrew Boe, solicitor, deposes that between October and December 1996 he had instructions from the applicant to appeal to the Federal Court from his conviction and sentence in the Supreme Court. According to Mr Boe, he found the applicant "either obsessed or delusional for most of our dealings". He raised this concern with counsel retained to present the appeal, Mr G R James QC and Mr S J Odgers. However, according to Mr Boe, during a consultation with the applicant held in prison, the latter denied any mental unfitness. The applicant stated firmly that he was not prepared for his mental fitness to be an issue in the appeal. In the result, on 17 December 1996, Mr Boe wrote to the applicant expressly raising his mental fitness to provide instructions. In the letter, after referring to the review of the trial transcript and the applicant's "demonstrated inability to properly communicate" with his firm, Mr Boe informed the applicant that it was a condition of his continuing to act for him that the applicant undergo a psychiatric assessment forthwith "to determine your continued capacity to provide cogent instructions". The letter noted that the condition was "being placed on the advice and direction of senior and junior Counsel". According to Mr Boe, the applicant never accepted this condition. Shortly after the letter was sent, the applicant withdrew Mr Boe's instructions.

227 The hearing of the appeal in the Full Court began in March 1997. It continued over two weeks. A new solicitor was retained, Mr Bernard Collaery. According to Mr Collaery's affidavit he also raised with the applicant on "more than five occasions" the applicant's "fitness at trial to either plead and/or give instructions". This caused the applicant to become agitated and to insist that he had no mental problems. Mr Collaery states that he visited the applicant in prison in February 1997, just before the hearing of the appeal. He supported counsel's request that the applicant be examined by a psychiatrist "so that we can advance a mental health ground at your Appeal". According to the affidavit, the applicant specifically instructed Mr Collaery and counsel "not to raise the question of my mental health". He described himself as merely having "an irascible character when I was harassed". The applicant wrote a letter to counsel

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227 s 68(3)(h).

and to Mr Collaery, which was annexed to the latter's affidavit. It asserted that "there is no mental health component in the present problem, whatsoever – at least not as far as I am concerned".

228 Mr Stephen Odgers, who was junior counsel in the appeal to the Full Court, deposes in his affidavit that he and senior counsel advised the applicant that it would be desirable for him to undergo a psychiatric assessment "so that consideration could be given to a ground of appeal based on fresh evidence which might thereby be obtained". According to Mr Odgers, the applicant "emphatically refused to undergo any psychiatric assessment". In the face of the maintenance of this refusal, Mr Odgers and senior counsel, Mr James, accepted his decision and his instructions. No ground of appeal based on mental unfitness was filed. None was argued. It must be assumed that counsel were sufficiently satisfied that the applicant could provide instructions.

229 *Reports of the applicant's psychiatrist:* The third and final category of new evidence involves two reports of Dr Allan White. The first report, annexed to an affidavit and dated 8 April 1998, was addressed to the applicant's present solicitors. It followed a consultation with the applicant on that day for the purpose of providing an opinion on the applicant's psychiatric condition at the trial and thereafter. For that report, Dr White had available to him documentation including Dr Milton's reports and what he describes as "a review of the incidents before the Jury". According to this first report, Dr White's opinion is that:

> "Documentation indicates that he was severely psychotic while he was under surveillance prior to his arrest. In my view, he was not fit to plead let alone represent himself."

230 After discussing alternative diagnoses of the applicant's precise mental condition, Dr White concludes that the applicant suffers from chronic paranoid schizophrenia and that he was affected by that condition at the time of the trial. He expresses the opinion that the applicant was "acutely psychotic at the time of that trial". He considers that the applicant's mental health is now stable, that he is fit to plead and could instruct his solicitors, so long as he remained under anti-psychotic medication.

231 A second report of Dr White, dated 29 September 1998 is annexed to a further affidavit by him. This report apparently followed one of 19 July 1998 by Dr Milton. The latter is described as having reviewed documents, including Dr White's earlier report, and providing an opinion "specifically critical of [Dr White's] report". Consistent with the respondent's contention that new evidence could not be received in support of this application, Dr Milton's last-mentioned report was not tendered by the Crown. However, despite the criticism apparently included in Dr Milton's report, Dr White adheres to his view as previously expressed:

> "While he is able to plead the charge, the reasoning behind that plea and the reasoning behind his ability to exercise his right of challenge are thought disordered and coloured by beliefs of harassment and persecution. ...
>
> In my view, his inability to process logical thought materially interferes with his ability to understand the effect of any evidence that may [be] given against him.
>
> … I remain of the view that [the applicant] suffers from Chronic Paranoid Schizophrenia and has done so for many years.
>
> It is my view that he had evidence of severe incapacitating mental illness before the trial, during the trial, and after the trial so any suggestion that he was malingering mental illness is inappropriate.
>
> In my view, he was at times so disturbed that he was unfit to plead. Given the need for continuous mental stability and given the clear evidence that he was unable to maintain continuous mental stability, it is my view that he was unfit to run his own defence.
>
> In my view, his legal sophistication has improved to the point where he is now fit to plead despite an ongoing psychotic illness. Again in my view, he remains unfit to plead his own case and lacks the integrative judgment to dismiss counsel for irrational reasons."

The first issue: admission of new evidence in appeals

232 There can be no doubt that the present authority of this Court stands against the reception of the foregoing new evidence. There have been rare departures from a strict application of the rule[228]. Occasionally, during an appeal, reference is made without objection (or by agreement) to facts which have occurred since the trial or appeal[229]. Such reference may include use of materials filed by a party in support of an application for special leave or materials offered by an

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228 Most notably in *Buzacott & Co Ltd v Cyclone Proprietary Ltd* (1920) 27 CLR 286.

229 In appeals concerned with complaints about a departure from procedural fairness in an intermediate court, counsel are commonly allowed to inform the Court of what occurred. This is what happened when *R H McL v The Queen* was argued before the Court (transcript of proceedings, High Court of Australia, 21 March 2000 at 2). It may not amount to the reception of evidence in a formal sense; but it is certainly similar. Counsel commonly make statements in the course of arguing appeals, usually at the invitation of the Court, concerning court practice and local knowledge.

applicant seeking leave to intervene[230]. It may refer to developments affecting the status of a party[231], steps in associated litigation or the enactment of new legislation or other changes to the law or surrounding facts. Sometimes so-called "constitutional facts" are placed before the Court without objection[232]. However, the foregoing usually relate to uncontroversial or minor matters.

233 The constitutional obstacle is presented where the propounded facts are significant and objection is taken to their reception. In such circumstances, this Court, for a very long time[233], has held that the Court has no power to receive such evidence. There is one notable dissent to this proposition[234]. However, there are so many strongly expressed opinions supporting the principle[235] that those who may be of a contrary inclination must pause before giving effect to a preference for the approach of the minority over that of the majority.

234 A close analysis of the majority view in *Mickelberg* might suggest the possibility of distinctions of assistance to the present applicant. That case was concerned (as all earlier cases had been) with an appeal from a State Supreme Court. The possibility of a different rule in relation to appeals from federal or Territory courts was reserved[236]. However, I see no basis of principle for adopting a different rule with respect to appeals from the other courts listed in s 73 of the Constitution.

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230 eg *Attorney-General v Breckler* (1999) 73 ALJR 981 at 1004; 163 ALR 576 at 607.

231 eg *Giumelli v Giumelli* (1999) 196 CLR 101 at 127 (death of a party); cf *Doherty v Liverpool District Hospital* (1991) 22 NSWLR 284.

232 Brazil, "The Ascertainment of Facts in Australian Constitutional Cases", (1970) 4 *Federal Law Review* 65.

233 At least since *Ronald v Harper* (1910) 11 CLR 63.

234 That of Deane J in *Mickelberg v The Queen* (1989) 167 CLR 259 at 276-294.

235 eg *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 85 per Gavan Duffy CJ and Starke J, 87 per Rich J, 107-110 per Dixon J, 112-113 per Evatt J. See also *Mickelberg v The Queen* (1989) 167 CLR 259 at 265-271 per Mason CJ, 274 per Brennan J, 298-299 per Toohey and Gaudron JJ.

236 *Mickelberg v The Queen* (1989) 167 CLR 259 at 298-299 per Toohey and Gaudron JJ.

235 There is a hint in one opinion[237] that this Court may have "a discretion to receive evidence of supervening facts on matters which were the subject of assumption or estimation in the courts below". But whilst this point was mentioned, together with the possibility that "appeals in constitutional cases stand in a different position"[238], no ruling has been made for many years admitting an exception to the otherwise absolute rule forbidding the reception of new evidence. Given the reasons propounded for the rule, it is difficult to accept, if it is sustained, the possibility of exceptions.

236 In choosing their stand, those of the majority opinion have not overlooked the different meanings of the word "appeal", potentially available in the context of s 73 of the Constitution. In one of the earlier expositions it was acknowledged that the word could have a number of different meanings[239]. The one denoting a strict appeal was preferred as that applicable to the context. The issue presented in such an appeal is whether the order of the court from which the appeal is brought was right, "on the materials which it had before it"[240].

237 In matters involving the interpretation of the Constitution this Court is sometimes more inclined to reconsider an earlier holding than in matters of statute and common law[241]. In part, it has taken this stance out of recognition of the different ways in which each generation sees the unchanging text. However, the near unanimity of judicial opinion on the point in issue, its durability and certain practical advantages that it entails add up to strong reasons for adhering to the established rule.

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237 *Mickelberg v The Queen* (1989) 167 CLR 259 at 271 per Mason CJ referring to *Barder v Caluori* [1988] AC 20.

238 (1989) 167 CLR 259 at 271.

239 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 85 per Gavan Duffy CJ and Starke J; cf *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 322-325; 160 ALR 588 at 609-613; *Clarke & Walker Pty Ltd v Secretary Department of Industrial Relations* (1985) 3 NSWLR 685 at 691 citing the six classifications of "appeal" of Glass JA in *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281 at 297-298.

240 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 85.

241 See eg *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 278; *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 327-328; *Stevens v Head* (1993) 176 CLR 433 at 461-462.

238 If the rule appears to exclude the possibility of judicial relief from injustice, it is not as if an applicant is left entirely bereft of any remedy, at least in a case such as the present. In special circumstances, where a wrong revealed by new developments could be cured without disturbance of the orders of the courts below, it has been held to be possible to refer a particular matter back to the appropriate court[242]. Further, subject to the terms of legislation constituting a Court of Criminal Appeal or its equivalent, it might sometimes be possible for a fresh application to be made to such a court reliant on new evidence[243]. Additionally, in all of the States[244], the Northern Territory[245] and the Australian Capital Territory itself[246], provisions have been enacted in criminal matters to enable the Executive Government to refer a petition concerning a contested conviction to a court for reconsideration. Unless abolished or excluded by statute, the Royal prerogative of mercy would also be available in some criminal cases to cure a patent injustice demonstrated by later available facts.

239 I acknowledge the strength of the authority invoked by the respondent. I accept the applicability of that authority to the new evidence tendered in these proceedings. I concede the other remedies available to a person in the applicant's position. I hesitate to disagree with such clear holdings of the Court that have lasted so long. However because, most respectfully, I regard those holdings as containing a seriously flawed understanding of the Constitution, I am bound to express and explain my own opinion.

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242 In *Davies and Cody v The King* (1937) 57 CLR 170 at 172 the Court approved of this remedy to ensure that the evidence was brought to attention in a proper way. See also *Scott Fell v Lloyd* (1911) 13 CLR 230 at 234 where Griffith CJ declared that the Court should "send the case back to the Supreme Court for the purpose of obtaining further evidence".

243 See eg *Postiglione v The Queen* (1997) 189 CLR 295 at 300, 343; cf *Grierson v The King* (1938) 60 CLR 431.

244 *Crimes Act* 1900 (NSW), s 474C; *Crimes Act* 1958 (Vic), s 584; *Criminal Code* (Q), s 672A; *Criminal Law Consolidation Act* 1935 (SA), s 369; *Sentencing Act* 1995 (WA), s 140; and *Criminal Code* (Tas), s 419. Note that *Mickelberg v The Queen* (1989) 167 CLR 259 was itself a case where the proceedings were referred to the Court of Criminal Appeal of Western Australia pursuant to the *Criminal Code* (WA), s 21(a) following a petition for the exercise of mercy. A second referral of the convictions of the Mickelbergs has been referred to the Court of Criminal Appeal. See *Mickelberg v The Queen* unreported, Supreme Court of Western Australia, 12 February 1999.

245 *Criminal Code* (NT), s 433A.

246 *Crimes Act* 1900 (ACT), s 475.

New evidence may exceptionally and constitutionally be received

240 *Approach to constitutional interpretation:* The opinion of the majority in *Mickelberg* appears to have been greatly influenced by the understanding of what "appellate jurisdiction" would have been understood as meaning in 1900 – the year that the Australian Constitution was enacted by the United Kingdom Parliament[247]. Upon the basis of that determinant, much time was taken in *Mickelberg* and earlier cases in the review of nineteenth century practice, in England and in Australia, in relation to appellate reconsideration of orders in criminal proceedings. The purpose of such review was to ascribe to the word "appeals", as appearing in s 73 of the Australian Constitution, the stamp of the defects conceived to be applicable at its birth.

241 In *Mickelberg*, Deane J criticised this reasoning, and its factual and legal bases. He did so according to its own assumptions. However, much more basic was his assertion, which I repeat, that the approach adopted involves an incorrect "construction of a fundamental constitutional provision intended to establish the Court as an effectively ultimate appellate court for Australia"[248]. In my respectful opinion, it is to misconceive the role of this Court in constitutional elaboration to regard its function as being that of divining the meaning of the language of the text in 1900, whether as understood by the founders, the British Parliament, or ordinary Australians of that time.

242 That a different approach would be necessary for the construction of the Constitution was recognised as early as 1901 by one of the founders, Andrew Inglis Clark. He declared, at the outset of the new Commonwealth, that the document had to be read and construed "not as containing a declaration of the will and intentions of men long since dead … but as declaring the will and intentions of the present inheritors and possessors of sovereign power"[249]. Clark acknowledged the "living force" of the Constitution which otherwise would be a "silent and lifeless document"[250]. Words in a constitutional setting inevitably take colour from the social circumstances in which they must be understood and

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247 *Mickelberg v The Queen* (1989) 167 CLR 259 at 270 per Mason CJ.

248 (1989) 167 CLR 259 at 288.

249 Clark, *Studies in Australian Constitutional Law* (1901) at 21; cf Wheeler, "Framing an Australian Constitutional Law: Andrew Inglis Clark and William Harrison Moore", (1997) 3 *Australian Journal of Legal History* 237 at 247-249.

250 Clark, *Studies in Australian Constitutional Law* (1901) at 21; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 171-173 per Deane J.

applied[251]. I have stated elsewhere my views on this question[252]. In my opinion, the Constitution is to be read according to contemporary understandings of its meaning, to meet, so far as the text allows, the governmental needs of the Australian people.

243 There are many instances where the Constitution has been approached in the way that I favour[253]. Thus a jury trial, to which s 80 of the Constitution refers, would in 1900 undoubtedly have meant a "jury" comprising men only, and then, chosen by reference to their property qualifications. So it had been for centuries. Yet this Court rejected those requirements as inherent in that feature of legal procedure inherited from England[254]. Why, one asks rhetorically, is the notion of "appeal" stamped indelibly with certain limitations yet the notion of a "jury" is not?

244 There could scarcely be a more vivid illustration of this point than the recent decision in *Sue v Hill*[255]. There, the reference in s 44(i) of the Constitution to a "subject or a citizen of a foreign power" was held applicable to the United Kingdom. Such an understanding of the provision would have been regarded as self-evidently erroneous, even absurd, in 1900. Yet the Court, looking at the constitutional words with today's eyes, read them so as to derive their contemporary meaning. There are many similar illustrations[256]. They are

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251 *Victoria v The Commonwealth* ("the *Payroll Tax Case*") (1971) 122 CLR 353 at 396-397 per Windeyer J.

252 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 400-401; *Abebe v The Commonwealth* (1999) 73 ALJR 584 at 624-625, 627; 162 ALR 1 at 55, 59; *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839 at 878; 163 ALR 270 at 323-324; *Grain Pool of Western Australia v The Commonwealth* (2000) 74 ALJR 648 at 669-671; 170 ALR 111 at 139-142.

253 *Attorney-General for NSW v Brewery Employés Union of NSW* (1908) 6 CLR 469 at 610 per Higgins J; *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 126-127; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 171-173 per Deane J; *McGinty v Western Australia* (1996) 186 CLR 140 at 200 per Toohey J, 221 per Gaudron J. See generally *R v Brislan; Ex parte Williams* (1935) 54 CLR 262; *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297.

254 *Cheatle v The Queen* (1993) 177 CLR 541 at 549, 561 noting the search for the "essential features" of the institution of jury trial.

255 (1999) 73 ALJR 1016; 163 ALR 648.

256 See eg *Cole v Whitfield* (1988) 165 CLR 360 (concerning s 92 of the Constitution).

sometimes explained by reference to the disputable philosophical distinction between the *connotation* and *denotation* of verbal meaning. I contest that distinction. But even if it be applied, it is difficult to reconcile an expansive view of the "denotation" of one inherited legal procedure ("jury") with a narrow, restricted and immovable view of another then developing procedure of much shorter legal history ("appeal").

245 This Court should adopt a single approach to the construction of the basic document placed in its care. Constitutional elaboration, above all, should be approached in a consistent way, lest the inconsistencies of an *originalist* approach here and a *contemporary* approach there be ascribed to the selection of whichever approach produces a desired outcome.

246 *Analogy – new grounds of appeal:* The question whether, in the exercise of its appellate jurisdiction, this Court may receive new evidence is, to some extent, analogous with the question whether the Court may allow a new ground of appeal to be raised for the first time, one which has not been considered earlier in the courts of trial or appeal below.

247 Opinions have been expressed that entertaining such a new ground of appeal is, or may be, impermissible because it alters the appellate character of the process[257]. How can one have an "appeal" involving a point of argument raised for the first time in a final court? Yet, despite this suggestion, this Court has reserved to itself the right, in exceptional circumstances, to admit new grounds of appeal if justice demands that course[258]. The fact that this course has been taken frequently and recently[259] indicates a rejection by the Court of the notion that there is any *constitutional* restriction on the power of the Court to hear and determine an appeal on a new ground. Such a ground might involve a detailed reconsideration of the facts and evidence[260], although not (it seems) a point the reconsideration of which would involve a relevant procedural unfairness to a party, for example one which, had it been raised earlier, could have been

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257 *Pantorno v The Queen* (1989) 166 CLR 466 at 475-476; *Mickelberg v The Queen* (1989) 167 CLR 259 at 272-273; *Gipp v The Queen* (1998) 194 CLR 106 at 123-129.

258 *Giannarelli v The Queen* (1983) 154 CLR 212 at 221, 222, 223, 229-230, 231; *Pantorno v The Queen* (1989) 166 CLR 466 at 475-476, 483-484; *Cheatle v The Queen* (1993) 177 CLR 541 at 548; *Gipp v The Queen* (1998) 194 CLR 106 at 116, 152.

259 cf *Bond v The Queen* (2000) 74 ALJR 597 at 602; 169 ALR 607 at 614.

260 cf *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306; 160 ALR 588.

answered by evidence in the courts below[261]. The retention of this measure of flexibility to permit the Court to consider and determine fully an exceptional issue when the proceeding is still within the Judicature, illustrates the error of adopting an absolute exclusion of new evidence, whatever its purpose and legal significance. Procedure, under our Constitution, ultimately bends to the insistent demands of justice.

248 *The constitutional context:* The basic flaw that runs through the reasoning of the decisions of this Court concerning the meaning of "appeals" in s 73 of the Constitution is that it was earlier felt necessary to affix that word with the meaning, and only the meaning, which it bore in 1900. Being an erroneous approach, it unsurprisingly produced erroneous outcomes. In 1900 the notion of "appeal" (itself always a creature of statute) was relatively new. Today it is not. After more than a century of appeals and nearly a century of common appellate review of judgments, orders and sentences in civil and criminal cases in Australia, the meaning ("denotation" if one likes) of the word has expanded. We are not hostage to the understandings of the word of 1900. Naturally, they may inform the argument. But they do not dictate its outcome.

249 If one considers the context in which the word "appeals" appears in s 73, it lends further support to the argument that it should not be given the narrow meaning that has been accepted so far. First, the word appears not in an ordinary statute but in a constitutional instrument, difficult of formal change, designed to endure indefinitely and to cover a vast number of unforeseen circumstances. Ordinary principles of construction would argue strongly against imposing a narrow meaning on a word so as to restrict (whatever the circumstances) the capacity of the nation's final court to prevent a serious injustice where this could be shown by clear evidence available to it. As Deane J observed in *Mickelberg*, to the extent that the Court is limited, the result diminishes "the nation, rather than the court"[262].

250 It is true that this Court did not take long to introduce the limitation and that it has proved a most persistent one. But it seems plain that it was not conceived to be inherent in the minds of many of those who laboured on the constitutional text[263]. In the early years of the century, and indeed for long after, there would

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261 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; *Louinder v Leis* (1982) 149 CLR 509 at 512, 519; *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8.

262 *Mickelberg v The Queen* (1989) 167 CLR 259 at 288.

263 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 740 observed that the word "appeal" was used in the Constitution "without limitation of any kind, and leaves the whole question of the mode of appeal and the procedure on appeal to be regulated by the Parliament. It clearly

(Footnote continues on next page)

have been practical reasons of convenience for adhering to a rule which had the effect of excluding the receipt of new evidence. However, the rule was propounded as one of legal principle. Necessarily, it is applicable to civil as well as criminal appeals. It certainly defies the ordinary practice of appeals in the nineteenth century involving the exercise of equitable jurisdiction, where fresh evidence could sometimes be received on appeal[264]. Even if all of the historical relics of ancient common law procedures, mentioned in the cases, were thought to suggest a shackling of the *exercise* of appellate jurisdiction in criminal appeals, it hardly seems likely that the very *notion* of "appeals", as used in the context of s 73, was to be restricted so severely. Why, one might ask, should the grant of power be confined beyond even the possibility of regulation by the Judicature itself or (to the extent constitutionally permissible) by the Parliament?

251 It is no answer that some of those who are disappointed by the rejection of jurisdiction may sometimes go somewhere else when they are lawfully before the judicial branch of government in this Court. The Court's jurisdiction is, as it should be, broad and ample in content. It is not so crippled by artificial restrictions that the demonstrable justice of a case must be ignored. The person with a proper appeal is not fobbed off to the Crown's prerogative of mercy (where this has survived) or to the discretions of the Executive Government to conduct a review[265] or other inquiry. In any case, such palliatives are not available in civil appeals.

252 The Court has held that appellate courts below this Court are legally incapable of reopening their concluded orders[266]. However, the rule of necessity that permits this Court, as the ultimate court, to reopen its own orders so as to avoid the blight of an uncorrected injustice, should also inform the approach of

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includes appeals on matters of fact as well as on matters of law"; cf Jolowicz, "Appeal and Review in Comparative Law: Similarities, Differences and Purposes", (1986) 15 *Melbourne University Law Review* 618 at 619-620. Note that in the original High Court Rules (Pt II, Section I, r 1(10)) it was provided that "[t]he Full Court shall have all the powers … of the Court … appealed from, and shall have full discretionary power to receive further evidence upon questions of fact". This rule was revoked in 1952. See also *High Court Procedure Act* 1903 (Cth), s 19 and now *Judiciary Act* 1903 (Cth), s 77G and High Court Rules, O 37 r 3 which provides for the examination of witnesses if so ordered by the Court.

264 As Deane J pointed out in *Mickelberg v The Queen* (1989) 167 CLR 259 at 278.

265 Which is itself subject to limitations: *Varley v Attorney-General (NSW)* (1987) 8 NSWLR 30.

266 *DJL v The Central Authority* (2000) 170 ALR 659 at 670-671; cf at 686-688.

the Court to an understanding of the scope of its appellate jurisdiction[267]. To deny this Court the authority to receive new evidence essential to avoiding a legal injustice is to demonstrate a completely unwarranted lack of confidence in the capacity of the Court to keep the balance right between "the demands of justice [and] the policy in the public interest of bringing suits to a final end"[268]. The *occasion* for the admission of new evidence in the exercise of appellate jurisdiction by a court such as this would be rare indeed and confined to very special circumstances. But to deny the *possibility* of such exercise, and to ascribe such denial to a constitutional limitation derived solely from the word "appeals", seems quite unconvincing.

253 There are two further textual considerations, to be found in the constitutional scheme and language, which reinforce this view. The first is relatively minor. In some cases where it is hypothesised that vital new evidence cannot be received by this Court in the exercise of its appellate jurisdiction, it would be perfectly possible for an application to be made to the Court at the same time, in the exercise of its original jurisdiction, to afford relief against an officer of the Commonwealth having a responsibility for the enforcement of the judicial order[269]. It seems unlikely that such a signal disharmony would exist between the capacity of the Court in separate proceedings to receive evidence having vital legal significance. It is no answer to say that the receipt of new evidence of its nature involves the exercise of the original jurisdiction of the Court[270]. As Deane J remarked in *Mickelberg*, that is to presuppose, not to resolve, the content of the proper incidents of appellate jurisdiction, which is the question in issue.

254 More importantly, there is the clue in s 73 itself concerning the answer to this controversy. The closing paragraph of the section indicates that "[u]ntil the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be

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267 *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 684; *State Rail Authority of NSW v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 at 38, 45-46; *Nintendo Co Pty Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 168; *De L v Director-General, NSW Department of Community Services [No 2]* (1997) 190 CLR 207 at 215; *DJL v The Central Authority* (2000) 170 ALR 659 at 686.

268 *McCann v Parsons* (1954) 93 CLR 418 at 430-431.

269 Under the Constitution, s 75(v).

270 *Mickelberg v The Queen* (1989) 167 CLR 259 at 269 per Mason CJ; cf at 286 per Deane J. Deane J pointed out that the Court commonly exercises original jurisdiction as an incident of its appellate powers eg in the granting of interlocutory relief: a point which "likewise seems to have been ignored".

applicable to appeals from them to the High Court". Long before the Constitution came into force, the Judicial Committee of the Privy Council had been empowered to receive further evidence on appeal to it[271]. Given the clear indication in the text of s 73 that this Court should, from its establishment, have no lesser jurisdiction than the Privy Council it seems, with respect, absurd to suggest that until the Parliament otherwise provided in relation to the appellate jurisdiction of this Court, it enjoyed the powers of the Privy Council in appeals but thereafter lost such powers forever.

255 Against a background of nearly 70 years in which appeals to the Privy Council could, exceptionally, receive new evidence in Australian appeals, it is difficult to accept that this Court was to be in a position inferior to that body in the exercise of its own appellate jurisdiction. Not the least is this so because of the way in which the Constitution envisaged that this Court would quickly replace the Privy Council for most Australian appeals, be the exclusive venue in respect of some of them and, upon the happening of certain events (which have since transpired), wholly replace the Privy Council in the exercise of the ultimate appellate jurisdiction in respect of all Australian courts[272].

256 This last argument was advanced by Deane J in *Mickelberg*. But it is no mere "assertion"[273]. It represented to Deane J, as it does to me, powerful internal evidence, within the language and structure of Ch III itself, that the crabbed view of "appeals" which this Court has previously taken is wrong, and clearly so. Of course, the occasions for the exercise of the power of the Privy Council to receive new evidence were extremely rare. However, no one doubted that the exceptional power existed in 1900 as it does today. Gradually this view of the Constitution gathers adherents. In due course it will command a majority. The interpretation of the Constitution cannot be declared to be "settled" in such a matter by judicial *fiat*. In the law, time often corrects error.

257 *Appeals in 1900:* Even on the assumption that the content of the appellate jurisdiction of this Court is to be decided by reference to what "appeals" meant in 1900 (which I would not accept) there are many indications that it is factually incorrect to suggest, as a universal rule, that the notion of "appeals" excluded absolutely the reception of new evidence. After all, it is not as if "appeal" was a

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271 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 747; *Judicial Committee Act* 1833 (Imp) (3 & 4 Will 4 c 41), ss 7 and 8; cf *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 109 per Dixon J.

272 cf *Ebert v The Union Trustee Co of Australia Ltd* (1961) 105 CLR 327 at 331.

273 Reasons of McHugh J at [114].

common law proceeding of ancient lineage. On the contrary, in 1900 it was a relatively new creature of statute the content of which had been expanding throughout the nineteenth century. Australians who were informed about such matters, and the United Kingdom Parliament which had earlier enacted the *Judicial Committee Act* 1833 (Imp)[274] and the *Supreme Court of Judicature Act* 1873 (UK)[275], may be taken to have been aware of the variety and scope of "appeals" as a legal procedure for the review of primary decisions[276].

258 A number of the early decisions of this Court, expounding the scope of its appellate jurisdiction, appear to have been strongly influenced by the then self-imposed limitations of the English Court of Appeal rejecting fresh evidence as involving a "very dangerous practice"[277]. It was natural enough, at the beginning of the twentieth century, that such English judicial opinions should have influenced the Justices of this Court operating as they were in a post-colonial environment. However, it is wholly inappropriate that such notions should shackle the Constitution today.

259 The English Court of Appeal and the House of Lords have long since abandoned the rule that the reception of new evidence is a dangerous and impermissible thing[278]. That attitude was itself doubtless the product of the novelty of appellate facilities and the resistance in many quarters to the very notion of "appeals"[279]. This attitude has no place in contemporary understandings of the Constitution. With every respect, we can now see that it ought not to have influenced perceptions of a limitation on the constitutional power available to this Court in discharging its ultimate national appellate jurisdiction. Yet concepts borrowed from earlier times and other places can

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274 3 & 4 Will 4 c 41.

275 36 & 37 Vict c 66.

276 cf *Crimes Act* 1900 (NSW), s 471 appearing under the heading "Appeals" (since repealed).

277 *Ronald v Harper* (1910) 11 CLR 63 at 78; cf *Flower v Lloyd* (1877) 6 Ch D 297; (1879) 10 Ch D 327; *Birch v Birch* [1902] P 130.

278 Discussed *Mickelberg v The Queen* (1989) 167 CLR 259 at 277. See *Appellate Jurisdiction Act* 1876 (UK) (39 & 40 Vict c 59); *Criminal Appeal Act* 1968 (UK), s 35(3).

279 *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 322-323, 327-330; 160 ALR 588 at 609-610, 615-618.

sometimes leave behind a precedential legacy that endures far beyond reason[280]. This is such a case. It is time to delete it from our constitutional jurisprudence.

260 *New evidence in other final courts:* A review of the approach of other final courts, with functions similar to this Court, contradicts the suggestion that there is something in the very notion of "appeals" to a final court which is alien to the reception of new evidence in exceptional cases. Save for the Supreme Court of the United States of America, the final appellate courts of all common law jurisdictions appear to assert an entitlement, in exceptional circumstances, to admit fresh evidence in the discharge of their function of deciding "appeals". To this extent, the holdings of this Court portray an anomalously narrow conception of the nature of "appeals". Not only is the power to receive new evidence standard to such final courts. The restrictions imposed on its admissibility are also substantially similar[281].

261 In the United Kingdom, the English Court of Appeal has altered its position from that adopted in the nineteenth century as stated above. In part, this development has occurred as a result of the passage of legislative enhancement of the jurisdiction of that Court to receive fresh evidence[282]. But, in part, it has followed the decision of the Court of Appeal to adopt a more flexible approach to the discretion so conferred. Thus in *R v Gilfoyle*[283] that Court saw no difficulty in interpreting its powers even to include one of receiving fresh evidence "of its own initiative"[284] where it "thinks it necessary or expedient in the interests of

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280 cf *R v Ministry of Defence; Ex parte Smith* [1996] QB 517 at 554 per Sir Thomas Bingham MR; *Fitzpatrick v Sterling Housing Association Ltd* [1998] Ch 304 at 340.

281 Typically requiring proof of (1) no lack of diligence to discover the evidence at the trial or in the intermediate court; (2) a *prima facie* likelihood that the evidence is credible and would have affected the outcome of the proceedings; and (3) necessity in the sense that refusal would plainly cause serious injustice. See eg *Beresford* (1971) 56 Cr App R 143 at 149; *Skone v Skone* [1971] 1 WLR 812; [1971] 2 All ER 582; *Baker v Black Sea & Baltic General Insurance Co Ltd* [1998] 1 WLR 974; [1998] 2 All ER 833; *R v Barr* [1973] 2 NZLR 95; *S v de Jager* 1965 (2) SA 612 at 613.

282 *Criminal Appeal Act* 1968 (UK), s 23 as amended by *Criminal Appeal Act* 1995 (UK), ss 4(1), 29, Scheds 2 and 3.

283 [1996] 3 All ER 883.

284 [1996] 3 All ER 883 at 897.

justice"[285] so as to remove "a lurking doubt"[286]. Lest it be said that this represents no more than the power of Australian intermediate Courts of Criminal Appeal (and their equivalents) to receive "fresh" or "further" evidence, the House of Lords also accepts that, in its appellate jurisdiction, it possesses powers equivalent to those of the Court of Appeal. Various procedural possibilities by which such evidence may be considered have been explored[287]. In recent proceedings, evidence has been received not only from parties[288] but also, apparently, from an intervener[289]. I accept that the constitutional position of the House of Lords is different from that of this Court. But it is surely worth observing that the reception of evidence in exceptional circumstances to prevent a plain and serious injustice has not been rejected on the ground that it is inconsistent with the very function of their Lordships to decide "appeals". On the contrary, a reason given to accept such evidence is that it is essential that it should exist to prevent an irremediable injustice, incompatible with the functions and purposes of the judicial branch of government.

262 In New Zealand, the Court of Appeal has power to receive further evidence both in criminal[290] and civil[291] appeals. Again, the constitutional position is different. The occasions for the admission of new evidence are extremely rare. But no one suggests that the power is alien to the appellate function.

263 In South Africa, all appellate courts have the power to "receive further evidence" in criminal and civil matters[292]. Exceptional circumstances are

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285 [1996] 3 All ER 883 at 898.

286 [1996] 3 All ER 883 at 899. See also *Beresford* (1971) 56 Cr App R 143 at 149.

287 *Ladd v Marshall* [1954] 1 WLR 1489; [1954] 3 All ER 745.

288 *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [2000] 1 AC 61 at 66 per Lord Slynn of Hadley.

289 *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [2000] 1 AC 61 at 67 per Lord Slynn of Hadley.

290 *Crimes Act* 1961 (NZ), s 389.

291 Court of Appeal (Civil) Rules 1997 (NZ), r 24. See *Sulco Ltd v E S Redit and Co Ltd* [1959] NZLR 45 at 72; *R v Dunsmuir* [1996] 2 NZLR 1 at 8; *Ranby v Hooker* unreported, Court of Appeal of New Zealand, 20 March 1997. There is also a power of reference by the Governor-General in Council to the Court of Appeal. See *Crimes Act* 1961 (NZ), s 406(a).

292 *Supreme Court Act* 1959 (SAf), s 22.

required[293]. In *Simaan v South African Pharmacy Board*[294], the Appellate Division appears to have received new evidence. Recently, in *Van Eeden v Van Eeden*[295], an appellate court permitted new evidence to be led although it concerned circumstances that had arisen after the trial court had delivered its judgment. The rules of the Constitutional Court incorporate this provision by reference[296]. In addition, that Court's statute and rules provide that the Court may receive new evidence if uncontested or of such a nature that it is capable of easy verification[297]. Furthermore, the Court may appoint a commission on its own initiative to obtain and hear evidence which is "necessary for the determination of any issue in such proceedings"[298]. Finally, s 173 of the 1996 Constitution of the Republic of South Africa provides that the Constitutional Court, the Supreme Court of Appeal and the High Courts all have the "inherent power to protect and regulate their own process".

264 In the United States, it appears that the Supreme Court will never hear new evidence in appeals[299]. However, that Court does not enjoy under the United States Constitution the same functions as this Court does under the Australian Constitution. This Court is at once a constitutional court, a court of federal appeals and a general appellate court for the entire Judicature of the Australian nation. In this respect, its appellate function is much closer in character to the Supreme Court of Canada than that of the United States. The power of the Supreme Court of Canada to receive fresh evidence on appeal is, to use the words of L'Heureux-Dubé J for that Court, "not contested"[300]. The power exists in both civil and criminal appeals. Whilst it is rarely exercised, it remains in reserve.

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293 *S v Sterrenberg* 1980 (2) SA 888.

294 1982 (4) SA 62 at 77-80.

295 1999 (2) SA 448.

296 Constitutional Court Rule 29. See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* unreported, Constitutional Court of South Africa, 2 December 1999 at [8], where Ackermann J alluded to the failure of one of the parties to attempt to apply Rule 29.

297 Constitutional Court Rule 30. See *Brink v Kitshoff NO* 1996 (4) SA 197 at 207-208; *S v Lawrence* 1997 (4) SA 1176.

298 *Constitutional Court Complementary Act* 1995 (SAf), s 7.

299 58 Am Jur 2d, New Trial §471 citing *Malaspina v Itts* 223 A 2d 54 (1966).

300 *Catholic Children's Aid Society of Metropolitan Toronto v M (C)* [1994] 2 SCR 165 at 185; cf *Supreme Court Act* RSC 1985, c S-26 (Can), s 62(3).

The Supreme Court of Canada has rejected attempts to impose rigid limitations on the exercise of the power[301]. It does not appear to have been suggested either by a party or by that Court itself that the powers to prevent, in this way, what would otherwise be a serious miscarriage of justice, are fundamentally incompatible with the appellate function.

265 If we look beyond common law countries, it appears equally true that final courts of the civil law tradition may also receive fresh evidence in exceptional circumstances[302]. It is inappropriate to examine this issue at further length. It is enough to say that the foregoing analysis establishes that, save for the Supreme Court of the United States whose position is distinguishable, the self-denying interpretation of the nature of "appeals" adopted by this Court is out of keeping with the vigilance reserved by all other final courts of appeal to ensure that, in the exceptional case, they can avoid themselves becoming an instrument of serious injustice.

266 There is nothing in the language or structure of our Constitution that warrants maintaining a stance on this subject uniquely offensive to the essential purpose of the Judicature. Since appeal is, and was in 1900, a creature of statute, the content of appellate jurisdiction (including of this Court) cannot be artificially restricted to a narrow conception of "appeals" which finds favour in no equivalent court of similar function and jurisdiction.

267 *Appeals as a statutory creation:* It is true that appeal is a creature of statute and the Parliament has not attempted to enact provisions to regulate the reception by the Court of new evidence. In the state of present authority that omission is hardly surprising. But in this instance the facility of appeal is afforded in the statutory language of the Constitution itself (ss 73 and 74). The fact that the Constitution does not, nor does any other federal law, provide in terms for the reception of new evidence in an appeal or the grounds of its reception is not, in my opinion, fatal. This is no ordinary court. It is the ultimate appellate court of Australia. In default of statutory regulation, it may be left to this Court to spell out the exceptional circumstances in which new evidence will be received.

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301 *Catholic Children's Aid Society of Metropolitan Toronto v M (C)* [1994] 2 SCR 165 at 186.

302 cf *Code of Criminal Procedure* (France), Arts 622-626 cited in American Series of Foreign Penal Codes, vol 29, *The French Code of Criminal Procedure* (1988) at 37; *The Criminal Procedure Code* (Germany), §359 cited in American Series of Foreign Penal Codes, vol 10, *The German Code of Criminal Procedure* (1965).

268 In Australia statutory provision for the reception of such evidence once existed. It has since been repealed[303]. However, relevant rules of court exist. By the High Court Rules, O 37, rules have been made regulating the reception of "Evidence". Such rules are not confined, in terms, to evidence within the original jurisdiction of this Court. They are general in their language. Order 37 r 3 provides:

> "(1) The Court or a Justice may, in any proceeding, if it appears necessary for the purpose of justice:
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> (a) make an order for the examination upon oath before the Court, Justice, an officer of the Court or any other person … and
>
> (b) may empower a party to the proceeding to give the deposition in evidence in the proceeding on such terms, if any, as the Court or a Justice directs.
>
> (2) The Court or Justice may give directions with respect to the procedure to be followed in and in relation to the examination."

269 It is true that, by O 1 r 5, "proceeding" is defined to *include* "action, cause, matter and suit". Obviously, O 37 r 3 is intended to apply chiefly to a trial in the original jurisdiction. But it is wide enough to extend to, and empower evidence to be adduced in, a "proceeding" by way of appeal, provided that course is constitutionally permissible. In my view it is.

270 *Avoiding artificial reasoning:* The removal of the supposed constitutional barrier would also relieve this Court of the artificial reasoning into which it is forced by the present rule[304]. Once the procedural ruling was made during the hearing of this application, this Court was subjected to extended argument concerning whether the trial judge and the Full Court ought themselves to have noted the applicant's lack of mental fitness and initiated investigation of that question, alteration of the issues chosen by the parties, amendment of the record and judicial determination of the point. In my respectful view, adopting this approach involves a much more serious departure from the ordinary conceptions of the judicial function as it is practised in Australia (particularly in criminal courts) and the role of appellate courts under our constitutional arrangements.

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303 *High Court Procedure Act* 1903 (Cth), Schedule, Pt II, Section I, r 1(1).

304 A good example is *Government Insurance Office of NSW v Fredrichberg* (1968) 118 CLR 403 at 410, 416-417, 422 cited in the reasons of Gummow J at [182].

271 *Distinguishing "additional" and "new" evidence:* Even if, contrary to the foregoing opinion, this Court for reasons of authority or perceived principle were to adhere to the holding that new evidence is inadmissible in an appeal to it, there is surely a distinction between such evidence as it is relevant to the substantive issue determined in the earlier proceedings and evidence as it concerns suggested defects of a procedural kind. Thus, where subsequently discovered facts cast doubt on the propriety of the participation of a judge in appellate proceedings, such evidence would surely be admitted in support of a ground of appeal against the order in which the judge participated[305]. It might be impossible, once the final order of the court in question has been entered, for that court to correct its own order, the matters previously in contest having passed into judgment[306]. This Court has no authority to correct or otherwise alter the orders of earlier courts unless, relevantly, it allows an appeal and sets aside the order in the exercise of its appellate powers. In my view, the position in this case is analogous.

272 Let it be assumed that the mental unfitness of the applicant is the very reason that occasioned his earlier denials; that it coloured his judgment and rendered wholly believable his assertion of mental fitness to plead. In such circumstances, the belated disclosure of the factual foundation to establish a question about a want of mental fitness at the time of the trial is not, of its nature, a "part" or "detail" of the "transaction amounting to the crime" of which the applicant has been found guilty. Instead, it concerns separate and fundamental questions. These involve the very integrity of the trial (and subsequently of the appellate) process[307]. These are the questions now before this Court. Conceding that in many cases the stringent requirements for the admission of new evidence would be missing, where (as here) they may be found to be present, this Court is surely not required to close its eyes. It is difficult to accept that the Constitution adopted by the Australian people is so mechanical and rigid as to forbid such an exercise of appellate powers and to oblige this Court to ignore evidence in a

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305 cf *Livesey v New South Wales Bar Association* (1983) 151 CLR 288. See *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 at 127-129.

306 *DJL v The Central Authority* (2000) 170 ALR 659 at 672-673.

307 See the analogous consideration of the distinction between an error said to result in a miscarriage of justice in a trial and an error so radical or fundamental as to suggest that a trial according to law has not been held: *Quartermaine v The Queen* (1980) 143 CLR 595 at 600-601; *Wilde v The Queen* (1988) 164 CLR 365 at 372; *KBT v The Queen* (1997) 191 CLR 417 at 434-435; *Krakouer v The Queen* (1998) 194 CLR 202 at 225. On the accused's right to a fair trial see *Dietrich v The Queen* (1992) 177 CLR 292 at 311, 314-315 per Mason CJ and McHugh J.

highly relevant matter before it which, if considered, would warrant the provision of relief against a postulated grave injustice amounting to a judicial wrong.

273 It is, of course, possible that, when properly examined, the evidence proffered for the applicant in these proceedings might fail to meet the strict criteria warranting this Court's reception of it. It might be disclosed as no more than a further attempt by the applicant to manipulate the judicial process. Such manipulation does occur. Courts must remain vigilant to the possibility. On the other hand, there is sufficient evidence proffered for the applicant, in my view, to warrant its further examination. Thus, even if *further* evidence generally be inadmissible in an appeal to this Court, *new* evidence which essentially raises the issue of whether a party has had a trial at all, or a true appeal as the law and the Constitution envisage, presents an issue in a different category[308]. In the exercise of its appellate function, and in exceptional circumstances, this Court may, in my opinion, receive such evidence. Neither past authority nor applicable constitutional principle forbids that course. At least they do not do so in the special circumstances of this case where refusal even to consider the evidence is an affront to common sense and to the concept of justice that runs through Ch III of the Constitution[309].

274 *Practical considerations:* At the time this Court first propounded its rule denying itself an entitlement to receive evidence in an appeal, it would naturally have been concerned about the added burden which such a facility might impose. Although from 1903 appeals in criminal matters lay only by special leave of the Court, most of the Court's appellate jurisdiction was, as it still is, civil in character. Civil appeals commonly lay as of right. Understandably, the prospect of determining applications to admit new evidence in such appeals would have been unappealing. However, both in criminal and civil appeals, the Court now has more than adequate means to defend itself against unwarranted applications that it should receive new evidence. The applicable considerations have been developed by other final courts of appeal. The parties seeking to enlist this exceptional power would be subject to the strict requirements imposed upon all applicants for special leave[310]. Therefore, whatever might have been the attitude

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308 cf *Cameron v Cole* (1944) 68 CLR 571 at 589-590.

309 *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 607-609, 614-615 per Deane J, 702-704 per Gaudron J; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 486-487 per Deane and Toohey JJ, 502 per Gaudron J; *Chu Kheng Lim v Minister of Immigration and Ethnic Affairs* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ.

310 *Judiciary Act* 1903 (Cth), ss 35, 35A. See also s 44 of that Act (remittal of matters by the High Court to other courts).

to "appeals" in and after 1900 (and the concerns long held about the undeflectable practical burdens which such functions initially imposed upon this Court), today such considerations need not play, even *sub silentio*, any role in the expression of our constitutional doctrine.

275 In *R v Gardiner*[311], Dickson J in the Supreme Court of Canada acknowledged "a tendency to read down the jurisdiction of the [Supreme Court]". He ascribed this tendency to the "burgeoning caseload and inadequate discretionary means of controlling it" which then faced that Court. However, he cautioned against a narrow approach to the appellate jurisdiction in a final constitutional and appellate court. He did so in words that are applicable to this Court's present dilemma[312]:

> "They were measures which were probably justified as a means of controlling the Court's docket … The applicability of rules with a built-in bias against jurisdiction to issues of discretionary leave to appeal, however, seems unfounded. The discretionary element provides the screening mechanism formerly supplied by a narrow interpretation of jurisdiction.
>
> … To decline jurisdiction is to renounce the paramount responsibility of an ultimate appellate court with national authority.
>
> … [I]ts jurisdiction should be as comprehensive respecting federal and provincial laws as is that of the lower courts, subject to the screening of cases for their national importance …
>
> If policy considerations are to enter the picture, as they often do, there would appear to me to be every reason why this Court should remain available to adjudicate upon difficult and important questions …
>
> Cases calling for the articulation of governing and intelligible principles bearing upon deprivation of personal liberty would seem rationally to be the paradigm of the type of case which should find its way to this Court.
>
> … The statutory language, the historical development of the Court's jurisdiction and the role of the Court as ultimate appellate tribunal all lead to that conclusion."

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311 [1982] 2 SCR 368 at 393.

312 [1982] 2 SCR 368 at 394-405.

276 This Court now has full control over the exercise of its entire appellate jurisdiction[313]. Any application for the admission of new evidence which was not manifestly well grounded, indeed compelling, could be expected to receive short shrift both at the special leave hearing and, if such leave were granted, on the hearing of the appeal.

Conclusion: the new evidence should be received

277 It follows that there is, in my view, no constitutional or other impediment to this Court's receipt of the new evidence, tendered in support of this application, relevant to the applicant's mental fitness at the time of his trial and the appeal to the Full Court. I would therefore overrule the objection to the receipt and consideration of the new evidence. I would proceed to determine the admissibility and weight of such evidence. If eventually ruled admissible, the evidence would undoubtedly justify the grant of special leave to the applicant. It would then be for this Court to decide, in disposing of the appeal, whether it could, or should, remit to a single Justice or to the Federal Court or other court the taking of such evidence. Alternatively, this Court might proceed to hear and determine the evidence for itself. At least it might do so to a point that it was convinced that the order of the Full Court had to be set aside so that the entire issue of the applicant's fitness to plead might, on the evidence, be remitted to that Court. The power of the Full Court of the Federal Court to receive further evidence relevant to that issue is not in doubt. However, on present authority, the Full Court could not embark upon a fresh consideration of that question until the impediment of its earlier order was removed by this Court exercising its appellate powers[314].

278 A majority of this Court has reached a different conclusion. The evidence has therefore been rejected. Without the evidence, the applicant is forced to argue his alternative submission. This presents the second issue.

The second issue: based strictly on the record there is no error

279 It would, I imagine, be open to me to confine my disposition of this application to one directing that the hearing proceed to completion on the basis that the constitutional objection of the respondent should be overruled. However, because there is a division of opinion in the Court as to what should then follow

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313 *Smith Kline & French Laboratories (Aust) Ltd v The Commonwealth* (1991) 173 CLR 194 where the validity of s 35 of the *Judiciary Act* 1903 (Cth) as now appearing was upheld. It was held that neither s 35(2) of that Act nor s 33(3) of the *Federal Court of Australia Act* 1976 (Cth) infringed s 73 of the Constitution.

314 *DJL v The Central Authority* (2000) 170 ALR 659.

on the applicant's alternative case, it appears necessary, and certainly desirable, that I should accept for present purposes the Court's ruling that the evidence is inadmissible and proceed to consider what follows. In *Mickelberg*, after expressing his view as to the requirements of the Constitution in respect of the appellate jurisdiction of this Court, Deane J took a similar course. He proceeded to his ultimate orders "on the basis that a ruling had been given by the Court at the time when the further evidence was tendered"[315]. His Honour then reasoned on the footing that he was "constrained to deal with the case on the basis that that further evidence was not before the Court"[316]. That is the course which I will likewise take.

280 Consistent with the opinion which I expressed in *Gipp v The Queen*[317], I do not doubt that, in an exceptional case where a serious error is brought to light concerning what would otherwise be a manifest miscarriage of justice, a new ground of appeal may be permitted in this Court, although never previously raised, argued or determined in the courts below[318].

281 However, it is one thing to uphold the power, on the basis of the record, to enlarge the issues for determination. It is quite another to uphold the point in question when it is fully argued. Not infrequently, because the point was not in issue in the courts below (having been rejected or overlooked there), a foundation in the evidence contained in the record will be missing. Where this is so it may well destroy the chances of success on the point, once it is formally put in issue for determination by this Court.

282 I have given careful consideration to the suggestion that, within the record as it was before them, the trial judge and the Full Court ought to have perceived the applicant's lack of fitness to plead, to understand the evidence and (when it became necessary) to represent himself at intervals during his trial. I fully accept that, both by the statute applicable in the Australian Capital Territory[319] and by the general law, the question of an accused person's fitness to be tried is not one left exclusively to the parties. It is one in respect of which the court itself has

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315 (1989) 167 CLR 259 at 289.

316 (1989) 167 CLR 259 at 289.

317 (1998) 194 CLR 106 at 154-155. See also *Giannarelli v The Queen* (1983) 154 CLR 212 at 230-231.

318 cf *Gipp v The Queen* (1998) 194 CLR 106 at 113 per Gaudron J; contra at 123-129 per McHugh and Hayne JJ.

319 *Mental Health (Treatment and Care) Act* 1994 (ACT), s 68(2). See also *Crimes Act* 1900 (ACT), s 428E, set out in the reasons of Hayne J at [299].

responsibilities[320]. This is true despite the fact that neither the prosecutor nor the defence raises it[321].

283 There is no doubt that the applicant's conduct at the trial was often grossly disruptive, frequently abusive, repeatedly insulting, needlessly offensive and objectively contrary to his own best interests. Having regard to the view which I have reached about the admissibility of the new evidence and having regard to the disturbing content of that evidence, there would obviously be certain attractions for me to hold the trial judge and the appellate court in error in respect of their obligations. It will be apparent that I consider that the new evidence, proffered but rejected, demonstrated a distinctly arguable case that the applicant was unfit to plead and to be tried in the way that occurred. But neither the trial judge nor the Full Court had the new evidence or any evidence touching the precise issue essential to deciding the applicant's mental fitness. The most that was available to them was the applicant's misconduct during the trial and (in the case of the Full Court) certain reports of Dr Milton.

284 Confining myself to the materials which the judges in the courts of trial and appeal had, I am not convinced that they erred in failing to perceive, raise and determine the question of the applicant's mental fitness. No such issue was ever presented. The trial judge, who had the advantage which this Court has never had of viewing the conduct of the applicant over a hearing lasting more than five months, was never moved to raise the question for himself. Clearly enough[322], he simply regarded the applicant as deliberately disruptive and cunningly manipulative. Despite his long experience in presiding in criminal trials, the trial judge never felt moved, in the absence of the jury, to identify the question of the applicant's mental fitness, whether for submissions or for evidence.

285 The Full Court which, unlike the trial judge, did have before it for a limited purpose the pre-trial reports of Dr Milton likewise never felt moved to raise the question. Although sundry legal practitioners had expressed to the applicant himself, and to the prosecutor, their concerns about the applicant's mental fitness, never once at the trial or in the Full Court did any of them present the issue squarely or even obliquely for judicial consideration and decision. The burdens on the judges in these proceedings were heavy enough without this Court's now imposing upon them, retrospectively, a prescience in this case which is born of (or unconsciously coloured by) the new evidence tendered to this Court, read, but rejected. That evidence was never placed before those who are now said to have

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320 *Kesavarajah v The Queen* (1994) 181 CLR 230 at 244-245.

321 *R v Podola* [1960] 1 QB 325 at 349-350; *R v Presser* [1958] VR 45 at 46.

322 cf the trial judge's remarks on sentencing noted by Gleeson CJ at [32].

failed in their judicial duties to anticipate and imagine the defects belatedly complained about. I believe that my opinion is consistent with the view I expressed in *Gipp* that it was impossible and inappropriate to criticise the judges below for failing to comb through the record to invent points about suggested misdirections which the parties, competently represented, had never themselves raised[323]. This is not the way the trial or appellate process operates in this country. Now to impose such a change would be a far more serious departure from constitutional assumptions than the modest re-reading of "appeals" that I favour.

286 Limiting myself, then, to the record of the trial in the Supreme Court and of the appeal before the Full Court, I do not believe that either Court erred or that, on such record, a miscarriage of justice or fundamental failure of the trial process is shown. Accordingly, although in my view this Court in hearing this application should permit the enlargement of the issues, as enlarged, within the record, they do not avail the applicant. Whilst he should have special leave because of the general significance of the points argued in his application, it is my opinion that, on the record, his appeal must be dismissed.

287 This outcome is clearly unsatisfactory. In this case, there are other remedies that may permit the repair of the possible injustice to the applicant which the result entails[324]. However, such remedies lie outside the appellate system of the Australian Judicature. Essentially, they belong to the Executive Government. By reason of the constitutional holding that is upheld in this case, the Australian judiciary is disclosed as incapable, even in a matter still before it in its highest court, to repair what may be a fundamental error or a proved injustice. This is an outcome which I would reject and from which I dissent. But upon the basis of this Court's adherence to its narrow view of its appellate jurisdiction, it is an outcome that must follow. The applicant must therefore fail.

Orders

288 I would grant special leave but dismiss the appeal.

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323 *Gipp v The Queen* (1998) 194 CLR 106 at 152.

324 Such as an application under the *Crimes Act* 1900 (ACT), s 475.

289 HAYNE J. The applicant contends that he was not fit to plead or stand his trial in the Supreme Court of the Australian Capital Territory on the charge that he murdered Colin Stanley Winchester. He has not previously made this contention. It was not raised at his trial and it was not raised in his appeal to the Full Court of the Federal Court of Australia against his conviction for murder.

290 In support of his application for special leave to appeal to this Court from the dismissal of his appeal to the Full Court of the Federal Court[325], the applicant has tendered the evidence that is referred to in the reasons of other members of the Court. In *Mickelberg v The Queen*[326], it was held that, on an appeal under s 73 of the Constitution from the decision of a State court exercising State jurisdiction, the High Court has no power to receive fresh evidence. The fact that the present appeal is from the decision of a Territory court leads to no different conclusion about the powers of this Court. There is no sufficient reason to reconsider the decision in *Mickelberg*. As the reasons of other members of the Court show, *Mickelberg* stands in an unbroken line of authority of long standing[327]. The conclusion is based upon the constitutional distinction between appellate and original jurisdiction. The word "appeal" is now used to describe many different forms of proceeding: appeals on questions of law[328], appeals by way of rehearing[329], appeals by rehearing de novo[330], appeals which, on examination, can be seen to be an exercise of original jurisdiction[331]. The fact that the word is now used in these ways does not provide any reason to depart from the construction of s 73 that was adopted in *Mickelberg* by adopting one of these several different meanings in preference to the others.

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325 *Eastman v The Queen* (1997) 76 FCR 9.

326 (1989) 167 CLR 259.

327 *Ronald v Harper* (1910) 11 CLR 63; *Werribee Council v Kerr* (1928) 42 CLR 1; *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73; *Davies and Cody v The King* (1937) 57 CLR 170; *Grosglik v Grant [No 2]* (1947) 74 CLR 355; *Crouch v Hudson* (1970) 44 ALJR 312.

328 For example, from a Magistrates Court to a Supreme Court.

329 For example, from a Magistrates Court to a District or County Court.

330 For example, from a Master or Registrar to a Judge.

331 For example, from the Administrative Appeals Tribunal to the Federal Court of Australia.

291 In my opinion, the determinative issue in this case is whether, on the material before it, the Full Court of the Federal Court could or should have examined whether the applicant was fit to plead and to stand trial[332].

292 Consideration of that question requires attention to two issues: the nature of a criminal trial and the jurisdiction of the Full Court of the Federal Court when sitting as a Court of Criminal Appeal on appeal from the Supreme Court of the Australian Capital Territory.

293 A criminal trial is an accusatorial and adversarial process. It "is not, and does not purport to be, an examination and assessment of all the information and evidence that exists, bearing upon the question of guilt or innocence"[333]. As Barwick CJ said[334]:

> "It is a trial, not an inquisition: a trial in which the protagonists are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility. The judge is to take no part in that contest, having his own role to perform in ensuring the propriety and fairness of the trial and in instructing the jury in the relevant law. Upon the evidence and under the judge's directions, the jury is to decide whether the accused is guilty or not. Consequently if the proceedings are not blemished by error on the part of the judge, whether it be on a matter of law or in the proper conduct of the proceedings, or by misconduct on the part of the jury, there has been a fair trial."

Ordinarily, then, it will be for the prosecution to prove its case and for the accused to choose the ground or grounds upon which to meet the accusation.

294 But the unstated premise from which these descriptions of the criminal trial process proceed is that the accused is fit to plead and fit to stand trial. There can be no trial at all unless the accused is fit both to plead and to stand trial. Because the question of fitness is one which affects whether the accused has the capacity to make a defence or answer the charge, it is a question for the trial judge to

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332 As was pointed out by Mason CJ, Toohey and Gaudron JJ in *Kesavarajah v The Queen* (1994) 181 CLR 230 at 234, "[t]he use of the terms interchangeably, while not accurate, is not uncommon".

333 *Re Ratten* [1974] VR 201 at 214 per Smith, Pape and Adam JJ.

334 *Ratten v The Queen* (1974) 131 CLR 510 at 517.

consider regardless of whether the prosecution or the accused raise it[335]. In that respect it is a question which falls outside the adversarial system. Indeed, it must fall outside the adversarial system because the very question for consideration is whether there is a competent adversary.

295 In the great majority of cases, no question of fitness arises. But if it does, the question for a trial judge is whether the accused may not be fit to plead or stand trial. Only if affirmatively satisfied that the tribunal which is responsible for determining the fitness of the accused (in many jurisdictions, a jury empanelled to determine the question, but in the Australian Capital Territory a statutory tribunal) could *not* reasonably find that the accused was not fit to stand trial may the trial proceed[336].

296 An issue of fitness may arise in many ways. As was said in *R v Dashwood*[337]:

> "It does not matter whether the information comes to the court from the defendant himself or his advisers or the prosecution or an independent person, such as, for instance, the medical officer of the prison where the defendant has been confined."

In *R v Presser*, the issue was said to arise "from some passages in the depositions and from further information that was supplied to [the trial judge] in a report"[338] (presumably a medical report). The demeanour of the accused during the trial[339] or even a question from the jury[340] may raise the issue. But once there is a "real and substantial question to be considered"[341], the question must be submitted to the body which is empowered to decide the question. There will be a "real and substantial question to be considered" by this body unless no properly instructed jury (or no tribunal) could reasonably conclude that the accused was not fit.

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335 See, for example, *Proceedings in the Case of John Frith for High Treason* (1790) 22 Howell's State Trials 307; *R v Presser* [1958] VR 45.

336 *Kesavarajah* (1994) 181 CLR 230 at 245.

337 [1943] KB 1 at 4.

338 [1958] VR 45.

339 *R v Khallouf* [1981] VR 360 at 364-365.

340 *Khallouf* [1981] VR 360 at 362.

341 *Khallouf* [1981] VR 360 at 364.

297 Ordinarily it would be expected that material suggesting doubts about the accused's fitness to plead or to stand trial would be drawn to the court's attention by counsel for the prosecution (if aware of it) or by counsel apparently retained for the accused (if counsel had doubts about the matter). In particular, if counsel for the prosecution or counsel for the accused had expert medical opinion that raised a question about the accused's fitness, it would be expected that the existence of this material would be drawn to the attention of the trial judge. That did not happen in this case, but it is neither necessary nor possible to examine now why it did not.

298 No doubt in deciding whether the accused may not be fit to plead or to stand trial, regard must be had to the relevant tests of fitness. As was pointed out by the majority in *Kesavarajah v The Queen*[342], at common law those tests were based on the explanation given by Alderson B to the jury in *R v Pritchard*[343] and require the ability: (1) to understand the nature of the charge; (2) to plead to the charge and to exercise the right of challenge; (3) to understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged; (4) to follow the course of the proceedings; (5) to understand the substantial effect of any evidence that may be given in support of the prosecution; and (6) to make a defence or answer the charge[344]. Properly understood, these tests may not be very difficult to meet.

299 In the Australian Capital Territory, questions of fitness to plead are regulated by statute, in particular Pt 11A of the *Crimes Act* 1900 (ACT). Particular reference need be made to only some of the applicable provisions as they stood at the time of trial[345]. Section 428E of the *Crimes Act* provided:

> "(1) Where, on the trial of a person charged with an indictable offence –
>
> (a) the issue of fitness to plead to the charge is raised by a party to the proceedings or by the Court; and
>
> (b) the Court is satisfied that there is a question as to the person's fitness to plead to the charge;

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342 (1994) 181 CLR 230 at 245 per Mason CJ, Toohey and Gaudron JJ.

343 (1836) 7 Car & P 303 [173 ER 135].

344 See also *Presser* [1958] VR 45 at 48 per Smith J.

345 For present purposes, it is not necessary to notice the amendments made by the *Crimes (Amendment) Act* 1999 (ACT), the *Legal Practitioners (Consequential Amendments) Act* 1997 (ACT) or the *Mental Health (Treatment and Care) (Amendment) Act* 1999 (ACT).

the Court shall order the person to submit to the jurisdiction of the Tribunal to enable the Tribunal to determine whether or not the person is fit to plead to the charge.

(2) Where the Court makes an order under subsection (1), it shall adjourn the proceedings to which the order relates and shall make such orders as it considers appropriate, including the granting of bail to the person who is the subject of the order."

Section 68 of the *Mental Health (Treatment and Care) Act* 1994 (ACT) regulated the task of the Mental Health Tribunal, which is the Tribunal referred to in s 428E. It provided:

"(1) In this section –

'order to determine fitness' means an order of the Supreme Court under Part XIA of the Crimes Act requiring a person to submit to the jurisdiction of the Tribunal to enable the Tribunal to determine whether or not the person is fit to plead to a charge laid against the person.

(2) Following such inquiry as the Tribunal thinks appropriate, the Tribunal shall determine, on the balance of probabilities –

(a) whether or not a person who is subject to an order to determine fitness is fit to plead to the charge; and

(b) if the Tribunal determines that the person is unfit to plead to the charge, whether or not the person is likely to become fit within 12 months after the determination is made.

(3) The Tribunal shall not make a determination that a person is fit to plead to a charge unless satisfied that the person is capable of –

(a) understanding what it is that he or she has been charged with;

(b) pleading to the charge and exercising his or her right of challenge;

(c) understanding that the proceeding before the Supreme Court will be an inquiry as to whether or not the person did what he or she is charged with;

(d) following, in general terms, the course of the proceeding before the Court;

(e) understanding the substantial effect of any evidence given against him or her;

(f) making a defence to, or answering, the charge;

(g) deciding what defence he or she will rely on;

(h) giving instructions to his or her legal representative (if any); and

(j) making his or her version of the facts known to the Court and to his or her legal representative (if any).

(4) The Tribunal shall notify the Supreme Court of its determination in respect of a person and may make recommendations to the Court as to how the person should be dealt with."

Other provisions of Pt 11A of the *Crimes Act* governed what was to happen if the Tribunal found that an accused was not fit to plead. If the Tribunal determined that an accused charged with a serious offence was likely to become fit within 12 months after the determination, the Court was required to discharge the jury empanelled for the trial, order the accused to be detained in custody or released on bail, and adjourn the proceedings[346]. If, however, the Tribunal determined that an accused was not fit and was unlikely to become fit within 12 months after the determination, the Court was required[347] to conduct a special hearing under s 428J. On such a hearing, unless the accused elected otherwise, a jury was empanelled to decide whether it was proved beyond reasonable doubt that, on the evidence available, the accused committed the acts which constitute the offence. If not satisfied, the jury was to return a verdict of not guilty and the accused was to be dealt with as if he or she had been found not guilty at an ordinary trial. If the jury was satisfied that the accused did commit the acts alleged, that was a bar to further prosecution of the accused for those acts[348]. The Court could then order that the accused be detained in custody until the Tribunal otherwise ordered, or order the accused to submit to the jurisdiction of the Tribunal to enable it to make a mental health order under s 28 of the *Mental Health*

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346 s 428H.

347 s 428I.

348 s 428K.

(Treatment and Care) Act[349]. Various kinds of mental health order could be made including orders for treatment, counselling, specified care and the like[350].

300 Again there is one feature of this statutory scheme which warrants particular notice – that the question of fitness to plead can be raised by the Court as well as by a party to the proceedings. That is entirely consistent with the common law and reflects the fundamental importance of the question. Whether the scheme applies not only to questions of fitness to plead but also to questions of fitness to be tried may be open to argument. It is neither necessary nor desirable to express any view on that issue now.

301 It is said that, in this case, there was no reason for the trial judge to think that the applicant may not have been fit to plead and stand trial. That is, it is said that the course of events at trial raised no real and substantial question about the applicant's fitness to plead and stand trial. For the moment, it is convenient to assume that this was so. But when the matter came before the Full Court, that Court had before it, not only the record of the trial, and the evidence which was adduced at the trial, but also some further material which was not in evidence at the trial.

302 The record of the trial revealed that, for large parts of his trial, the applicant was unrepresented. He dismissed his lawyers and then re-engaged those, or other, lawyers, many times during the trial. The Full Court said that "[i]t would not be an exaggeration to describe [the applicant's legal representation during the course of the trial] as chaotic"[351]. The Court concluded that "[i]t cannot be said that the [applicant] acted with justification in so frequently dismissing his lawyers"[352], the applicant being "prepared to see his murder trial proceed without the benefit of counsel if his counsel would not submit to his unreasonable demands"[353].

303 The record of the trial also revealed that the applicant often disrupted the proceedings. In the words of the Full Court, throughout the course of the trial, the applicant "made vile, foul-mouthed, vituperative comments addressed to [the trial judge] and to the Crown Prosecutor which led to the trial judge having

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349 *Crimes Act*, s 428M.

350 *Mental Health (Treatment and Care) Act*, s 29.

351 (1997) 76 FCR 9 at 32.

352 (1997) 76 FCR 9 at 33.

353 (1997) 76 FCR 9 at 34.

him removed from the Courtroom for part of the trial"[354]. That disruption took various forms, including the applicant chanting "Stop judicial condonation of harassment" or like statements as witnesses were sworn or giving their evidence[355]. As the Full Court said[356], the applicant:

> "raised continuously his complaint of harassment. He perceived, in the conduct of the police and the prison authorities a form of personal victimisation. His call to 'Stop judicial condonation of harassment' was an oft-repeated response to a question from [the trial judge]."

304 When he was unrepresented, the applicant refused to cross-examine some very important prosecution witnesses. Of this, and the applicant's dealings with his legal representatives, the Full Court said[357]:

> "[T]he [applicant] consciously and for his own particular purposes continually withdrew the instructions of his legal representatives and refused to cross-examine witnesses at the conclusion of their evidence in chief. The conduct of the [applicant] in this regard was not dictated by a lack of understanding of the consequences of his conduct or his inability to cross-examine a witness or to articulate an objection or argument. A perusal of the transcript demonstrates that the [applicant] was acutely aware of what he was doing, was a person of some intellect and was capable of making decisions and conducting the trial in what he believed were his best interests."

305 The Full Court had before it a series of reports by a consultant psychiatrist (Dr Milton) who had been retained by investigating police to express opinions about the psychiatric state of the applicant. These reports, made between February 1989 and September 1992, were tendered to and received by the Full Court in connection with the applicant's contention that there had been an abuse of process by the police's (presumably successful) attempts to destabilise the applicant to the point where he could not properly participate in the presentation of his defence at trial[358]. Nothing now turns on the basis for their reception. What is important is that they were before the Full Court.

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354 (1997) 76 FCR 9 at 34.

355 (1997) 76 FCR 9 at 35, 39.

356 (1997) 76 FCR 9 at 35-36.

357 (1997) 76 FCR 9 at 103.

358 (1997) 76 FCR 9 at 48.

306 As the Full Court recorded in its reasons, the reports expressed the author's opinions on the applicant's psychiatric state and his stability. Dr Milton said that certain material to which he referred "established beyond doubt that [the applicant] suffered from a paranoid disorder"[359], that he "manifests at the very least a severe form of the condition [known] as paranoid personality"[360], and that he "suffers from a serious emotional disorder … sufficiently severe as to be likely to qualify for a defence of diminished responsibility were he to face trial for Mr Winchester's murder"[361].

307 The reports also contained a number of other statements (to which the Full Court did not refer in its reasons) which bear upon the questions raised in this Court. They include references to the applicant commencing psychiatric treatment in December 1966 and continuing to receive treatment during the 1970s. One of his treating doctors or Dr Milton (the report does not make it clear which) is recorded as concluding that "[t]here is no evidence that [the applicant] was actually delusional, but for practical purposes he might just as well have been".

308 In February 1989, Dr Milton expressed the opinion (to which, as I have said, the Full Court referred) that the applicant "manifests a severe form of the condition known as Paranoid Personality". This must be contrasted with the views, which he recorded in January 1990, that the applicant "should now be regarded as psychotic (ie insane)" and that it may be that he "is not just a paranoid personality but actually suffers a paranoid psychosis and will eventually need to be institutionalised".

309 No doubt these conclusions must be balanced against other statements in Dr Milton's reports. In August 1990, he recorded his opinion that "[t]here was no suggestion of any schizophrenic thought disorder" and that the applicant "appears well in touch with reality, at least as he perceives it" and "is not delusional". But in September 1992, Dr Milton said that "I believe [the applicant] is, for practical purposes, psychotic, ie out of touch with reality" but that "it would be difficult to substantiate this in terms of the present Mental Health Act".

310 What, in light of these statements, and the record of the trial, could or should the Full Court have done?

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359 (1997) 76 FCR 9 at 47.

360 (1997) 76 FCR 9 at 47.

361 (1997) 76 FCR 9 at 48.

311 Section 24(1) of the *Federal Court of Australia Act* 1976 (Cth) provides:

> "Subject to this section and to any other Act, whether passed before or after the commencement of this Act (including an Act by virtue of which any judgments referred to in this section are made final and conclusive or not subject to appeal), the Court has jurisdiction to hear and determine:
>
> …
>
> (b) appeals from judgments of the Supreme Court of a Territory; …"

312 In *Chamberlain v The Queen [No 2]*[362], it was held that the Full Court of the Federal Court, on an appeal from the Supreme Court of a Territory under s 24(1)(b) of the *Federal Court of Australia Act*, has the power and the duty to set aside the verdict of a jury in a case where a miscarriage of justice has occurred. As was said by Gibbs CJ and Mason J in *Chamberlain*[363]:

> "The grant of a general appeal by s 24(1)(b) of the *Federal Court of Australia Act* was intended to enable the Full Court of the Federal Court to 'entertain any matter, however arising, which shows that the decision of the Court appealed from is erroneous': cf *Ah Yick v Lehmert*[364]. Since it cannot be supposed that the Parliament intended to make available to the citizens of the Territories an inferior sort of justice, or to require that the Federal Court should affirm a criminal conviction notwithstanding that it had reached the conclusion that a miscarriage of justice had occurred, it must be concluded that the power of the Federal Court, unfettered in terms as it is, was intended to extend at least as widely as those of the State Courts of Criminal Appeal, and thus to enable the Federal Court to set aside a verdict whenever it is of opinion that there has been a miscarriage of justice."

313 The common form of the statutes governing appeals to the State Courts of Criminal Appeal was based on s 4(1) of the *Criminal Appeal Act* 1907 (UK) which provided that:

> "The Court of Criminal Appeal on any such appeal against conviction *shall allow the appeal* if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the

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362 (1984) 153 CLR 521.

363 (1984) 153 CLR 521 at 529.

364 (1905) 2 CLR 593 at 601.

> appellant was convicted should be set aside on the ground of a wrong decision of any question of law *or that on any ground there was a miscarriage of justice*, and in any other case shall dismiss the appeal …"[365] (Emphasis added)

314 The present application focuses attention upon what is meant by the requirement that a Court of Criminal Appeal allow an appeal against conviction if "on any ground there was a miscarriage of justice".

315 That expression should not be given a narrow meaning[366]. Nice questions may arise about how to relate the reference to "miscarriage of justice" in the common form of provision for appeals against conviction and the later reference in the proviso to "substantial miscarriage of justice". Brooking JA has suggested, in *R v Gallagher*[367], that this is a riddle of the kind which Plutarch records caused Homer to die of chagrin. This problem must, however, be put aside for the moment. What is important, for present purposes, is that an appellate court is bound to set aside a verdict if there has been a miscarriage of justice.

316 That obligation arises if the appellant contends, and the court concludes from the material before it, that the jury should have entertained a reasonable doubt as to the guilt of the accused (what, for a time, was referred to as the "unsafe and unsatisfactory" ground)[368] but, of course, subject to the operation of the proviso, a Court of Criminal Appeal will also be bound to set aside a verdict if the appellant demonstrates that the trial was not fair. All sorts of circumstances may lead to the conclusion that there was not a fair trial. An accused may be denied a fair trial because his or her counsel is flagrantly incompetent[369] or because he or she does not have any legal representation[370]. There may be incidents which occur during trial that would make the continued trial unfair[371]. And so the examples might be multiplied.

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365 *Criminal Appeal Act* 1912 (NSW), s 6; *Crimes Act* 1958 (Vic), s 568; *Criminal Law Consolidation Act* 1935 (SA), s 353; *Criminal Code* (Q), s 668E; *Criminal Code* (WA), s 689; *Criminal Code* (Tas), s 402; *Criminal Code* (NT), s 411.

366 *Gallagher v The Queen* (1986) 160 CLR 392 at 395 per Gibbs CJ.

367 [1998] 2 VR 671 at 672.

368 *M v The Queen* (1994) 181 CLR 487.

369 For example, *R v Birks* (1990) 19 NSWLR 677.

370 *Dietrich v The Queen* (1992) 177 CLR 292.

371 cf *Webb v The Queen* (1994) 181 CLR 41.

317 The question that now arises is, however, of a different kind. It is one which goes, not to the fairness of the trial, but to whether there could be a trial at all. The miscarriage of justice said to have occurred is that there has been a trial where there should not have been.

318 The fact that neither party raised the issue in the Full Court did not relieve that Court of its separate obligation to consider it in this case. Once it is accepted, as in my view it must be, that the question of fitness stands outside the adversarial process of the criminal trial, the facts that the parties to the proceedings at trial did not raise it, and that the trial judge had no cause to raise it, do not lead to the conclusion that an appellate court, armed for the first time with material which suggests the accused may not be fit to plead, is not itself bound to raise that issue for consideration in the appeal. In this respect the question of fitness to plead is very different from other issues which may cause a trial to miscarry. Those issues must be raised by a party to the proceeding; the appellate court has no obligation (and may have no power) to do so of its own motion[372]. But that cannot be so in relation to the issue of fitness to plead, because the issue is one which raises for consideration the validity of the premise which underpins the conclusion that ordinarily it is for the prosecution to prove its case and for the accused to choose the ground or grounds on which to meet the accusation.

319 The Full Court was bound to set aside the conviction if there was a miscarriage of justice. And there is a miscarriage of justice if an accused is put to trial when that accused *may not* have been fit to plead and stand trial. That is, to adopt the terms used earlier, there is a miscarriage of justice if there is a real and substantial question to be considered about the accused's fitness. The conclusion that there is a miscarriage if the accused *may not* have been fit follows from the decisions in this Court[373] and in intermediate appellate courts[374] in which questions of fitness have been raised on appeal. There the question for the appellate court has been treated as being whether there was a question as to the accused's fitness, not whether the appellate court was persuaded that the accused was not fit. Only if the appellate court is affirmatively persuaded that no tribunal, acting reasonably, could conclude that the accused was not fit, may that court determine that no miscarriage of justice has occurred and only then could the question of fitness be put aside.

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372 *Gipp v The Queen* (1998) 194 CLR 106 at 123-129.

373 *Ngatayi v The Queen* (1980) 147 CLR 1 and *Kesavarajah* (1994) 181 CLR 230.

374 For example, *Khallouf* [1981] VR 360. See also *R v Dashwood* [1943] KB 1; *R v Podola* [1960] 1 QB 325.

320 A conclusion by a Court of Criminal Appeal that an accused *may not* have been fit to plead or stand trial requires the court to quash the conviction. There has been a trial where the accused may not have been fit and that is a miscarriage of justice. But the further question which then arises is, what consequential order should be made? If the appellate court were affirmatively persuaded that the material before it demonstrated that the accused was not fit, not only would the conviction be set aside, the appellate court would make such order as the trial judge should have made on such a finding. If, however, as would ordinarily be the case, the appellate court could not reach that affirmative conclusion, it would set aside the conviction and order a retrial, thus allowing the statutorily prescribed tribunal to determine the issue of fitness. This was what was done by this Court in *Kesavarajah* and it is what has often been done by intermediate courts[375] in cases where it was said that the trial judge should have concluded that there was a case for investigation of the accused's fitness.

321 In this respect the question of fitness does not differ from many cases which come before a Court of Criminal Appeal. In some cases of miscarriage of justice, the court will set aside the conviction and order a new trial; in others, it will set aside the conviction and order the entry of a verdict of acquittal. There is no reason to say of cases where fitness to plead first emerges as an issue on appeal that a Court of Criminal Appeal must itself try that issue to finality and decide whether unfitness is demonstrated.

322 Cases of fresh evidence offer a useful analogy in some, but not all, respects. If evidence which was not available at trial is adduced on an appeal against conviction, and if there is a significant possibility that a jury, acting reasonably, would have acquitted the accused if the evidence had been before it, the unavailability of that evidence amounts to a miscarriage of justice[376]. Miscarriage of justice is not confined to cases of demonstrated error at trial. Further, the assessment of evidence (at least evidence going to the issue of guilt) is ordinarily a matter for the tribunal of fact – the jury – not for the appellate court. It follows that, ordinarily, in such a case, the appellate court sets the conviction aside and orders a new trial. But, as Barwick CJ pointed out in *Ratten v The Queen*[377], there may be cases where the new evidence persuades the appellate court that the accused is innocent, or at least that a reasonable jury must

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375 For example, *Khallouf* [1981] VR 360.

376 *Gallagher* (1986) 160 CLR 392 at 399 per Gibbs CJ, 402 per Mason and Deane JJ; *Mickelberg v The Queen* (1989) 167 CLR 259 at 273 per Mason CJ, 275 per Brennan J, 301 per Toohey and Gaudron JJ.

377 (1974) 131 CLR 510 at 518.

entertain a doubt as to guilt[378]. In such a case the conviction would be set aside and a verdict of acquittal entered.

323 The analogy with cases of fresh evidence breaks down, in my view, in relation to the degree of persuasion the appellate court must have that the relevant issue is a live issue. (In a fresh evidence case, the issue is of guilt or innocence; in the present case, it is the issue of fitness to plead.) *Gallagher* held that there must be a "significant possibility" of acquittal, although Gibbs CJ warned against regarding the particular form of expression adopted as "an incantation that will resolve the difficulties of every case"[379]. How to formulate the quality which must attach to fresh evidence to ground a successful appeal was considered further in *Mickelberg*[380] but it is not necessary, for present purposes, to stay to consider details of that discussion. Fitness to plead, going as it does to whether there could be a trial, raises different issues from those that arise in relation to cases of fresh evidence. In cases of fresh evidence (where guilt has already been decided by a jury) there is the competing consideration of the desirability of treating jury verdicts as final. No such issue intrudes in relation to fitness to plead for, as I have said, the issue is not guilt or innocence of the charge or how the trial should have proceeded. The issue is whether there should have been a trial. Accordingly, I consider the appropriate test in the present case to be as I have stated earlier: must the Tribunal, if the question had been put to it and it had acted reasonably, have found the accused to be fit to plead and stand trial?

324 The material to which I have referred as being before the Full Court was such as to require the Full Court, of its own motion, to raise with the parties to the appeal to that Court whether there was a question about the fitness of the present applicant to plead and stand his trial. On the material to which I have referred, I do not consider it possible to say that a finding that the applicant was fit was inevitable.

325 No doubt the fact that neither the prosecution nor the defence suggested, either at trial or on appeal, that there was a question about the applicant's fitness to plead and stand his trial is a very important consideration suggesting that the applicant was fit. But three other matters must be considered. First, there was expert medical opinion that in 1992 the applicant suffered from a serious emotional or paranoid disorder that might be characterised by delusions. Secondly, there was the record of the way in which the trial had been affected by

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378 See, however, *Craig v The King* (1933) 49 CLR 429 at 439 per Rich and Dixon JJ.

379 *Gallagher* (1986) 160 CLR 392 at 399.

380 (1989) 167 CLR 259 at 273, 274, 301-302.

the applicant's conduct. Thirdly, there was the Full Court's own conclusion that some of that conduct had no reasonable or rational basis.

326 The Full Court not having raised the issue, the prosecution, as respondent to the appeal, had no opportunity of meeting the material which raises the question. In these circumstances the proper order for this Court to make is to grant special leave to appeal, treat the appeal as instituted and heard instanter and allowed. The order of the Full Court of the Federal Court should be set aside and the matter remitted to that Court for further consideration in conformity with the reasons of this Court.

327 CALLINAN J. The applicant in this case was convicted of murder in the Supreme Court of the Australian Capital Territory (Carruthers AJ) on 3 November 1995[381]. His appeal to the Full Court of the Federal Court of Australia (von Doussa, O'Loughlin and Cooper JJ) was dismissed on 25 June 1997.

328 He then challenged, unsuccessfully, the verdict on constitutional grounds in this Court. At the same time as he mounted his constitutional challenge he applied to this Court for special leave to appeal.

329 The applicant's application for special leave to appeal was initially based upon evidence that was sought to be tendered as fresh evidence. During argument a further question was raised, whether, by reason of what appeared in the transcript of the trial and what occurred during the hearing of the appeal to the Full Court of the Federal Court the Full Court should have considered whether an issue of fitness to plead arose.

330 The applicant's trial commenced on 16 May 1995. There were almost 7,000 pages of transcript and in excess of 300 documentary and other exhibits. More than 200 witnesses gave evidence. The trial before the jury lasted until 3 November 1995. The applicant, who gave evidence at his trial, denied any involvement in the killing.

331 It is the applicant's contention, that, from beginning to end, the applicant was unfit to plead and that the trial Court failed in its duty to have proper regard to that matter.

332 It may be taken as clearly settled at common law that no one may be tried for a crime unless that person is mentally competent to defend himself or herself, and further, is able to understand the proceedings and the nature of the evidence to be led[382].

333 It is also well settled that when a question arises as to the mental fitness of an accused to stand trial, it is the court's duty to determine the accused's fitness to be tried[383] and that the obligation to conduct such an inquiry exists

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381 Carruthers AJ passed sentence on 10 November 1995.

382 *R v Dashwood* [1943] KB 1 at 4; *R v Beynon* [1957] 2 QB 111 at 114, 116; *R v Presser* [1958] VR 45 at 46; *R v Podola* [1960] 1 QB 325 at 348; *R v Stipendiary Magistrate at Toowoomba; Ex parte McAllister* [1965] Qd R 195 at 217. See also *Ebatarinja v Deland* (1998) 194 CLR 444.

383 *Kesavarajah v The Queen* (1994) 181 CLR 230 at 244, 245 per Mason CJ, Toohey and Gaudron JJ.

notwithstanding that neither the prosecutor nor the defence seeks it[384]. The statement of principle in that form says little about a case such as this one in which the question did not arise because the accused expressly instructed that it not be raised, and in which for part of the trial he represented himself in circumstances aptly described by the Full Court of the Federal Court as chaotic[385].

334 Legislative recognition was given to the principles I have stated, the applicant submits, by the Australian Capital Territory legislature in enacting Pt XIA of the *Crimes Act* 1900 (ACT) and Pt VIII of the *Mental Health (Treatment and Care) Act* 1994 (ACT).

335 Had the issue been raised, that is, that there was a *question* as to fitness to plead, it would have been for the Tribunal established by the *Mental Health (Treatment and Care) Act* to arrive at one of the determinations referred to in s 68(2) of that Act. If the Tribunal be satisfied that an accused is fit to plead, the trial continues, or recommences[386]. If the Tribunal determine that a person is unfit to plead, but is likely to become fit within 12 months, the jury is to be discharged and the proceedings adjourned[387]. Provision for review of the accused's condition is to be found in s 69 of the *Mental Health (Treatment and Care) Act*.

336 If the Tribunal determine that a person is unfit to plead and is unlikely to become fit to plead within 12 months, a "special hearing" is to be held[388].

337 In support of his application, the applicant sought to tender a great deal of material. A question was raised at the outset, of the admissibility of much of it on the ground that it was hearsay or founded on hearsay. The respondent also took the stance that much of the material upon which the applicant wished to rely was not fresh in the relevant sense and was therefore inadmissible on that ground as well. A great deal of the questionable material was contentious. And because of its contentious nature the respondent's counsel submitted that if the Court were minded to receive it, he should be entitled to cross-examine the deponents to it. The primary position of the respondent was that the decision and reasoning of

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384 *Kesavarajah v The Queen* (1994) 181 CLR 230 at 244; *R v Presser* [1958] VR 45 at 46; *R v Podola* [1960] 1 QB 325 at 349-350.

385 (1997) 76 FCR 9 at 32-34.

386 *Crimes Act*, s 428F.

387 s 428G(2)(c).

388 See ss 428I, 428J, 428K, 428M.

this Court in *Mickelberg v The Queen*[389] precluded the reception of any evidence by this Court, whether on the hearing of an application for special leave, or an appeal. As to this, the applicant made three submissions: that *Mickelberg* did not foreclose the possibility of the reception of fresh evidence on the hearing of an application for special leave; alternatively, if it did, then *Mickelberg* should be reconsidered and overruled; and, in any event *Mickelberg* was distinguishable on other grounds.

338 In determining whether to grant special leave, this Court is not yet exercising any appellate jurisdiction. The jurisdiction bears some resemblance to the jurisdiction which the Court exercises in its original jurisdiction, in that it may have to determine some factual and, on occasions, mixed factual and legal questions, but the ambit of those questions is defined, and is defined exclusively by s 35A of the *Judiciary Act* 1903 (Cth)[390]. Accordingly, although the factual matters that are relevant to these questions are often non-contentious, the Court may sometimes need to receive evidence of facts relied on to satisfy the criteria for a grant of special leave prescribed by s 35A of the *Judiciary Act*. Evidence tendered on those issues to be received should be in an admissible form.

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389 (1989) 167 CLR 259.

390 Section 35A provides:

> "In considering whether to grant an application for special leave to appeal to the High Court under this Act or under any other Act, the High Court may have regard to any matters that it considers relevant but shall have regard to:
>
> (a) whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law:
>
> (i) that is of public importance, whether because of its general application or otherwise; or
>
> (ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and
>
> (b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates."

339 McHugh J (speaking for a Court constituted by himself, Kirby and Callinan JJ) in *Deputy Commissioner of Taxation v Woodhams*[391] said this, meaning, by "affidavit evidence", evidence by affidavit in an admissible form:

> "We would also wish to make it clear that if a party for special leave wishes to rely on facts to show the importance of consequences of the case beyond what is plain from the record, those facts must be proved by affidavit evidence."

340 At present *Mickelberg* does stand in the way of the reception of fresh evidence on the hearing of any appeal by the Court. It would be futile to grant special leave on the basis that fresh evidence is available for consideration by this Court if the Court has no jurisdiction to receive and act on such evidence on appeal if leave be granted.

341 Some discussion of the material upon which the applicant initially sought to rely in support of the argument that *Mickelberg* should be reopened is necessary. It fell into different categories: some of it was no more than matter which emerged during, and was apparent from the transcript of the evidence, submissions and statements made during the trial, that is to say, matter that was on the record and to which this Court clearly might have regard. No issue arises as to the use of that.

342 The balance of the material may generally be divided into three categories. One of these consisted of evidence of the legal representatives of the applicant at his trial as to his instructions to them, manifestations of bizarre behaviour that they observed at that time, and some observations that they made as lay people of his apparent mental state[392]. I will refer to this category of evidence as the lawyers' evidence.

343 The next category of material sought to be tendered was contained in psychiatrists' reports and recounted what others, principally the applicant, had told these experts. I will refer to this as the hearsay evidence. No affidavit was filed by the applicant himself.

344 The last category of evidence included the expert opinions of the psychiatrists who necessarily placed much reliance upon not only the lawyers' evidence but also the hearsay evidence.

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391 Transcript of proceedings, special leave application, 14 May 1999 at 10.

392 See *Melbourne v The Queen* (1999) 73 ALJR 1097 at 1135-1136 per Callinan J; 164 ALR 465 at 517.

345 I will say something in a preliminary way about the hearsay evidence first. In my opinion it is unlikely that there would be any basis upon which it could be received in its present form, either upon the application for special leave or on appeal. Sometimes there are misconceptions about the evidence that experts are entitled to give. One of these is that experts may always swear as to the issue[393]. Another is that experts are allowed to give hearsay evidence. So much of the psychiatrists' reports in this case as recount what the applicant told them (apart from any bizarre statements being themselves manifestations of mental infirmity[394]) would seem fairly clearly to be hearsay. The objection to it would appear therefore to be well founded but I need not, having regard to the ruling that the Court made and to which I will refer, finally resolve the objection. If it were admissible, it is difficult to see any reason why the respondent should not be permitted to cross-examine on, and to tender evidence in answer to it.

346 Much of what the applicant and some others have told the experts, none of whom have sworn affidavits, is the foundation for the psychiatrists' opinions about the applicant's mental condition. If the basis upon which the opinions are formed is evidentially unsound then the opinions also could neither be received nor be of any weight or value if they were, unless there is some statutory basis for their reception[395].

347 The lawyers' evidence was tendered in a form which appears to be admissible. The only purpose of receiving the lawyers' evidence, as well as any other evidence (save for such of it as relates to the criteria for the grant of special leave) would be to assess it to decide whether, if it were led at a trial there would be a significant possibility of a result different[396] from that which was reached at the original trial, of guilt of murder. Not only must a person seeking to tender such evidence on an appeal make out such a significant possibility, he or she must also demonstrate that the evidence is fresh evidence[397], in the relevant sense.

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393 See *Naxakis v Western General Hospital* (1999) 73 ALJR 782 at 803 n 127 per Callinan J; 162 ALR 540 at 569.

394 See *Melbourne v The Queen* (1999) 73 ALJR 1097 at 1135-1137 per Callinan J; 164 ALR 465 at 517-518.

395 There was no argument whether the hearsay evidence should be admitted under the *Evidence Act* 1995 (Cth) but in any event the provisions of that Act (see s 67) relating to notice do not, so far at least, appear to have been satisfied.

396 *Gallagher v The Queen* (1986) 160 CLR 392 at 399 per Gibbs CJ.

397 *Wollongong Corporation v Cowan* (1955) 93 CLR 435 at 444 per Dixon CJ.

348 I am of the opinion that the sort of evidence which the applicant may be able to adduce (if put in proper form) would probably be capable of being classified as fresh evidence. Ordinarily evidence will only be fresh if it could not with reasonable diligence have been discovered by the litigant or his legal advisors[398]. Subject to one qualification, diligence on the part of the advisors at the trial would be unlikely to have enabled them to gain access to and lead evidence of, the fact of the applicant's mental infirmity. His express instructions prevented that. The qualification is that the applicant was in possession of reports by Dr Milton, a psychiatrist, for part of the trial[399]. It is not clear whether his lawyers when they were representing him also saw those reports. However, if they did, they would have been forbidden to use them to raise any issue of unfitness by the applicant. And his own mental infirmity (if it truly existed) was the very thing which operated to prevent its ascertainment by expert and other evidence and disclosure of it to the Court. Such evidence appears therefore to be capable literally and substantively of qualifying as fresh evidence.

349 After some inconclusive debate about the admissibility of the material to which I have referred the Court made a ruling as follows[400]:

> "Senior counsel for the applicant has sought to read in support of the application for special leave to appeal from the decision of the Full Court of the Federal Court of Australia a number of affidavits being the affidavits numbered 12, 13, 14, 15, 16, 17, 18, 19, 23 and 24 in the index to the application book which appears on page 2 of volume 3. Objection has been taken to that evidence on a number of grounds. In addition, senior counsel for the respondent has indicated that if the evidence were received, he would seek to cross-examine the deponent of at least one of the affidavits.
>
> Before ruling on the admissibility of any of that evidence and before, if necessary and appropriate, hearing any cross-examination, the Court will hear full argument from the parties and the interveners on an anterior issue which arises in the case. It has been foreshadowed on behalf of the respondent and the interveners that it will be argued that special leave to appeal should be refused on the ground that a grant of special leave would be futile by reason of the decision of this Court in *Mickelberg v The Queen*.

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398 *Giannarelli v Wraith* (1988) 165 CLR 543.

399 (1997) 76 FCR 9 at 46: "The Crown supplied a copy of the Milton reports to the appellant either on 17 August 1995, the day when their existence was disclosed by Mr Jackson, or the following day."

400 Transcript of proceedings, 25 March 1999 at 11-12.

Senior counsel for the applicant has foreshadowed a number of arguments to the contrary of that proposition, including an argument to the effect that this Court should reconsider *Mickelberg v The Queen*.

The course that we will take today is to hear argument on that anterior issue relating to *Mickelberg v The Queen*, and we do not expect today that we will proceed further to hear or deal with arguments concerning the admissibility of evidence."

350 I come then to the substantive issues that were argued. Appellate courts rarely conclusively determine a case on fresh evidence. What appellate courts regularly do is form a view about the plausibility, relevance and likely force of the evidence and send the case back for a retrial if the fresh evidence satisfies the appropriate tests[401]. There may be exceptions in the case of civil proceedings

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401 For the relevant civil test see *Wollongong Corporation v Cowan* (1955) 93 CLR 435 at 444 per Dixon CJ:

> "If cases are put aside where a trial has miscarried through misdirection, misreception of evidence, wrongful rejection of evidence or other error and if cases of surprise, malpractice or fraud are put on one side, it is essential to give effect to the rule that the verdict, regularly obtained, must not be disturbed without some insistent demand of justice. The discovery of fresh evidence in such circumstances could rarely, if ever, be a ground for a new trial unless certain well-known conditions are fulfilled. It must be reasonably clear that if the evidence had been available at the first trial and had been adduced, an opposite result would have been produced or, if it is not reasonably clear that it would have been produced, it must have been so highly likely as to make it unreasonable to suppose the contrary."

Statements to a similar effect appear in the judgment of Dixon J in *Orr v Holmes* (1948) 76 CLR 632 at 641:

> "[N]ew evidence must have so high a probative value with reference to an issue essential to the cause of action or defence as the case may be that it cannot reasonably be supposed that had the evidence been adduced the issue would not have been found for the party seeking the new trial."

The criminal test is less stringent. It was stated by this Court in *Gallagher v The Queen* (1986) 160 CLR 392 at 402 per Mason and Deane JJ in these terms:

> "The appellate court will conclude that the unavailability of the new evidence at the time of the trial involved such a miscarriage if, and only if, it considers that there is a significant possibility that the jury, acting reasonably, would have acquitted the applicant of the charge if the new evidence had been before it in the trial."

when the evidence both at the trial, and fresh on appeal is entirely documentary, or, in a criminal case when the fresh evidence is so persuasive that the appellate court may feel itself entitled or bound to quash the verdict without ordering a retrial. However almost always the appropriate course for an appellate court to take is to order a retrial, so that the court at first instance may hear all the evidence and weigh the fresh evidence against the other evidence in the one hearing.

351 *Mickelberg* was not the first case in which this Court has held that it should not receive fresh evidence on appeal. The course of previous authority was discussed by Mason CJ in *Mickelberg*[402]:

> "The authorities in this Court stand clearly for the proposition that the reception of fresh evidence is not a part of the appellate jurisdiction of the Court. The applicants challenged the reasoning on which these authorities are based on the ground that the reasoning depended on old English authorities which have been overtaken by more recent decisions. The applicants made the point that, at a time when an appeal lay from this Court to the Privy Council, the Court was influenced by the circumstance that the Court of Appeal and the House of Lords did not receive fresh evidence. As it is now clearly established that both the Court of Appeal and the House of Lords receive fresh evidence, there has been a material development which justifies reconsideration of the existing authorities.
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> In *Ronald v Harper*[403] this Court unanimously rejected the submission that, on an appeal from the Full Court of the Supreme Court of a State, it had jurisdiction to receive further evidence in support of an application for a new trial. Griffith CJ, in the course of concluding that the Court had no such jurisdiction, referred to *Flower v Lloyd*[404], where the Court of Appeal decided that it had no power to receive fresh evidence and James LJ stated that it would be a very dangerous practice to allow such a thing. Griffith CJ also referred to *Birch v Birch*[405] where the Court of Appeal expressed the same opinion. But these references were not central to the Chief Justice's reasoning and were designed to make the point of policy that it would be undesirable for the Court to exercise such a power. The other members of the Court made no reference to the position of the Court of Appeal and confined themselves to the jurisdiction of the High Court under the

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402 (1989) 167 CLR 259 at 266-268.

403 (1910) 11 CLR 63.

404 (1877) 6 Ch D 297; (1879) 10 Ch D 327.

405 [1902] P 130.

Constitution. Barton J[406] was 'strongly disposed' to think that there was no such jurisdiction. O'Connor J observed[407]:

> 'It is abundantly clear from s 73 of the Constitution that the High Court can review a judgment of a State Court only by way of appeal. Acting on that view the Commonwealth legislature, in equipping this Court for the discharge of its duty, has recognized its authority to act in respect of the judgments of State Courts exercising State jurisdiction in no other way than by appeal. To determine as a Court of first instance the facts upon which these new grounds of appeal rest would be obviously to exceed the jurisdiction vested in this Court by the Constitution.'

Griffith CJ also stated that in any event it was clear that the primary judgment 'would not be set aside unless there were, at least, a reasonable probability that the new evidence sought to be given would make a difference in the result'[408]. However, this was neither a statement of principle nor the formulation of a test for the receiving of fresh evidence, but merely an indication that the plaintiff had not been harmed by the Court's lack of jurisdiction.

Since *Ronald v Harper*, this Court has consistently maintained that it lacks power to receive fresh evidence, whether due to constitutional limitation or to the absence of express statutory authority[409].

Underlying this uninterrupted stream of authority are two propositions. The first is that an appellate court, in hearing an appeal in the proper sense of the term, is called upon to redress error on the part of the court below. In deciding whether there was error, the appellate court looks to the materials which were before the court below. It is otherwise if, according to the statute governing the jurisdiction of the appellate court, the appeal is by way of rehearing. Then the court of appeal is not restricted to

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406 (1910) 11 CLR 63 at 82.

407 (1910) 11 CLR 63 at 84.

408 (1910) 11 CLR 63 at 78.

409 See *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 85 per Gavan Duffy CJ and Starke J, 87 per Rich J, 109-111 per Dixon J, 113 per Evatt J; *Davies and Cody v The King* (1937) 57 CLR 170 at 172 per Latham CJ; *Grosglik v Grant (No 2)* (1947) 74 CLR 355 at 356-357 per Latham CJ, Rich, Dixon, McTiernan and Williams JJ; *Crouch v Hudson* (1970) 44 ALJR 312 per Barwick CJ, McTiernan, Menzies, Windeyer and Owen JJ.

the materials on which the court below gave its decision and may receive additional evidence, including evidence as to matters which have taken place subsequent to that decision. Dixon J pointed to this difference in *Victorian Stevedoring*[410] when he contrasted the appellate functions of the Judicial Committee and the English Court of Appeal. The Judicial Committee's prerogative jurisdiction was to decide whether the judgment complained of was right when given on the materials before the court below[411]. The appeal to the English Court of Appeal, on the other hand, was by way of rehearing[412] and enabled that Court to receive further evidence when hearing an appeal. Thus, the Court was entitled and ought to hear the case as at the time of rehearing[413]. But in this respect the jurisdiction of the Court of Appeal differed from that of a court hearing an appeal in the strict and proper sense of the term. In passing I note that the Court of Appeal's discretion to receive further evidence has been much discussed in England[414]. But that discussion throws no light on the answer to the question presently under consideration."

352 And later his Honour said[415]:

"The second basic proposition underlying the stream of authority already mentioned is that s 73, in conferring appellate jurisdiction on this Court, contains nothing to suggest that the Court is 'to go beyond the jurisdiction or capacity of the Court appealed from', to quote the words of Dixon J in *Victorian Stevedoring*[416]. Indeed, by differentiating between original and

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410 (1931) 46 CLR 73 at 109.

411 *Ponnamma v Arumogam* [1905] AC 383 at 388; *Donegani v Donegani* (1835) 3 Knapp 63 at 88 [12 ER 571 at 581]; but cf *Judicial Committee Act* 1833 (Imp) (3 & 4 Will IV c 41), s 8.

412 See *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 108-109.

413 *Attorney-General v Birmingham, Tame, and Rea District Drainage Board* [1912] AC 788 at 801-802.

414 See *Curwen v James* [1963] 1 WLR 748; [1963] 2 All ER 619; *Murphy v Stone-Wallwork (Charlton) Ltd* [1969] 1 WLR 1023; [1969] 2 All ER 949; *Mulholland v Mitchell* [1971] AC 666; *McCann v Sheppard* [1973] 1 WLR 540; [1973] 2 All ER 881.

415 (1989) 167 CLR 259 at 269.

416 (1931) 46 CLR 73 at 109.

> appellate jurisdiction and by making different provisions for their exercise, Ch III of the Constitution reinforces the notion that, when it refers to the appellate jurisdiction, it is speaking of appeals in their true or proper sense."

353 Similar observations were made by Brennan J[417] and Toohey and Gaudron JJ[418].

354 Although in this case the first appeal was from the Supreme Court of the Australian Capital Territory to the Full Court of the Federal Court I do not think any relevant distinction can be drawn between an appeal to this Court from a State court and an appeal from the Full Court of the Federal Court sitting on an appeal from the Supreme Court of the Territory.

355 Against the formidable array of authority to which Mason CJ referred stand only the dissenting judgment of Deane J in *Mickelberg* and possibly the decision in *Buzacott & Co Ltd v Cyclone Proprietary Ltd*[419]. However the latter suffers from the defect that the Court there was not referred to the earlier decision in *Ronald v Harper*[420] and Mr Latham, who was counsel for the successful appellant in *Buzacott* did not even refer to *Buzacott* when giving his contrary decision as a Justice of this Court in *Davies and Cody v The King*[421].

356 With the greatest of respect to those distinguished jurists who have spoken to the contrary I prefer the reasoning of Deane J in dissent in *Mickelberg*. Because I would wish to add very little to it, I will merely restate relevant parts of it[422]:

> "The modern appeal in the strict sense has long escaped many of the artificial constraints of the old proceedings in error. Conceptually, the distinction between the two kinds of appeal has commonly been seen as being that the appeal by way of rehearing involves the appellate court in making such order as ought to be made according to the state of things at the time it makes the order, whereas in an appeal in the strict sense the appellate court is confined to the question whether 'the order of the Court

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417 (1989) 167 CLR 259 at 274-275.

418 (1989) 167 CLR 259 at 297-299.

419 (1920) 27 CLR 286.

420 (1910) 11 CLR 63.

421 (1937) 57 CLR 170.

422 (1989) 167 CLR 259 at 278-279.

from which the appeal is brought was right on the materials which that Court had before it[423]. Helpful though that distinction may be as a broad generalization, it is, for two reasons, unacceptable as a basis for confining the appellate jurisdiction conferred upon this Court in a way which would exclude all power to receive fresh evidence. The first reason, which is developed below, is that the common law procedures for correcting error or miscarriage, while not extending to an appeal by way of rehearing, were not confined to the appeal 'in the strict sense' which can be loosely related to the old proceedings in error. The second reason, which is also developed below, is that, in any event, there is no justification for confining the constitutional conferral of a general appellate jurisdiction upon this Court by reference to what could or could not be done, under traditional procedures, before the existence of any general appellate jurisdiction."

357 His Honour went on to say[424]:

"As has been said, however, there is, in any event, no justification for the approach that ancient procedures should be allowed to reach from the past to fetter with their inadequacies the ability of this Court to do justice in the exercise of its general appellate jurisdiction under the Constitution. The notion that an appellate court should be powerless to do justice in an individual case unless it can identify specific 'error' on the part of the court below should not be allowed to survive the days when appellate procedures were seen as involving an element of affront to the jurisdictional aspirations or the dignity of the court below. Plainly, a modern court exercising general appellate jurisdiction is empowered, even on an appeal in the strict sense from an intermediate court of appeal, to set aside the judgment below on a ground not previously raised if the circumstances of the case are such as to justify that exceptional course[425]. In such a case, there may well be no error at all on the part of the courts below in that those courts may have been both entitled and constrained to dispose of the case on the actual issues of fact and law which the parties had, by their pleadings or their conduct of the case, identified. Likewise, if the case is one in which it would be an affront to justice or common sense for the Court to decline to receive further evidence on an appeal, the power to receive such evidence should be

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423 *Ponnamma v Arumogam* [1905] AC 383 at 390; and see, generally, *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 108-109.

424 (1989) 167 CLR 259 at 280-281.

425 See, for example, *Chalmers Leask Underwriting Agencies v Mayne Nickless Ltd* (1983) 155 CLR 279 at 283.

accepted as an incident of the general grant of appellate jurisdiction contained in s 73."

358 His Honour's conclusion is set out in this passage[426]:

"The main – and, in my view, the only strong – consideration favouring a conclusion that this Court lacks any power at all to receive further evidence on an appeal from a State Supreme Court is to be found in authority. There are cases in this Court which provide clear support for the proposition that the appellate jurisdiction conferred by s 73 carries with it no power whatsoever to receive fresh evidence. However, in none of those cases was it necessary for the purpose of deciding the particular case to lay down a broad and unqualified rule that the Court lacked all power to receive further evidence in the performance of its appellate functions. In so far as general statements to that effect in those cases were based on preconceptions about reserved 'State judicial power', they were, as I have indicated, based on a mistaken foundation. In so far as such statements were based on the view that the English Court of Appeal or the House of Lords had no power to hear further evidence on appeal[427], they are contrary to the subsequent decisions of those courts. In so far as those statements were based on a perceived need to identify actual error by the court below on the material before that court, they were based on an unduly narrow perception of the function of the appellate process in a modern context. In so far as those statements were based on the distinction between appellate jurisdiction and original jurisdiction[428], they appear to me, with due respect, to miss the point. If further evidence is received as an integral part of the appellate procedure, it will not be received in the exercise of original jurisdiction. Even if its receipt did involve the exercise of 'original' jurisdiction, the question would remain whether the power to exercise such original jurisdiction was an incident of the grant of appellate jurisdiction. Thus, evidence that an applicant for special leave to appeal from an order affirming his conviction was about to be hanged would undoubtedly be received by the Court in the exercise of its incidental power to preserve the subject matter, 'human or not', of an appeal pending decision[429]. It is simply not to the point to assert that that incident of the grant of appellate

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426 (1989) 167 CLR 259 at 284-285.

427 See, respectively, *Ronald v Harper* (1910) 11 CLR 63 at 78 and *Scott Fell v Lloyd* (1911) 13 CLR 230 at 234.

428 See *Ronald v Harper* (1910) 11 CLR 63 at 84.

429 See *Tait v The Queen* (1962) 108 CLR 620 at 623.

> jurisdiction under s 73 involves the exercise of original, rather than appellate, jurisdiction."

359 Particularly compelling in my opinion is his Honour's statement that the modern appeal in the strict sense has long escaped many of the artificial constraints of the old proceedings in error.

360 In my view the last paragraph of s 73 of the Constitution of itself is almost sufficient to compel a different conclusion from that of the majority in *Mickelberg*:

> "Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court."

361 I read the paragraph as referring, among other things, to the manner and nature of exercise of the Court's appellate jurisdiction and as evincing an intention that this Court exercise its appellate jurisdiction in the same way as the Judicial Committee might exercise its jurisdiction at the time of Federation.

362 I find it difficult to accept that the subject matter of the last paragraph of s 73 is identical with that of the second last paragraph in which quite different language "exception or regulation" is used[430]. That paragraph provides as follows:

> "But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council."

363 The Convention Debates[431] do not assist in elucidating the meaning of the last paragraph of s 73. However it is inconceivable that the lawyers who participated could have been unaware that as early as 1833 the Privy Council had been given virtually unlimited power to receive evidence on the hearing of an appeal[432].

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430 But see *Smith Kline & French Laboratories (Aust) Ltd v The Commonwealth* (1991) 173 CLR 194 at 208-210.

431 *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 20 April 1897 at 967-968.

432 *Judicial Committee Act*. See especially ss 7, 8 and 9.

364 Deane J in *Mickelberg* in his discussion of s 73 reached the same conclusion as I have. His Honour said[433]:

> "Reference to the Judicial Committee of the Privy Council is relevant in another respect. Section 73 was clearly intended to confer upon the Court an equivalent jurisdiction to that exercised by the Privy Council on appeals from the Supreme Courts of the Australian Colonies prior to Federation. Thus, the penultimate paragraph of s 73 precludes the Parliament from preventing 'the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council'. …
>
> At the establishment of the Constitution, the Privy Council had long enjoyed the power to receive further evidence on (inter alia) appeals from the Supreme Courts of the Australian Colonies: see the *Judicial Committee Act*, ss 7 and 8. As has been seen, the Judicial Committee has itself related the power to receive further evidence on an appeal to the traditional common law power to set aside a verdict on the grounds of further evidence[434]. The power has been said to be a 'discretionary' one which 'in general' should only be exercised in cases where the evidence is 'fresh' or newly available and where 'the fresh evidence, if true, would have had, or would have been likely to have had, a determining influence on the court below'[435]. Presumably, conformably with the approach of the House of Lords, the Judicial Committee's power to receive further evidence would also be exercised in other exceptional cases where justice or common sense demands that further evidence be received[436]. It is highly unlikely that it would have been intended that the grant of jurisdiction contained in s 73 should be confined in a way which would make the powers of this Court on appeals from State Supreme Courts significantly more restricted than were the powers of the Privy Council on such appeals at the time of the establishment of the Constitution. So to confine the appellate powers of the Court would, during the period in which appeals lay from the Court to the Privy Council, have resulted in the bizarre situation that the Court could not receive further evidence on an appeal to it from the Full Court of the Supreme Court of a State but the Privy Council could receive that further evidence on a further appeal from this Court to it. That would mean that

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433 (1989) 167 CLR 259 at 283-284.

434 *Andrew v Andrew* [1953] 1 WLR 1453 at 1454 (practice note).

435 *Mulholland v Mitchell* [1971] AC 666.

436 cf *Mulholland v Mitchell* [1971] AC 666.

this Court would be required to deal with the appeal to it on a factual basis which could be rendered hypothetical by the Privy Council receiving the further evidence which this Court was powerless to receive."

365 It is interesting that in *Ronald v Harper*[437] although Griffith CJ rejected the submission that the Court could and should receive fresh evidence on appeal, his Honour was obviously concerned to show that that rejection did not there involve any injustice, for, at some length he went on to consider the evidence tendered and to analyse it to demonstrate that it could not have produced a different result if it were to be received[438].

366 Barton J[439] adopted a similar approach to that of the Chief Justice and also went on to analyse (as did O'Connor J) the evidence. O'Connor J[440] did refer to s 73 of the Constitution but made no attempt to explore the meaning of its last paragraph and made no reference to the power of the Privy Council, available since 1833, to receive fresh evidence on appeal. Neither the short note in the report of the argument nor any of the judgments refers to that power of the Privy Council.

367 This Court would probably practically never be called upon to make a final decision on the basis of fresh evidence. All that the Court would in practice do would be to assess its cogency and persuasiveness for the purpose of deciding, whether to order a new trial, or that the intermediate court of appeal consider the fresh evidence, the latter being a course of a kind contemplated by Griffith CJ with equanimity "in the interests of justice" in *Scott Fell v Lloyd*[441] after his Honour had reaffirmed what he had held in *Ronald v Harper*[442].

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437 (1910) 11 CLR 63.

438 See (1910) 11 CLR 63 at 78-79 for his Honour's statement that the analysis was *obiter*.

439 (1910) 11 CLR 63 at 82-83.

440 (1910) 11 CLR 63 at 84.

441 (1911) 13 CLR 230 at 234. Although Griffith CJ referred to the power of the Judicial Committee to review further evidence on appeal accorded to it by statute he made no reference to s 73 of the Constitution.

442 (1910) 11 CLR 63.

368 This is, as I have pointed out, the usual practice of appeal courts after considering fresh evidence[443]. In *Murphy v Stone-Wallwork (Charlton) Ltd*[444], no new trial was ordered following the reception of fresh evidence only because the parties had agreed to an assessment of damages, if the appeal were to succeed[445]. It should be kept in mind that historically strictly there was no appeal from the verdict of a jury; all that was available was an application to a higher court for a retrial[446]. In *Australian Iron and Steel Ltd v Greenwood*, Windeyer J explained the reasons for this[447]:

> "As error did not lie to correct a verdict, and as attaint was virtually obsolete after *Bushell's Case*[448], the only means the courts had of controlling juries' verdicts was by ordering new trials. By the middle of the seventeenth century the practice had become well established[449]."

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443 See, for example, *Malpas v Malpas* (1885) 11 VLR 670; *R v Ennor* [1916] VLR 376; *Young v Symons* [1972] VR 611; *Goktas v Government Insurance Office (NSW)* (1993) 31 NSWLR 684. See also *Quade v Commonwealth Bank of Australia* (1991) 27 FCR 569 where, in a trade practices case, fresh evidence was received, and a retrial was ordered. The appellants did not submit that the Court should order a verdict in their favour.

444 [1969] 1 WLR 1023; [1969] 2 All ER 949.

445 Also relevant to that case were the various provisions which authorised the Court to hear the case by way of rehearing, allow the tender of fresh evidence and to make any order or give any direction which ought to have been made or which the nature of the case requires. The effect of these provisions has been described as follows:

> "[T]he Court has power to give any judgment and to make any order which ought to have been made, and to make such further or other order as the Court may think fit": *Attorney-General v Birmingham, Tame, and Rea District Drainage Board* [1912] AC 788 at 801 per Lord Gorell.

In New South Wales the relevant provision is s 75A of the *Supreme Court Act* 1970 (NSW). The section has no application to appeals arising out of jury trials: s 75A(2)(c).

446 *Musgrove v McDonald* (1905) 3 CLR 132 at 148.

447 (1962) 107 CLR 308 at 315.

448 (1670) Vaughan 135 [124 ER 1006].

449 *Bright v Eynon* (1757) 1 Burr 390 [97 ER 365].

369 The continuing force of *Mickelberg* gives rise to this anomaly. Assume here that persuasive fresh evidence had become available the moment before the intermediate court of appeal was to pronounce its final judgment. It is likely that it would then have been received and acted on by the Court, and, on appeal from that Court to this one, acted upon here in considering the correctness of the decision of the intermediate court if special leave had been granted. However if the evidence became available immediately after the pronouncement of the judgment of the intermediate court of appeal the applicant might be left to such remedies only as the Executive in its discretion might permit him under s 475 of the *Crimes Act*[450].

370 The tendency in this Court seems to be towards applying current principles to the grant, or the withholding of prerogative writs pursuant to s 75(v) of the Constitution[451]: the Court equally should receive fresh evidence on appeal in an appropriate case in a manner which reflects the generally ample nature of the modern appeal and also, the amplitude of the powers of the Privy Council exercisable since 1833.

371 It follows that I would, if a foundation could be laid by the tender of evidence in proper form and of sufficient force, (subject to the respondent's right to test that evidence) be prepared to grant the application for special leave to appeal on the ground that the case raised the important question, whether *Mickelberg's* case should be reconsidered.

372 There is no majority view to a similar effect. I move therefore to the other arguments that the applicant advanced.

373 It should be said at the outset of the consideration of these that the applicant's conduct and attitude to his trial and appeal placed almost everyone involved in this case in an almost impossible situation. No valid criticism can be made of any of them. Carruthers AJ never, for example read what I will refer to as the Milton reports because they were not received in evidence at the trial[452].

374 The summary of the Milton reports provided by Kirby J in his reasons relieves me of the task of detailed reference to them. The respondent had custody of those reports, and provided them to the applicant's lawyers, but quite properly did not seek to rely on them at trial because, presumably, of their highly

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450 See also *Crimes Act* 1900 (NSW), Pt 13A.

451 cf *Abebe v The Commonwealth* (1999) 73 ALJR 584 at 623 per Gummow and Hayne JJ; 162 ALR 1 at 53.

452 (1997) 76 FCR 9 at 49.

prejudicial content. The applicant's lawyers were strictly forbidden reliance on them by the applicant, as a basis for any contention that he might be unfit to plead. As will appear however the Full Court, unlike the judge and jury at the trial did have the Milton reports before them. But it was not there argued, as it is now, that those reports, either alone or in combination with behaviour as recorded in the trial transcript, presented any question of fitness to plead which the Full Court should have pursued. There was no ground of appeal raising such a question, although, as will appear, the Milton reports were before, and were referred to by, the Full Court.

375 However, that is not the end of the matter, because, the applicant argues, notwithstanding the absence of a relevant ground of appeal, or any argument by the applicant, that he was, or might have been unfit to plead, there was material before the Court, which (according perhaps to counsels of perfection in hindsight) should have alerted the Court to the possible existence of such a question.

376 It is necessary therefore to consider the material (other than the so-called fresh evidence) relied upon, for two purposes: to decide whether all or any of that material was properly before the Court; and, if it was, whether it was sufficient to give rise to the possibility that the applicant might have been unfit to plead at his trial.

377 The recorded manifestations of allegedly bizarre behaviour were undoubtedly properly before the Full Court to the extent that they could be discerned from the transcript at the trial. The Milton reports did, albeit in a somewhat unusual fashion, find their way into evidence. The starting point is the notice of appeal of the applicant in the Full Court. The relevant grounds are 1(d), 11 and 13, which I set out below[453]:

> "1(d). the failure of the trial judge to direct the jury regarding the appellant's conduct during the trial.
>
> …
>
> 11. The trial judge erred in admitting evidence of enhanced tape recordings alleged transcripts of conversation by the Appellant.
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> …

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453 (1997) 76 FCR 9 at 38.

13. The inability of the Appellant to adequately prepare his defence and instruct Counsel at trial by reason of actions by the Prosecution resulted in [a] miscarriage of justice."

378 It should be immediately stated that those grounds were not designed to raise the question that the applicant now seeks to raise, and that they were not the foundation for any such argument in the Full Court. They were intended to provide a foundation for another argument which in part at least relied upon material contained in the Milton reports.

379 The Milton reports were not tendered at the trial but they were marked for identification and remained in the custody of the Court[454]. That occurred because the applicant personally had cross-examined a Crown witness Detective Sergeant Jackson about surveillance of him on behalf of the Police. In the course of that cross-examination evidence was adduced that the police investigators had consulted Dr Milton and had obtained advice based on their own observations of the applicant, and observations of others, and tape recordings of statements by the applicant, as to (among other things) any measures that should be taken to protect members of the public against any violent actions on his part. After argument during the appeal with respect to the Milton reports and the rejection of an affidavit to which they were annexed, von Doussa J said:

"They may not have been tendered but they are there. They were part of the documentation of the court. We do not need an affidavit to get them."

380 Further discussion ensued during which counsel for the respondent made a critically important concession. He said:

"If my learned friend wishes to tender them on the appeal I would not object to their tender, except upon the basis that I have already outlined as to their relevance. But I would not take any point about their identification; after all, they did come from those who instructed me."

381 Subsequently von Doussa J (presumably for the Court) stated that grounds 1, 11 and 13 would be argued on the transcripts together with the Milton reports:

"VON DOUSSA J: Mr James, we had better deal with the information we are going to have before we have the argument.

MR JAMES: The transcripts, your Honours, and the MFIs comprising Dr Milton's reports I cannot see - - -

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454 (1997) 76 FCR 9 at 49.

> VON DOUSSA J: Well, it is the view of the court that it should be confined to that. The diaries open up other issues. … Obviously you need Dr Milton's reports available to us because they are not otherwise there. But our view at the moment is that the ground of appeal ought to be argued on whatever its dimensions, on Dr Milton's report and the transcript.
>
> …
>
> Well, that is on the transcript. So that ground 11 will be argued on the transcript, plus Dr Milton's reports and as a matter of convenience we will have reference to those which are exhibited to the affidavit of Mr Eastman, sworn on - - -
>
> MR JAMES: Your Honour is saying ground 11. The grounds were advised - - -
>
> VON DOUSSA J: And 1.
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> MR JAMES: I think your Honour is referring to ground 13.
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> VON DOUSSA J: Thirteen, I am sorry, 1 and 13.
>
> MR JAMES: Part of what appears in 11 and ground 1.
>
> VON DOUSSA J: Thank you. Well, we will have access to the exhibit to the affidavit, but not to the affidavit. That defines the material upon which it is to be argued."

That is the course which was followed and led ultimately to the dismissal of the applicant's appeal on those grounds which did not provide any basis for the argument now advanced in this Court. Its consequence is however that the Milton reports were in evidence (consensually) in the Full Court and now form part of the record at which this Court may look.

382 It is against that background that the following questions have to be answered. Do the Milton reports and the recorded manifestations of the applicant's behaviour at the trial give rise to a question of the applicant's fitness to plead at the trial? Does that material in combination show, in fact, either that the applicant was or may have been unfit to plead at the trial? What orders could and should the Full Court of the Federal Court have made? If this Court is of the opinion that the Full Court should have had regard to the question of the applicant's fitness to plead at the trial, how should the applicant's application for special leave to appeal be disposed of by this Court?

383 I turn then to the first of these matters. The purpose of the making of the Milton reports was not to explore the fitness of the applicant to plead. However,

over the period 1989 until 1992 up until two and a half years before the commencement of the trial he made 12 detailed reports that involved assessments of the applicant's psychiatric condition.

384 In his last report of 4 September 1992, Dr Milton stated that he had observed the applicant for about an hour in court until the latter was removed at the direction of the Magistrate who was conducting his committal. He then referred to a tape recording, to which he had listened, of an abusive telephone call made by the applicant, and various statements by other people as to what they had seen and heard the applicant do and say from time to time. In his earlier reports he had referred to similar material that had been progressively gathered.

385 Dr Milton concluded that the applicant had demonstrated virtually all of the features typically associated with a paranoid personality disorder[455]. He believed for all practical purposes that the applicant was psychotic and out of touch with reality, adding that "it would be difficult to substantiate this in terms of the present Mental Health Act". After some further discussion of the applicant's violent propensities, Dr Milton provided advice as to the appropriate way those who might encounter the applicant during legal proceedings should deal with him. Because of the basis upon which the Milton reports were tendered, and the fact that his fitness to plead was not an issue joined by the parties in the Full Court, no attempt was made to question Dr Milton's assessment of the applicant "in terms of the present Mental Health Act". And, as I have already indicated, in my view, Dr Milton may not have been permitted (over objection) to swear to the precise and final issue which would be for the Court or, if appropriate, for the Tribunal if the matter had been raised.

386 It is enough to point out with respect to the earlier reports that they contain similar observations about the conduct of the applicant and his mental condition, including that the applicant probably had a genetic predisposition to a severe mental disorder. One further reference is required and that is to a prognosis made in a report by Dr Milton of the view of another psychiatrist, Dr McDonald who had earlier formed the view that the applicant had been suffering paranoid psychosis and would need to be institutionalised eventually[456].

387 I interpolate at this point that any deficiencies in form in Dr Milton's evidence (by reason of its hearsay nature and otherwise) should be treated as having been cured by the concessions of the respondent at the appeal that I have quoted.

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455 See the report of Dr Rod Milton dated 4 September 1992.

456 See the report of Dr Rod Milton dated 15 January 1990 at 5.

388 Little in my opinion turns upon Dr Milton's statement that "it would be difficult to substantiate this [the applicant's psychotic state] in terms of the present Mental Health Act". Section 68(2)(a) of the *Mental Health (Treatment and Care) Act* requires the Tribunal to determine on the balance of probabilities whether or not a person the subject of the charge is fit to plead to it. Fitness is nowhere defined and should not be taken to be synonymous with any particular or necessarily precise psychiatric definition.

389 I have formed the opinion that the Milton reports and the recorded manifestations of the applicant's behaviour at the trial taken in combination, did present a question for decision by the Full Court, whether or not there was a need to consider the possibility that he might not be fit to plead. At the very least the Milton reports point to a highly disturbed, often, delusional person with irrational thoughts and suffering a diagnosable psychiatric condition which might become progressively worse beyond the period with which the reports were concerned. On one view, certainly, his conduct at the trial could be regarded as merely manipulative, but on another, it could be seen as irrational and highly prejudicial to his own cause: in particular, to state repeatedly to the trial judge, as he did, that his Honour was condoning judicial harassment could not possibly have improved his prospects.

390 Regard might also be had to his highly erratic performance in reinstating and withdrawing instructions for his defence the details of which are set out in the judgment of the Full Court[457]:

> "Before proceeding to a consideration of the grounds of appeal it is necessary to say something about the appellant's legal representation during the course of the trial. It would not be an exaggeration to describe it as chaotic.
>
> On the first day of the trial, 2 May 1995, Mr Williams QC appeared but only to announce that his instructions and those of his junior and his instructing solicitors had been withdrawn. The appellant sought an adjournment of the trial because he was unrepresented, saying that if the adjournment was not granted he would not take part in the proceedings. The appellant informed his Honour of his reasons for withdrawing those instructions. He said that police intimidation had been 'condoned' by the Court; he claimed that the Court had refused to take contempt proceedings at his request against certain police officers and he claimed that Mr Williams had refused to conduct the defence in accordance with his instructions. The application for an adjournment was refused and the matter proceeded.

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457 (1997) 76 FCR 9 at 32-34.

On 15 May 1995, the fifth day of the trial, Mr Williams QC appeared, informing the Court that he had, once again, been instructed to act on behalf of the appellant. He unsuccessfully sought an adjournment of the trial and a permanent stay of the proceedings. On the next day, shortly after the jury had been empanelled, Mr Williams' instructions were again terminated and the appellant was, once more, without legal representation.

On 18 May 1995, the eighth day of the trial, Mr O'Donnell announced his appearance for the appellant but on 22 May (which was the next day of the trial), he advised the Court that he had withdrawn from the case. The appellant, however, made it clear that he had terminated Mr O'Donnell's instructions because he had allegedly walked out of a conference.

On 22 May, Mr Peter Baird appeared for the appellant but on the same day he sought leave to withdraw.

On 31 May 1995, the 15th day of the trial, Mr O'Loughlin announced his appearance for the appellant, informing the Court that he would be led by Mr Terracini. He sought an adjournment until 12 June to enable him and Mr Terracini to read the brief and prepare the defence. His Honour refused that application, stating that it was his opinion that the appellant had become unrepresented through his own fault. His Honour's rulings on this aspect of the trial have not been challenged on appeal.

The matter proceeded with Mr O'Loughlin appearing for the defence until 5 June when he was joined by Mr Terracini. From that date until 29 June, the 30th day of the trial, the appellant was represented by both counsel.

On 29 June the appellant terminated his counsel's instructions. Thereafter, Mr Terracini and Mr O'Loughlin moved in and out of the trial as their instructions were first withdrawn and then reinstated. It cannot be said that the appellant acted with justification in so frequently dismissing his lawyers. If he were justified in terminating their instructions, why then would he have re-engaged them on so many occasions? Any suggestion that the answer to that question rests in an acknowledgment of fault by counsel would be ridiculed by the number of times their supposed incompetence or refusal to accept instructions allegedly justified their dismissal. This is apparent from the following timetable:

Day 33	10 July 1995	Re-instructed
Day 33	10 July 1995	Instructions Terminated
Day 34	11 July 1995	Re-instructed
Day 36	13 July 1995	Instructions Terminated
Day 37	14 July 1995	Re-instructed
Day 39	18 July 1995	Instructions Terminated

Day 39	18 July 1995	Re-instructed
Day 39	18 July 1995	Instructions Terminated
Day 41	20 July 1995	Re-instructed
Day 46	27 July 1995	Instructions Terminated
Day 48	31 July 1995	Re-instructed
Day 50	2 August 1995	Instructions Terminated
Day 52	8 August 1995	Re-instructed
–	11 August 1995	Instructions Terminated
Day 65	31 August 1995	Re-instructed
Day 78	25 September 1995	Instructions Terminated
Day 80	3 October 1995	Re-instructed
Day 84	10 October 1995	Instructions Terminated

The circumstances under which Mr Terracini's instructions were terminated for the last time on 10 October were quite astonishing. The appellant claimed (in the absence of the jury) that he had heard Mr Terracini have a verbal altercation with a person in the Courtroom shortly before the commencement of proceedings. He claimed that he heard Mr Terracini say 'Don't you stare at me like that you flea'. It would seem that this assertion was made by the appellant in the absence of counsel after Mr Terracini had informed the Court that all instructions had been terminated, although the transcript does not record the withdrawal of counsel. The appellant told the Court that when he inquired of him, Mr Terracini said that the other person was a police officer but that he refused to disclose his identity to the appellant. The appellant, when addressing his Honour, said that '... if my counsel is distracted by a police officer in this court moments before addressing the jury it becomes of interest to me against the background of numerous such incident [sic] going on over the last six years'.

Later the appellant said to his Honour that he was 'determined to make an issue of it'. So it was that when Mr Terracini subsequently refused to name the officer, his instructions were terminated. It was for Mr Terracini – not for the appellant – to make an assessment of the situation; he was the person who had been involved in the altercation; he was the one best able to decide what (if any) action should be taken. As his Honour said, Mr Terracini was 'an experienced, responsible member of the bar' who was 'well aware of his duties to his client'. In an expression of confidence in counsel, his Honour added that he had no doubt that Mr Terracini would have been satisfied that the incident did not in any way operate to the prejudice of the appellant. Regrettably, the appellant would not accept the views of his Honour; he was prepared to see his murder trial proceed without the benefit of counsel if his counsel would not submit to his unreasonable demands.

As from 10 October, the appellant remained without legal representation for the balance of the trial. This summary, which has not included his many changes of lawyers during the period preceding the trial, is indicative of the appellant's inability to work in harmony with his lawyers."

391 On the other hand, his conduct was often that of an articulate and resourceful person and it is only the combination of the observations and opinions stated in the Milton reports and the recorded manifestations of his personality at the trial that bring me to the conclusion I have reached, that the applicant may have been unfit to plead.

392 The second question is what orders could and should the Federal Court have made other than the order dismissing the appeal.

393 Section 27[458] of the *Federal Court of Australia Act* 1976 (Cth) provides that in an appeal the Federal Court shall have regard to the evidence given in the proceedings out of which the appeal arose. The Court has the power to draw inferences of fact and, in its discretion, to receive further evidence. This evidence may be taken, as appropriate, orally or in written form. This provision has been conservatively construed by the Full Federal Court and in a manner somewhat similar to the way in which other courts of ample jurisdiction have

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458 Section 27 provides:

"**Evidence on appeal**

In an appeal, the Court shall have regard to the evidence given in the proceedings out of which the appeal arose, and has power to draw inferences of fact and, in its discretion, to receive further evidence, which evidence may be taken:

(a) on affidavit; or

(b) by video link, telephone or other appropriate means in accordance with another provision of this Act or another law of the Commonwealth; or

(c) by oral examination before the Court or a Judge; or

(d) otherwise in accordance with section 46."

approached the question whether the evidence is receivable as "fresh evidence"[459].

394 It is unnecessary in this case to comment upon the correctness or otherwise of those decisions of the Full Court of the Federal Court and to decide whether further evidence as used in s 27 of the *Federal Court of Australia Act* should have the same meaning as that term was construed by this Court to have when used in the *Family Law Act* 1975 (Cth) in *CDJ v VAJ*[460].

395 By consent (subject to relevance) the evidence was received here. Plainly it did have relevance, not only to the grounds argued in respect of it, but also, as it turns out, to the matter with which this Court is concerned, and, in an ideal world, the Full Court might have discerned.

396 Division 2 of Pt XIA of the *Crimes Act* 1900 (ACT) is concerned with, inter alia, fitness to plead. Section 428E provides that where on the trial of a person charged with an indictable offence if the Court is satisfied that there is a question as to the person's fitness to plead to the charge the Court shall order the person to submit to the jurisdiction of the Tribunal to enable the Tribunal to determine whether or not the person is fit to plead to the charge. Section 428E which appears in that division provides as follows:

> **"Division 2 – Unfitness to plead**
>
> **428E Referral to Tribunal**
>
> (1) Where, on the trial of a person charged with an indictable offence –
>
> (a) the issue of fitness to plead to the charge is raised by a party to the proceedings or by the Court; and
>
> (b) the Court is satisfied that there is a question as to the person's fitness to plead to the charge;
>
> the Court shall order the person to submit to the jurisdiction of the Tribunal to enable the Tribunal to determine whether or not the person is fit to plead to the charge.

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459 *Turner v Jupiters Management Ltd* (1989) 29 IR 276 at 277 per Northrop J; *Australian Bank Employees Union v Australia and New Zealand Banking Group Ltd* (1990) 94 ALR 667 at 672 per Northrop J.

460 (1998) 72 ALJR 1548 at 1558-1559 per McHugh, Gummow and Callinan JJ; 157 ALR 686 at 700.

(2) Where the Court makes an order under subsection (1), it shall adjourn the proceedings to which the order relates and shall make such orders as it considers appropriate, including the granting of bail to the person who is the subject of the order."

397 Whilst in terms the section refers to a trial and not an appeal and to the "Court" which, by definition, is the Supreme Court of the Australian Capital Territory, s 28[461] of the *Federal Court of Australia Act* by par (b) of sub-s (1)

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461 "**Form of judgment on appeal**

(1) Subject to any other Act, the Court may, in the exercise of its appellate jurisdiction:

(a) affirm, reverse or vary the judgment appealed from;

(b) give such judgment, or make such order, as, in all the circumstances, it thinks fit, or refuse to make an order;

(c) set aside the judgment appealed from, in whole or in part, and remit the proceeding to the court from which the appeal was brought for further hearing and determination, subject to such directions as the Court thinks fit;

(d) set aside a verdict or finding of a jury in a civil proceeding, and enter judgment notwithstanding any such verdict or finding;

(e) set aside the verdict and judgment in a trial on indictment and order a verdict of not guilty or other appropriate verdict to be entered;

(f) grant a new trial in any case in which there has been a trial, either with or without a jury, on any ground upon which it is appropriate to grant a new trial; or

(g) award execution from the Court or, in the case of an appeal from another court, award execution from the Court or remit the cause to that other court, or to a court from which a previous appeal was brought, for the execution of the judgment of the Court.

(2) It is the duty of a court to which a cause is remitted in accordance with paragraph (g) of subsection (1) to execute the judgment of the Court in the same manner as if it were its own judgment.

(3) The powers specified in subsection (1) may be exercised by the Court notwithstanding that the notice of appeal asks that part only of the decision may be reversed or varied, and may be exercised in favour of all or any of the

(Footnote continues on next page)

confers ample power upon the Full Federal Court to make such order as, in all the circumstances, it thinks fit, which would include an order, if appropriate, that the court appealed from could and would have made, had it been apprised of the further evidence available to the Full Court. The Full Court also had power pursuant to O 34 r 2 of the Federal Court Rules to inquire and report on the question.

398 That the Full Court should have such a power is in a case of this type particularly apt having regard to the well-established principles with respect to fitness to plead.

399 From very early times in England except for a period during the reign of Henry VIII[462] if a man committed a capital offence whilst of sound mind but became mad before arraignment he could not be arraigned for the crime. And as far back as pre-Norman times King Alfred hanged Cole, one of his judges because he judged Ive to death when he was a madman[463]. The English courts also recognised that a defendant who did not plead could stand "mute of malice" or mute "by visitation of God"[464]. Procedural fairness in a criminal trial requires that the accused be aware of the nature of proceedings and be capable of participation in them in a fit state to defend himself[465].

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respondents or parties, including respondents or parties who have not appealed from or complained of the decision.

(4) An interlocutory judgment or order from which there has been no appeal does not operate to prevent the Court, upon hearing an appeal, from giving such decision upon the appeal as is just.

(5) The powers of the Court under subsection (1) in an appeal (whether by the Crown or by the defendant) against a sentence in a criminal matter include the power to increase or decrease the sentence or substitute a different sentence."

462 33 Hen VIII c 20.

463 See Blackstone, *Commentaries on the Laws of England* (1803), vol V (bk IV) at 24-25; see also Holdsworth, *A History of English Law*, vol VIII at 439.

464 *R v Schleter* (1866) 10 Cox CC 409.

465 *Proceedings in the Case of John Frith for High Treason* (1790) 22 Howell's State Trials 307 at 318.

400 It is now well established at common law that a finding of unfitness bars further trial and there is statutory jurisdiction in force in most jurisdictions[466] to enable this matter to be determined separately from the trial process. It has been held that, before the question of fitness has to be pursued there must be a "real question"[467] or a "real and substantial question"[468] or a "serious question"[469] on the material before the court.

401 In *R v Khallouf* the Full Court of the Supreme Court of Victoria (Young CJ, McInerney and Tadgell JJ) said[470]:

> "[T]he question whether there was a matter to be considered and the question whether the applicant was fit to be tried seem rather to have been run together. … [I]t is important that they be kept separate."

402 The statutory scheme in the ACT contemplates a similar division of issues, for the trial to be interrupted, on the basis of the possible unfitness of the accused to plead. All that must be present however, is a question as to the accused's fitness[471].

403 Humphreys J in *R v Dashwood*[472] did not seem to think that existence of the possibility of unfitness to plead even needed to be founded on admissible evidence. His Lordship said[473]:

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466 *Mental Health (Criminal Procedure) Act* 1990 (NSW), s 9; *Criminal Code* (NT), s 357(1); *Criminal Code* (Q), s 645; *Mental Health Act* 1974 (Q), s 29 (see *R v Enright* [1990] 1 Qd R 563); *Criminal Law Consolidation Act* 1935 (SA), Div 3 of Pt 8A; *Criminal Code* (Tas), s 380(1); *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 (Vic), s 7; *Criminal Law (Mentally Impaired Defendants) Act* 1996 (WA), s 12.

467 *Ngatayi v The Queen* (1980) 147 CLR 1 at 9 per Gibbs, Mason and Wilson JJ.

468 See *R v Presser* [1958] VR 45 at 46 per Smith J.

469 See *R v Khallouf* [1981] VR 360 at 363 per Young CJ, McInerney and Tadgell JJ.

470 [1981] VR 360 at 364 per Young CJ, McInerney and Tadgell JJ.

471 *Mental Health (Treatment and Care) Act*, s 68(1).

472 *R v Dashwood* [1943] KB 1 (Humphreys, Hilbery and Tucker JJ).

473 [1943] KB 1 at 4.

> "It does not matter whether the information comes to the court from the defendant himself or his advisers or the prosecution or an independent person, such as, for instance, the medical officer of the prison where the defendant has been confined."

404 It has also been said that a trial judge may rely on committal depositions and papers, psychiatric reports from prison medical staff or upon his or her own observations of the demeanour of the accused[474]. In other words an issue of fitness to plead is an issue that stands outside the ordinary rules applying to adversarial proceedings, that the issues are those upon which the parties are joined. In this case however I am content to rest my decision on the evidence which was received and could properly be treated as admissible evidence.

405 It follows in this case, in my opinion, that the Full Court could and should have given consideration to the possibility of making an order that would have had the effect of requiring the applicant's fitness to plead at his trial to be determined by the Tribunal. The precise form of that order does require some further discussion.

406 I agree however with the Full Court of the Supreme Court of Victoria in *Khallouf*[475] that satisfaction of the existence of such a question falls short of any conclusion as to the proper answer to it. As Mackay writes in *Mental Condition Defences in the Criminal Law*[476] there are many defendants who have warped standards of morality but are fit to plead[477].

407 I am of the opinion that in the circumstances the members of the Full Court should have turned their minds to the possibility of the existence of a question of the applicant's fitness to plead at the trial.

408 The last question is how the applicant's application for special leave to appeal to this Court should be disposed of? The issues as to whether the relevant question of fitness to plead arose, and if it did, what should follow were fully argued, with each party in agreement on the course which should be followed if

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474 See *R v Burles* [1970] 2 QB 191 at 196.

475 *R v Khallouf* [1981] VR 360 at 364 per Young CJ, McInerney and Tadgell JJ.

476 (1995) at 217.

477 See also Duff, *Trials and Punishments* (1986) at 120. Duff makes a distinction between one "who understands the claims which the law makes on him, but refuses to accept those claims or to ascribe any legitimate authority to the law" and one who "*cannot* see the law as ... anything more than a set of orders backed by threats which give him prudential reasons for obedience".

the applicant were to succeed here. The respondent accepted that if the appeal were upheld the matter should be remitted to the Full Court for further hearing in that Court. Accordingly, I would order that special leave be granted, that the appeal be allowed, the order of the Full Court of the Federal Court dismissing the appeal be set aside, and that the matter be remitted to the Full Court of the Federal Court for further hearing and determination whether there was a question as to the appellant's fitness to plead at the time of the trial.