HIGH COURT OF AUSTRALIA

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

ALAN JAMES CRAMPTON APPELLANT

AND

THE QUEEN RESPONDENT

Crampton v The Queen [2000] HCA 60
23 November 2000
S233/1999

ORDER

1. *Special leave to appeal granted, appeal treated as instituted and heard instanter, and appeal allowed.*

2. *Set aside order of the Court of Criminal Appeal of New South Wales made on 1 June 1999 and in lieu thereof order that the appeal to that Court be allowed, conviction quashed and a verdict of acquittal entered.*

On appeal from the Supreme Court of New South Wales

Representation:

P Byrne SC with M A Marty for the appellant (instructed by MacMahon Associates)

M G Sexton SC, Solicitor-General for the State of New South Wales with S J Gageler and A M Blackmore for the respondent (instructed by S E O'Connor, Solicitor for Public Prosecutions)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with A S Bell intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

B M Selway QC, Solicitor-General for the State of South Australia with I K Haythorpe intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for the State of South Australia)

CATCHWORDS

Crampton v The Queen

Criminal law – Direction to jury – Events allegedly occurred in 1978 – Complaint made in March 1997 – Whether *Longman* warning required – Requirements of *Longman* warning.

Criminal law – Act of indecency with another male person – Whether defendant entitled to be acquitted on the basis that the evidence did not support a verdict of guilt on the correct interpretation of *Crimes Act* 1900 (NSW), s 81A.

Constitutional law (Cth) – Whether the High Court can entertain grounds of appeal sought to be raised for the first time in the High Court.

Words and phrases – "with".

Constitution, s 73.
Crimes Act 1900 (NSW), s 81A.

1 GLEESON CJ. The Court has before it an application for special leave to appeal from a decision of the Court of Criminal Appeal of New South Wales[1] dismissing an appeal against the applicant's conviction, following a trial in the District Court of New South Wales, of an offence against s 81A of the *Crimes Act* 1900 (NSW).

2 The principal ground of that application is as follows:

> "The applicant has been convicted of an offence under s 81A *Crimes Act* 1900 (NSW) (in the terms in which the section stood in 1978) on the basis of evidence which clearly fails to establish the elements of that offence and which positively establishes that the offence charged has not been committed, either in the manner alleged or at all."

3 The basis of that contention is that, on the evidence relied upon by the prosecution at trial, the case fell outside the terms of s 81A, as those terms had been construed by the Court of Criminal Appeal[2], and as the same language had been construed by the English Court of Appeal[3]. The section prohibited an act of indecency by a male person *with* another male person. A later, similar provision was amended to prohibit such conduct *with or towards* another male person[4], but, at the relevant time, the statutory prohibition was against acts of indecency *with* another male person. The decisions referred to established that the conduct of the applicant was conduct towards the complainant, but not conduct with him, and therefore s 81A did not apply. The facts of the case appear sufficiently from the reasons of Gaudron, Gummow and Callinan JJ. For the reasons given by their Honours, I agree that the decisions were correct, and should be followed in this Court.

4 The authorities just mentioned were not drawn to the attention of the trial judge, or of the Court of Criminal Appeal. There was no possible tactical advantage to the defence in failing to raise the point at trial or on appeal. In those circumstances, there is a question whether, as a matter of jurisdiction and discretion, this Court can, and should, grant special leave to appeal. If the answer to both aspects of that question is in the affirmative, the consequence of allowing the appeal will be to quash the conviction.

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1 *R v Crampton* [1999] NSWCCA 130 (Wood CJ at CL, Barr and Greg James JJ).

2 *R v Page* unreported, Court of Criminal Appeal of New South Wales, 25 November 1991; *Orsos* (1997) 95 A Crim R 457.

3 *R v Preece* [1977] QB 370.

4 See s 78Q of the *Crimes Act* (as amended by Act No 2 of 1992).

5 There is another point in the case, which was taken (unsuccessfully) in the Court of Criminal Appeal, and in respect of which there has already been a grant of special leave to appeal. In brief, it is whether the directions of the trial judge complied with the requirements stated by this Court in *Longman v The Queen*[5]. I agree that they did not. However, this is a new trial point, and the applicant, even if successful on it, wishes to press the argument concerning the construction of s 81A.

6 In *Giannarelli v The Queen*[6], this Court[7] unanimously decided to grant special leave to appeal, and allowed an appeal, in a case similar to the present. The applicants had been convicted of perjury. The offences were said to have been committed in the course of giving evidence before a Royal Commission. There was an unsuccessful appeal to the Court of Criminal Appeal of Victoria. In this Court the applicants raised, for the first time, a point of law which, if correct, meant that they could not properly have been convicted. There was a statute which made inadmissible, at a criminal trial, evidence of what they had said at the Royal Commission. At the trial, and in the Court of Criminal Appeal, the statute had not been relied upon.

7 Gibbs CJ said[8]:

> "It is of course only in an exceptional case that this Court will give special leave to appeal from a decision of a Court of Criminal Appeal affirming a conviction when the point that the applicant seeks to raise in attacking the conviction was not taken either at the trial or in the Court of Criminal Appeal. However, the present case is exceptional, in that under the law the charge laid could never be proved."

8 That statement reflected the practice of the Court, both in criminal and civil cases[9]. In *Gipp v The Queen*[10], Kirby J pointed out that the practice was not inconsistent with the decision in *Mickelberg v The Queen*[11], in which it was held

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5 (1989) 168 CLR 79.

6 (1983) 154 CLR 212.

7 Gibbs CJ, Murphy, Wilson, Brennan and Deane JJ.

8 (1983) 154 CLR 212 at 221.

9 eg *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418; *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319 per Mason J; *Pantorno v The Queen* (1989) 166 CLR 466.

10 (1998) 194 CLR 106 at 154-155 [138].

11 (1989) 167 CLR 259.

that this Court could not receive fresh evidence on an appeal, and explained why that was so. I agree with the view his Honour then expressed, and with the reasons he gave.

9 In *Gipp*[12], two members of the Court, without deciding the issue, expressed reservations about the practice.

10 In my opinion the conclusion in *Giannarelli* as to the Court's power to grant special leave even where the point to be relied upon was raised for the first time was correct, as was the statement that the power should only be exercised in exceptional circumstances.

11 The Court of Criminal Appeal was exercising jurisdiction conferred upon it by ss 5 and 6 of the *Criminal Appeal Act* 1912 (NSW). Section 6 of the *Criminal Appeal Act* relevantly provides that the Court of Criminal Appeal shall allow an appeal if it is of the opinion that the verdict of the jury cannot be supported having regard to the evidence. That covers the present case. From time to time, points are raised in the Court of Criminal Appeal which were not taken at trial. In certain kinds of case, r 4 of the Criminal Appeal Rules requires the leave of the Court, but the requirement for leave assumes the power to entertain grounds of appeal based on new points. The Court of Criminal Appeal had jurisdiction to entertain the point upon which the applicant now seeks to rely. This Court is not being invited "to go beyond the jurisdiction or capacity of the Court appealed from."[13] What is proposed is in no sense a re-hearing, or an exercise of original jurisdiction.

12 The jurisdiction of this Court which is invoked is that conferred by s 73 of the Constitution. It is enlivened by the existence of a judgment, decree, order or sentence. The process of reviewing the final determination of the Court of Criminal Appeal, which was a judgment, in the light of the material that was before that Court, is strictly appellate, notwithstanding that a new legal issue is permitted to be raised in this Court. Error in a final determination does not necessarily involve error in the process of reasoning of the court. This view of the nature of an appeal has been acted upon, in England and Australia, for more than a century. In 1892, in *Connecticut Fire Insurance Co v Kavanagh*[14], the Privy Council said:

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12 (1998) 194 CLR 106 at 126-129 [57-65] per McHugh and Hayne JJ.

13 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 109 per Dixon J.

14 [1892] AC 473 at 480.

> "When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea."

13 Statements of the limitations upon the circumstances in which the power will be exercised acknowledge its existence. For example, in *Suttor v Gundowda Pty Ltd*[15] the Court said:

> "The circumstances in which an appellate court will entertain a point not raised in the court below are well established. Where a point is not taken in the court below and evidence could have been given there which by any possibility could have prevented the point from succeeding, it cannot be taken afterwards."

14 The power invoked in the present case exists but, as was said in *Giannarelli*, it should only be exercised in exceptional circumstances. There are a number of reasons for this.

15 First, there is what was referred to by L'Heureux-Dubé J in the Supreme Court of Canada as "the overarching societal interest in the finality of litigation in criminal matters"[16] when she said:

> "Were there to be no limits on the issues that may be raised on appeal, such finality would become an illusion. Both the Crown and the defence would face uncertainty, as counsel for both sides, having discovered that the strategy adopted at trial did not result in the desired or expected verdict, devised new approaches. Costs would escalate and the resolution of criminal matters could be spread out over years in the most routine cases."

16 Secondly, it is common for appellants in criminal appeals to retain counsel different from the counsel who (by hypothesis, unsuccessfully) conducted the trial. This increases the tendency to look for a new approach to the case, and carries the danger that trial by jury will come to be regarded as a preliminary skirmish in a battle destined to reach finality before a group of appellate judges.

17 Thirdly, it is usually difficult, and frequently impossible, for a court of appeal to know why trial counsel did, or failed to do, something in the conduct of the case. Decisions as to the conduct of a trial are often based upon confidential information, and an appreciation of tactical considerations, that may never be

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15 (1950) 81 CLR 418 at 438 per Latham CJ, Williams and Fullagar JJ.

16 *R v Brown* [1993] 2 SCR 918 at 923-924.

available to an appellate court. The material upon which a judge, either at trial or on appeal, may form an opinion as to the wisdom of a course taken by counsel can be dangerously inadequate, and, when it is, the judge may have no way of knowing that. Ordinarily, a barrister knows more about the strengths and weaknesses of his or her client's position than will appear to a judge, whose knowledge of the case is largely confined to the evidence.

18 Fourthly, as a general rule, litigants are bound by the conduct of their counsel[17]. This principle, which is an aspect of the adversarial system, forms part of the practical content of the idea of justice as applied to the outcome of a particular case. For that reason, courts have been cautious in expounding the circumstances in which an appellant will be permitted to blame trial counsel for what is said to be a miscarriage of justice[18].

19 Fifthly, in a common law system the adversarial procedure is bound up with notions of judicial independence and impartiality. A criminal trial is conducted before a judge (sitting with or without a jury) who has taken no part in the investigation of the offence, or in the decision to prosecute the offender, or in the framing of the charge, or in the selection of the witnesses to be called on either side of the case, and whose capacity to intervene in the conduct of the trial is limited. One of the objects of a system which leaves it to the parties to define the issues, and to select the evidence and arguments upon which they will rely, is to preserve the neutrality of the decision-making tribunal. Courts are hesitant to compromise features of the adversarial system which have implications fundamental to the administration of justice.

20 In the case of an attempt to raise a new point in this Court there is the additional consideration, reflected in the statutory provisions governing the requirement of special leave to appeal[19], that a second appeal is intended to be reserved for special cases. It is not there for the purpose of giving any sufficiently determined and resourceful litigant a third chance of success.

21 I regard the present case as exceptional, for substantially the same reason as the case of *Giannarelli* was regarded as exceptional. On the only charge on which he was convicted, the applicant had available to him a point of law which constituted a complete answer. The evidence relied upon by the prosecution

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17 *Rondel v Worsley* [1969] 1 AC 191 at 241 per Lord Morris of Borth-y-Gest; *R v Birks* (1990) 19 NSWLR 677 at 683-684; *Halsbury's Laws of England*, 4th ed, vol 3(1), par 518.

18 *R v Birks* (1990) 19 NSWLR 677.

19 *Judiciary Act* 1903 (Cth), s 35A.

demonstrated that he was not guilty of the offence charged. If the point had been taken at trial, the outcome could not possibly have been affected by any further evidence. The failure to take the point cannot have been deliberate.

22 Special leave to appeal should be granted. The appeal should be allowed. The conviction and sentence should be quashed, and a verdict and judgment of acquittal entered.

23 GAUDRON, GUMMOW AND CALLINAN JJ. Three questions arise in this appeal: whether and in what respects the case called for a *Longman*[20] direction; may this Court entertain grounds of appeal and points sought to be raised for the first time in this Court; and, what is the true meaning and application of s 81A of the *Crimes Act* 1900 (NSW).

Factual background

24 During the years 1978 to 1988 the appellant was a primary school teacher. He taught children with learning disabilities. Complaints were made in 1997 by two of his former pupils about sexual misconduct by him of various kinds in their presence. Those complaints resulted in five charges against the appellant. The jury were unable to reach agreement on four of them. Only one of the charges is therefore now relevant. As Barr J in the Court of Criminal Appeal of New South Wales observed, the trial had this unusual aspect[21]:

> "A peculiar feature of the trial was that although in his evidence about the second and third counts [the relevant complainant] said that [the other complainant] was present, no evidence was adduced from [the latter] about those events. Similarly, [the relevant complainant] gave no evidence about the events giving rise to the fourth and fifth counts, notwithstanding that [the other complainant] said that he was present."

25 The offence with which this Court is concerned was alleged to have occurred between 31 July 1978 and 1 October 1978. The complainant's evidence was that the appellant enticed him into a storeroom located at, and opening off, the front of the classroom. There, in the complainant's presence the appellant engaged in sexual activity the details of which are set out in the judgment of Kirby J. There was no voluntary participation by the complainant in the conduct. The appellant, who gave evidence, said that an activity of the kind alleged never occurred and no opportunity for it to occur ever arose or was created. He also said that when he used the storeroom, he never closed the door between it and the classroom.

26 The count on which the appellant was convicted was the offence of committing an act of indecency *with* the complainant. The charge was brought pursuant to s 81A of the *Crimes Act* which provided as follows:

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20 *Longman v The Queen* (1989) 168 CLR 79.

21 [1999] NSWCCA 130 at [26].

> "Whosoever, being a male person, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of indecency with another male person shall be liable to imprisonment for two years."

The section was inserted into the *Crimes Act* by Act No 16 of 1955.

27 Section 34(2)(f) of the *Interpretation Act* 1987 (NSW) allows recourse to second reading speeches to assist in educing the meaning of a provision. The debate on the Act of 1955 focused principally on those sections of that Act which were intended to abolish capital punishment in New South Wales. The Attorney-General, the Hon W F Sheahan QC, did, however, say in the second reading speech that the purpose of s 81A was to deal with "the problem of homosexuality"[22] and the section "creates a new offence to cover cases more serious than [male prostitution]"[23]. He also said[24]:

> "No requirement regarding corroboration has been inserted in the proposed new section 81A. The offence to be created by this section is a 'substantive' one, that is, some act of indecency must have been committed or attempted before a charge will lie. The provision is similar to sections 79 and 81 of the Crimes Act which deal with the offences of sodomy and indecent assault upon a male. There is no statutory provision regarding corroboration in respect of either of these offences, but the general law in regard to the danger of convicting upon the unsupported testimony of accomplices applies. The proposed new section would come within the scope of the general law."

28 Section 81A was repealed by Act No 7 of 1984. This Act also decriminalised homosexuality in New South Wales. Most of the parliamentary debate was concerned with that matter. Only passing reference was made to s 78Q which was to replace s 81A[25]. The 1984 provision is as follows:

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22 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 March 1955 at 3228.

23 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 March 1955 at 3229.

24 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 March 1955 at 3230.

25 See eg: the Hon B J Unsworth (Vice-President of the Executive Council): "Section 78Q will render it an offence, punishable by imprisonment for two years, for a male to commit any act of gross indecency with a male under 18 years of

(Footnote continues on next page)

"**Acts of gross indecency (cf s 81A).**

78Q (1) Any male person who commits, or is a party to the commission of, an act of gross indecency *with* a male person under the age of 18 years shall be liable to imprisonment for 2 years.

(2) Any person who solicits, procures, incites or advises any male person under the age of 18 years to commit or to be a party to the commission of an act of homosexual intercourse, or an act of gross indecency, *with* a male person shall be liable to imprisonment for 2 years." (emphasis added)

29 It was not until Act No 2 of 1992 that the words "or towards" were added after the word "with" in both sub-sections. This amendment was the direct result of the decision of the Court of Criminal Appeal of New South Wales in *Page*[26]. The Attorney-General, the Hon Peter Collins QC, said this in his second reading speech with respect to the proposed additional words[27]:

"A further amendment in this bill concerns sexual assault. Section 78Q of the Crimes Act 1900 makes it an offence for any male person to commit or take part in the commission of an act of gross indecency with a male under 18 years of age, or to solicit, procure, incite or advise a male under 18 years to commit or take part in the commission of such an act. The wording of section 78Q, however, is inconsistent with similar sections of the Crimes Act 1900 which relate to acts of indecency. This inconsistency was discussed recently in the unreported Court of Criminal Appeal decision in Page's case of 25th November, 1991. Furthermore, the language of section 61N of the Crimes Act 1900, which makes it an offence to commit an act of indecency with or towards a person under the age of 16 years, also contains an inconsistency in regard to the conduct covered. It is therefore considered necessary to make minor amendments to these sections to avoid potential problems with their interpretation."

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age", in New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 17 May 1984 at 971.

26 *R v Page* unreported, Court of Criminal Appeal of New South Wales, 25 November 1991 (Gleeson CJ, Mahoney JA and Campbell J).

27 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 25 February 1992 at 68.

30 We will return to this legislative history when we come to deal with the points that the appellant seeks to take in this Court for the first time.

31 The consequence of the delayed complaint in this case was that the trial commenced about 20 years after the alleged events, on 8 July 1998. The trial was conducted in the District Court of New South Wales, before her Honour Judge Karpin and a jury of 12.

32 In the course of summing up to the jury her Honour made these comments:

> "Clearly you have to look carefully at the circumstances in which there has been no complaint at the time. But those matters to which I referred are also matters which you must take into consideration and give some thought to. You had the chance to observe both young men in the witness box and to assess their level of sophistication, even now in their early thirties. It is important that you look at the way in which they told you about these matters and the explanation they gave for not having complained earlier, when they were asked about those issues in cross-examination.
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> Late complaint, of course, necessarily has some potential disadvantages to the accused because it reduces his opportunity to explore the matters complained of in some ways or it has that potential. First of all, of course, memory of events tends to decrease and become vaguer. However, in this case, the accused says it did not happen. Not only did it not happen, there was never an opportunity for it to happen, never an occasion when it could have happened, never an occasion when there could have been a misunderstanding about what was happening. It is quite clear that the accused says there is no occasion of this nature or occasion when it might have been misunderstood. Two things arise, of course, when there is a delay in complaint. One is the opportunity of the accused perhaps to look at matters which were happening at about that time and to raise them in evidence. Also, the capacity of the complainants to be accurate is probably reduced and that may raise some greater difficulty in cross-examination of them. It may also, of course, explain some errors in the recollection."

33 Counsel for the appellant asked her Honour to give redirections in respect of the passage we have quoted. The submission was that her Honour's directions

fell short of what the decision of this Court in *Longman v The Queen*[28] required. Her Honour acceded to the submission by giving a redirection in these terms:

> "Finally, I just want to make it very clear about this, the matters are to be looked at separately. There is no supporting evidence so that the evidence in one cannot be used in another. The evidence of one complainant cannot be used to support the evidence of the other. There was a very long period in which there was no complaint. The complaint came late. You must take that into account and the circumstances in which it came into existence and what the complainant, that is [the relevant complainant] who was the only one who complained of course, had to say about that. There was no complaint as such from [the other complainant]. He told the police about it when he was approached by the police following the complaint by [the relevant complainant]. You will be aware that in the circumstances of a twenty year delay that clearly those are all matters which you are going to consider. You are going to consider motive, the opportunity to concoct, the reason why that might be. You are going to look very carefully at the nature and circumstances in which that complaint came into existence. Those are all matters that you will bear in mind when you consider the case for the accused."

34 The appellant was convicted on count one on 15 July 1998, and was sentenced on 28 August 1998.

The Appeal to the Court of Criminal Appeal of New South Wales

35 An appeal to the Court of Criminal Appeal of New South Wales (Wood CJ at CL, Barr and Greg James JJ) was unanimously dismissed on 1 June 1999. Of the relevant parts of the summing up, Barr J, with whom the other members of the Court substantially agreed, said[29]:

> "This was a compact summing up that contained several appropriate warnings. It seems to me that the combination of observations, directions and warnings was sufficient in the context of the trial to give the jury a firm understanding that they were obliged to consider very carefully the evidence of each complainant and why. Looking at the summing up over all, I think that it was fair."

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28 (1989) 168 CLR 79.

29 [1999] NSWCCA 130 at [29].

The Appeal to this Court

36 Special leave to appeal was granted by Gaudron and Hayne JJ on 26 November 1999 on the following ground:

> "The Court of Criminal Appeal erred in determining that the directions given to the jury by the learned trial judge on the delay of almost 20 years between the complaint and the conduct giving rise to it were adequate to meet the circumstances of the case."

37 Their Honours referred the application for special leave to appeal to the Full Court of this Court on two further grounds not raised in the Court of Criminal Appeal.

> "The [appellant] has been convicted of an offence under s 81A Crimes Act 1900 (NSW) (in the terms in which that section stood in 1978) on the basis of evidence which clearly fails to establish the elements of that offence and which positively establishes that the offence charged has not been committed, either in the manner alleged or at all.
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> The directions given by the learned trial judge to the jury on the elements of an offence under s 81A Crimes Act 1900 (NSW) were inadequate in that they failed to explain to the jury the true nature of such an offence."

38 The parties were directed to be prepared to argue these grounds as if on an appeal, and also to be prepared to argue matters relating to the power of this Court to deal with points and grounds of appeal not taken below.

39 We turn to the reasons for judgment of this Court in *Longman*[30]. In the joint judgment of Brennan, Dawson and Toohey JJ, their Honours said[31]:

> "There were several significant circumstances in the case: the delay in prosecution, the nature of the allegations, the age of the complainant at the time of the events alleged in the two counts in the indictment, the alleged awakening of a sleeping child by indecent acts and the absence of complaint either to the applicant or to the complainant's mother. It would not have been surprising if these circumstances had elicited some comment from the trial judge, for it would have been proper to remind the jury of considerations relevant to the evaluation of the evidence. Of

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30 (1989) 168 CLR 79.

31 (1989) 168 CLR 79 at 90-91.

course, any comment must be fairly balanced. For example, any comment on the complainant's failure to complain should include (as indeed s 36BD requires) that there may be 'good reasons why a victim of an offence such as that alleged may hesitate in making or may refrain from making a complaint of that offence'. But there is one factor which may not have been apparent to the jury and which therefore required not merely a comment but a warning be given to them: see *R v Spencer*[32]. That factor was the applicant's loss of those means of testing the complainant's allegations which would have been open to him had there been no delay in prosecution. Had the allegations been made soon after the alleged event, it would have been possible to explore in detail the alleged circumstances attendant upon its occurrence and perhaps to adduce evidence throwing doubt upon the complainant's story or confirming the applicant's denial. After more than twenty years that opportunity was gone and the applicant's recollection of them could not be adequately tested. The fairness of the trial had necessarily been impaired by the long delay (see *Jago v District Court (NSW)*[33]) and it was imperative that a warning be given to the jury. The jury should have been told that, as the evidence of the complainant could not be adequately tested after the passage of more than twenty years, it would be dangerous to convict on that evidence alone unless the jury, scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy. To leave a jury without such a full appreciation of the danger was to risk a miscarriage of justice. The jury were told simply to consider the relative credibility of the complainant and the appellant without either a warning or a mention of the factors relevant to the evaluation of the evidence. That was not sufficient."

The passage distinguishes between two different sets of circumstances: those which might well invite, and, we would interpolate, will generally require, comment; and those in respect of which a warning is imperative.

40 Deane J said[34]:

"A trial judge has the general responsibility of giving appropriate directions to assist the jury in the performance of their function as the judges of fact. That responsibility includes the giving of an appropriate

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32 [1987] AC 128 at 141.

33 (1989) 168 CLR 23 at 31-32, 42-44, 56-57, 71-72.

34 (1989) 168 CLR 79 at 95-96.

caution or warning in circumstances where there are potential dangers in acting upon particular evidence which may not, without such a caution or warning, be appreciated by the jury."

41 The other member of the Court, McHugh J, expressed his opinion in this way[35]:

"Accordingly, the present case was one where the requirement of a fair trial required a strong warning to the jury of the potential for error in the complainant's testimony. The jury should have been warned that, in evaluating her evidence, they had to bear in mind that it was uncorroborated, that over twenty years had elapsed since the last of the alleged offences occurred, that experience has shown that human recollection, and particularly the recollection of events occurring in childhood, is frequently erroneous and liable to distortion by reason of various factors, that the likelihood of error increases with delay, that the complainant had testified concerning incidents occurring to her as a young child after she had awoken and pretended to be asleep, that no complaint was made to her mother, and that, by reason of the delay and lack of specificity as to the dates, the defence was unable to examine the circumstances of the alleged offences. To what extent these matters needed elaboration or a consequential warning that it would be unsafe to convict on such uncorroborated evidence was very much a matter for the trial judge."

42 There may be some differences, of degree only perhaps, between the joint judgment and those of the other members of the Court: the former would confine the affirmative obligation to give a warning to the matter of delay and the difficulties of testing and disproving allegations by reason of the passage of time, and of the danger of convicting on the complainant's evidence alone[36]. The reasons of Deane and McHugh JJ might perhaps be read as suggesting that the positive obligation to warn that it might be dangerous to convict on a complainant's evidence, may arise in a case in which emotion, prejudice or suggestion may operate to distort recollection, or, in which other circumstances of potential danger in acting upon particular evidence exist. For reasons which will appear, in this case we do not think it necessary to explore the significance

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35 (1989) 168 CLR 79 at 108-109.

36 (1989) 168 CLR 79 at 91.

(if any) of such differences as there may be between the respective reasons for their Honours' unanimous decision in the result[37].

43 In our opinion, the appellant's appeal should succeed on the ground on which special leave has been granted.

44 As the appellant submits, the first reference by the trial judge to delay was followed by an observation which could have diminished the effect of the caution – it did fall short of a warning – against acting on the evidence of the complainant of a complaint so long delayed. To say what her Honour did in the first passage from her summing up that we have quoted was to say too little, too unemphatically, and less than what *Longman* required be said in the circumstances of this case. The redirection, which we have also quoted, suffered from some of the same or similar deficiencies.

45 The trial judge should have instructed the jury that the appellant was, by reason of the very great delay, unable adequately to test and meet the evidence of the complainant. Her Honour should not have offered the qualification that she did in relation to the remarks she did make about the delay. An accused's defence will frequently be an outright denial of the allegations. That is not a reason for disparaging the relevance and importance of a timely opportunity to test the evidence of a complainant, to locate other witnesses, and to try to recollect precisely what the accused was doing on the occasion in question. In short, the denial to an accused of the forensic weapons that reasonable contemporaneity provides, constitutes a significant disadvantage which a judge must recognise and to which an unmistakable and firm voice must be given by appropriate directions. Almost all of the passage of the majority in *Longman* to which we have referred (with appropriate adaptations to the circumstances of this case, including that because of the passage of so many years, it would be dangerous to convict on the complainant's evidence alone without the closest scrutiny of the complainant's evidence), should have been put to the jury. Additionally, this was, in our opinion, a case in which the trial judge should, again with appropriate adaptation, when summing up, have drawn attention to the additional considerations mentioned by Deane and McHugh JJ in *Longman*: the abstention, by the prosecutor, from questioning each co-complainant about the respective charges, the fragility of youthful recollection, the absence of a timely

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37 *Crofts v The Queen* (1996) 186 CLR 427 at 446 and *Jones v The Queen* (1997) 191 CLR 439 at 445-446, cases in which this Court has since held that directions in accordance with the joint judgment in *Longman* should have been, but were not, given.

complaint (subject to any reasonable explanation therefor) and the possibility of distortion.

46 As the allowance of the appeal on the first ground would only result in an order for the quashing of the verdict and an order for a new trial, the Court heard full argument on the further grounds in respect of which special leave was sought. But first it has to be decided whether this Court has power to deal with those grounds.

47 In our view, there can be no constitutional impediment to the hearing and determination of an appeal on a ground raised for the first time in this Court. The powers of the Court under s 73[38] of the Constitution have been described as "of the widest character which true appellate jurisdiction may possess". This was the language of Rich J in *Victorian Stevedoring and General Contracting Co Pty Ltd*

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38 "**Appellate jurisdiction of High Court**

73. 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."

and Meakes v Dignan[39]. His Honour added: "On an appeal we should re-examine fact and law as, indeed, we have always done, freely and without fetter or restriction."[40] There are already cases in which this Court has made clear that it may entertain and decide points not taken in the courts below in criminal cases[41].

48 In 1888, in *Cooper v Cooper* Lord Halsbury LC said[42]:

> "[I]t is manifest therefore that if all the facts are before your Lordships for decision, and that the point is open (and I have endeavoured to shew it is open to the parties to contend) – then, it is not only competent but incumbent upon this House to decide upon the true view of what legal rights these facts establish, although what was a question of fact in the Court of Session was not there mooted but is for the first time argued here before your Lordships."

49 Dixon J said that s 73 implied "the fullest authority to ascertain whether the judgment below ought, or ought not, to have been given"[43].

50 No relevant change to the principle applicable to a final appeal occurred as a result of Federation, or on the establishment of this Court. This is made clear in a civil case, *Suttor v Gundowda Pty Ltd*[44] in which Latham CJ, Williams and Fullagar JJ said[45]:

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39 (1931) 46 CLR 73 at 87.

40 (1931) 46 CLR 73 at 87.

41 For example: *Packett v The King* (1937) 58 CLR 190; *Pantorno v The Queen* (1989) 166 CLR 466; *Gipp v The Queen* (1998) 194 CLR 106.

42 (1888) 13 App Cas 88 at 101. See also *Misa v Currie* (1876) 1 App Cas 554 at 559; *The "Tasmania"* (1890) 15 App Cas 223 at 225, 230 per Lord Herschell; *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 at 480; *Montefiore v Guedalla* [1903] 2 Ch 26 at 31-32, 35, 39; *Banbury v Bank of Montreal* [1918] AC 626 at 705.

43 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 109.

44 (1950) 81 CLR 418.

45 (1950) 81 CLR 418 at 438.

> "The circumstances in which an appellate court will entertain a point not raised in the court below are well established. Where a point is not taken in the court below and evidence could have been given there which by any possibility could have prevented the point from succeeding, it cannot be taken afterwards. In *Connecticut Fire Insurance Co v Kavanagh*[46], Lord Watson, delivering the judgment of the Privy Council, said, 'When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below.'[47] The present is not a case in which we are able to say that we have before us all the facts bearing on this belated defence as completely as would have been the case had it been raised in the court below."

Quick and Garran say this of s 73[48]:

> "This section confers upon the High Court a general appellate jurisdiction in all matters decided by the State Courts of last resort, by other federal courts, by Judges of the High Court itself in the exercise of the original jurisdiction of the Court, and (on matters of law only) by the Inter-State Commission. The original jurisdiction of the High Court is limited to matters in which the subject matter of the suit, or the character of the parties, fall under certain specified heads; but the appellate jurisdiction has no such limits. It extends (subject to the excepting and regulating power of the Parliament) not only to all decisions of courts of original federal jurisdiction, but also to all decisions of the Supreme Courts of the States, irrespective of whether the subject-matter of the suit, or the character of the parties, would have brought it within the original jurisdiction of the federal courts. In other words … the High Court is not merely a *federal*, but also a *national* court of appeal; it occupies the provincial as well as the federal sphere, and is the apex of the judicial

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46 [1892] AC 473.

47 [1892] AC 473 at 480.

48 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 737-738.

systems of the States, as well as of the judicial system of the Commonwealth." (emphasis in original)

51 The most recent case on point is *Gipp v The Queen*[49] in which the three judges in the majority[50] entertained no doubt that the Court could hear argument on and uphold a ground of appeal not taken in the courts below although the other two members of the Court thought the question might still be an open one[51]. We do not take what the majority said in *Mickelberg*[52] and *Eastman*[53], in respect of the non-reception of evidence on appeal to this Court, to deny the amplitude of the Court's powers to deal with fresh points which can be made on the basis of the record in the courts below.

52 Accordingly we are of the opinion that there is no constitutional inhibition upon the jurisdiction of this Court to entertain an appeal on grounds raised for the first time in this Court.

53 The trial of the appellant was conducted in the District Court which was exercising State, not federal, jurisdiction. It follows that in respect of the appellant's conviction and sentence by that Court, s 73 of the Constitution had no immediate operation. This is because, where purely State jurisdiction is involved, s 73 is directed only to the Supreme Courts of the States. Section 73 is engaged here because the appeal is brought from the New South Wales Court of Criminal Appeal, which, for the purposes of s 73, is classified as the Supreme Court. It was held in *Stewart v The King*[54] that the *Criminal Appeal Act* 1912

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49 (1998) 194 CLR 106.

50 (1998) 194 CLR 106 at 116 [23] per Gaudron J, 154-155 [138] per Kirby J, 161 [164] per Callinan J.

51 (1998) 194 CLR 106 at 125-129 [56]-[65] per McHugh and Hayne JJ.

52 *Mickelberg v The Queen* (1989) 167 CLR 259.

53 *Eastman v The Queen* (2000) 74 ALJR 915; 172 ALR 39.

54 (1921) 29 CLR 234. Before the establishment of the New South Wales Court of Criminal Appeal, appeals were taken to this Court from decisions of the Supreme Court of New South Wales upon Crown cases reserved under s 475 of the *Crimes Act*: *White v The King* (1906) 4 CLR (Pt 1) 152; *Bataillard v The King* (1907) 4 CLR (Pt 2) 1282; *Myerson v The King* (1908) 5 CLR 596. In *Trainer v The King* (1906) 4 CLR (Pt 1) 126, this Court reversed the decision of the Supreme Court of New South Wales upon a special case stated by the Chairman of Quarter Sessions.

(NSW) ("the Criminal Appeal Act") did not create a new court, but merely directed that the Supreme Court of New South Wales, constituted as therein prescribed, should act as the Court of Criminal Appeal and that, therefore, an appeal lay from the Court of Criminal Appeal to this Court under s 73.

54 In essence the submission of the respondent is that, with respect to a ground not in the grounds of appeal filed in the Court of Criminal Appeal, that Court would have had no jurisdiction to consider it and this Court cannot do so because its jurisdiction is no larger than that of the Court of Criminal Appeal. Section 5(1)(a) of the Criminal Appeal Act provides that a person convicted on indictment may appeal under the statute against the conviction "on any ground which involves a question of law alone". In other cases there is a requirement for leave[55] or a certificate of the trial judge[56]. Rule 25A of the Criminal Appeal Rules is headed "Further grounds of appeal" and states:

> "(1) Where the appellant intends to rely on grounds of appeal not stated in his notice of appeal or application for leave to appeal, he shall, within 28 days after giving his notice of appeal, or of application for leave to appeal send his notice of additional grounds of appeal to the Registrar.
>
> (2) The Court may at any time extend the time fixed by subrule (1)."

55 Rule 4 assumes that the Court may give leave to raise a point that was not taken at the trial. The rule states:

> "No direction, omission to direct, or decision as to the admission or rejection of evidence, given by the Judge presiding at the trial, shall, *without the leave of the Court*, be allowed as a ground for appeal or an application for leave to appeal unless objection was taken at the trial to the direction, omission, or decision by the party appealing or applying for leave to appeal." (emphasis added)

56 These rules were made under the power conferred by s 28 of the Criminal Appeal Act. It is not suggested that they were not properly made in exercise of that power.

57 This Court, in relation to a fresh ground, may do not only what the Court of Criminal Appeal could have done by giving leave in respect of it, but also,

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55 s 5(1)(b), (c).

56 s 5(1)(b).

pursuant to s 73 of the Constitution, may uphold an appeal on that ground even if leave had not been sought in the Court of Criminal Appeal. This Court may perhaps only choose to do that rarely, but the power to do it is constitutionally entrenched and should be exercised to cure a substantial and grave injustice[57].

58 We move then to the grounds in respect of which special leave is sought and has so far not been granted. Her Honour the trial judge's summing up did not need, in view of the fact that the point was not raised before, to draw any relevant distinction between the commission of an offence *with* a person, and an offence committed in the presence of, or towards, a person. Her Honour said:

> "The words in the indictment which say, 'Did commit an act of indecency with [the relevant complainant]' referred to an act of indecency in the presence of [the relevant complainant] so it is sufficient if the Crown has proved beyond reasonable doubt that the accused did those things of which [the relevant complainant] has told you, and that they were in the presence of [the relevant complainant]. Those are the two aspects, that he was there, that he saw this, and that is what happened. If you are of the opinion that such an action is indecent, then that is sufficient."

It was the appellant's submission in this Court that the evidence for the Crown, taken at its highest, could not sustain a conviction for the offence charged because the conduct alleged did not include actual participatory conduct (voluntary or involuntary) by the complainant.

59 In *R v Jones*[58] the Bench, without explicit reference, seems to have accepted that the equivalent provision in the United Kingdom required a participatory consensual act or acts by a person other than the accused. In *R v Hornby and Peaple*[59] the Court of Criminal Appeal held that it was essential that the members of the jury be directed to the requirement that the two men charged there had been "acting in concert"[60].

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57 *Craig v The King* (1933) 49 CLR 429 at 442 per Starke J.

58 [1896] 1 QB 4.

59 [1946] 2 All ER 487 at 488.

60 See also *R v Hunt* [1950] 2 All ER 291; *R v Pearce* [1951] 1 All ER 493 at 494; *Archbold's Pleading, Evidence and Practice in Criminal Cases*, 35th ed (1962), par 2988.

60 But in the English case *R v Hall*[61] a different view was taken. It was held that, in context, "with" included "against" or "directed towards"[62]. A similar conclusion was reached in *Burgess*[63] in respect of the English *Indecency with Children Act* 1960 which relevantly provided for an offence of gross indecency with or towards a child[64].

61 This view of the meaning of "with" as being capable of including "towards" did not prevail. In *R v Preece*[65] Scarman LJ in delivering the judgment of the Court said:

> "To construe the section so that the complete offence could be committed even though the other man did not consent could lead to the embarrassment of, and injustice to, innocent men. For example, two men happen to be close to each other in a public lavatory: one, the defendant, masturbates in the presence of the other, intending that the other should watch him since it is this that gives him sexual satisfaction: the other, who is not charged, sees him and is disgusted. The act of indecency was 'directed towards' him: upon Lord Parker CJ's construction of the section, the first man will be properly charged with committing an act of gross indecency with the other, who will be named in the indictment, though not charged, and is innocent of any indecency.
>
> The embarrassment and distress that this could cause perfectly respectable men is such that we would not so construe the section unless it was incapable of any other construction."

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61 [1964] 1 QB 273.

62 [1964] 1 QB 273 at 276-277 per Lord Parker CJ delivering the judgment of the Court.

63 *Director of Public Prosecutions v Burgess* [1971] 1 QB 432 at 436 per Lord Parker CJ with whom James and Cooke JJ agreed.

64 Section 1 read: "(1) Any person who commits an act of gross indecency with or towards a child under the age of 14, or who incites a child under that age to such an act with him or another, shall be liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding six months, to a fine not exceeding £100, or to both."

65 [1977] QB 370 at 375-376.

62 Two relatively recent decisions in New South Wales are to a similar effect. In *R v Page*[66] the Court of Criminal Appeal adopted the approach of Scarman LJ in *Preece*[67] but as a concession was made on that matter by the Crown there the question was not fully argued. The distinction between the words "with" and "towards" in s 61N of the *Crimes Act* was held, however, to be a real one by a majority (Priestley JA and Grove J, Hulme J dissenting) of the Court of Criminal Appeal in *Orsos*[68].

63 In this case the only act of the relevant complainant, the Crown points out, is an act of involuntary participation by that complainant in the wiping from the floor, with the appellant's handkerchief, and at his direction, the results of his onanism. It was not an act done in concert with the appellant. Nor was it, in our opinion, as offensive as it would have been to the complainant, the sort of activity to which the offence in s 81A was directed, that is, as the Attorney-General of the day put it, "the problem of homosexuality" implying, we think, consensual participatory acts, or, acts done in concert. It was not conduct of the kind to which the charge could be directed, as explained in the English and New South Wales authorities to which we have referred and are content to adopt.

64 Accordingly the appellant should not have been charged with, and the conduct of which evidence was given was not capable of sustaining, the count upon which he was convicted.

65 We would grant special leave to appeal and allow the appeal on the first of the two further grounds proffered. The consequence is that not only should the appeal be allowed but also that a verdict of acquittal should be entered in respect of the conviction the subject of the appeal. We would so order.

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66 Unreported, Court of Criminal Appeal of New South Wales, 25 November 1991 (per Campbell J, Gleeson CJ and Mahoney JA concurring).

67 Unreported, Court of Criminal Appeal of New South Wales, 25 November 1991 at 3.

68 (1997) 95 A Crim R 457.

66 McHUGH J. The facts and issues in this case are set out in the joint judgment of Gaudron, Gummow and Callinan JJ. I agree that the appeal should be allowed and that a verdict of acquittal should be entered in respect of the conviction the subject of the appeal. But my path to that conclusion differs from that taken by their Honours.

67 I agree with their Honours that the case called for a *Longman* direction and that the conviction must be set aside. That being so, the question arises as to whether a new trial should be ordered or an acquittal entered in respect of the count which was the basis of the charge under s 81A of the *Crimes Act* 1900 (NSW).

68 Before the case reached this Court, the appellant had raised no point concerning the application of s 81A of the *Crimes Act* 1900 (NSW) to the facts of the case. Despite his failure to do so, their Honours hold that it was open to him to do so as a substantive ground of appeal in this Court. I have previously expressed the view that this course is not open to an appellant, having regard to the nature of the appeal conferred by s 73 of the Constitution[69]. I adhere to that view although the majority decision on this point in the present case will settle the matter for the future.

69 Because the conviction of the appellant must be set aside, however, the Court has a discretion whether to order a new trial or to enter an acquittal in respect of the count which was the subject of the conviction. As Gaudron, Gummow and Callinan JJ point out, the conduct of the appellant was not capable of sustaining the charge under that count. In those circumstances, it would be futile to order a new trial of that count.

70 The appropriate order, therefore, is that the appeal should be allowed, the conviction set aside, and a verdict of acquittal entered in respect of that count.

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69 *Gipp v The Queen* (1998) 194 CLR 106 at 125-129 [56]-[65].

71 KIRBY J. These proceedings raise three questions. Those questions are identified in the joint reasons of Gaudron, Gummow and Callinan JJ[70].

72 By special leave, the appellant appeals to this Court against the judgment of the New South Wales Court of Criminal Appeal[71]. That Court rejected his complaint that directions given to the jury by the trial judge did not conform to the instructions of this Court in *Longman v The Queen*[72] and other cases[73]. Success on that issue would require the setting aside of the appellant's conviction and, normally, would result in an order for retrial.

73 However, the appellant also sought to enlarge his appeal to include a more basic challenge. This was, in effect, that the Crown evidence, at its highest, did not establish the offence of which the appellant had been convicted and that the trial judge should have so directed the jury. The application to enlarge the grounds of appeal to tender this point for decision was referred to the Full Court. So was the issue of whether, in an appeal as envisaged by the Constitution[74], this Court may permit a new ground (even of a fundamental character) never before litigated. In my opinion the appellant succeeds on each of these three questions. He is therefore entitled to have his conviction quashed.

The complaints and charges against the appellant

74 Before his conviction, Mr Alan Crampton (the appellant) was a highly regarded primary school teacher with specialist experience in teaching pupils with learning disabilities. In 1978, he was teaching at a public school in the western suburbs of Sydney. Before the subject complaints he had no criminal convictions nor any other notable mark against his character. He was regarded as a hard-working, efficient, stable and reliable person and an impressive teacher[75]. At all times, he has denied the accusations made against him.

75 In March 1997, a male student in his class of 1978 (the first complainant) made a complaint to police concerning sexual offences said to have been

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70 Reasons of Gaudron, Gummow and Callinan JJ at [23] ("the joint reasons").

71 *R v Crampton* [1999] NSWCCA 130.

72 (1989) 168 CLR 79 ("*Longman*").

73 eg *Jones v The Queen* (1997) 191 CLR 439 at 446, 453-455, 464.

74 s 73.

75 *R v Crampton* unreported, District Court of New South Wales, 28 August 1998 at 5-6 (remarks of Karpin DCJ on sentence).

committed by the appellant 19 years earlier. Before 1997 this complainant had made no such allegations whether to the appellant, other teachers, his family or police. Because the complaints referred to incidents during which another boy in the class was alleged to have been present, police interviewed that person who then himself made a complaint (the second complainant). He too had never previously complained to anyone of sexual misconduct on the part of the appellant.

76 Upon the basis of the statements taken from the two complainants, the police charged the appellant with five offences. He pleaded not guilty. He stood trial in the District Court of New South Wales in July 1998. The trial lasted six days. Following deliberations lasting more than a day, the jury returned with a verdict of guilty on the first count of the indictment and an indication that, in relation to the other four counts, they were unable to reach agreement. The appellant was convicted on the first count. He was subsequently sentenced to serve 500 hours community service.

The alleged offence

77 The appellant's conviction was of an offence against s 81A of the *Crimes Act* 1900 (NSW) ("the Act"). That offence was repealed in 1984[76]. It was then re-enacted in the form of s 78Q of the Act. The terms of s 81A, as it stood at the time of the appellant's alleged offence[77], and of s 78Q as later enacted and amended, sufficiently appear in the joint reasons[78].

78 In 1978, s 81A appeared in a part of the Act providing for "Unnatural offences". Its marginal note referred to "Outrages on decency". It was immediately preceded by the provision concerning the "abominable crime of buggery"[79] and the crime of indecent assault on a male[80]. By way of contrast to the language of s 81A, the last-named offence, appearing in s 81, read:

> "Whosoever commits an indecent assault upon a male person of whatever age, with or without the consent of such person, shall be liable to penal servitude for five years."

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76 *Crimes (Amendment) Act* 1984 (NSW).

77 Joint reasons at [26].

78 Joint reasons at [28].

79 The Act, s 79.

80 The Act, s 81. The marginal note refers to 46 Vict No 17, s 60.

79 In 1992, the partly re-enacted form of s 81A, namely s 78Q of the Act, providing for the offence of "acts of gross indecency", was again amended[81]. The amendment inserted after "with", wherever occurring, the words "or towards"[82]. The Explanatory Note accompanying the Act records that the purpose of this amendment was to make "the language of the provision more consistent with section 61N and other provisions relating to acts of indecency"[83]. The context of judicial authority within which that amendment was effected will need to be described.

80 Before embarking on a description of the events said to constitute the appellant's offence against s 81A, it is useful to indicate the appellant's fundamental legal challenge to the accusation against him. Put shortly, the appellant's submission to this Court was that, even if the first complainant's evidence against him were accepted to the full (evidence which he continued to deny), it would not, in law, amount to the offence of the commission of an "act of indecency with another male person". The facts alleged would meet a charge expressed in terms of an act of indecency "towards" another male person or "in the presence of" another male person. But it was not an act of indecency "with" such a person, as the Act then alone provided. With this challenge in mind, I turn to describe the relevant evidence given by the first complainant.

The evidence in support of the conviction

81 The first complainant alleged that the appellant, in 1978, whilst teaching a class, had called him from the back of the classroom into a storeroom nearby. In the storeroom the appellant was allegedly standing with his back against a bookshelf. His penis was erect and he was masturbating. According to the first complainant, the appellant closed the door of the storeroom as soon as the first complainant entered. At the trial there was a dispute as to whether the appellant could have closed the door whilst standing where described. In this Court it was agreed that that dispute must be taken to have been resolved against the appellant.

82 Photographs tendered at the trial showed that the storeroom was a small, confined space. The appellant allegedly ejaculated onto the floor and gave the first complainant his handkerchief and told him to clean up the ejaculate. He then allegedly said to the first complainant: "This is what will come out of you

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81 By *Criminal Legislation (Amendment) Act* 1992 (NSW), s 3, Sched 1, cl 6.

82 A similar amendment was made to s 61N of the Act: see *Criminal Legislation (Amendment) Act* 1992, s 3, Sched 1, cl 3.

83 Explanatory Note accompanying *Criminal Legislation (Amendment) Act* 1992 at 4.

when you're older." At the end of this episode, according to the first complainant, he was told to go back to his seat in the classroom. The appellant then continued with the class as normal. The first complainant did not talk to anyone about that day. His explanation was that he was scared and did not understand what had happened as he had never seen anything like it before.

83 It was not claimed that the appellant had touched the first complainant or that he had procured the first complainant to touch him. Such allegations were made in respect of the other counts upon which the jury could not reach a verdict. It was not alleged that the first complainant participated in the appellant's conduct save by watching it, cleaning up the ejaculate as instructed and listening to the statement after the act. Before this Court, the Crown submitted that, in the circumstance that the appellant and the first complainant were male persons, the events described sufficed to constitute the offence. The appellant submitted that they did not.

The trial judge's direction concerning the offence

84 Perhaps because the argument now raised by the additional grounds was not presented at the trial, the directions of the trial judge concerning the elements of the offence were relatively brief. As the appellant complains that they fell short of the trial judge's duty to explain those elements to the jury (and, in fact, mis-stated the requirements of the section) it is important to note what the trial judge (Karpin DCJ) told the jury in this respect[84]. Her Honour said:

> "The words in the indictment which say, 'Did commit an act of indecency with [the first complainant]' referred to an act of indecency in the presence of [the first complainant] so it is sufficient if the Crown has proved beyond reasonable doubt that the accused did those things of which [the first complainant] has told you, and that they were in the presence of [the first complainant]. Those are the two aspects, that he was there, that he saw this, and that is what happened. If you are of the opinion that such an action is indecent, then that is sufficient."

85 The trial judge gave the jury unexceptionable instructions about the meaning of "indecent"[85]. She noted that the appellant's case amounted to a denial: on no occasion had he ever called the first complainant, or any other student, into the storeroom and closed the door. Apart from this, there was no

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84 *R v Crampton* unreported, District Court of New South Wales, 14 July 1998 at 12 (charge by Karpin DCJ to the jury).

85 *R v Crampton* unreported, District Court of New South Wales, 14 July 1998 at 10 (charge by Karpin DCJ to the jury).

other instruction to the jury about the meaning of the offence. Specifically, there was no other instruction about the requirement that the prosecution prove the commission of the act of indecency "with" another male person. In the way that the trial was conducted, that issue does not appear to have been contested. Although other matters were the subject of detailed requests for redirection, there was no application in respect of the foregoing portion of the trial judge's charge.

86 The appellant emphasised, as is the case, the fundamental obligation of the judge in a criminal trial accurately to explain the relevant law to the jury[86], and in particular to explain, by reference to the relevant evidence, the elements of the offence[87]. However, the logic of the appellant's argument in respect of the first count was not that the necessary elements of s 81A of the Act needed an elaborate explanation but rather a direction to acquit him of the offence had to be given having regard to the failure of the evidence to support the offence. Eventually, this was the proposition which the appellant propounded in this Court. If the construction of the section which he advanced was accepted, there was no evidence of commission of the offence. On the contrary, the prosecution evidence, accepted at its highest, demonstrated that he was not guilty of the offence.

An act of indecency "with" a male person

87 Judicial authority concerning the elements of s 81A and its English equivalent was, unfortunately, not called to the notice of the trial judge. That authority clearly provided that it was not necessary, in order to make out the elements of the offence, to establish physical contact between each of the male persons involved[88]. Nor was it necessary to establish any element of compulsion[89]. But that left a question about the legal requirements concerning the involvement of the second male person where that person did no more than to witness the act of indecency of the first. Was such a passive role sufficient to constitute "the commission of ... [an] act of indecency with another male person"[90]? Or was some closer involvement in the act of indecency on the part of

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86 *Mraz v The Queen* (1955) 93 CLR 493 at 514; *KBT v The Queen* (1997) 191 CLR 417 at 434-435; *Gipp v The Queen* (1998) 194 CLR 106 at 139-140 [100].

87 *Holland v The Queen* (1993) 67 ALJR 946 at 950-953; 117 ALR 193 at 199-202; *KBT v The Queen* (1997) 191 CLR 417 at 434-435; cf *R v Jones* (1995) 38 NSWLR 652 at 659.

88 *R v Hornby and Peaple* [1946] 2 All ER 487 at 488; *R v Hunt* [1950] 2 All ER 291 at 292.

89 *R v B and L* (1954) 71 WN (NSW) 138 at 139 noted (1969) 43 ALJ 279 at 280.

90 The Act, s 81A.

the observer required to constitute the offence and, if so, was such involvement proved in the present case?

88 In England, decisions relevant to the meaning of equivalent provisions go back at least to *R v Jones*[91]. In that case Wills J, who had stated a case for the opinion of the Court for Crown Cases Reserved on the meaning of the *Criminal Law Amendment Act* 1885 (UK)[92], questioned whether "the act constituting the crime" had to be one involving the participation of both men[93]. The judges answering the case appear to have assumed, rather than decided, that an act of gross indecency *with* another involved the active participation of that other[94].

89 Half a century later in *R v Hornby and Peaple*[95], the English Court of Criminal Appeal held that the jury, considering a count charging such an offence, should be directed that the prosecution had to establish that the two men were "acting in concert". Indeed, the court regarded it as "essential ... that the minds of the jury should be directed on that point"[96]. A similar requirement appears to have been accepted in the same court in *R v Hunt*[97]. Later, in *R v Pearce*[98], that court endorsed the previous authority, concurring in the view that the two male persons "must be proved to have been acting in concert together"[99]. The matter was taken as settled by Archbold's *Criminal Pleading, Evidence & Practice* in 1962[100]. But at this point, a discordant judicial note was struck.

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91 [1896] 1 QB 4.

92 s 11.

93 *R v Jones* [1896] 1 QB 4 at 4-5.

94 See *R v Preece* [1977] QB 370 at 374 ("*Preece*").

95 [1946] 2 All ER 487 at 488.

96 *R v Hornby and Peaple* [1946] 2 All ER 487 at 488.

97 [1950] 2 All ER 291 at 292.

98 [1951] 1 All ER 493.

99 *R v Pearce* [1951] 1 All ER 493 at 494.

100 35th ed (1962), par 2988.

90 In *R v Hall*[101], Lord Parker CJ, after referring to previous authority, expressed reservations about the interpretation of the offence adopted by Humphreys J in *R v Pearce*. His Lordship said[102]:

> "the word 'with' in section 13 of the *Sexual Offences Act*, 1956, does not mean 'with the consent of' but has the somewhat looser meaning of merely 'against' or 'directed towards.'"

As will be apparent, these observations were addressed to meeting a contention that the consent of the second individual was not required to constitute the crime rather than to reverse the longstanding view about the elements of the offence, in its successive manifestations, namely that it required action in concert by two participants. Naturally enough, in the present proceedings, the Crown latched onto Lord Parker's words. If they were good law, the word "with" in s 81A of the Act would mean no more than "against" or "directed towards". So construed, the word would certainly be capable of including the conduct alleged against the appellant.

91 In the way of these things, English authority later returned to the point and corrected itself. In *Preece*[103], two men were apprehended in adjoining cubicles of a public toilet whilst masturbating. Each was watching the other through a hole between the cubicles. A question arose as to whether such conduct constituted an offence against the section equivalent to that in issue in these proceedings. The English Court of Appeal noted that there was a conflict in judicial authority between *Hall* and the earlier decisions. The court rejected the dicta in *Hall*. It returned to the earlier authority. The reasons of the court were given by Scarman LJ who said[104]:

> "To construe the section so that the complete offence could be committed even though the other man did not consent could lead to the embarrassment of, and injustice to, innocent men. For example, two men happen to be close to each other in a public lavatory: one, the defendant, masturbates in the presence of the other, intending that the other should watch him since it is this that gives him sexual satisfaction: the other, who is not charged, sees him and is disgusted. The act of indecency was 'directed towards' him: upon Lord Parker CJ's construction of the section, the first man will be properly charged with committing an act of gross

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101 [1964] 1 QB 273 ("*Hall*").

102 *Hall* [1964] 1 QB 273 at 277.

103 [1977] QB 370.

104 *Preece* [1977] QB 370 at 375-376.

> indecency with the other, who will be named in the indictment, though not charged, and is innocent of any indecency.
>
> The embarrassment and distress that this could cause perfectly respectable men is such that we would not so construe the section unless it was incapable of any other construction."

On this footing, their Lordships reaffirmed the view that "with" involves the participation of two men[105]. In the facts of that case such participation was found.

92 In New South Wales, in relation to s 81A, the construction which the English judges had initially favoured, and to which they returned in *Preece*, was accepted by the Court of Criminal Appeal in *R v Page*[106]. In that decision the controversy in the English authorities was noted. So was a concession by the Crown that the interpretation of s 81A of the Act adopted in *Preece*, in respect of the equivalent provision, should be followed. The Court expressly preferred the conclusion reached in *Preece*[107]. It rejected the wider view that the word "with" included "against" or "towards". Consequently, in *Page* the conviction of the appellant under s 81A was set aside. The Court noted that the section "has now been replaced by other provisions in which this problem does not arise"[108].

93 In a later decision of the same Court in *Orsos*[109] a somewhat analogous question arose. In that case, the accused had been charged with inciting a person to commit "an act of indecency with or towards" the accused contrary to s 61N(1) of the Act. By majority, the Court found that the count was bad for duplicity[110]. This conclusion was based on the opinion that to commit an act of indecency "with" a person involved two participants, whereas logically and grammatically

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105 *Preece* [1977] QB 370 at 376.

106 Unreported, Court of Criminal Appeal of New South Wales, 25 November 1991 per Campbell J (Gleeson CJ and Mahoney JA concurring) ("*Page*").

107 *Page* unreported, Court of Criminal Appeal of New South Wales, 25 November 1991 per Campbell J (Gleeson CJ and Mahoney JA concurring) at 3.

108 *Page* unreported, Court of Criminal Appeal of New South Wales, 25 November 1991 per Campbell J (Gleeson CJ and Mahoney JA concurring) at 3.

109 (1997) 95 A Crim R 457.

110 *Orsos* (1997) 95 A Crim R 457 at 460 per Grove J; Priestley JA concurring, Hulme J dissenting.

one person could commit an act of indecency "towards" another[111]. Priestley JA (in agreeing with Grove J) accepted the approach adopted in *Preece*. He rejected that adopted in *Hall* on the footing that "it gives to the statutory words a meaning closer to what, as far as I can judge, most English speakers would think they meant upon reading them with reasonable care in their immediate context"[112].

94 Although *Orsos* concerned a different section in the current provisions in the Act, the approach taken by the majority of the Court of Criminal Appeal logically supports the construction urged for the appellant in respect of s 81A of the Act in this case. Had *Page* or *Orsos* been drawn to the notice of Karpin DCJ, it would have been her Honour's duty, at the trial of the appellant, to give effect to the construction of s 81A there explained. On the basis of the holding in *Orsos* that "[t]o commit an act of indecency 'with' a person involves two participants"[113], it would have presented the question whether, relevantly, the first complainant in the present case was a "participant" in the act of indecency alleged against the appellant. That is, whether it could be said that he "acted in concert" with the appellant in the commission of the offence.

Indecency "with" a person requires action in concert

95 Leaving aside for the moment the constitutional and discretionary arguments advanced, the Crown submitted that this first point lacked merit both on factual and legal grounds. So far as the facts were concerned, the Crown argued that, even if a measure of participation by the second male person was required, there was evidence upon which it would have been open to the jury to convict the appellant, namely the evidence of the first complainant. According to his evidence he had been present in a small room with the door closed. He had been forced to watch a sexual act. As Scarman LJ noted in *Preece*[114], and is a commonplace, some people obtain sexual satisfaction from the fact that another person watches them performing indecently. According to the Crown, the mere fact that there was no physical contact was insufficient in law to excuse the appellant from liability. Emphasis was laid upon the requirement that the first complainant should clean up the ejaculate with the appellant's handkerchief and the statement made to the first complainant concerning his own future sexual development.

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111 *Orsos* (1997) 95 A Crim R 457 at 460 per Grove J; Priestley JA concurring, Hulme J dissenting.

112 *Orsos* (1997) 95 A Crim R 457 at 458.

113 *Orsos* (1997) 95 A Crim R 457 at 460 per Grove J.

114 [1977] QB 370 at 376.

96 I do not believe that the issue can be resolved on this footing. On no view could it be said that the first complainant acted "in concert with the appellant" in the act of indecency which had thus concluded. His age and inexperience at the time would tend to deny such a possibility. Nor do I believe that this is a matter which, had it been signalled at the trial, would have given rise to any further or different evidence. The prosecution case, relevant to testing the legal proposition, was that contained in the evidence of the first complainant. His involuntary observations and subsequent actions cannot be regarded as concurrent conduct by him in the act of indecency found against the appellant.

97 The Crown then submitted that this Court should prefer the reasoning of the English Court of Criminal Appeal in *Hall*[115], disapprove the contrary English authority before and since, and overrule the local decisions in *Page*[116] and *Orsos*[117] in so far as those decisions required the construction of s 81A urged for the appellant. It was argued that *Preece* had been affected by an irrelevant concern that an innocent observer of an accused's conduct might be named in an indictment although not charged with the offence[118]. Attention was drawn to the Crown's concession in *Page*[119] and to Priestley JA's remark in *Orsos* that the "arguments are ... relatively evenly balanced"[120].

98 Obviously, the point cannot be said to be unarguable. After all, the construction now urged escaped those who represented the prosecution and the appellant at trial, the trial judge and the Court of Criminal Appeal. I would not, for my own part, criticise too sternly counsel who missed the point[121]. They have not been heard in their defence and it is not an issue before this Court. Their omission was not noticed by four very experienced judges. Sometimes, unless an ambiguity is perceived, one is unaware of all the mental struggles that have gone on to unravel it. On the other hand, this appeal does emphasise, once again, the duty of those involved in criminal trials to familiarise themselves with past

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115 [1964] 1 QB 273. See also *Director of Public Prosecutions v Burgess* [1971] 1 QB 432.

116 Unreported, Court of Criminal Appeal of New South Wales, 25 November 1991.

117 (1997) 95 A Crim R 457.

118 *Preece* [1977] QB 370 at 375-376.

119 Unreported, Court of Criminal Appeal of New South Wales, 25 November 1991 at 3.

120 (1997) 95 A Crim R 457 at 458.

121 cf reasons of Hayne J at [164].

decisions concerning the offence charged. This said, for a number of reasons, it is my opinion that *Preece*, *Page* and *Orsos* were correctly decided. They accurately state the elements of s 81A of the Act.

99 First, it is important to put s 81A in the context in which that provision appears[122]. It was one of those provisions dating back to the nineteenth century, which were directed against so-called "unnatural [sexual] offences" by males with males. It was not, as such, directed at offences against young persons. It was targeted at homosexual conduct. Consent was irrelevant. Age was irrelevant. In s 81A it was made explicitly clear that whether the offence occurred "in public or private" was irrelevant. This was the kind of offence which, in the then opinion of the legislature, outraged decency[123]. The judicial language in several of the English cases cited indicates the concerns to which the provisions of sections such as s 81A were addressed[124]. The preceding sections of the Act also suggest that s 81A was not concerned with the conduct of one male person in relation to another who is wholly innocent and merely observing. The context therefore lends weight to the appellant's interpretation that the mischief which the section was meant to address was male sexual conduct performed in concert with another male.

100 Secondly, the state of judicial authority also strengthens the appellant's argument. The attempt to give the word "with" the meaning of "against" or "directed towards", as postulated in *Hall*[125], was expressly rejected by later courts both locally and in England.

101 Thirdly, the fact that the Act was subsequently changed, on the hypothesis that this understanding of the word "with" represented a correct statement of the law, may not be conclusive. Courts no longer blindly observe the fiction that the legislature, in adopting later amendments, is taken to accept earlier court

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122 A point made by Priestley JA in *Orsos* (1997) 95 A Crim R 457 at 458. See also the joint reasons at [27] by reference to the minister's explanation about "the problem of homosexuality".

123 Marginal note to s 81A as originally enacted.

124 See eg *R v Hunt* [1950] 2 All ER 291 as a case in point. It involved consensual sexual conduct by two adult males in a private shed. They were watched by the police who subsequently entered the shed. The report (at 291-292) contains epithets by Lord Goddard CJ such as "disgusting evidence", "filthy exhibitions by the one to the other", "[they are] no doubt ... thoroughly ashamed of themselves", and so on.

125 [1964] 1 QB 273 at 277.

interpretations of the legislation so amended[126]. But there is no doubt that the addition of the words "or towards"[127] in the present equivalent provision of the law of New South Wales affords a measure of support in at least two respects. It indicates, at the very least, that those legislators who considered the matter (and those in the government who proposed the amendment) thought that the word "with" was ambiguous and in need of clarification. As well, it provides a reason why, in respect of a section that has now been repealed, replaced and amended, this Court should hesitate before adopting a new and different construction.

102 Fourthly, an examination of the equivalent statutory provisions in other Australian jurisdictions shows that most of the applicable legislation removes the possibility of the ambiguity which appeared in s 81A. It is true that some provisions, like that section, refer only to the commission of an act of indecency "with" another person[128]. However, in most cases the legislation makes expressly clear that the act of indecency extends to an offence committed "with or in the presence of"[129] another person, or simply "in the presence of"[130], or "on" or "upon"[131] a designated person, or "towards"[132] a specified person. In some Australian jurisdictions the alternative reference to the commission of the indecent act as being "in the presence of" an under-aged person goes back many years[133]. A survey of Australian legislation suggests a gradual withdrawal of gender-specific provisions such as s 81A and an acceptance of the need to provide, in varying ways, for offences involving indecent acts in relation to those

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126 *R v Reynhoudt* (1962) 107 CLR 381 at 388; *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 351.

127 The Act, s 78Q following *Criminal Legislation (Amendment) Act* 1992, s 3, Sched 1, cl 6.

128 *Criminal Code* (WA), s 184; *Criminal Code* (NT), ss 127, 128.

129 *Criminal Law Consolidation Act* 1935 (SA), s 58(1)(a) and (c); *Crimes Act* 1958 (Vic), ss 47(1), 49(1) (see also s 50(1), "Gross indecency with person under sixteen", repealed 1991).

130 *Crimes Act* 1914 (Cth), s 50BC(c) and (d) (inserted 1994); *Criminal Code* (WA), s 319(1) (inserted 1992).

131 *Crimes Act* 1914 (Cth), s 50BC(a); *Crimes Act* 1900 (ACT), s 92J; *Criminal Code* (NT), s 130(2)(b).

132 The Act, ss 61N, 78Q.

133 *Criminal Law Consolidation Act* 1935 (SA), s 58 appeared in similar terms after 1978. *Crimes Act* 1958 (Vic), s 69(1) goes back to 1958.

who, for reasons of age or otherwise, are unable to give a valid consent[134]. Such provisions, and the amendments to Australian criminal statutes adopted in recent decades, tend to support the construction of s 81A urged for the appellant.

103 Fifthly, it was common ground that such a construction of s 81A would not mean that the criminal law afforded no offence for the kind of conduct alleged by the first complainant against the appellant. At common law it was an indictable misdemeanour publicly to expose the naked person[135]. In successive summary offences legislation in New South Wales, provision has been made for the offence of indecent behaviour and exposure of the person[136]. It is not necessary, for present purposes, to determine the scope of such offences and their availability against the appellant. It is sufficient to say that it could not be assumed that, in default of the applicability of s 81A, conduct such as that alleged against the appellant, if proved, would go unpunished by the criminal law. As argued above, the legislature has now enacted specific offences which take into account considerations such as the abuse of authority and trust. These developments strengthen the argument for the appellant that, at the time of the commission of the alleged offence, the Act had not provided an offence specific to the circumstances alleged in this case. In the matter of criminal offences, it is not for the courts to create new offences in order to repair a legislative omission, and certainly not to do so retrospectively[137].

104 It follows that the appellant has made out his contention that the facts and circumstances proved at his trial, even if fully accepted as stated by the first complainant, do not constitute an offence against s 81A of the Act. It is therefore necessary to consider the appellant's request for special leave to permit him to argue this point in objection to his conviction. In resistance to that application, the Crown asserted that, for reasons of statute and constitutional law, this Court

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134 *Crimes Act* 1914 (Cth), s 50BC; *Crimes Act* 1958 (Vic), ss 47, 49; *Criminal Code* (Q), s 210; *Criminal Law Consolidation Act* 1935 (SA), s 58(1)(a); *Criminal Code* (WA), s 319(3); *Criminal Code* (NT), ss 130, 131, 132.

135 Archbold, *Criminal Pleading, Evidence & Practice*, 31st ed (1943) at 1327-1329; Bignold, *Police Offences*, 9th ed (1962) at 189; see also *R v Madercine* (1899) 20 LR (NSW) 36.

136 The marginal note suggests that such offences date back to 4 Will IV No 7, s 22. See eg *Police Offences Act* 1901 (NSW), ss 12 (repealed 1970), 78 (repealed 1979); *Summary Offences Act* 1970 (NSW), ss 7, 11, 12 (repealed 1979); *Vagrancy Act* 1902 (NSW), s 4(2)(d) (repealed 1970).

137 *Lipohar v The Queen* (1999) 74 ALJR 282 at 322-323 [193]-[197]; 168 ALR 8 at 64-65.

could not permit the new ground to be added. Alternatively, the Crown submitted that, as a matter of discretion, it should not do so.

The argument that the new ground is inadmissible

105 Having identified a legal defect in the very foundation of the appellant's conviction, whilst the proceedings arising out of that conviction are still in train before the Judicature of Australia[138], it would be an odd result for this Court to acknowledge the defect but to refuse relief. Yet similar outcomes can happen if the notion of "appeal" in the Constitution is given a narrow reading[139]. Two related arguments of law are available to support the proposition that, in this Court, a fresh ground of appeal, never previously argued in the courts below, is inadmissible in a case such as the present.

106 The first is that, inherent in the very notion of "appeals", as that word is used in s 73 of the Constitution, is the concept of correcting an error of the court the subject of appeal. A court's decision, so the argument goes, resolves the issues which were fought out and decided by the judicial process. Support for this idea may be found in the reasons of Toohey and Gaudron JJ in *Mickelberg v The Queen*[140] where their Honours said:

> "Ordinarily, an appeal raises the correctness or otherwise of the decision under appeal in the light of the evidence and *issues* as they were before the court whose decision is in question."

107 Additional support for this approach may be found in a strict view of the Court's repeated holding that the appeal to this Court for which the Constitution provides is one classified (amongst the many possible categories of "appeal"[141]) as an appeal in its "strict and proper sense"[142]. Such an "appeal" invokes "the right of ... a superior Court, and ... its aid and interposition to redress the error of

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138 Still "in the system" ("toujours en cours") as it has been expressed in Canada: *R v Brown* [1993] 2 SCR 918 at 923 and *R v Thomas* [1990] 1 SCR 713 at 715 both applying *R v Wigman* [1987] 1 SCR 246 at 263.

139 *Eastman v The Queen* (2000) 74 ALJR 915 at 967 [286]; 172 ALR 39 at 110 ("*Eastman*").

140 (1989) 167 CLR 259 at 298 (emphasis added).

141 *Eastman* (2000) 74 ALJR 915 at 919 [18], 926 [76], 932 [111], 966 [277], 968 [290], 983-984 [371]; 172 ALR 39 at 43, 53-54, 61, 107-108, 110-111, 131.

142 *Mickelberg v The Queen* (1989) 167 CLR 259 at 268 per Mason CJ.

the court below"[143]. Its purpose is to "determine whether the order of the Court below was correct on the evidence and in accordance with the law then applicable"[144]. It is not an appeal by way of rehearing, as was later provided to many appellate courts, including some such courts in Australia[145]. Such a court necessarily has a larger power to do justice than one confined to the correction of error detected in the record. In this Court, the distinction drawn by the Constitution between the original jurisdiction and the appellate jurisdiction is frequently invoked as a reason for adhering to a strict delineation between the limited functions given to this Court, on appeal, and the broader powers enjoyed by State, federal and Territory courts acting within their respective appellate jurisdictions[146]. Upon this view, the limited power of this Court is only to give the judgment "which ought to have been given at the original hearing"[147].

108 On this basis (so the first argument runs) it is impermissible and alien to the constitutional concept of "appeals" to correct the decision of a court below which has never ruled upon the point subsequently said to constitute its error. For this Court to determine the new point would be for it to exercise, effectively, an original jurisdiction which has not been conferred upon it by the Constitution. Such submissions resonate with the argument successfully advanced in *Eastman*[148] to reject the exceptional tender of new evidence before this Court. At the heart of the point is a similar idea. How can the process be an "appeal" if the issue has not been dealt with by the court appealed from, whether for lack of evidence (as in *Eastman*) or lack of a propounded issue (as in this case)?

109 In this application, the Crown extended the foregoing logic with a second distinct but connected argument. Doubtless it did so, in part, because of many decisions of this Court permitting new grounds of appeal to be raised before it for

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

144 *CDJ v VAJ* (1998) 197 CLR 172 at 202 [111].

145 See eg *Judicature Act* 1873 (UK), s 4; *Quilter v Mapleson* (1882) 9 QBD 672 at 676; *Banbury v Bank of Montreal* [1918] AC 626 at 676.

146 *R v Snow* (1915) 20 CLR 315 at 322; *Werribee Council v Kerr* (1928) 42 CLR 1 at 20-21; *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 109-110; *Eastman* (2000) 74 ALJR 915 at 943-944 [167] per McHugh J; 172 ALR 39 at 77.

147 *Jeffery v Jeffery* (1949) 78 CLR 570 at 579.

148 (2000) 74 ALJR 915 at 919 [18], 926 [76], 932 [111], 966 [277], 968 [290], 983-984 [371]; 172 ALR 39 at 43, 53-54, 61, 107-108, 110-111, 131.

the first time[149] and, in part, because of the way in which, in *Gipp v The Queen*[150], McHugh and Hayne JJ expressed the possible limitation imposed by the Constitution in terms of this Court's jurisdiction. This is what their Honours said[151]:

> "The jurisdiction of a court of appeal ordinarily depends on the grounds of appeal that can be legally raised in support of the appeal. Under the common law system of justice, jurisdiction is the authority to decide issues between parties. In the case of an appellate court, that authority is governed by the issues raised in the notice of appeal and any notice of contention relied on to support the judgment against which the appeal is brought. In the absence of a special statutory regime, a notice of appeal that does not specify a ground of appeal is invalid and the appellate court in which it is 'filed' has no authority to determine any issue affecting the parties."

110 Building on this observation, and other similar remarks in earlier decisions[152], the Crown argued thus: in an appeal from the Supreme Court, sitting as the Court of Criminal Appeal[153], this Court's jurisdiction derives from, and is limited to, the jurisdiction of the Court of Criminal Appeal from which the appeal comes. In New South Wales, the relevant limits were imposed by the *Criminal Appeal Act* 1912 (NSW)[154] and the Criminal Appeal Rules[155]. Such legislative provisions define the character of that Court. It was one limited to deciding grounds of appeal lawfully before the Court of Criminal Appeal. It was

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149 *Giannarelli v The Queen* (1983) 154 CLR 212 at 222-223, 229-230, 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 [23], 152 [132]; see also *Bond v The Queen* (2000) 74 ALJR 597 at 602 [30]; 169 ALR 607 at 614.

150 (1998) 194 CLR 106.

151 (1998) 194 CLR 106 at 126 [58] (footnote omitted).

152 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 108-110.

153 See *Stewart v The King* (1921) 29 CLR 234 at 240.

154 ss 5(1)(a) and (b), 6(1); cf *R v Burns* (1920) 20 SR (NSW) 351; *Kakura and Sato* (1990) 51 A Crim R 1 at 6; *R v Collins* [1970] 1 QB 710 at 713-714.

155 r 25A ("Further grounds of appeal").

not one ranging broadly, as in an inquisition, to discover truth, suppress falsehood and provide justice without regard to legal forms[156].

111 Although, on this view, a point not raised below might be argued on the basis of the record (as many cases in this Court have decided[157]), any such point would have to be within the jurisdiction of the court appealed from. Because most appeals to this Court come from Full Courts or Courts of Appeal in civil matters, where the appellate court below is conducting a rehearing with very large powers to amend and enlarge the record, no problem is ordinarily presented by the enlargement of issues before this Court. At least this is so where the new ground can be decided within the record, without any evidentiary or procedural injustice to a party[158], and where the demands of justice oblige admission of, and decision upon, the new point[159]. However, where an appellate court is more limited, and confined to determining appeals only upon grounds lawfully placed before it (as it was suggested the Court of Criminal Appeal of New South Wales is), its jurisdiction was limited and so, therefore, was the jurisdiction of this Court.

112 According to the Crown, any attempt by this Court to go beyond the jurisdiction of the Court of Criminal Appeal would represent an impermissible encroachment on the powers by law confined to that Court (usurping in effect that Court's exclusive right by statute to enlarge the grounds of appeal before it). The power of the Court of Criminal Appeal to enlarge the grounds was given to it by rules made with the authority of statute. Such power of enlargement was not conferred on, or enjoyed by, this Court. Any encroachment by this Court on the power of the Court of Criminal Appeal would take this Court outside the constitutional notion of "appeal". By inference, it would be an invalid exercise of original jurisdiction by this Court where none existed or could exist under the Constitution.

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156 See *Grierson v The King* (1938) 60 CLR 431 at 435-436.

157 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 437-438; *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319.

158 *The "Tasmania"* (1890) 15 App Cas 223 at 225, 230; cf *Coulton v Holcombe* (1986) 162 CLR 1 at 7.

159 *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 at 480; *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; *Green v Sommerville* (1979) 141 CLR 594 at 608.

There is no constitutional impediment to a new ground

113 If one starts from the logic of the narrow conception of "appeal" which has so far been accepted by this Court (the defects of which I attempted to describe in *Eastman*[160]) it has to be acknowledged that there is considerable logical force in the foregoing submissions. If the fundamental reason for holding that this Court has no constitutional power to admit new evidence, whatever the circumstances and whatever the resulting injustice, is because of the limitations stamped on the notion of "appeals" derived from nineteenth century understandings[161], the suggested limitation upon this Court's constitutional powers to admit new grounds has a certain legal attractiveness.

114 It will be apparent from my reasons in *Eastman* that I do not accept that the word "appeals", when used in the Constitution, has such a confined operation[162]. Accordingly, the suggested difficulties urged on this Court by the Crown do not arise from my conception of the Court's appellate function. I will not repeat the reasons I have given for the larger ambit which I favour. Upon my view, the suggestion that "appeals", as appearing in the Constitution, are confined as the Crown urged is fundamentally misconceived. The word "appeals" is a constitutional word. It must be given its meaning according to its essential characteristics derived from contemporary understandings[163]. It is not confined to supposed or invented understandings attributed to the founders or others, whether in 1900 or other times. The idea that, by the constitutional word "appeals" today, this Court is powerless to enlarge the issues in an appeal still before it and brought to it as the final appellate court of the Australian Judicature to cure a fundamental flaw in a criminal conviction, is manifestly untenable.

115 Nor could any State statute or rules made under such a statute confine the ambit of the constitutional notion of "appeals" to this Court. The supposed

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160 (2000) 74 ALJR 915 at 957-963 [240]-[266]; 172 ALR 39 at 96-104.

161 The elaboration of this Court on this point is more than usually replete with references to understandings of the law in 1900. See eg *Mickelberg v The Queen* (1989) 167 CLR 259 at 270, 277; *Eastman* (2000) 74 ALJR 915 at 930-931 [104], 932 [111], 933-934 [120], 935 [129], 937-939 [143]-[147], 948 [192], 982 [361]; cf at 925 [68], 957-959 [240]-[245]; 172 ALR 39 at 59, 61, 63, 65, 69-70, 83-84, 129; cf at 52, 96-98.

162 (2000) 74 ALJR 915 at 957-966 [240]-[276]; 172 ALR 39 at 96-107.

163 *Grain Pool of Western Australia v The Commonwealth* (2000) 74 ALJR 648 at 669-671 [110]-[118]; 170 ALR 111 at 139-142; Kirby, "Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?", (2000) 24 *Melbourne University Law Review* 1.

qualification of this Court's appellate jurisdiction to permit a new issue to be raised does not, therefore, arise in my conception of the constitutional jurisdiction of this Court to hear and dispose of "appeals". Certainly, this is so where this Court is satisfied that a new ground may be decided with fairness to other parties on the evidence adduced below and where the interests of justice (including reasonable convenience and the economic management of proceedings) suggest or require that leave to enlarge the issues in the appeal should be granted.

116 But even if one does not share this conception of the ambit of "appeals", where that word is used in a constitutional context, nothing in the decision of this Court in *Eastman* requires reconsideration of the longstanding practice of the Court, in exceptional cases, including criminal appeals[164], to permit a new ground to be raised for the first time. None of those in the majority in *Eastman* decided the matter on the basis that the applicant in that case could not be allowed to enlarge his grounds. The order of the Court providing special leave to appeal in *Eastman* suggests that such enlargement was permitted. The "appeal" was then determined on the issues so enlarged. Those in the minority in *Eastman* also clearly envisaged that the issues in this Court could and should be enlarged beyond those that had been before the Full Court of the Federal Court in that case[165]. The reasons of McHugh J, alone, reserved the possible inadmissibility of the fresh ground argued for the first time in this Court[166]. It is not therefore necessary to reach back to *Dignan's Case*[167], *Giannarelli v The Queen*[168] or even *Gipp v The Queen*[169] to find against the Crown's first argument suggesting this Court's disablement to permit the new ground. The recent and nearly unanimous authority of the Court in *Eastman* stands against this submission.

117 There are many reasons of legal principle and legal policy that explain why this Court should not alter its present authority in this respect. First, the

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164 *Pantorno v The Queen* (1989) 166 CLR 466 at 475-476, 483-484; *Gipp v The Queen* (1998) 194 CLR 106 at 116 [23], 152 [132].

165 *Eastman* (2000) 74 ALJR 915 at 929 [99] per Gaudron J, 975 [324]-[325] per Hayne J, 990 [407] per Callinan J; 172 ALR 39 at 58, 119-120, 140.

166 *Eastman* (2000) 74 ALJR 915 at 943-944 [166]-[167]; 172 ALR 39 at 76-77.

167 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 109.

168 (1983) 154 CLR 212.

169 (1998) 194 CLR 106.

Court has permitted entirely new grounds to be argued in this Court for the better part of a century[170].

118 Secondly, it is important and conducive to the justice and law which the Judicature upholds under the Constitution, that such a facility should exist in a final appellate court. Whilst a case is still properly before the judiciary, the jurisdiction to prevent miscarriages of justice and fundamental errors of law should remain untrammelled by unduly protective procedural conceptions. Whilst this is true in every matter, it is especially true in a criminal matter so long as a serious or fundamental error can be corrected before the issues litigated pass into final judgment.

119 Thirdly, in asserting its entitlement to so proceed, this Court has not acted outside the functions usually taken to be proper to final courts of appeal[171]. The Privy Council, whose jurisdiction in appeals was, at federation and for much of the first century thereafter, cognate with that of this Court, asserted such a power[172]. I know of no final court, with functions akin to this Court, which denies itself the right to permit enlargement of the issues before it where justice requires and convenience suggests that course. Generally speaking, the rigidities of procedural rules, that were a feature of the nineteenth century jurisprudence of the common law, were replaced in the twentieth century by a greater flexibility and by judicial impatience with rigidities that would prevent the ultimate attainment of justice according to law[173]. So it is here.

120 Fourthly, as a matter of practicality, many litigants in appeals, particularly criminal appeals where they may be held in custody, cannot afford experienced, or any, legal counsel. Even where parties are well represented important points may be missed[174]. The logic of the Court's holding in *Dietrich v The Queen*[175]

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170 Since at least *Hicks v The King* (1920) 28 CLR 36 at 43 per Isaacs and Rich JJ.

171 *Cooper v Cooper* (1888) 13 App Cas 88 at 101.

172 A point made by Deane J in *Mickelberg v The Queen* (1989) 167 CLR 259 at 283-284; see also *Eastman* (2000) 74 ALJR 915 at 960-961 [254]-[256] of my own reasons, 982 [363]-[364] per Callinan J; cf at 934-935 [122]-[127] per McHugh J; 172 ALR 39 at 100-101, 129-130; cf at 64-65; cf *Devine v Holloway* (1861) 14 Moo 290 at 298 [15 ER 314 at 318]; *The "Tasmania"* (1890) 15 App Cas 223 at 225, 230; *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 at 480.

173 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 165-167; *Jackamarra v Krakouer* (1998) 195 CLR 516 at 541-542 [66].

174 As the minority considered in *Eastman* (2000) 74 ALJR 915; 172 ALR 39.

175 (1992) 177 CLR 292 ("*Dietrich*").

has not, so far, been extended to criminal appeals, assuming that to be possible. *Dietrich* has no application to non-criminal matters. There are therefore strong practical reasons which argue against adopting a view of the Constitution, and of the jurisdiction of this Court, which would narrow the Court's entitlement to allow a new point to be raised for the first time before legal proceedings were finally concluded.

121 Fifthly, the Crown's argument, if accepted, would inevitably impose on this Court an obligation, before exercising its jurisdiction, to search for the "issues" actually decided in the court below. Those "issues" might have gone beyond the formal grounds of appeal which are sometimes ignored or overlooked in argument and disposition of proceedings. As many decisions show, appellate courts in Australia, including Courts of Criminal Appeal, have a large jurisdiction which, being conferred on superior courts, will ordinarily attract ample powers to dispose of all matters before them[176]. Historically, the provision of appeals from criminal convictions and sentences was a large step for a common law jurisdiction to take[177]. The step having been taken, it would be an error of principle to confine narrowly the powers conferred on Courts of Criminal Appeal. More importantly, the Constitution having exceptionally (and somewhat creatively) provided in terms for appeals against "sentences"[178], it must be assumed that, by that provision, a large and novel appellate power was afforded to this Court in respect of criminal appeals. It would be contrary to the applicable tenets of constitutional construction now to impose a limitation where nearly a century of experience has shown such a limitation to be unnecessary and undesirable.

Discretionary considerations require permitting the new ground

122 It follows that this Court has the power to permit the amendments of the notice of appeal sought by the appellant. However, the Crown urged that, in the exercise of its discretion, the Court should decline the application. It is true that repeated statements in this Court acknowledge that to permit a new ground to be

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176 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205 per Gaudron J; *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421; *Emanuele v Australian Securities Commission* (1997) 188 CLR 114 at 136-137; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 81 [21], 121 [134.3]; *Re JJT; Ex parte Victoria Legal Aid* (1998) 195 CLR 184 at 201 [41.3].

177 *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 322-324 [73]-[75]; 160 ALR 588 at 609-610; *Fleming v The Queen* (1998) 197 CLR 250 at 257-258 [16]-[17].

178 Constitution, s 73.

added in this Court requires exceptional circumstances to be shown[179]. In all proceedings, including criminal proceedings, due weight must be given to that element of distributive justice which is often expressed as the public's interest in finality of litigation[180]. However, other considerations must also be given weight. One of these is the prevention of the repetition of similar mistakes of law in the future[181]. Given the amendment of the comparable Australian legislation and the repeal of s 81A of the Act this is not a factor in the present case. But the avoidance of a serious miscarriage of justice to an individual certainly is. Where a fundamental legal point has been missed which goes to the validity of a conviction, that will represent a powerful consideration as to why such conviction should not stand. Such a conviction, if legally flawed, should not remain either as a burden on the appellant or as part of a court's record. Where relief can still be provided it should, in my view, be given.

123 The error at the trial lay not so much in the trial judge's directions to the jury, now shown to have been erroneous. It lay, instead, in permitting the jury to render a verdict upon the first count when the alleged facts, even if fully accepted, failed, as a matter of law, to establish the offence there charged. On the contrary, those facts showed that, in law, no such offence had occurred. I would therefore grant special leave and allow the appellant to amend the notice of appeal to include the two grounds reserved to this Court.

Inadequacy of the warning about delay

124 The foregoing conclusion requires that the appeal be allowed, the conviction quashed and a verdict of acquittal entered. Consequently, it is not strictly essential, in the approach which I take, to decide the point argued on the remaining ground of appeal for which special leave was originally granted. This concerned the appellant's complaint that the directions of the trial judge had failed adequately to warn the jury of the dangers of convicting the appellant given the delay of 19 years between the occurrence of the alleged offence and the initial complaint made against the appellant.

125 The law on this subject is stated in *Longman*[182]. It has been repeated in a number of decisions involving delays very much shorter than that in the present

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179 *Giannarelli v The Queen* (1983) 154 CLR 212 at 221; *Pantorno v The Queen* (1989) 166 CLR 466 at 475-476; *Gipp v The Queen* (1998) 194 CLR 106 at 154-155 [138].

180 cf *R v Brown* [1993] 2 SCR 918 at 923-924 per L'Heureux-Dubé J (diss).

181 *Giannarelli v The Queen* (1983) 154 CLR 212 at 230.

182 (1989) 168 CLR 79.

case[183]. It is important to note the distinction made by the majority in *Longman* between *comment* (which a trial judge may and sometimes should give to ensure the fairness of the trial) and a *warning* (which in circumstances of "long delay" it is "imperative", in the sense of obligatory, that the trial judge must give to the jury).

126 *Comment* will simply remind the jury of matters frequently within common experience which they may ordinarily be taken to know but might have forgotten or overlooked. *Warnings* derive from the special experience of the law. The specific difficulties that an accused will have, in circumstances of significant delay, in defending himself or herself in a criminal trial, include securing evidence (comprising now scientific as well as lay evidence) and gathering information promptly with which to test and challenge the evidence of the accuser.

127 The law recognises that there may, on occasions, be cogent reasons why a child or young person does not make a prompt complaint about sexual misconduct. I referred to some of these reasons in *Jones v The Queen*[184]. It will usually be proper for the trial judge to bring appropriate considerations to the specific notice of the jury by way of comment. Such considerations do not, however, relieve the trial judge of the paramount duty imposed by the law (and quite possibly implied in the Constitution[185]) to ensure the fair trial of a person accused of a serious criminal offence. It is to uphold that basic right, in the context of jury trial, that such judicial warnings must be given.

128 In view of my primary conclusion, it is not obligatory upon me to elaborate my views concerning the *warning* required in the present case[186]. However, as otherwise the disposal of that question by the Court of Criminal Appeal might be thought to be correct, I should say that I consider that the directions in this case were defective by the standards of *Longman*. I say this

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183 *Crofts v The Queen* (1996) 186 CLR 427 (six-year delay); *Jones v The Queen* (1997) 191 CLR 439 (four-year delay).

184 (1997) 191 CLR 439 at 463-464. See also *M v The Queen* (1994) 181 CLR 487 at 515; *R v Seaboyer* [1991] 2 SCR 577 at 649-650.

185 *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 for Immigration* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ; *Eastman* (2000) 74 ALJR 915 at 965 [273]; 172 ALR 39 at 106.

186 See *Longman* (1989) 168 CLR 79 at 91, 95.

with respect to the trial judge whose conduct of the trial was otherwise admirably fair.

129 The *warning* in a case involving a long delay between an alleged offence and a complaint is, in part, an element in the balance required by the law in such matters. In overseas jurisdictions courts have been more willing than they appear to have been in Australia to provide a permanent stay of proceedings to protect accused persons from the injustices that can arise in attempting to mount a defence to such charges years, or even decades, after an alleged offence occurred. But this has been so, in part, because Australian courts know that *Longman* obliges trial judges, in cases such as the present, not only to *comment* about the difficulties which the long delay in complaint presents but specifically to *warn* the jury, in clear and emphatic terms, of the dangers that may be inherent in such a trial.

130 The warning required by *Longman* must be, in the words of the joint reasons in this case, "unmistakable and firm"[187]. It must be related to the evidence and derived from forensic experience. The need for such a warning is demonstrated by the facts of a case such as the present. In practical terms, after 20 years, the appellant's defence could never rise much above a mere denial and protest of innocence. He had lost the chance of obtaining effective evidence from other children who were in the class at the time of the alleged offence concerning his alleged conduct. He had lost the chance of procuring effective evidence from other teachers said to have been coming and going near the class at times relevant to the events alleged. He had lost the chance of resolving, with certainty, the conflict of evidence about the nature and appearance, 20 years earlier, of locations relevant to the charges against him. He had lost the opportunity to collect forensic scientific evidence, such as was available in 1978, concerning the presence (or absence) of semen on the floor of the storeroom. He had lost the opportunity to respond effectively, by the testimony of storekeepers, to evidence that he had purchased lollies and other goods to favour the first complainant.

131 Twenty years after the alleged offence, the first complainant was an adult whose life's experience, character and motivations would have been unknown to the appellant. The appellant would thus be at a great disadvantage in testing events that may have affected the first complainant's recollection or reliability. Repeated answers to questions, searching the detail of the first complainant's testimony, such as "I can't remember" or "it's too long ago" made it extremely difficult to test that evidence in an effective way.

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187 Joint reasons at [45].

132 The idea that these serious disadvantages are unimportant and that the jury, unaided, will somehow sort things out by simply resolving the claims and denials in oath against oath must be firmly rejected[188]. That idea is contrary to the repeated authority of this Court in and since *Longman*. The jury need the assistance of the trial judge to warn, from the law's long experience, that trials with such potentially grave consequences for liberty and reputation need to be fought with forensic weapons[189]. The passage of time – especially great time – may make it difficult, or impossible, to secure such weapons for an adequate defence. A jury may not understand this. A judge will. And the law requires that the judge warn the jury in clear and unmistakable terms.

Orders

133 I agree in the orders proposed by Gaudron, Gummow and Callinan JJ.

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188 cf McGinley, "Case and Comment: *Bull*; *King*; *Marotta*", (2000) 24 *Criminal Law Journal* 315 at 318.

189 Joint reasons at [45].

134 HAYNE J. In July 1998, an indictment was preferred against the appellant in the District Court of New South Wales charging him with two counts of committing an act of indecency, in 1978, with another male (whom I shall call the complainant) contrary to the provisions of s 81A of the *Crimes Act* 1900 (NSW) as then in force. He was further charged with three counts of indecent assault. One of those counts concerned the complainant; the other two related to another male. The offences of indecent assault were alleged to have been committed in 1978 or 1979. The appellant pleaded not guilty to each count. The jury at his trial returned a verdict of guilty to one of the two counts of committing an act of indecency with the complainant. The jury could not agree about the other counts and were discharged without returning a verdict on them. The appellant was sentenced to perform community service.

135 He appealed to the Court of Criminal Appeal of New South Wales against his conviction but that appeal was dismissed[190]. He was granted special leave to appeal to this Court on the ground that the Court of Criminal Appeal erred in determining that the directions given to the jury by the trial judge (Judge Karpin) about "the delay of almost 20 years between the complaint and the conduct giving rise to it were adequate to meet the circumstances [of] the case". He also seeks special leave to appeal on the further grounds (not taken at trial or in the Court of Criminal Appeal) that the evidence led at trial did not establish the elements of the offence charged, and that the directions given by the trial judge did not explain to the jury "the true nature" of the offence of which he was convicted. The application for special leave to appeal on these two grounds was referred to the Full Court hearing his appeal.

136 It is convenient to deal first with the ground concerning the directions given about the delay between the events the subject of the charge and the complaint made by the complainant. It is necessary to say a little about what the prosecution alleged had happened.

The prosecution case

137 In 1978, the appellant was a primary school teacher and the complainant was a student in his year 6 class. Confining attention to the charge of which the appellant was convicted, the complainant gave evidence that on a Friday in 1978 (during the winter sports season) the appellant called him into a storeroom at the front of the classroom. According to the complainant, the appellant was masturbating; the appellant ejaculated and then gave the complainant a handkerchief to wipe up the ejaculate. The complainant did not suggest that there was any physical contact with the appellant and he did not suggest that he had participated in any other way in the appellant's conduct. He did not speak to

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190 *R v Crampton* [1999] NSWCCA 130 (Wood CJ at CL, Barr and Greg James JJ).

anyone about this incident until 1997. In that year he spoke first to a Rape Crisis Centre, then to his mother and later to police.

138 The appellant gave sworn evidence at his trial. He denied the allegations against him.

139 The evidence before the jury was, therefore, of a kind that is not uncommon in cases of this kind. The complainant alleged that there had been inappropriate sexual behaviour by the appellant. There was no witness to the conduct. It was alleged to have occurred many years ago, when the complainant was young. The appellant denied any misconduct. What instructions should the trial judge give the jury in such a case?

The appropriate direction

140 The critical feature of the circumstances I have described is that many years had elapsed between the time of the alleged conduct and the accused being put on notice of the allegation. That lapse of time inevitably meant that the accused was put at a significant disadvantage, of a kind and to an extent which a jury might not appreciate without proper direction. In *Longman v The Queen*[191], this Court described the instructions that should be given to the jury in these circumstances. As was said in the joint judgment[192]:

> "The jury should have been told that, as the evidence of the complainant could not be adequately tested after the passage of more than twenty years, it would be dangerous to convict on that evidence alone unless the jury, scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy."

141 The trial judge did not give such a direction in this case. Nowhere did the trial judge speak of the dangers of convicting the appellant on the complainant's evidence alone.

142 The trial judge did comment about the fact that the complainant made no complaint about the appellant until long after the incident was alleged to have occurred. As the trial judge said to the jury, this deprived the appellant of an opportunity to "look at matters which were happening at about [the time of the alleged incident] and to raise them in evidence" and it probably reduced the capacity of the complainant to be accurate. As the joint judgment in *Longman*

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191 (1989) 168 CLR 79.

192 (1989) 168 CLR 79 at 91 per Brennan, Dawson and Toohey JJ.

points out[193], it was proper to remind the jury of considerations relevant to the evaluation of the evidence and these were considerations of that kind. But what has come to be known as a "*Longman* warning" is not just a judicial *comment* of this kind, proper and appropriate as it may be. It is a *warning* to the jury that, because the evidence of the complainant could not be adequately tested after the passage of so many years, it would be *dangerous to convict* on that evidence alone unless the jury, scrutinising the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy. That warning was not given.

143 The leading judgment of the Court of Criminal Appeal[194] was given by Barr J. Although reference was made to *Longman*, it seems to have been treated as holding no more than that a trial judge must "bring home to the jury the need for caution and careful examination of the evidence"[195] and, in particular, that delay in complaining produced difficulties for the appellant[196]. That, as I have pointed out, is not a sufficient or complete statement of what was held in *Longman*. There was a miscarriage of justice at trial.

144 That conclusion would ordinarily lead to an order for a retrial, but the appellant submits that the evidence given at his trial did not establish the elements of the offence charged. As mentioned earlier, this is a contention that was not made at trial, or to the Court of Criminal Appeal, and which the appellant now seeks special leave to raise for the first time in this Court. Its consideration entails several steps that should be dealt with separately.

The jurisdiction of the High Court

145 This Court's jurisdiction to hear and determine appeals from judgments, decrees, orders and sentences of the Supreme Court of a State is given by s 73 of the Constitution. The judgment of the Court of Criminal Appeal dismissing the appellant's appeal was a judgment of the Supreme Court[197]. It is well established that an appeal to this Court is an appeal in the strict sense, not an appeal of the kind usually described as an appeal by way of rehearing[198]. Neither party, and

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193 (1989) 168 CLR 79 at 90.

194 *Crampton* [1999] NSWCCA 130.

195 *Crampton* [1999] NSWCCA 130 at [22].

196 *Crampton* [1999] NSWCCA 130 at [28].

197 *Criminal Appeal Act* 1912 (NSW), s 3(1).

198 *New Lambton Land and Coal Co Ltd v London Bank of Australia Ltd* (1904) 1 CLR 524 at 532; *Ronald v Harper* (1910) 11 CLR 63 at 77-78, 82, 84; *Werribee*

(Footnote continues on next page)

none of the Attorneys-General for the Commonwealth, New South Wales or South Australia, who intervened, sought to dispute that this is the proper characterisation of the appellate jurisdiction of the Court. Argument centred upon what followed from this general proposition, and from the equally important (and uncontroversial) general propositions that a criminal trial is an accusatorial and adversarial process[199] and a criminal appeal is an adversarial process.

146 Because "[i]n conferring jurisdiction upon this Court, the Constitution clearly discriminates between original and appellate jurisdiction"[200] the Court has always refused to hear fresh evidence on appeal[201]. It may also follow from the distinction between original and appellate jurisdiction that the Court's powers on appeal are limited to giving such judgment as ought to have been given in the first instance. But whether or not that necessarily follows from the nature of the Court's appellate jurisdiction, the Parliament has regulated[202] its appellate jurisdiction in that way. Section 37 of the *Judiciary Act* 1903 (Cth) provides:

> "The High Court in the exercise of its appellate jurisdiction may affirm reverse or modify the judgment appealed from, *and may give such judgment as ought to have been given in the first instance*, and if the cause is not pending in the High Court may in its discretion award execution from the High Court or remit the cause to the Court from which the appeal was brought for the execution of the judgment of the High Court; and in the latter case it shall be the duty of that Court to execute the judgment of the High Court in the same manner as if it were its own judgment."

147 Because the Court may give such judgment as ought to have been given in the first instance, and because "[a]n appeal is the right of entering a superior Court, and invoking its aid and interposition to redress the *error* of the Court

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Council v Kerr (1928) 42 CLR 1 at 20; *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 85, 87, 109-110, 113; *Mickelberg v The Queen* (1989) 167 CLR 259; *Eastman v The Queen* (2000) 74 ALJR 915; 172 ALR 39.

199 *Ratten v The Queen* (1974) 131 CLR 510 at 517 per Barwick CJ.

200 *Dignan* (1931) 46 CLR 73 at 109 per Dixon J.

201 *Mickelberg v The Queen* (1989) 167 CLR 259; *Eastman v The Queen* (2000) 74 ALJR 915; 172 ALR 39.

202 Constitution, s 73: "The High Court shall have jurisdiction, *with such exceptions and subject to such regulations* as the Parliament prescribes, to hear and determine appeals …".

below"[203], it may be thought to follow that if, in the court below, a party did not allege error in the respect now in question, it is not open to this Court to entertain the argument for the first time. How can this Court travel beyond the matters agitated in the intermediate court if it is exercising *appellate* jurisdiction? How can there be an *error* if the intermediate court was not required to consider the point? It was these questions which McHugh J and I sought to raise in *Gipp v The Queen*[204].

148 The constitutional conferral of appellate jurisdiction on this Court is to be construed amply and as "implying the fullest authority to ascertain whether the judgment below ought, or ought not, to have been given"[205]. As will appear, I consider that this authority extends to entertaining a question of law which is raised for the first time in the Court. The exercise of that authority in any particular case is, however, subject to limits[206].

149 A question of law not raised at trial or in the intermediate court can be raised in this Court only if it requires the exercise of appellate, as distinct from original, jurisdiction. The distinction between appellate and original jurisdiction is reflected in the distinction between an appeal by way of rehearing and an appeal strictly so called. An appeal by way of rehearing is a "trial over again, on the evidence used in the Court below"[207] with power in the appellate court to hear further evidence, to draw inferences of fact, and to give any judgment or order which ought to *have been made* and such *further or other order* as the case may require[208]. Such an appeal may, therefore, involve the exercise of original jurisdiction. It is for this reason that appeals to this Court must be appeals

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203 *Attorney-General v Sillem* (1864) 10 HLC 704 at 724 per Lord Westbury LC [11 ER 1200 at 1209], cited in *Dignan* (1931) 46 CLR 73 at 109 per Dixon J (emphasis added). See also *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 74 ALJR 1348 at 1353 [14]; 174 ALR 585 at 590.

204 (1998) 194 CLR 106 at 126-129 [57]-[65].

205 *Dignan* (1931) 46 CLR 73 at 109 per Dixon J.

206 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438 per Latham CJ, Williams and Fullagar JJ. See also *Water Board v Moustakas* (1988) 180 CLR 491 at 497; *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8; *University of Wollongong v Metwally [No 2]* (1985) 59 ALJR 481 at 483; 60 ALR 68 at 71; *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319; *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 at 480.

207 *In re Chennell; Jones v Chennell* (1878) 8 Ch D 492 at 505 per Jessel MR.

208 *Banbury v Bank of Montreal* [1918] AC 626 at 675 per Lord Atkinson referring to O 58 r 4 of the Rules of the Supreme Court 1883.

strictly so called. But to consider a question of law for the first time in this Court does not require a rehearing of the proceeding, even in the limited sense in which that word is used in the phrase "appeal by way of rehearing".

150 As has been pointed out, an appellant may be prevented by the course of events at trial from raising a new point on appeal. A new point of law cannot be taken if, had it been taken at trial, the course of proceedings at trial could have been altered (whether by the adducing of other evidence or otherwise)[209]. That being so, a party permitted to raise a point for the first time on appeal can be seen to be seeking no more than the judgment or order which ought to have been given by the trial judge on the evidence led at trial. The party does not seek some judgment or order different from or in addition to the judgment or order which should have been given at trial. The party does not seek to have the appellate court conduct any rehearing of the proceeding. The jurisdiction which the party seeks to have engaged is appellate, not original.

151 Because the authority of this Court is limited to giving such judgment as ought to have been given by the Court of Criminal Appeal, it is necessary to consider that Court's powers. So far as now relevant, ss 5 and 6 of the *Criminal Appeal Act* 1912 (NSW) (which, respectively, give a right of appeal and provide for the determination of appeals) provide:

> "**5 Right of appeal in criminal cases**
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> (1) A person convicted on indictment may appeal under this Act to the court:
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> (a) against the person's conviction on any ground which involves a question of law alone, and
>
> …
>
> **6 Determination of appeals in ordinary cases**
>
> (1) The court on any appeal under section 5(1) against conviction shall allow the appeal if it is of opinion 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 of trial should be

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209 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438 per Latham CJ, Williams and Fullagar JJ; *Water Board v Moustakas* (1988) 180 CLR 491 at 497; *University of Wollongong v Metwally [No 2]* (1985) 59 ALJR 481 at 483; 60 ALR 68 at 71; *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8; *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319.

> set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

152 On an appeal to the Court of Criminal Appeal, that Court is bound (subject to the operation of the proviso to s 6(1)) to allow the appeal if of the opinion that there was a miscarriage of justice. That obligation arises if the Court is of that opinion on any of certain stated "grounds" or "on any other ground whatsoever".

153 As was pointed out in the course of oral argument of the present matter, the *Criminal Appeal Act* uses the word "ground" in several different ways. Section 5(1)(a) speaks of appeal "on any ground which involves a question of law". In this context "ground" may well be used to refer to the allegation of error pleaded by the appellant in the notice of appeal. By contrast, in s 6(1), "ground" is used to refer to the basis for the Court's conclusion, rather than to any pleaded allegation of error. Further, other uses of the word elsewhere in the Act (for example, in the phrase "on the ground of mental illness"[210]) and the use of expressions like "the point or points raised by the appeal"[211] suggest that "ground" is not used in the Act as meaning only a pleaded allegation of error. Thus, ss 5(1) and 6(1) do not expressly confine the powers of the Court of Criminal Appeal to allowing an appeal on one or other of the particular grounds of appeal pleaded by an appellant to that Court. Nevertheless, it may be readily accepted that the statute assumes that a criminal appeal is an adversarial, not inquisitorial, process.

154 Because a criminal appeal is an adversarial proceeding, the grounds of appeal stated by an appellant mark out the whole of the ground for contest between the parties to that appeal. It follows that I do not accept that, absent some specific enabling provision, an appellate court can, or should, engage in some general inquiry for error in the proceedings below. In particular, I do not accept that a Court of Criminal Appeal is obliged to consider for itself whether, for reasons beyond those raised by the grounds of appeal, there has been some miscarriage of justice in a trial. Unless one of the parties to the appeal embraced the contention that the proceedings below miscarried in a respect identified in the course of argument (and it would be rare indeed for counsel not to do so if

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210 ss 5(2), 5AA(2).

211 The proviso to s 6(1).

prompted) the Court of Criminal Appeal would, in my view, have no power to give effect to that contention. (As I said in *Eastman v The Queen*[212], I consider that other questions intrude when the issue is whether there was a trial between competent parties, but that is a view which did not command the assent of a majority of the Court and it is, in any event, a qualification which does not apply here.)

155 But it does not follow from these conclusions that this Court cannot entertain a point of law not raised in the Court of Criminal Appeal or at trial. Whether it can entertain a point of that kind depends upon the distinction between the appellate and the original jurisdiction of this Court, not the distinction between adversarial and inquisitorial procedures in the Court of Criminal Appeal. Once it is accepted that, on an appeal strictly so called, a point of law can be entertained for the first time in this Court, there is no question of the Court going beyond its power to give only such judgment as ought to have been given below if it gives effect to that new point. This Court gives the judgment which the court below ought to have given had the point been raised. Whether this Court *will* entertain an appeal on a point not previously taken raises other issues.

Exceptional circumstances

156 In *Giannarelli v The Queen*, Gibbs CJ said[213]:

> "It is of course only in an exceptional case that this Court will give special leave to appeal from a decision of a Court of Criminal Appeal affirming a conviction when the point that the applicant seeks to raise in attacking the conviction was not taken either at the trial or in the Court of Criminal Appeal."

It is not possible to specify all the kinds of case that might qualify as exceptional. It is as well, however, to say something about what is meant in this context by "exceptional", and why it is right to recognise this qualification or limitation.

157 Trial is the central feature of the criminal justice system. The importance of trial cannot be emphasised too strongly. It is at trial that the prosecution must make its case and it is at trial that the accused must make whatever answer is to be made to the charge or charges made. Appeal is for the correction of error at trial. It is not an opportunity to make some second, different, case in answer to the charge or charges made, any more than it is an opportunity for the

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212 (2000) 74 ALJR 915 at 969 [294]; 172 ALR 39 at 111.

213 (1983) 154 CLR 212 at 221.

prosecution to make some different case against the accused. A second appeal to this Court is, in the respects I have just mentioned, no different. It is not, and must not be seen as, an opportunity to make some different case from the case which was made at trial. Moreover, ample as the appellate jurisdiction of this Court is, the responsibility for correction of miscarriages of justice at trial in this country rests almost entirely upon the intermediate courts of appeal. The principal role of this Court is the statement and development of the law, rather than the correction of particular error in individual cases.

158 The way in which a trial was conducted is an important consideration for any appellate court. As Barwick CJ said in *Ratten v The Queen*[214]:

> "[The criminal trial] 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.* … Great latitude must of course be extended to an accused in determining what evidence by reasonable diligence in his own interest he could have had available at his trial, and it will probably be only in an exceptional case that evidence which was not actually available to him will be denied the quality of fresh evidence. But *he must bear the consequences of his own decision as to the calling and treatment of evidence at the trial*." (emphasis added)

159 Ordinarily, an accused must also bear the consequences of a decision not to take a point at trial. Thus, if a point was not taken at trial, the immediate questions which arise on appeal (whether to an intermediate court or to this Court) are why was it not taken, and is it now too late to take it? Could taking the point at trial have caused a difference in the way in which the trial was conducted? If it may have led to a party adducing evidence other than that party did, the point cannot be taken on appeal. If, as is so often the case where the complaint on appeal relates to the directions given at trial, the making of that complaint at trial could have led to a correction being made then and there, why was that not done? Ordinarily, this last question will admit only of the answer that, in the context of the particular trial, the point was not important, the only other explanation being that it was not done because counsel for the accused or for the prosecution (or both) were incompetent or acted in breach of duty.

160 Ordinarily, if a point is not taken at trial, a party will seek to agitate it in the Court of Criminal Appeal. I do not stay to examine when that can be done. If it is taken for the first time on application for special leave to appeal to this

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214 (1974) 131 CLR 510 at 517.

Court, this will suggest strongly that there was a reason not to take the point earlier which is sufficient to make it unavailable in this Court.

161 Insufficient attention may sometimes have been given in the past by intermediate appellate courts to the considerations I have mentioned and, in particular, to whether the point taken on appeal was important at the trial given the way in which the trial was conducted. Further, insufficient attention may sometimes have been given in the past to the conclusion about the conduct of counsel that is implicit in the holding that the point was important but was not taken. It is as well that those matters be addressed directly.

162 If a criminal trial is not conducted according to law the individual accused suffers a miscarriage of justice. There is a very large cost to all who are affected by the trial, the consequent appeal and any retrial (the accused, the victim, the witnesses). There is also a very large cost to the community as a whole. Judges and those who represent the parties have responsibilities to ensure that, as far as possible, these costs are avoided. Courts of appeal, including this Court, must do whatever they can to bring home to all involved the nature and importance of these obligations.

163 In this regard, the duties of counsel are well known. As Mason CJ said in *Giannarelli v Wraith*[215]:

> "The peculiar feature of counsel's responsibility is that he owes a duty to the court as well as to his client. His duty to his client is subject to his overriding duty to the court. In the performance of that overriding duty there is a strong element of public interest. ...
>
> The performance by counsel of his paramount duty to the court will require him to act in a variety of ways to the possible disadvantage of his client. Counsel must not mislead the court, cast unjustifiable aspersions on any party or witness or withhold documents and authorities which detract from his client's case. *And, if he notes an irregularity in the conduct of a criminal trial, he must take the point so that it can be remedied, instead of keeping the point up his sleeve and using it as a ground for appeal*.
>
> It is not that a barrister's duty to the court creates such a conflict with his duty to his client that the dividing line between the two is unclear. The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary. Rather it is that a barrister's duty

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215 (1988) 165 CLR 543 at 555-556. See also *Arthur J S Hall & Co v Simons* [2000] 3 WLR 543; [2000] 3 All ER 673.

> to the court epitomizes the fact that *the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice*." (emphasis added)

The efficient working of the criminal justice system depends upon the performance of these duties. A finding, by an appellate court, that there had been a wilful breach of these duties would be a very serious matter. To find that there had been a breach because counsel were incompetent is only marginally less serious. Yet, often enough, one or other of these conclusions must be the unstated premise for making an argument on appeal that was not raised below. That premise cannot go untested. Testing it will reveal whether the point was in fact important at trial.

164 The present case illustrates the points which I seek to make. Trial counsel for the appellant took exception at the trial to the judge's charge and submitted, in effect, that an insufficient *Longman* warning had been given. But neither counsel referred the trial judge, or the Court of Criminal Appeal, to the reported decisions which bore upon the identification of the elements of the offence of which the appellant was ultimately convicted. There is no explanation for that omission which is consistent with the competent discharge of the duties of counsel.

165 I agree with Gaudron, Gummow and Callinan JJ, substantially for the reasons they give, that the evidence at trial did not establish the commission of the offence of which the appellant was convicted. The point now taken by the appellant is a point of law and it is conclusive. It is not suggested that the course of the proceedings at trial would have changed had the point been taken when it should have been (at the close of the prosecution case) except by bringing the proceedings against the appellant on this charge to the end of acquittal sooner than now will be the case. This, then, is an "exceptional" case. That being so, the application for special leave should be granted, the appeal treated as instituted and heard instanter and allowed. The judgment and orders of the Court of Criminal Appeal should be set aside and in lieu, order that the appeal to that Court be allowed, the conviction set aside and direct a verdict of acquittal be entered.